YEARBOOK OF THE INTERNATIONAL LAW COMMISSION

1949

Summary Records and Documents of the First Session including the report of the Commission to the General Assembly

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UNITED NATIONS

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UNITED NATIONS
New York, 1956

NOTE TO THE READER

The symbol A/CN.4/SR. (followed by a number) used in footnote references in this volume indicates the summary record of the meeting of the International Law Commission bearing the same number. For example, A/CN.4/SR.32 indicates the summary record of the 32nd meeting.

TABLE OF CONTENTS

INTRODUCTORY NOTE

Recalling General Assembly resolution 176 (II) of 21 November 1947 which stated that " one of the most effective means of furthering the development of international law consists in promoting public interest in this subject and using the media of education and publicity to familiarize the peoples with the principles and rules that govern international relations ", the International Law Commission, at its seventh session held in 1955, adopted a resolution whereby it recommended to the General Assembly to examine the possibilities of printing the studies, special reports and summary records of the Commission.

The question of the printing of the documents of the International Law Commission was considered by the General Assembly at its tenth session on the basis of a report submitted by the Secretary-General (A/C.6/348). By its resolution 987 (X) of 3 December 1955, the Assembly requested the Secretary-General, beginning with the eighth session (1956) of the International Law Commission, to arrange for the printing each year, in English, French and Spanish, of the documents and records of the Commission.

As to the documents of the first seven sessions of the Commission, the General Assembly by the same resolution requested the Secretary-General to arrange for their printing in the following way:

(1) The studies, special reports, principal draft resolutions and amendments presented to the Commission were to be printed in their original anguages;

(2) The summary records were to be printed initially in English.

Subsequently at its eighth session the International Law Commission recommended that the publication should take the form of a Yearbook.

The present volume—the Yearbook of the International Law Commission for the year 1949—contains the summary records of the first session of the Commission, together with the report to the General Assembly. In preparation of the first session, a number of studies were published by the Secretariat as separate booklets. These were not included in the present Yearbook. Their titles are as follows:

Survey of international law in relation to the work of codification of the International Law Commission;

Preparatory study concerning a Draft Declaration on the Rights and Duties of States;

Statute of the International Law Commission and other resolutions of the General Assembly relating to the International Law Commission;

The Charter and Judgment of the Nürnberg Tribunal—History and Analysis;

Ways and means of making the evidence of customary international law more readily available;

Historical survey of the question of international criminal jurisdiction.

In accordance with resolution 987 (X), this volume is published only in English.

AGENDA OF THE FIRST SESSION [1]

1. Planning for the codification of international law: survey of international law with a view to selecting topics for codification.
(Article 18 of the Statute of the International Law Commission)

2. Draft declaration on the rights and duties of States.
(Resolution 178 (II) adopted by the General Assembly 21 November 1947)

3. (*a*) Formulation of the principles recognized in the Charter of the Nürnberg Tribunal and in the judgment of the Tribunal.
(*b*) Preparation of a draft code of offences against the peace and security of mankind.
(Resolution 177 (II) adopted by the General Assembly 21 November 1947)

4. 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.
(Resolution 260 B (III) adopted by the General Assembly 9 December 1948)

5. Ways and means for making the evidence of customary international law more readily available.
(Article 24 of the Statute of the International Law Commission)

6. 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).

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[1] The provisional agenda (A/CN.4/3) was adopted without change by the Commission at its first meeting (see A/CN.4/SR.1, para. 19).

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SUMMARY RECORDS

OF THE

FIRST SESSION

12 April - 9 June 1949

NOTE

The present summary records include the corrections to the provisional summary records which were requested by members of the Commission, and such drafting and editorial modifications as were considered necessary; in particular, working papers submitted during the session were incorporated in the summary records.

Symbols of United Nations documents are composed of capital letters combined with figures. Mention of such a symbol indicates a reference to a United Nations document.

TABLE OF CONTENTS

SUMMARY RECORDS OF THE FIRST SESSION

(Documents A/CN.4/SR.1 to 38)

1st MEETING

Tuesday, 12 April 1949 at 3 p.m.

CONTENTS

Chairman: Mr. Manley O. HUDSON.

Present:

Members: Mr. Ricardo J. ALFARO, Mr. Gilberto AMADO, Mr. James L. BRIERLY, Mr. Roberto CÓRDOVA, Mr. J. P. A. FRANÇOIS, Mr. Shuhsi HSU, Mr. Vladimir M. KORETSKY, Sir Benegal N. RAU, Mr. A. E. F. SANDSTRÖM, Mr. Georges SCELLE, Mr. Jean SPIROPOULOS, Mr. Jesús María YEPES.

Secretariat: Mr. KERNO, Assistant Secretary-General in Charge of Legal Affairs; Mr. LIANG, Director of the Division for the Development and Codification of International Law, Secretary to the Commission.

Opening remarks by Mr. Kerno, Assistant Secretary-General in charge of Legal Affairs

Mr. Kerno (Assistant Secretary-General) took the Chair ad interim.

1. Mr. KERNO (Assistant Secretary-General) declared the first meeting of the International Law Commission open. He was happy to welcome the members of the Commission to Lake Success. The Secretary-General, to whom that honour belonged, deeply regretted that he could not be present at the opening meeting as he was obliged to attend a plenary meeting of the General Assembly. The first meeting of the Commission was an important date in the history of international law, and realization of its importance would grow as the Commission's work developed.

2. International law was like a great and ancient edifice the doors of which were being opened so that it could be put in order, as it had to serve as a shelter to mankind. Only under its protective roof could the Members of the United Nations find the international peace which the Organization had been established to ensure and maintain. It was not by chance that international law was mentioned both in the Preamble and in Article 1 of the Charter which set forth the purposes of the United Nations. The San Francisco Conference had furthermore recognized the need for improving and systematizing international law. That was why Article 13 of the Charter provided that one of the principal functions of the General Assembly was to " encourage the progressive development of international law and its codification ", a formula designed to strike a balance between the need for improvement and the need for stability.

3. At its first session in 1946, the General Assembly had decided that a thorough study should be made of methods for implementing that provision of the Charter; the Statute of the International Law Commission was the result of that study. The Statute, in the drafting of which many members of the Commission had played an important part, was a document particularly well designed to facilitate the accomplishment of the Commission's weighty task. The Statute outlined a possible procedure not only for the development of the international law on those urgent subjects referred to the Commission by the General Assembly; it also offered compromise between the codification of international law through official conventions, as had been tried under the auspices of the League of Nations, and codification through the unofficial scientific restatement of positive law as very well exemplified in the words of the " Harvard Research ".

4. With regard to codification, the Statute left the members of the Commission quite free to plan their real work and carry it out. He hoped that the Commission would give serious consideration to the suggestion contained in the Survey of International Law (A/CN.4/1/Rev.1),[1] that codification should be looked upon as forming part of a comprehensive, long-range plan for the eventual codification of international law as a whole. An outline of the Commission's work adopted at the beginning of the session would be an important step towards carrying out the work visualized in Article 13 of the Charter.

5. Several individual items could be considered by the Commission forthwith; for instance, the drafting of a declaration on the rights and duties of States, not only because the General Assembly had considered it of great importance, but also

[1] *Survey of International Law in relation to the work of Codification of the International Law Commission* (United Nations publication, Sales No.: 1948.V.I (1)).

because it touched on the fundamental principles of international law. That subject had, moreover, been brought to the attention of the United Nations as early as the San Francisco Conference. A draft declaration of the rights and duties of States would provide an opportunity for stating the general principles of international law and would serve as an introduction to a comprehensive codification of international law as a whole.

6. The other items referred to the Commission by the General Assembly fell within the purview of international penal law and were of the utmost importance to the United Nations, namely, the statement of the Nürnberg principles, the preparation of a draft code of offences against international peace and security, and the question of setting up international criminal jurisdiction.

7. The development and codification of international law was a delicate and continuous task which could not be accomplished in one or two annual sessions. It had been hoped to set up a permanent International Law Commission, but it had been realized that such a Commission could not profit by the co-operation of such eminent jurists as those present. As the Commission would not be in full-time session, it would probably wish to make heavy demands on the Legal Department; that Department and in particular the Division for the Development and Codification of International Law was entirely at the Commission's disposal.

Election of officers

(a) Election of the Chairman

8. Mr. SPIROPOULOS proposed the election of Mr. Hudson.

9. Mr. YEPES, Mr. SCELLE and Mr. FRANÇOIS supported his nomination.

Mr. Hudson was unanimously elected Chairman of the Commission.

(b) Election of the first Vice-Chairman

10. Mr. BRIERLY proposed Mr. Koretsky.

11. Mr. AMADO and Mr. SPIROPOULOS seconded the nomination.

Mr. Koretsky was unanimously elected first Vice-Chairman.

(c) Election of the second Vice-Chairman

12. Mr. ALFARO proposed Sir Benegal Rau.

13. Mr. CORDOVA and Mr. FRANÇOIS seconded the nomination.

Sir Benegal Rau was unanimously elected second Vice-Chairman.

(d) Election of the Rapporteur

The election of the Rapporteur was adjourned to the second meeting of the Commission.

14. Mr. KERNO (Assistant Secretary-General) proposed that the officers should remain in office for one year according to the usual custom of Commissions.

It was so decided.

Mr. Kerno (Assistant Secretary-General) handed over the Chair to Mr. Hudson.

Address by the Chairman

15. The CHAIRMAN thanked the members of the Commission for the honour they had conferred upon him by electing him to the Chair of the first session of the International Law Commission. The chairmanship carried with it heavy responsibilities; he hoped to be able to shoulder those responsibilities with the help and, if need be, the criticism of his colleagues. He recalled that he had known all the members of the Commission for many years and had already had the pleasure of collaborating with most of them. He was sure that the work done by the Commission would be most fruitful.

16. He considered that the Commission's work should be based on history; it was impossible for a jurist to forget the lessons of history and there was no doubt that in all their activities the members of the Commission would be walking in its mighty shadow. The Commission must take into consideration the many gradual achievements of the past, some of them due to the labours of the eminent jurists assembled in the Commission. Nor must it be forgotten that history was not static: it was, on the contrary, in perpetual motion. That was why the members of the Commission must not be slaves of the past; they must approach their work constantly bearing in mind the circumstances of the current era. The members of the Commission were elected for three years, but at the expiry of their term of office the Commission's work would continue. They must therefore think of the Commission's future, and work not only for the present but for the time to come.

17. The Chairman wished to congratulate and thank the members of the Secretariat, Mr. Kerno, Mr. Feller and Mr. Liang, for the vast documentation they had placed at the Commission's disposal.

Rules of procedure

18. The CHAIRMAN said that the International Law Commission was a subsidiary organ of the General Assembly; as such it was governed by the provisions of rule 150 of the rules of procedure of the General Assembly. According to rule 150,

" the rules relating to the procedure of committees of the General Assembly, as well as rules 38 and 55, shall apply to the procedure of any subsidiary organ unless the General Assembly or the subsidiary organ decides otherwise". Consequently, the International Law Commission was free to adopt the rules referred to or to draw up its own rules of procedure, either for the whole of its work or for specific items. Since it was an organ of a rather special kind, the International Law Commission could approach its work without complying too strictly with the provisions of the rules of procedure; experience would show whether it was preferable to abide by the provisions of rule 150 or to draw up special rules of procedure for the Commission. The Chairman proposed that they should decide that the provisions of the rules of procedure laid down in rule 150, namely, rules 88 to 122 and rules 38 and 55, would be provisionally applicable to the Commission; if need arose, the Commission would draft its own rules of procedure.

It was so decided.

Adoption of the provisional agenda (A/CN.4/3)

19. The CHAIRMAN read the provisional agenda of the Commission.

The provisional agenda of the Commission (A/CN. 4/3) was adopted unanimously.[2]

20. The CHAIRMAN then asked the Commission to decide which item on the agenda it would consider first. After having read Article 18 of the Statute of the Commission (A/CN.4/4), the Chairman said that item 1 was the only item on the provisional agenda which pertained to the entire work of the Commission considered as a potentially permanent organization. The subject of the item was the organization of work for the codification of international law, and, to that end, the survey of international law for the purpose of finding appropriate topics for codification. The Chairman assumed that the Secretariat had placed that item first on the agenda because it thought that the members of the Commission would wish to begin with a general discussion on their plan of work, not only for the current session but also for future sessions.

21. Mr. LIANG (Secretary to the Commission) confirmed that interpretation of the Secretariat's intention. Items 2, 3 and 4 of the agenda should be studied by the Commission from the point of view of substance, while the purpose of item 1 was the preparation of a plan for organizing the work both for the immediate future and for subsequent sessions of the Commission.

22. The Secretariat thought that the Commission might undertake simultaneously to prepare the organization of its work and to study certain special questions referred to it by the General Assembly. The Secretariat had prepared a survey of international law for the Commission's work of codification (A/CN.4/1/Rev.1).[3] That document had been distributed to the members of the Commission on 2 February 1949, together with the provisional agenda; it could be used as a basis for the Commission's discussions.

23. Mr. KORETSKY did not wish to criticize the Secretariat's work but he wished to point out that the survey did not seem to him, at first glance, to be useful as a basis for the Commission's discussions. In fact, the impression obtained in reading the document was that its authors had tried to give laymen a smattering of international law, whereas they should have tried to prepare a draft programme of work to be submitted to the Commission. Mr. Koretsky thought that a discussion of the document prepared by the Secretariat would be of very little use. He suggested that the Secretariat should be instructed by the Chairman to prepare a brief programme of work including the list of topics to be codified.

24. The CHAIRMAN said that the discussion of item 1 of the agenda would enable the members of the Commission to state their views on the problem of the codification of international law as a whole. They could then express their opinions on the survey of international law prepared by the Secretariat. He wished, however, to say immediately that, in his opinion, the Secretariat had shown commendable modesty in refraining from proposing a list of questions for the Commission to codify, because it was obviously the duty of the Commission to draw up the list of topics suitable for codification. The Chairman thought that the Commission might begin a general discussion on item 1 of the agenda before studying the documents relating to items 2, 3 and 4.

25. Mr. ALFARO recalled that the task of the Commission was to draft a work that might be entitled: " The Law of Nations Codified ". To do that it had to begin by drawing up a plan of the work. Obviously the Commission could do so only after making a survey of the whole field of international law. Mr. Alfaro emphasized that the adoption of item 1 of the agenda as the first subject of discussion in no way bound the Commission to comply with the suggestions included in the general survey made by the Secretariat. In submitting that survey to the Commission, the Secretariat had doubtless wished to supply it with the information available on the subject of the codification of international

[2] The text of the provisional agenda is identical to that of the agenda.

[3] *Ibid.*

law. When the Commission had decided on the procedure to be followed in drafting the code of the law of nations, it would have to settle the fundamental question of whether it would confine itself to existing international custom, or whether the codification would deal also with questions of international law in international agreements.

26. Mr. AMADO stated that the document prepared by the Secretariat expressed the perplexity of all jurists when confronted with the problems raised by the organization of the Commission's work. For the codification of international law, various courses were open to the Commission: the Secretariat paper, which pointed out the various courses, was unquestionably useful from that point of view. Mr. Amado thought that the Commission, at the first stage of its work, should begin with a general discussion on the way in which it planned to organize the work.

27. Mr. BRIERLY supported Mr. Alfaro. It was absolutely necessary to organize the Commission's work, but it was not essential to use the Secretariat paper as a basis for discussion. Mr. Brierly pointed out that the time had not come to discuss the value of the survey made by the Secretariat; for the time being, it was only necessary to decide whether the Commission would begin by planning the organization of its work for the codification of international law.

28. Mr. CORDOVA also considered that the Commission should first discuss item 1 of the agenda. Article 18, paragraph 3 of the Statute, which gave priority to questions referred to the Commission by the General Assembly, should certainly be taken into account, but it seemed that the Commission had the right to decide on the order of its discussions, and it was logical that it should first consider its programme of work.

29. The CHAIRMAN thought that the first item on the agenda might include a plan of work for the progressive development of international law and at the same time for its codification, in other words for the whole work of the Commission including questions referred to it by the General Assembly.

30. Mr. FRANÇOIS agreed with Mr. Alfaro and the members of the Commission who shared his point of view. He considered that Mr. Koretsky's remarks were unwarranted. The Secretariat would have exceeded its competence if it had, on its own initiative, drawn up a programme of work, the broad outlines of which would first have to be decided by the Commission in a general discussion. It was only at a later stage that the Secretariat could be instructed to draw up a programme of work based on those directives.

31. Mr. Shuhsi HSU remarked that the Commission was faced with two distinct problems: firstly, that of deciding whether it should begin its discussions with the first item on its agenda. He agreed with that idea because the debate must open with a general discussion. Secondly, it had to decide what document should serve as a basis of discussion. Unless certain members of the Commission were ready to submit forthwith a personal study in that connexion, he saw no objection to the Commission using the documents prepared by the Secretariat.

32. Mr. SANDSTROM thought that it would be logical to discuss first of all the general problem of codification, taking as a basis the study prepared by the Secretariat, and then to examine certain individual questions. With regard to items 2, 3 and 4 of the agenda, he wished to know whether those questions must necessarily be examined in plenary meeting, as appeared from the statement made by the Secretary of the Commission, or whether the Commission might instruct one or two subcommittees to study them.

33. Mr. LIANG (Secretary to the Commission) stated that he had only wished to remind the Commission of the priority granted those questions by article 18 of the Statute, without prejudging the procedure which the Commission intended to follow in dealing with the substance of the matter.

34. Mr. SCELLE felt that the Commission was faced with two main duties: the first and basic one was the codification of international law, whatever the meaning, narrow or broad, of that term. The second was the study of particular questions referred to it by the General Assembly. There was no objection to those questions being dealt with simultaneously, the Commission devoting several meetings to its main work and the others to questions referred to it directly by the General Assembly. Referring to article 18 of the Statute, Mr. Scelle considered that it need not necessarily be interpreted as giving priority to every request of the General Assembly. That priority must not slow up the main work of the Commission and should therefore only apply in cases concerning the codification of international law.

35. Mr. SPIROPOULOS agreed with Mr. Scelle that the main task of the Commission was undoubtedly to codify international law. Nevertheless, without even having to invoke article 18 of the Statute, the Commission could not ignore the categorical requests made to it by the supreme body of the United Nations. Moreover, it was natural that the General Assembly, having set up a quasi-permanent Commission of jurists, should assign to it certain work which it would otherwise have allocated to *ad hoc* committees. But the two objectives might be harmonised if Mr. Scelle's suggestion were adopted and a simultaneous study made of the whole field of international law (which might take many years) and

of items 2, 3 and 4 of the agenda in order that at least a report showing the progress made in that connexion, if not definite plans regarding those questions, might be submitted to the General Assembly.

36. Mr. YEPES agreed with Mr. Koretsky on the value of the study prepared by the Secretariat which lacked clarity and of which the arguments were occasionally questionable. With regard to the programme of work, the Commission should unquestionably begin by examining the whole field of international law in order to decide which parts should be codified. Item 1 of the agenda should therefore be examined first, as Mr. Alfaro had suggested.

37. Mr. SANDSTROM considered that the third paragraph of article 18 definitely gave priority to any request made by the Assembly. The Commission could not therefore defer the study of questions thus referred to it. The method suggested by Mr. Scelle of making a simultaneous study of the entire codification and of items 2, 3 and 4 of the agenda seemed to him to be the most suitable.

38. Sir Benegal RAU remarked that, before examining international law to find topics for codification, the Commission should organize its work; accordingly, the members should first agree on the procedure to be followed. In that connexion, it was necessary to decide on the interpretation of article 18, paragraph 2 of the Statute in order to determine whether, once the Commission had selected a particular topic for codification, it had to ask the General Assembly to confirm its choice before it could begin the work of codification, or whether, on the contrary, it was free to select those topics without consulting the Assembly in advance. As stated in paragraph 106 of the Secretariat survey, the interpretation had been left to the Commission. It should be settled when the Commission took up item 1 of the agenda which it was to consider first.

39. Mr. CORDOVA thought that the General Assembly had instructed the Commission to codify international law on the understanding that the Commission was a body of experts to which certain legal questions of special interest to it could be submitted. Clearly that was the meaning of the priority set forth in article 18, paragraph 3. Therefore, during the current session, the Commission should consider both the organization of its work on codification and items 2, 3 and 4 of the agenda. In that way, it would be carrying out the instructions of the Assembly even if it reached no conclusion on the matters with which the Assembly had asked it specially to deal, owing to the lack of time and the importance of those problems.

40. Mr. KERNO (Assistant Secretary-General) told the Commission that it had been the intention of the Secretariat, in preparing its draft of the agenda, for the first item to give rise to a general discussion on the terms of reference and work of the Commission in connexion both with the progressive development and the codification of international law. That intention might not be clear enough from the wording of the agenda item which did, in fact, refer only to article 18 of the Statute bearing solely on codification. The anticipated discussion should make possible the preparation of a general plan of work not only for the current session but for the future as well. Within the scope of that plan, the Commission could select the questions which it thought should be dealt with immediately, bearing in mind the priority to be given to items 2, 3 and 4 of the agenda, in which cases the Commission would adopt the procedure it considered appropriate. At its following session, the General Assembly would certainly welcome a report outlining the general plan of codification and the progress of the work on the three special questions referred to the Commission.

41. Mr. KORETSKY recalled his wish to have the Secretariat prepare a rather brief working paper to serve as a basis in the selection of topics for codification. As that suggestion seemed to have been set aside, he proposed that the matter should be dealt with by a sub-commission consisting of 3 or 4 members which would simply select topics for immediate codification, in accordance with the terms of article 18 of the Statute.

42. The CHAIRMAN felt that the discussion seemed to indicate that the Commission, generally speaking, wished to interpret the first item of the agenda rather broadly and did not want to restrict its meaning to codification in the narrow sense. Preliminary general discussion on that item should result in the formulation of directives which would guide either the Secretariat or a sub-commission in the preparation of a list of topics for codification. That discussion should bear upon the whole field of international law and should not be limited by the terms of the Secretariat memorandum.

43. Moreover, regardless of the interpretation placed upon article 18, paragraph 3 of the Statute, the Commission could not, in the course of the current session, fail to consider items 2, 3 and 4 of the agenda relating to the special questions referred to it by the General Assembly. The primary desire of the Commission seemed to be to proceed with a general discussion of item 1 of the agenda on the organization of its work on codification.

44. Mr. SPIROPOULOS thought that the work of the Commission was simpler than appeared. The agenda prepared by the Secretariat comprised all the questions which the Commission was bound to consider, including those referred to it by the General Assembly: the Commission had only to adhere to its agenda.

45. With regard to the first item of the agenda on the selection of topics for codification, the Secretariat memorandum, if it did nothing else, did set forth all the questions that could be codified and could therefore serve as a basis for that work. Once the Commission had selected its topics, it seemed to be bound by article 18 of the Statute to submit them to the General Assembly which would decide which ones were to be finally retained; only then would the actual work of codification commence.

46. On the other hand, the Commission had been specially instructed by the Assembly to deal with the three questions listed in items 2, 3 and 4 of the agenda. They should be examined one after the other either in plenary meeting or in a sub-commission and a report to the General Assembly should be prepared on each. As Mr. Scelle had suggested, items 1 and 2 of the agenda could be considered simultaneously.

47. Mr. SCELLE drew attention to the danger of too narrow an interpretation of the priority mentioned in article 18. Such an interpretation would place the Commission entirely at the disposal of the General Assembly and lead it to devote all its time to examining special questions at the expense of its main work which was the codification of international law.

48. Mr. ALFARO remarked that all the questions raised during the debate could be discussed and clarified when the Commission came to examine the first item of the agenda on the organization of its work for the codification of international law. He therefore proposed that that item should be the first subject of discussion.

It was so decided.

The meeting rose at 5.15 p.m.

2nd MEETING

Wednesday, 13 April 1949, at 3.15 p.m.

CONTENTS

Chairman: Mr. Manley O. HUDSON.

Rapporteur: Mr. Gilberto AMADO.

Present:

Members: Mr. Ricardo J. ALFARO, Mr. James L. BRIERLY, Mr. Roberto CÓRDOVA, Mr. J. P. A. FRANÇOIS, Mr. Shuhsi HSU, Mr. Vladimir M. KORETSKY, Sir Benegal N. RAU, Mr. A. E. F. SANDSTRÖM, Mr. Georges SCELLE, Mr. Jean SPIROPOULOS, Mr. Jesús María YEPES.

Secretariat: Mr. KERNO, Assistant Secretary-General in charge of the Legal Department; Mr. LIANG, Director, Division for the Development and Codification of International Law, Secretary to the Commission.

Election of the Rapporteur

1. The CHAIRMAN recalled that at the previous meeting the Commission had decided to postpone the election of a Rapporteur until the following meeting. He called upon the members of the Commission to proceed with the election.

2. Mr. SCELLE, supported by Mr. YEPES, Mr. BRIERLY, Mr. CORDOVA and Mr. ALFARO proposed Mr. Amado.

Mr. Amado was unanimously elected Rapporteur of the Commission.

3. Mr. AMADO expressed his appreciation of the honour bestowed upon him and assured the Commission that he would spare no effort in conveying as faithfully as possible the views of the eminent jurists of whom the Commission was composed.

Planning for the codification of international law: survey of international law with a view to selecting topics for codification. (Article 18 of the Statute of the International Law Commission) (A/CN.4/1/Rev.1)

4. The CHAIRMAN opened the general debate on the organization of the Commission's work. As an introduction, he stressed that article 15 of the Statute of the Commission distinguished between the " progressive development of international law " and the " codification of international law ". The Statute also drew a distinction between the procedure to be followed with regard to the progressive development of international law as set forth in articles 16 and 17, and that applicable to the codification of international law as stated in articles 18 to 23. Examination of those articles led to the conclusion that, by drafting rules of so elastic a nature, the authors of the Statute had wished to grant the Commission a great deal of freedom in choosing the method for studying a definite question.

5. The CHAIRMAN then remarked that the procedure established by article 16 applied only " when the General Assembly referred to the Commission a proposal for the progressive development of international law ", while paragraph 3 of article 18 placed the Commission under obligation to " give priority to requests of the General Assembly to deal with any question ". From the fact that article 16 was placed in the section on the progressive development of international law and that paragraph 3 of article 18 was placed in

the section on the codification of international law, he concluded that the priority referred to in that paragraph applied only to questions being examined with a view to codification. Unless the General Assembly itself specified that it was acting in pursuance of the provisions of the first sentence of article 16 or in application of paragraph 3 of article 18, it would be for the Commission to determine, as each case arose, in which category the Assembly's proposal or request should be classified. The Chairman announced that Mr. Liang would shortly distribute to members a Secretariat memorandum to clarify that point of view.

6. The Chairman recalled that article 23 of the Statute stated the four types of recommendations which the Commission might make to the General Assembly on the codification of international law: (1) to take no action, the report having already been published; (2) to take note of or adopt the report by resolution; (3) to recommend the draft to Members with a view to the conclusion of a convention; (4) to convoke a conference to conclude a convention. If those provisions of article 23 were borne in mind, there would be greater latitude in the selection of suitable topics for codification than if the Commission had to restrict itself to questions which could only be codified by international conventions. The Chairman stated in that connexion that he had directed the work of the " Harvard Research in International Law " for twelve years in the United States, and that the activities of that institution had been handicapped by the fact that it had always attempted to codify international law by means of international agreements.

7. Turning to the examination of article 18 of the Statute and, in particular, of paragraph 2 of that article, the Chairman expressed the opinion that, if the Commission made its recommendations to the General Assembly on a topic the codification of which it considered necessary or desirable, it was not under any obligation to await the General Assembly's decision on those recommendations before it began to carry out the procedure set forth in article 19 and the subsequent articles of the Statute. It was clear that, in order to judge whether the codification of a topic was necessary or desirable, it was essential to study that topic thoroughly and, to a certain degree, to examine the possibilities of its codification.

8. According to article 18, paragraph 1, of the Statute, the Commission was to survey the whole field of international law with a view to selecting topics for codification. The Secretariat had considered the whole field of international law and had submitted its report to the members of the Commission (A/CN.4/1/Rev.1). The Chairman considered that study an essential part of the preparatory work of the Commission's first session and congratulated the Secretariat. Naturally it did not exhaust the studies that could be undertaken on the subject and, in some cases, the Chairman's views differed from those of the Secretariat on the approach to certain questions. However, the usefulness of the document, which contained an account of all that had been done in the past in the various fields of international law, could not be denied.

9. Like Mr. Koretsky, the Chairman thought that the Secretariat had dealt with the question somewhat vaguely and should have presented the Commission with concrete suggestions. In a conversation with the Chairman, Mr. Liang had said that he had already begun to prepare a kind of summary of the document previously submitted with a view to drawing from it concrete topics for codification. That new document would shortly be circulated to the members.

10. The Secretariat's study of international law was divided into three parts. The first part dealt with the functions of the Commission and the selection of matters for codification; the second was a study of the relationship between international law and codification, and the third dealt with the methods to be followed by the Commission and with its work. The Chairman thought that the first and third parts might have been combined and suggested that the general discussion in the Commission should bear upon those two parts of the document, leaving for subsequent consideration the second part and the selection of topics for codification.

11. Mr. KORETSKY reserved the right to express his views on the question as a whole later. He asked the Chairman, first, whether it was really expedient to abandon methods of codification through international conventions, and, secondly, whether paragraph 2 of article 18 was not being too liberally interpreted when it was taken to mean that the Commission would not be expected to await the approval of the General Assembly before beginning to consider the topics the codification of which it regarded as necessary or desirable, in accordance with the procedure outlined in article 19 and those following of the Statute.

12. The CHAIRMAN admitted that he personally preferred the method of codification through international conventions. However, he did understand the advantages of codifying certain topics by what had been called the " restatement " of the topic and he thought the question had been settled by the drafters of article 23 of the Statute, which provided for means of codification other than international agreements.

13. His interpretation of paragraph 2 of article 18 was based on the fact that he considered it inconceivable that the Commission should be obliged to wait until the General Assembly had approved its recommendations before it could begin consideration of the topics the codification

of which it considered necessary or desirable. The Chairman stressed that his opinion on the matter was in no way final and that he would be glad to know how the members of the Commission interpreted the paragraph in question. In that connexion, he drew their attention to the footnote to paragraph 106 of the Secretariat's survey which gave two proposals made to Sub-Committee 2 of the Sixth Committee for a more precise definition of the word " recommendations ", both of which had not been accepted by the Sub-Committee.[1]

14. Mr. ALFARO offered the Commission a few suggestions designed to facilitate and speed up its work. It appeared, from the preliminary discussion at the previous meeting, from the remarks just made by the Chairman and from the rules governing the Commission, that the conclusion could be drawn that, in formulating its programme of work, the Commission should deal with the four questions which followed:

1. How the Commission was to carry out the work assigned to it under paragraph 1 of article 18, namely, the survey of the whole field of international law with a view to selecting suitable topics for codification;

2. The meaning to be given to the terms " codification " and " progressive development " of international law which appeared in Article 13 of the Charter and in articles 15 and 18 of the Statute of the Commission;

3. Whether item 1 and items 2, 3 and 4 of the Commission's agenda should be discussed simultaneously;

4. The interpretation of paragraphs 2 and 3 of article 18 of the Statute.

15. With regard to the first question, clearly the survey which the Commission was to make should not consist of an academic study of all the fields of international law, but of a general review of the established topics of international law with a view to selecting those suitable for codification. The primary purpose was the selection of topics; the study of international law was merely the logical and natural means of making the selection. Mr. Alfaro thought that the Commission could ask a committee of three to five members to prepare a list of the various topics of international law together with brief comments, if it considered them necessary, as well as a list of topics which might be codified or which were important enough to warrant some priority in codification. Once it had received the committee's report, the Commission itself could select topics suitable for codification.

16. There was no doubt that the second question should be discussed by the Commission in plenary meeting because the meaning given to the terms " codification " and " progressive development " of international law sould serve as a guide in the drafting of the code which the Commission had been called upon to formulate. Despite the importance of the question, Mr. Alfaro did not think it should give rise to long discussion, since the members of the Commission doubtless had very clear ideas on the subject. In his opinion, the statements made by Mr. Brierly, as Rapporteur of the Committee on the Progressive Development of International Law and its Codification, might serve as an excellent basis for discussion.

17. With regard to the third question, Mr. Alfaro noted that the Commission might very well find itself obliged to discuss item 1 and items 2, 3 and 4 of its agenda simultaneously. Several jurists maintained that the codification of international law, strictly speaking, should be preceded by a general statement of basic principles similar to that which appeared in the draft declaration of the rights and duties of States. It was clear that before beginning to draft articles on a given topic of international law, there had to be a knowledge of the fundamental rules governing the subject. The Commission should decide whether to discuss those rules immediately after if had selected the topics suitable for codification. The decision on whether the Commission would consider items 3 and 4 of its agenda at the same time as item 1 would depend on its interpretation of paragraphs 2 and 3 of article 18 of its Statute since, if those two items of the agenda were considered " requests " of the General Assembly in the meaning of the above-mentioned paragraph 3 of article 18, they would have to be given priority. Personally, Mr. Alfaro did not think so and he therefore considered it indispensable for the Commission to have a thorough discussion on the interpretation of paragraphs 2 and 3 of article 18 of its Statute which was the fourth question with which the Commission had to deal.

18. In conclusion, Mr. Alfaro submitted for the consideration of the members of the Commission the plan of work he had outlined.

19. Mr. FRANÇOIS thought that the Secretary-General's memorandum was right in emphasizing the continuity of the current efforts at codification and those previously made by the organs of the League of Nations. The continuity was so real that there seemed no need to stress, as the document did, that the work of the International Law Commission was entirely new. Of course, to take

[1] " Proposals made in Sub-Committee 2 to define more specifically the word 'recommendations' were defeated. Mr. Beckett (United Kingdom) proposed at the eleventh meeting of Sub-Committee 2 that this paragraph should be amended to read ' . . . it should present its recommendations to the General Assembly in the form of draft articles or otherwise'. This proposed addition was not carried, there being 7 votes in favour and 7 against. The representative of Australia then proposed that the paragraph be amended to read: ' . . . should present its recommendations to that effect'. This proposed addition was rejected by 7 votes against 5. "

the Statute literally, the Commission no longer need inquire, as had the League of Nations Committee of Experts, whether the codification of such matter was possible: it need only consider it necessary or desirable. That resulted from the fact that the Commission could prepare texts which would vary in official authority according to how far the General Assembly implemented them and would undoubtedly enable the Commission to extend its choice beyond subjects which could be codified in conventions by international conference. It would be dangerous, however, to believe that the Commission could disregard the possibility of actually establishing a codification which it judged necessary or desirable. Such a conception of the Commission's role might frustrate its efforts. The Commission was not a scientific body with purely academic terms of reference but a subsidiary organ of the General Assembly, itself a political body. The world did not expect the Commission to produce a general long-term plan but definite and rapid results. Indeed, the League of Nations had failed in that sphere, not by any means through lack of a general plan of codification, but because it had relied solely on conventions for carrying out its plans.

20. First place should be given to questions which might be solved by international agreement. Obviously, the more important ones should be taken first; but there should be no undue presumption. It was very difficult to unify law in a world in which unity of spirit was more than ever absent. The Commission should not therefore be over-ambitious. It would be better to obtain positive results on one or two less important questions than to draw up a general systematic plan which would subsequently prove impracticable.

21. The choice of topics was, therefore, above all a practical problem. The Commission should seek to ascertain which topics were sufficiently ripe for codification or progressive development and should, of course, give priority to the more important of those, while also taking into account the questions referred to it by the General Assembly. The order in which those different questions should be examined was, however, a matter for the Commission to determine and recommend.

22. It mattered little if the Commission at first gave the impression that it was interested only in minor topics taken at random. If its first attempts succeeded it would be able to venture further and introduce an element of cohesion and unity into its work of codification, although recent experience in that regard was not very encouraging. That was the method currently used at the conference on international private law at The Hague which, without drawing up any general systematic plan, was trying to select for codification topics most likely to be adopted by the international community.

23. He wondered whether the Commission's work should be restricted to the codification and progressive development of the law of peace. Admittedly, it would be even more difficult to come to a general agreement on the law of war. That, however, was not a sufficient reason for dismissing categorically at the outset the possibility of studying any topic related to war. The law of war, as stated in The Hague Conventions of 1899 and 1907, had been so outdated by events that it ought to be completely redrafted. A diplomatic conference was currently being held in Geneva at the instance of the International Red Cross with a view to a partial revision of that law. Nevertheless, too many other branches, such as air law, would remain antiquated. The law of war should not, therefore, be dropped forthwith from the Commission's programme.

24. Mr. LIANG (Secretary to the Commission) suggested, with regard to Mr. François' statement on the memorandum submitted by the Secretary-General, that the Secretariat's interpretation of the term " realizable " as applied to codification meant—as appeared from the context—realizable by international conference. It was, of course, for the Commission to decide whether that means of realization should be used as a criterion in its choice of topics. The adjective " realizable " had, however, never been used at any stage of the discussions which had preceded the establishment of the Commission. He recalled the failure of The Hague Conference on Codification of 1930, the topics of which had been chosen according to that criterion and could not, in fact, be codified. The memorandum was above all intended to draw the Commission's attention to article 23 of its Statute which, by implication, ruled out the criterion of realization by convention for the procedures mentioned in sub-paragraphs (*a*) and (*b*) to the effect that the Commission's report should be either simply published or that the General Assembly should take note of it or adopt it by resolution.

25. Mr. SPIROPOULOS, supported by Mr. SCELLE and Mr. CORDOVA, said that the discussion should be general, but seemed to be developing into a detailed discussion which might make it impossible to reach a decision within a reasonable time.

26. The CHAIRMAN pointed out that he could not prevent members of the Commission stating their views in as much detail as they thought necessary.

27. Mr. AMADO thought that, in drawing up its plan of work, the Commission should bear in mind the wide scope of its work which could only produce satisfactory results after a number of years.

28. It must also, of course, bear in mind that

it was a subsidiary organ of the General Assembly and must as a result pay special attention to the topics referred to it by the Assembly, in connexion with both the codification and the progressive development of international law. Those special duties must not, however, impede the Commission in the accomplishment of its essential function, the selection of suitable topics for codification. Moreover the two roles were not irreconcilable: for example, during its current session the Commission could work on a survey of international law and the preparation of its plan of work on parallel lines and at the same time undertake a detailed study of the topics referred to it by the Assembly. Such a programme should not raise any difficulties.

29. The problem which arose at the outset was that of defining the use the Commission intended to make of the freedom it had been granted to select, from the vast field of international law, appropriate topics for codification. That freedom of choice could only be exercised rationally, if it was governed by certain criteria. The Commission's Statute provided no such criteria, and it therefore lay with the Commission itself to determine them, after having first established the exact nature of the codification to be undertaken. Once that point was settled and the criteria adopted, it only remained to determine the order of priority of the topics chosen in virtue of those criteria. The plan of codification work would follow almost automatically from those three elements.

30. The International Law Commission was in a better position than the codifiers of The Hague or Geneva, since it had more time at its disposal and since there would, as a result, be more continuity in its work. Further, although it also must seek to have its drafts accepted by States, in order to give them the form of international conventions, there were other ways open to it. Its reports could be approved by the General Assembly and would thus not fail to influence States when they came to deal with them. If the Assembly merely took note of them, they would still have a value as subsidiary means for the determination of rules of law, according to sub-paragraph (*d*) of the first paragraph of Article 38 of the Statute of the International Court of Justice.

31. The Commission's work of codification did not, therefore, depend on immediate acceptance by States. Moreover, there was no need for the Commission to restrict itself to the formulation of universally accepted traditional rules. Its main duty was to fill the many gaps in existing law, to settle dubious interpretations wherever they arose and even to amend existing law in the light of new developments, having particular regard to the principles of the Charter.

32. It followed that the choice of topics must not depend on the prospects of their codification being accepted. Current matters which were likely to be the subject of universal agreement could be of but little importance. The Commission must choose instead topics offering difficulties to be solved and gaps prejudicial to the very prestige of international law. It was, of course, difficult to say what topics it was most necessary to codify, but it seemed that, by taking as a yardstick the principles and practice of the United Nations, it would be possible to determine a certain number of traditional fields of classic international law in which the need for re-organization made itself clearly felt.

33. He saw no objection to adopting the suggestion made in the memorandum submitted by the Secretary-General, according to which the work of codification was to be carried out within the framework of a comprehensive scheme embracing the entirety of international law. The work could be done by following to a certain extent the logical order of the topics, but without the Commission being obliged to keep to that course. The topics referred to the Commission by the General Assembly would have to be studied within the framework of the general plan as well as the isolated subjects chosen by the Commission itself. Thus, as it grew with the years, the Commission's work would retain as uniform a structure as possible.

34. The work could not, of course, be purely theoretical. It would have to take into account political contingencies and the opinion of governments. His point of view in that respect had not changed since he had made the following statement before the Committee on the Progressive Development and Codification of International Law:

> " Neither the codification nor the development of law can be achieved merely by the submission of learned opinions. They must take the form of resolutions by the General Assembly or of multilateral conventions. But those resolutions and conventions must not be submitted under ' take it or leave it ' conditions." (A/AC.10/28).

35. In his opinion, to use the formula of Mr. de Visscher, supported by Mr. Brierly and other members of the Commission, any codification work must be carried out in the following three stages: choice of topics suitable for codification, the precise statement of the existing law and collation which was the codifier's work, properly speaking.

36. The Commission had an excellent instrument with which to carry out that work in its Statute, which had been drawn up with due regard to the reasons for the failure of earlier attempts at codification which had been directed solely towards the immediate conclusion of international conventions and to the necessity for reconciling

the work of scientific preparation with political requirements and the need to take the interests of States into account.

37. Mr. SPIROPOULOS did not think that the Commission should start by trying to establish general principles. A more practical method should be adopted; one or more topics should be selected and studied and only in the course of that study should the general *a posteriori* rules be defined.

38. With regard to the four-point programme suggested by Mr. Alfaro, it was not necessary for the selection of topics to be preceded by a general study of international law, a subject with which the members of the Commission were very familiar. Furthermore, that work had already been carried out by all the previous codification commissions and their conclusions were still valid. It did not seem necessary to discuss the criteria which should govern the selection of topics and which were given in article 18, paragraph 2, of the Statute, or the possibility of practical realization to which Mr. François had referred. Most of the topics were at the same stage of codification. It was therefore a matter of personal opinion whether or not it was necessary or desirable to codify any of them.

39. Mr. SPIROPOULOS thought that any discussion of the second question would be useless as the extract from Mr. Brierly's statement, which was reproduced on page 3 of the Secretariat memorandum, provided a very satisfactory reply: codification could not be limited to stating the existing law: consequently the codifier must supplement and improve that law, thereby necessarily acting as a legislator.

40. The third question had been settled at the previous meeting since it had been decided to examine simultaneously the first and three following items of the agenda. Lastly, with regard to the interpretation of article 18, paragraphs 2 and 3, of the Statute, Mr. Spiropoulos thought that it would be advisable to determine the meaning of those paragraphs immediately.

41. Sir Benegal RAU compared articles 18 and 22 of the Statute and noted that both of them spoke of recommendations which the Commission should submit to the General Assembly; it was not possible to determine, however, whether two separate recommendations were involved—one requesting the Assembly's permission to study a topic for codification, and the other submitting the conclusions of that study to the Assembly—or whether both cases merely referred to the final recommendation which would close the examination of the topic for codification.

42. The footnote to paragraph 106 of the memorandum submitted by the Secretary-General did not enable the intention of the authors of the Statute to be interpreted with any certainty. In those circumstances it must be concluded that there was more than one answer to the question. The solution would vary with the circumstances: for example, if the Commission considered it necessary or desirable to codify a topic which the General Assembly had already referred to another organ of the United Nations, the Commission would obviously have to begin by asking permission to consider that question. On the other hand, if the topic selected had not yet been referred to another organ, the Commission could examine it and need only submit a recommendation when that examination had been completed.

43. Mr. BRIERLY drew attention to article 18, paragraph 2, which stated that the Commission should submit its recommendation to the Assembly when it considered that the codification of a particular topic was necessary or desirable. That judgement could only be made after a thorough study of the subject, which would involve the application of articles 19 and following and would inevitably lead to the recommendation referred to in article 22. Article 18 therefore could only refer to the same final recommendation.

44. Mr. CORDOVA also thought that the Commission would not have a recommendation to submit to the General Assembly until it had completed the examination of a topic: that recommendation should take one of the forms provided for in article 23 of the Statute. The Commission was not obliged to have its selection of topics confirmed by the Assembly; it derived that power of selection from its terms of reference; in the case of article 18, paragraph 3, however, the Commission should conform to the Assembly's choice when the latter was particularly interested in a given question and directly requested the Commission to study it; in that case the Commission would be bound to give it the priority provided for by that paragraph.

45. Mr. SCELLE agreed with Mr. Córdova. The Commission's main duty was to select suitable topics for codification; it was therefore not obliged to seek the Assembly's permission in carrying out its selection. The only recommendations which it had to submit were those provided for in article 23 of the Statute. That interpretation left the Commission completely free to proceed with its work of codification. It was clear from the preparatory work which had preceded the establishment of the Commission that the latter was a body with complete freedom, the equal of the International Court of Justice. In matters of codification it had the same free authority that the Court had with regard to disputes.

46. Mr. CORDOVA did not see what purpose would be served by submitting two recommendations to the General Assembly: firstly, to ask it to approve the choice of a topic the codification of which the Commission deemed necessary and desirable; and secondly, after the Commission's

work on the topic had been concluded, to request it to take one of the measures provided for in article 23 of the Statute. That procedure would give rise, at two sessions of the General Assembly, to two identical debates similar to those which would have taken place in the Commission. The first recommendation therefore seemed to be useless. The only logical solution was to select a topic, to study it thoroughly and to undertake its codification; when concrete results had been obtained they would be submitted to the General Assembly accompanied by one of the recommendations provided for in article 23; the General Assembly would then take its decision. Mr. Córdova concluded by stating that the four recommendations listed in article 23 were the only ones the Commission could put forward; they covered every eventuality.

47. Mr. SANDSTROM shared Mr. Córdova's opinion concerning article 23, and supported Mr. Spiropoulos' view on the question as a whole; the selection of topics for codification was the most important problem. It should be made on the basis of practical considerations the relative importance of which the Commission was entirely free to determine. The considerations were *inter alia:* importance of the topic, extent to which agreement would be reached by Commission members, state of international law on the matter, position of the various States, political difficulties which might impede efficient work, and the time needed to complete such work.

48. Mr. Sandström drew the Commission's attention to the procedure with regard to item 2 on its agenda. Two courses were open: either to lay down the general principles first and then to consult the States, or to adopt the opposite method and ask States to give a detailed statement of their views and establish general principles therefrom. Mr. Sandström had no definite views on the subject; it was an important question which should be studied carefully by the Commission.

49. Mr. SPIROPOULOS felt that the word " recommendations " was incorrectly used in the second paragraph of article 18. When the Commission informed the General Assembly that it considered codification of a certain topic to be necessary or desirable, it was not submitting a recommendation. Certain Commission members felt that article 18 should be linked with articles 23 and 22; such an interpretation seemed perfectly logical. There could, however, be some doubts in that regard. For his part, Mr. Spiropoulos agreed with the interpretation as it was natural to plead *pro domo sua.*

50. The CHAIRMAN noted that there were two articles in the statute bearing on the stage at which the Commission's recommendations should be submitted to the General Assembly. Article 18, paragraph 2, on the one hand, stated that the Commission would submit its recommendations to the General Assembly when it " considers that the codification of a particular topic is necessary or desirable "; such a decision could only be made after a very searching study of the topic, as Mr. Brierly had pointed out. Article 22, on the other hand, provided that, " taking such comments into consideration ", the Commission should prepare the final draft; the words " taking such comments into consideration " referred to the provisions of article 21 which became effective only after application of article 20 which, in turn, depended upon the provisions of article 19 being implemented. Thus the Commission submitted the recommendations mentioned in article 22 after having completed the process prescribed in articles 19, 20 and 21.

51. Consequently, regardless of whether taken literally or interpreted in the light of the subsequent articles, the second paragraph of article 18 did not permit of the conclusion that the Commission must submit its recommendations to the General Assembly in order to request the letter's authorization to undertake the codification of a topic.

52. Mr. KORETSKY felt that the Commission should not spend so much time on questions of its Statute's interpretation before undertaking the concrete work expected of it. A number of Commission members were trying, deliberately or otherwise, to give article 18, paragraph 2, an interpretation which would in fact change the provisions adopted by the General Assembly in respect of a point which had been much debated in the Committee on the Progressive Development of International Law and its Codification.

53. In order to interpret paragraph 2 of article 18 in the light of history the origin of the preparatory work must be remembered. The International Law Commission was, no doubt, a body of experts chosen for their personal competence; it should not be forgotten, however, that those experts had been appointed by the General Assembly and that the United Nations was defraying the Commission's expenses. Consequently the United Nations was entitled to be kept informed of the Commission's work.

54. Mr. Koretsky felt that the Chairman was rejecting as illogical the only possible interpretation of article 18, paragraph 2. Indeed, articles 18 to 23 were intentionally given in a certain order so as to form a uniform basis on which to establish the organization of the Commission's work: first, the Commission examined the various topics which arose; it then selected, after thorough consideration but without exhaustive study, those topics which it deemed desirable or necessary to codify, especially from the political point of view; it was at that stage that the Commission approached the General Assembly to find out whether the topic chosen could and should be immediately codified. If the General Assembly's reply to the Commission's suggestion was favourable, the latter

applied the provisions of articles 19, 20 and 21 consecutively; the Commission finally completed its work in accordance with the provisions of article 22, the recommendations mentioned in that article falling into one of the four categories listed in article 32. Thus article 23 was unquestionably linked to article 22, and not to article 18, as claimed by certain Commission members.

55. Mr. Koretsky pointed out that his interpretation was justified in view of the fact that two trends had appeared in the Committee on the Progressive Development of International Law and its Codification; the first trend had been to set up a commission of experts whose activities would not take external conditions, the position of the various governments, nor the political responsibilities of the General Assembly into account. That trend had prevailed in the sense that the Commission members had been appointed for their personal competence and not as representatives of their governments. The principles of the other trend had been borne out by the fact that the Commission was actually only a subsidiary organ of the General Assembly whose activities must be in conformity with the wishes of the latter and United Nations principles.

56. The International Law Commission was not the government of philosophers advocated by Plato; it was composed of citizens of various countries whose mission was to promote the progressive development of international law and its codification in accordance with the directives of the General Assembly and the wishes of their governments. It was therefore natural for the Commission to request the opinion of the General Assembly on the programme of work which it contemplated.

57. Mr. Koretsky expressed the view that article 18, paragraph 2 must be interpreted as he had indicated; otherwise the Commission might work to no avail. The topics which it had codified with great difficulty might not be considered interesting by a number of States or by the General Assembly.

58. Finally Mr. Koretsky expressed the hope that the general discussion which was in progress would no longer pertain to questions of interpretation and that the question of the selection of topics for codification might be taken up. Moreover he pointed out that it would be well to give thought to the questionnaire which the Commission had to circulate to States Members of the United Nations in order to learn their wishes and their opinions with regard to the work of the Commission.

59. Mr. YEPES could not share the point of view of Mr. Koretsky. Under article 18, paragraph 2, the Commission was self-governing; it chose the topics which it considered suitable for codification. The first paragraph of article 18 mentioned criteria to be used in determining whether topics were suitable or not. The autonomy of the Commission was limited only by the aims of the United Nations, set forth in the Charter, and by the provisions of article 18, paragraph 3, which gave priority to requests of the General Assembly.

60. Mr. SANDSTROM thought that, in interpreting article 18, paragraph 2, the proposal made in Sub-Committee 2 of the Sixth Committee to define the term " recommendations " more precisely must be taken into consideration. The first proposal had been submitted by Mr. Beckett (United Kingdom) whose view was identical with the view of the majority of the members of the International Law Commission. That proposal had not been adopted since there had been 7 votes for and 7 against. It would seem that the opponents of the first proposal considered the text of the paragraph sufficiently clear. The second proposal had been submitted by the representative of Australia who held the same view as Mr. Koretsky. That proposal had been rejected by 7 votes to 5. That led to the conclusion that the interpretation given by Mr. Koretsky was unacceptable.

61. Mr. SCELLE stated that he had listened to the two opposing arguments with the greatest interest. Mr. Koretsky's argument would seem tenable if the text were given a strictly literal interpretation. The Chairman's argument seemed in greater harmony with the ultimate aims of the International Law Commission. The current discussion referred to a question of primary interest in the development of international law and its codification; that type of question arose in all new international organizations set up with all the defects of former political organizations, in other words, where there was no clear separation of powers. All organizations with federalist tendencies wished to centralize all power in their own hands without clearly stating the relative jurisdiction of their various organs. In setting up the International Law Commission, the General Assembly had intended to remedy in part the confusion with regard to powers; it had given the Commission " pre-legislative " power similar to the power of the General Conference of the International Labour Organisation. The texts adopted by that General Conference were not binding in nature; nevertheless it was true that that Conference was an international legislative body with universally recognized jurisdiction in its field. In the same way, the International Court of Justice was an organ the decisions of which were not binding; nevertheless the Court had an incontestable jurisdiction which even the organ which had set it up could not retract.

62. The question was therefore whether the General Assembly had intended to give the International Law Commission jurisdiction of its own or whether it had wished to make it merely a consultative organ under its aegis. The reply

to that question seemed to have been given by the Chairman whose argument was the only progressive one: the International Law Commission had jurisdiction of its own; its powers had not been delegated to it by the General Assembly.

63. Care must be taken lest excessive timidity and a literal interpretation of texts made the International Law Commission, from its very inception, lose the tremendous influence which it might have on the integration of the United Nations. The Commission was at a turning point in the existence of the United Nations; it must face its responsibilities if it did not wish to retard progress in the organization of international society.

64. Mr. SPIROPOULOS remarked that Mr. Koretsky had been right in pointing out that article 18, paragraph 2 had given rise to lively discussion in Sub-Committee 2 of the Sixth Committee. Two arguments had been put forward, neither of which seemed to have prevailed. There might therefore be some doubt as to the precise meaning of article 18, paragraph 2. The records of the meetings at which the matter had been discussed would have to be examined before the exact wishes of the General Assembly could be ascertained. If the records did not settle the matter, the interpretation which won the support of the majority of the Commission members would have to be adopted.

65. With regard to the relationship of the Commission to the General Assembly, there was no need to ask the Assembly for an interpretation of article 18, paragraph 2. The Commission had been provided with a Statute and it was for the Commission to interpret it. If the General Assembly considered it necessary it could subsequently declare the Statute null and void or modify it.

66. Mr. KERNO (Assistant Secretary-General) recalled that he had stated at the first meeting that the Commission should study its Statute with a view to determining its terms of reference or purview, as Mr. Scelle had suggested. One of the most important questions was the interpretation to be given to article 18, paragraph 2, which dealt with the relationship of the Commission to the General Assembly. That question had been discussed at length in 1947, the main discussion having taken place in Sub-Committee 2 of the Sixth Committee. The records of those discussions were very concise and did not clearly reveal the reasons why the two proposals for making the meaning of the word " recommendation " more precise had been rejected. He stated that the Secretariat would implement Mr. Spiropoulos' suggestion by making the fullest possible search for references enabling the Commission to clear up that extremely important matter.

67. Mr. KORETSKY welcomed the Assistant Secretary-General's assurances. With regard to Mr. Scelle's observations, he remarked that everyone was influenced by his customary activiti.es Mr. Scelle compared the International Law Commission to the General Conference of the ILO and regarded the Commission as a self-governing body. Mr. Koretsky had been a member of General Assembly Commissions and considered the International Law Commission to be a subsidiary organ. He thought his own attitude a more reasonable one than that of Mr. Scelle. Mr. Scelle's idea would have to be rejected, however attractive it might seem. The International Law Commission was not entitled to assume powers which did not belong to it; it merely had to carry out the work assigned to it by the General Assembly in accordance with the latter's directives.

68. He felt that the Chairman was too generous and liberal in his interpretation of the Commission's Statute. There must be no room for sentiment and the text adopted by the General Assembly must be respected to the letter. He pointed out that the work of the Commission consisted not in drafting an imposing number of plans but rather in preparing a limited number of plans which would interest the General Assembly and would thus not run the risk of remaining dead letters.

69. He concluded by requesting the Commission to adopt his interpretation of article 18, paragraph 2, or if that did not seem possible immediately, not to take any decision before studying the additional information which the Secretariat could provide and which might cast light upon that as yet abstruse question.

70. The CHAIRMAN felt that the Commission could adopt Mr. Koretsky's last suggestion. No interpretation would be adopted before the Commission had been able to study all the references which the Secretariat could provide on the matter.

It was so decided.

The meeting rose at 6.00 p.m.

3rd MEETING

Thursday, 14 April 1949, at 3 p.m.

CONTENTS

Chairman: Mr. Manley O. HUDSON.
Rapporteur: Mr. Gilberto AMADO.

Present:

Members: Mr. Ricardo J. ALFARO, Mr. James L. BRIERLY, Mr. Roberto CÓRDOVA, Mr. J. P. A. FRANÇOIS, Mr. Shuhsi HSU, Mr. Vladimir M. KORETSKY, Sir Benegal N. RAU, Mr. A. E. F. SANDSTRÖM, Mr. Georges SCELLE, Mr. Jean SPIROPOULOS, Mr. Jesús María YEPES.

Secretariat: Mr. LIANG, Director of the Division for the development and codification of international law, Secretary to the Commission.

Planning for the codification of international law: survey of international law with a view to selecting topics for codification. (Article 18 of the Statute of the International Law Commission) (A/CN.4/1/Rev.1) *(continued)*

(a) INTERPRETATION OF ARTICLE 18, PARAGRAPH 2, OF THE STATUTE OF THE COMMISSION

1. The CHAIRMAN invited the Commission to continue the general discussion. During the previous meeting, certain members had expressed the hope that the discussion would, in principle, bear upon questions which had already been raised, so that some of them might be solved without delay. He proceeded to give a brief outline of the main points which had already been discussed; among them was the fourth point raised by Mr. Alfaro on the interpretation of paragraph 2 of article 18. He thought that the discussion might turn upon that important question of interpretation.

2. The Chairman pointed out that, as requested by certain members, the Secretary of the Commission would submit all the additional information he had been able to obtain on the discussions which had taken place in Sub-Committee 2 of the Sixth Committee during the second session of the General Assembly. Mr. François, Rapporteur of the Sub-Committee, would, if necessary, supplement the explanations furnished by the Secretary, or go into greater detail.

3. Mr. LIANG (Secretary to the Commission) stated that it was very difficult for the Secretariat to give satisfaction to members of the Commission who had asked for fuller information than that already given in the Secretary-General's memorandum (A/CN.4/1/Rev.1, footnote to paragraph 106). Summary records of the meetings of sub-committees were not mimeographed and distributed to the delegations for their approval; they were simply typed and kept in the files. Moreover, the summary records were very brief; they merely recorded the decisions taken, without going into details of the discussion which had preceded them. The footnote to paragraph 106 of the Secretary-General's memorandum reproduced in full that part of the summary record which concerned the question at present under discussion. The Secretariat was not in a position to add anything to the footnote to paragraph 106; it could only confirm that two proposals had been put forward in Sub-Committee 2, and that apparently neither of them had found acceptance.

4. Mr. Liang pointed out that the Secretary-General's memorandum drew the Commission's attention to the advisability of a thorough discussion to decide whether the Commission should or should not establish a general plan of work. If the Commission decided to prepare a plan of work, a course which had been advocated by Mr. Alfaro and Mr. Amado among others, the plan would be included in the report to be submitted to the General Assembly. The Assembly would examine the report and decide whether it approved the plan, as a whole or in part. On the other hand, if the Commission felt that such a plan was unnecessary and decided merely to select a limited number of subjects whose immediate study it considered advisable, those subjects would appear in the report to be sent to the General Assembly, and the latter would decide whether the Commission should consider them or whether they should be abandoned.

5. The Secretariat was not in a position to advocate either one or the other of the two possible solutions. It merely pointed out that in both cases the report submitted to the General Assembly would enable the latter to take a decision, which the Commission would have to respect.

6. Mr. FRANÇOIS, speaking as Rapporteur of Sub-Committee 2 of the Sixth Committee,[1] considered that article 18 of the Statute of the Commission had been drawn up in the spirit to which Mr. Koretsky had alluded; that opinion was confirmed in the second paragraph of that part of the report of Sub-Committee 2 to the Sixth Committee (A/C.6/193) which dealt with paragraph 11 of the report of the Committee on the Progressive Development of International Law and its Codification; paragraph 11 had become article 18 of the Statute.

7. A proposal had been submitted to Sub-Committee 2, the object of which was to deprive the International Law Commission of any right of initiative; the French representative, who had been the author of the proposal, had considered that the General Assembly would be more modest in its choice of topics for codification, and would concentrate the work on the most essential points; the proposal had been rejected by 10 votes to 5.

8. Furthermore, certain members of Sub-Committee 2 had wished to give the General Assembly a certain right of control over the work

[1] Second session of the General Assembly.

of the Commission. Mr. François did not consider that that point of view was illogical, or that it signified any lack of confidence in the International Law Commission. It had been said that it was an illogical proposal, since the Commission could not reach a conclusion on the possibility of codification of a given topic until it had studied the question in detail; the League of Nations practice, however, showed that such an opinion was not justified: the League had set up a Committee of Experts to consider what topics seemed "realizable" as a subject for codification; that Committee had reported to the Assembly, which had established a committee of five members to draw up a draft to be submitted as the basis of discussion to the first conference on codification. Such a system was not illogical; it must be borne in mind that the preparation of a draft treaty necessitated the co-operation of Governments, in accordance with the kind of procedure outlined in articles 19 and 21 of the Statute of the International Law Commission. It did not appear that a Commission of experts, appointed as individuals, could have the right to put into operation all the governmental machinery of sixty States, unless those Governments had had an opportunity to make known their views, based, for the greater part, on political considerations.

9. Mr. François concluded that a certain amount of control by the General Assembly was perfectly normal: the Assembly should be able to stop any work which it considered useless or inopportune. If it was opposed to the codification of certain topics, the continuation of such work would serve no practical purpose.

10. Mr. François considered that it was for that reason that Sub-Committee 2 had adopted, by 10 votes to 5, the existing text of article 18. Sub-Committee 2 had rejected the proposal of the United Kingdom representative, to the effect that the Commission should present its recommendations to the General Assembly "in the form of draft articles or otherwise"; such a procedure would, in the majority of cases, have necessitated previous consultation with Governments, which was precisely what it was desired to avoid in that phase of the International Law Commission's work. The proposal of the Australian representative that the paragraph should be amended to read ". . . should present its recommendations to that effect" had been rejected because it had contained no new suggestion and did not make the text of article 18 more explicit.

11. Mr. François wished to draw the attention of the Commission to another point. With regard to the progressive development of international law, the Commission had received no right of initiative: it had only been authorized to study proposals referred to it by the General Assembly, in accordance with article 16 of its Statute, or by Members of the United Nations and its principle organs other than the General Assembly, in accordance with article 17 of the Statute. With regard to codification, the Commission had been granted the right of initiative, but subject to a certain amount of control by the General Assembly. That system hat been prescribed for the Commission; that body was obliged to adopt it, even though it might not correspond exactly with the wishes of its members. Mr. François considered that there was no reason to suppose that the General Assembly would abuse its right of control, or that it would fail to give the recommendations of the Commission all the consideration proper to the opinion of an organ of such high competence in the field of international law.

12. Mr. François summarized his exposition in the statement that in his opinion the Commission did not require the approval of the General Assembly before embarking on the study of a given question; it could even continue that study to a very advanced stage, in order to be able to submit well-founded recommendations to the General Assembly: but it could not consult Governments, nor send them questionnaires, and could not draw up drafts of codifications without first securing the agreeement of the General Assembly.

13. Sir Benegal RAU regretted that the text of article 18 should be so obscure and ambiguous; the Commission must interpret it as logically as possible. The object of the controversy was to determine whether the second paragraph of article 18 meant that the Commission should submit recommendations to the General Assembly before beginning work on codification, and if, moreover, it should await the decision of the General Assembly. There was nothing in article 18 to indicate that such a procedure was imposed on the Commission. A comparison of article 18 with article 17 was enough: according to article 17, paragraph 2, sub-paragraphs (*c*) and (*d*), the Commission should submit a report to the General Assembly and wait until the latter invited the Commission to proceed with its work; article 18, paragraph 2, implied nothing of the sort; indeed, paragraph 3 of the same article might be held to imply precisely the contrary, since it mentioned the priority to be given to any requests of the General Assembly, which would be meaningless if the Commission was always bound to await the General Assembly's decisions.

14. In his opinion, the Commission was competent to undertake the codification of any topic when it appeared necessary or desirable, with the reservation that it would give priority to topics referred to it by the General Assembly. If the Commission judged that any topic was more important or more urgent than those referred to it by the General Assembly, it should address a recommendation to the General Assembly, requesting authorization to grant special priority to that topic; the General Assembly would then decide the question.

15. In conclusion, Sir Benegal thought that the Commission could undertake any work of codification which it judged necessary or desirable, without, however, reaching a final decision until its draft was ready, in accordance with the provisions of article 22. The following procedure seemed to him the obvious one: the Commission should make a preliminary study of the topic, prepare a draft in accordance with the provisions of article 21, take into account the comments submitted by Governments and then decide whether the codification of that topic was necessary or desirable. At that stage it should submit its recommendations to the General Assembly, in simultaneous application of the provisions of article 18, paragraph 2, and article 22.

16. Mr. ALFARO was happy to note that Sir Benegal Rau's conclusions were similar to those which he wished to offer. He felt obliged to point out, however, that the question could be considered from a slightly different angle. The Statute of the Commission provided for four types of recommendations. Those mentioned in article 16, paragraph (*j*) and article 17, paragraph 2, sub-paragraph (*c*), concerned the progressive development of international law; it was explicitly stated that they should be submitted to the Assembly at the conclusion of the Commission's work, which had been undertaken only at the request of the General Assembly, of Members of the United Nations or of principle organs of the Organization; the recommendations mentioned in article 22 and article 23 dealt with the codification of international law; it was equally clear that they were to be submitted to the General Assembly at the conclusion of the Commission's work. With regard to the fourth type of recommendations mentioned in the Statute, in article 18, paragraph 2, it was impossible to determine *a priori* in what circumstances they should be presented to the Assembly, what would be the Assembly's decision and what the effect such a decision would have on the work of the Commission. In those circumstances it could be asked to what extent it was permissible to compare the provisions of article 18 with those of other articles, particularly article 17, as Sir Benegal Rau had done.

17. Mr. Alfaro pointed out that Mr. Koretsky's statements and the explanations given by Mr. François as Rapporteur of Sub-Committee 2, showed that the General Assembly was anxious to have the final decision on the question of the codification of international law. That could not be denied, but the real question was to decide what attitude the Commission should adopt while awaiting the reply of the General Assembly, or in the event of the Assembly not taking a decision. He did not think that the Commission should interrupt the work it had undertaken: on that point he shared the opinion of the Chairman and Mr. Scelle.

18. In conclusion, he proposed that article 18, paragraph 2, should be interpreted in the following manner:

1. The General Assembly could take such action as it might deem necessary or advisable on the recommendations of the Commission, and the Commission must abide by the action of the General Assembly.

2. The Commission was not obliged to stop its codification work while awaiting the answer of the Assembly to the recommendations of the Commission relative to the selection of topics considered necessary or desirable for codification.

19. Mr. HSU agreed, on the whole, with Mr. François' conclusions and thought that Mr. Koretsky was correct in considering that confirmation by the General Assembly of the Commission's choice of topics was necessary. On the other hand, he could not agree with Mr. Koretsky on the advisability of consulting Governments before making that selection; such a method would give politics too large a place in the work of the Commission.

20. From a perusal of the text, it appeared that the recommendations referred to in article 18 differed from those provided for in articles 22 and 23: the first concerned the choice of topics; the second referred to drafts to be submitted to the General Assembly. It seemed, therefore, that the correct interpretation of article 18 gave the Commission the obligation to request the General Assembly's approval of the choice of topics before undertaking the real work of their codification. Some members of the Commission considered that interpretation too restrictive and feared that it might hamper the Commission's initiative. Assuredly the work which it was called upon to carry out demanded a great deal of initiative and even audacity on its part; but if the Commission felt that that clause prevented its acting as freely as it might wish in the interests of its work, it was an easy matter to request the General Assembly to modify the clause in a more liberal sense. For the moment, it was only proper to comply with a text the meaning of which had been made sufficiently clear by its authors.

21. Moreover, could it reasonably be feared that, when dealing with the recommendations concerning the choice of topics, the General Assembly would not take the necessary action to enable the Commission to continue its work of codification in the normal way? There was nothing, therefore, to prevent the Commission embarking forthwith upon the survey of the whole field of international law which must precede the choice of topics for codification at the same time as it examined the questions which had been specially referred to it by the General Assembly.

22. Mr. CORDOVA had hoped that the Secretariat would be in a position to supply information which would enable the Commission

to determine with certainty the meaning of article 18, paragraph 2; unfortunately, the explanations of the Secretary of the Commission and those of Mr. François had confirmed the footnote to paragraph 106 of the Secretary-General's memorandum (A/CN.4/1/Rev.1): Sub-Commission 2 had rejected the proposals which had tried to define more specifically the term " recommendations " in article 18.

23. Some members of Sub-Committee 2 had wanted to deprive the International Law Commission of all initiative: their proposals had been rejected; others, on the contrary, had wanted to ascribe almost unlimited initiative to the Commission: their proposals had also been rejected. It was necessary, therefore, to interpret article 18; in so doing, it must not be forgotten that the authors of the Statute had adopted two different points of view with regard to the question of the progressive development of international law and its codification. Articles 16 and 17, concerning progressive development, showed unequivocably that the Commission had no initiative in the choice of topics to be studied. On the other hand article 18, on codification, gave the Commission the power to choose the topics (paragraph 1), but requested the Commission to submit its recommendations to the General Assembly (paragraph 2).

24. Some members of the Commission thought that it had to submit recommendations to the General Assembly after a topic had been chosen, and await the Assembly's approval before undertaking the real work of codification; others, including Mr. Córdova, thought that the Commission was competent to proceed at once with work on any topic which it judged necessary or desirable for codification.

25. A compromise solution had been proposed by Mr. Alfaro, who thought that the Commission should consider the whole field of international law, choose the subjects " realizable " for codification and address recommendations to the General Assembly, while at the same time proceeding with the work of codification. Such a recommendation would then be merely a notification to the General Assembly, which would obviously have the right to stop the Commission's work on certain topics. Mr. Córdova did not oppose the presentation of recommendations in that sense, although they might be of doubtful value, since at each session the General Assembly would receive a report from the Commission, in which the latter would note the work of codification which it deemed necessary or desirable and which it had undertaken.

26. Mr. Córdova concluded by stressing once again the difference which the Statute established between the progressive development of international law on the one hand and its codification on the other; it was because the Commission had almost unlimited powers of initiative in matters of codification that the Statute gave priority to all requests from the General Assembly.

27. Mr. SPIROPOULOS said that the study of the preliminary work of the Statute and the explanations given by Mr. François and Mr. Liang had not enlightened the Commission on the exact significance of the provisions of article 18, paragraph 2. In the circumstances, the Commission itself would have to interpret them.

28. He himself thought that it was for the Commission, and not the General Assembly, to take the initiative in the codification of international law. In practice, the adoption of his interpretation of article 18, paragraph 2, or of the interpretation according to which the Commission had to await the General Assembly's approval before proceeding with the study of the topics which it considered necessary or desirable to codify, would not appreciably change the procedure of the Commission. Whichever interpretation was accepted, once the choice of topics for codification had been made—and all the members were agreed that the Commission had the utmost freedom in that matter—the Commission would have to notify the General Assembly of its choice and then act in accordance with the instructions the Assembly would give it. The recommendations which the Commission had to submit to the General Assembly under article 18, paragraph 2, were merely a transmission to that body of the Commission's decision that a specific topic in international law should be codified. The General Assembly, or more precisely the Sixth Committee, would examine the Commission's report, and it was very unlikely that it would take no decision on it.

29. Mr. SCELLE recalled that according to a general principle of law, which was reproduced in article 36 of the Statute of the International Court of Justice, all organizations were competent to interpret their own powers. Since there was some doubt as to the extent of the Commission's powers, it was for the Commission itself to decide what they were.

30. Mr. KORETSKY said that he viewed with some concern the fact that at the very outset of its session the Commission had devoted two meetings not to item 1 of its agenda, but to a discussion of what might happen at a later stage of its work. Like Mr. Scelle, he thought the Commission was entitled to determine its own powers; but it was obvious that it should do so only in case of doubt. In his opinion there was none. The preparatory work on the Statute and the summary records of the meetings of the Committee that drafted it showed that the text of article 18 was clear and unambiguous. Some members thought that the Commission should have the courage to interpret its own powers in a way that no one could consider too broad; it

was a good thing to be courageous, but the Commission should not, under the pretext of courage, disregard its obligations to the General Assembly.

31. There seemed to be a certain tendency in the Commission to interpret the word " recommendations " in article 18, paragraph 2, as meaning that the Commission need simply notify the General Assembly of its decisions. That word, however, which appeared more than once in the Charter, had a very specific meaning and there was nothing in the preparatory work of the Charter to corroborate such an interpretation.

32. To submit a recommendation to the General Assembly, under the terms of article 18, paragraph 2, was unquestionably the same as submitting the Commission's views and wishes for the Assembly to decide upon, to approve or to give other instructions. He found an added argument upon which to base his theory in Article 13 of the Charter, which laid down that " The General Assembly shall... make recommendations for the purpose of . . . encouraging the progressive development of international law and its codification." The codification of international law came within the General Assembly's competence: it was for Member States to decide whether or not the codification of a specific topic should be undertaken.

33. The question had a political as well as a technical aspect. There was an unfortunate tendency in certain circles to ignore not only the chief organs of the United Nations but the Organization itself. He would on no account wish to be a party to any attempt to ignore that principal organ—the General Assembly. The Commission, like all other organs of the United Nations, should make every effort to reinforce the prestige of the United Nations and not try to diminish it.

34. He understood perfectly the desire of certain members to accomplish, as soon as possible, the Commission's work of codification. The chief consideration that should guide the Commission in its choice of topics, however, was the possibility of achieving their codification. That codification could not be carried out without the consent of the General Assembly. It was therefore useless for the Commission to try to work independently without having first obtained that assent. Since it was the Commission's duty to choose the topics for codification, always bearing in mind the interests of the United Nations as a whole, it must work under the auspices of the General Assembly.

35. Mr. Córdova had emphasized that since according to article 18, paragraph 1, of the Statute the Commission was free to choose topics suitable for codification, it could proceed with its work without awaiting a decision from the General Assembly on the recommendations it made in accordance with paragraph 2 of that article.

36. It should be remembered, however, that the initiative in the matter of codification in no way meant the power to legislate but only to choose topics for codification. Since the Commission was merely a subsidiary organ of the General Assembly, it was only free to propose to the Assembly topics the codification of which it considered necessary or desirable; the Assembly itself would have to decide whether the proposed topics should or should not be codified.

37. In conclusion, he warned the Commission against the danger of exceeding its terms of reference, and asked it to approach its task in a practical manner by proceeding to choose topics for codification without concerning itself with what would happen after it had submitted its recommendations to the General Assembly.

38. Mr. SANDSTROM thought that the question of the interpretation which must be placed on paragraph 2 of article 18 was of such importance that the Commission must deal with it immediately. The word " recommendations " in that paragraph certainly had a meaning; since that meaning was obscure, however, the Commission must interpret it, and in order to do so it must study article 18 in its context, namely, in relation to the articles preceding or following it.

39. For his part, he favoured the widest possible interpretation of the Commission's powers. He recognized that the discussions in Sub-Committee 2 of the Sixth Committee could give rise to doubts regarding that interpretation, but he emphasized that the votes taken were the decisive factors which must be borne in mind. The result of those votes proved that Sub-Committee 2 had not reached any conclusion regarding the exact meaning of the word " recommendations ". It lay, therefore, with the Commission itself to determine that meaning, in the light of the other provisions of the Statute.

40. It could not be said that by placing a wide interpretation on its powers the Commission was ignoring a principal organ of the United Nations or in any way impeding its work for peace: the Commission's task depended in the last resort on the General Assembly, and it was obvious that if the Assembly did not approve the Commission's interpretation of paragraph 2 of article 18 of the Statute, it would not fail to say so when it examined the Commission's report.

41. The CHAIRMAN thought that when a Commission was organizing its work it was quite in order for it to devote attention to defining the extent of its competence. The fact that there was some doubt as to the exact extent of the Commission's powers was amply proved by the divergence of the views expressed during the discussion. When totally divergent opinions were expressed at an international conference, agreement could only be reached on a text which, while not entirely satisfactory to anyone, was

acceptable in that it was capable of various intepretations. That was exactly what had happened in Sub-Committee 2 regarding paragraph 2 of article 18.

42. According to the terms of paragraph 1 of article 18, the Commission was to survey the whole field of international law with a view to selecting topics for codification. The meaning of that paragraph was clear: the Commission's task was to select topics for codification. In his opinion, the French text of paragraph 2 was more satisfactory than the English. After having selected topics for codification, the Commission had to decide which of those topics it deemed necessary or desirable for codification. It was obvious that it could only take such a decision after having made a detailed study of those topics. The recommendation which the Commission would then have to submit to the General Assembly would simply be the transmission to the Assembly of the Commission's decision, with a statement of the reasons which had determined it. For his part, he did not see what other recommendation the Commission could make to the General Assembly.

43. Certain members of the Commission had shown that the application of the procedure provided for in articles 19 to 23 of the Statute would impose a heavy burden on Governments and that such a course should not be taken before the approval of the General Assembly had been obtained. Reviewing those articles, he noted that Governments would, if necessary, be called upon to supply, not only all the documentation on the topics of international law in which the Commission was interested but also their comments on the Commission's plans for codification. He recognized that the Commission must act with prudence in that field and only appeal to Governments when the need really made itself felt.

44. The procedure adopted by the League of Nations, to which Mr. François had referred, could not serve as a precedent, since the sole task of the Committee of Experts of the League of Nations had been to draw up a list of the topics which should subsequently be codified by a conference specially convened for that purpose by the Assembly. The International Law Commission, on the other hand, had been instructed not only to select topics for codification, but also to proceed with their codification. It was by no means his intention to ask the Commission to proceed with its work, disregarding the United Nations or the General Assembly. The Commission would report regularly to the General Assembly; it would keep it fully informed of the progress of its work and it would always be open to the Assembly to ask the Commission to cease dealing with such and such a topic, or to turn its attention to some specific question. Nor could it be maintained that by adopting the widest possible intepretation of paragraph 2 of article 18 the Commission was going beyond its terms of reference. It was only choosing the procedure which would allow it to work as rapidly and efficiently as possible. If the General Assembly did not accept that interpretation, it could intervene.

45. Summing up the debate, he asked the Commission to decide whether it wished to deal immediately with the question of the interpretation of paragraph 2 of article 18, as Mr. Sandström had proposed, or whether it preferred for the moment to postpone a decision on that interpretation, as Mr. Koretsky had suggested. If Mr. Sandström's proposal was accepted, the Commission would have either to decide on Mr. Alfaro's two-fold interpretation, or to reply, either immediately or after a prior investigation carried out by a sub-committee established for the purpose, to the following question:

> " Has the Commission competence to proceed under articles 19 to 23 without awaiting action by the General Assembly on recommendations made by the Commission under article 18, paragraph 2 ? "

46. Mr. ALFARO thought, as did Mr. Sandström, that the Commission should arrive at a definite decision on that point of the interpretation of its Statute. Although it ranked fourth among the questions raised by Mr. Alfaro, that point had in fact, after Mr. Koretsky's speech, been the subject of a discussion which had been so complete that it could not be closed except by a concrete solution, of whatever nature that might be.

47. Mr. SPIROPOULOS recalled that, without sharing Mr. Koretsky's dramatic view of the subject, he had already expressed an opinion similar to his on the inadvisability of settling purely theoretical problems of procedure at that time. The decision concerning those problems could easily be postponed until later, in the first place because it would be of no immediate usefulness, and, secondly, because any solution adopted *a priori* might prove to be inappropriate when put into actual practice. There were more urgent tasks demanding the attention of the Commission, and it should turn its attention to those without delay.

48. The CHAIRMAN asked the Commission to decide whether, in accordance with the suggestion of some of its members, it declined to take a decision at that time on the interpretation of paragraph 2 of article 18 of its Statute.

A vote was taken.

The proposal was not adopted having obtained only 5 votes.

The Commission decided, by 7 votes, that it would adopt a definite position on the matter of interpretation at the following meeting.

(b) CHOICE OF THE METHOD TO BE FOLLOWED IN THE SELECTION OF TOPICS FOR CODIFICATION

49. The CHAIRMAN suggested that the Commission should study the first of the other three questions which Mr. Alfaro had proposed for consideration, namely, the method whereby the topics for codification were to be selected.

50. Mr. KORETSKY wished to know what was to be the general plan of the Commission's work on the first item of the agenda, which called for a survey of international law with a view to selecting the topics for codification. In his opinion, it was not advisable to take up any subject at random and begin to study it as an experiment. The choice of topics for codification was an extremely delicate matter which required thorough consideration and which must therefore be preceded by long scientific research, at the national and international level, in order to obtain an accurate record of the existing status of international law, as the Institute of International Law had recommended in the resolution which was quoted in footnote 21 to the memorandum submitted by the Secretary General (A/CN.4/1/Rev.1). In view of the importance of such research, it did not seem that the Commission could consider selecting the topics for codification during that session, which could be devoted only to the preparation and organization of the Commission's work on that subject. In order to enable the Commission to take up the choice of topics for codification at the following session, Mr. Koretsky proposed that the Rapporteur should be asked to make a thorough study of existing conventions and treaties and of statute law, with the aid if necessary of two or three members appointed by the Chairman or by the Commission, and in collaboration with the appropriate division of the Secretariat, with a view to selecting a certain number of questions which would be likely to interest all the Member States of the United Nations. He might even make inquiries, through the Secretary-General, concerning the views and preferences of Governments on the subject, without Governments being obliged to reply. Since the first efforts of the League of Nations to codify international law, which had taken place in an atmosphere of hostility towards the popular democracies which were then in the process of organization, many events had taken place and the situation had so changed that many topics for codification which had seemed essential at that time, such as the control of territorial waters and that of nationality, would doubtless have to give place to other questions which had become of primary importance from the point of view of the maintenance of peace in an international community based on the equality of all States, absolute respect for their sovereignty and the exclusion of any intervention in affairs which fell within their domestic jurisdiction.

51. The question of codification must therefore be completely reconsidered, for it could be solved only by the peaceful co-operation of all forms of civilization, without distinction as to colour, and of all political systems of whatever shade of opinion. It would be advisable, therefore, to include among the members called upon to assist the Rapporteur representatives of various juridical systems, so that the work which they would accomplish together would not be too unilateral. Once the result of that work, in the form of a detailed memorandum containing a list of the topics suitable for codification, had been placed before the Commission, the latter would proceed at its following session to the consideration and criticism of the paper. The questionnaire for the Governments could then be prepared; it would not be sent to them until it had been approved by the General Assembly.

52. The adoption of that method, which would postpone the selection of topics until the following session, would enable the Commission to save much time, which it could devote to the study of the questions that had been specially referred to it by the General Assembly, and to the other items on the agenda. It could thus take up, among other things, the consideration of the Panamanian draft resolution on the rights and duties of States (A/285), which Mr. Alfaro seemed anxious about and the discussion of which, even if it were limited to fundamental principles, would be of long duration, as far as could be judged from the debates on the subject which had taken place on two different occasions in the General Assembly.

53. The CHAIRMAN remarked that Mr. Koretsky's proposal would, in fact, result in postponing the study of the first item to the next session, and in devoting the current session to the remainder of the agenda. At the preceding meeting, however, the Commission had decided to begin by discussing item 1 of the agenda; unless it reconsidered that it would have to adhere to it. Mr. Koretsky's proposal was similar to that made by Mr. Alfaro at the previous meeting to establish a sub-committe as the best means of carrying out the study indicated in article 18, paragraph 1 of the Statute. Such a sub-commission would apparently have to confine itself to forming a considered judgment based on the Secretariat memorandim and to drawing up a list of the topics for study. However that might be, the Commission could naturally opt for either solution.

54. Mr. CORDOVA, recalling an interesting observation made by Mr. Spiropoulos, was of the opinion that the sub-committee could also be entrusted with the study of the criteria to be used in the choice of topics for codification.

55. Mr. ALFARO explained that it was not his intention that the sub-committee should be asked to give an opinion on the Secretariat memorandum, concerning which every member of the Commission had already formed an opinion. His proposal was directly related to the first item on the agenda, which envisaged first the organization of the work of codifying international law—which was what the Commission was doing—and then the study of international law with a view to selecting appropriate topics for codification, which was the type of work that should be allocated to a sub-committee.

56. Consequently, Mr. Alfaro submitted the following draft resolution to the Commission:

"Be it resolved:

"1. A Sub-Committee is established for the purpose of reporting to the Commission on the action it must take and the procedure it must follow in pursuance of paragraph 1 of article 18 of the Statute of the Commission.

"2. The Sub-Committee shall be composed of the following members:

". . .

"3. For the discharge of the functions entrusted to the Sub-Committee, it shall:

"(*a*) After a survey of the field of international law, effected in the extent and manner that the Sub-Committee itself may determine, formulate a list of those subjects which constitute the whole domain of international law:

"(*b*) Formulate a list of those topics the codification of which is considered necessary or desirable;

"(*c*) Formulate the recommendations that must be made to the General Assembly pursuant to paragraph 2 of article 18 of the Statute, with regard to the necessity or desirability of codifying the topics listed as above stated."

57. That draft resolution referred both to item 1 of the agenda and to article 18 of the Statute, of which it would, in fact, be the application. It would not be advisable to digress from those terms of reference in order to express purely academic judgments concerning the value of a document. The Commission should avoid any procedure which might hinder the logical development of its work. Its task was to codify universal law; it need follow no other directives than the Charter, its own Statute, and its agenda.

58. The CHAIRMAN observed that the task of the sub-committee, as just defined, seemed almost as onerous as that which Mr. Koretsky would like to give to the rapporteur.

59. Mr. AMADO asked that that task should not exceed the normal working capacity of those who would have to perform it.

60. Mr. SPIROPOULOS agreed in principle with the method suggested by Mr. Alfaro, which he understood in the following manner. There was, of course, no question of asking the sub-committee to make a thorough survey of the whole field of international law. That survey had already been made a number of times, and the Commission could well base its work on the Secretariat memorandum, which, although not perfect, did not deserve the criticisms it had received. Instead of doing the work again, which might take a great deal of time, the Commission should be satisfied to use the second part of that memorandum. It would hold a general discussion on the different topics dealt with in the memorandum, determine which were the most important and decide whether it was necessary or desirable to proceed to their codification. The sub-committee would then make a report containing a summary of the general opinion of the members of the Commission as expressed in the course of that discussion.

61. The CHAIRMAN thought that the suggestion of Mr. Spiropoulos that the second part of the Secretariat memorandum should be discussed immediately was wise. That would preclude a study of the whole domain of international law, which Mr. Alfaro appeared to advocate as well as Mr. Koretsky, and which would prevent the Commission from reaching a solution concerning item 1 of the agenda in the course of the current session. The Chairman, however, reminded the Commission that if it adopted the preliminary procedure proposed by Mr. Spiropoulos, it would have to take into account the suggestion of Mr. François, which aimed at adding the law of war to the proposed topics for codification.

62. Mr. ALFARO pointed out that the way he envisaged the sub-committee's task corresponded exactly to the suggestions made by Mr. Spiropoulos. In his opinion, the five members of the sub-committee, taking the Secretariat document as the basis of their work, and relying on their own knowledge of international law, would be able in a very short time to draw up the two lists and the draft recommendations which would constitute the starting point of the Commission's debate on that item of the agenda. If, however, the Commission preferred to do the preparatory work itself in plenary session, Mr. Alfaro was prepared to withdraw his proposal for the establishment of a sub-committee for that purpose.

63. The CHAIRMAN was of the opinion that to set up a sub-committee would be premature as long as the Commission had not itself expressed some general opinions on the subject, which could serve as directives to the proposed sub-committee.

The meeting rose at 6 p.m.

4th MEETING

Monday, 18 April 1949, at 3 p.m.

CONTENTS

Chairman: Mr. Manley O. HUDSON.

Rapporteur: Mr. Gilberto AMADO.

Present:

Members: Mr. Ricardo J. ALFARO, Mr. James L. BRIERLY, Mr. Roberto CÓRDOVA, Mr. J. P. A. FRANÇOIS, Mr. Shuhsi HSU, Mr. Vladimir M. KORETSKY, Sir Benegal N. RAU, Mr. A. E. F. SANDSTRÖM, Mr. Georges SCELLE, Mr. Jean SPIROPOULOS, Mr. Jesús María YEPES.

Secretariat: Mr. KERNO, Assistant Secretary-General in charge of the Legal Department; Mr. LIANG, Director of the Division for the Development and Codification of International Law, Secretary to the Commission.

Planning for the codification of international law: survey of international law with a view to selecting topics for codification. (Article 18 of the Statute of the International Law Commission) (A/CN.4/1/Rev.1) (*continued*)

(a) INTERPRETATION OF ARTICLE 18, PARAGRAPH 2, OF THE STATUTE OF THE COMMISSION (concluded)

1. The CHAIRMAN recalled that the Commission had decided, at its previous meeting, to reach a conclusion at the current meeting on the interpretation of article 18, paragraph 2, of its Statute. Two texts had been submitted to the Commission at the previous meeting: Mr. Alfaro's interpretation which consisted of two points, and the question formulated by the Chairman. As an affirmative reply to that question would obviously be equivalent to the adoption of paragraph 2 of Mr. Alfaro's text, the Chairman was prepared to retain either of the two texts. With regard to the first paragraph of Mr. Alfaro's interpretation, it appeared to go beyond the scope of the problem, in that it tended to define the Assembly's competence in the matter. It was understood that the decision the Commission was about to take would not be final and could be modified in the future.

2. Mr. ALFARO saw no objection to having his interpretation restricted to the text of paragraph 2. The main advantage of paragraph 1 was that it took into account Mr. Koretsky's point of view, according to which the General Assembly always had the last word.

3. Sir Benegal RAU proposed the following text, which summed up the discussion and stated the conclusions arrived at:

> "The Commission had to determine at the outset its precise functions and powers with respect to the codification of international law and, in that connexion, it had to decide the meaning and implication of article 18, paragraph 2, of the Statute. After careful consideration of the language of the Statute in this and other articles, and of all available material bearing upon its construction, the Commission came to the following conclusions:
>
> "(1) That, if, at any stage, after selecting a particular topic, the Commission considers its codification to be necessary or desirable, the Commission must submit its recommendations to the General Assembly under article 18, paragraph 2;
>
> "(2) But that, in the absence of a decisive directive from the General Assembly not to deal with that topic, and subject always to the priority to be given under article 18, paragraph 3, to a request from the General Assembly to deal with some other topic, the Commission is competent to proceed with the codification of the selected topic in accordance with articles 19 to 23."

4. Mr. HSU preferred the formula of the Chairman to those of Mr. Alfaro and Sir Benegal Rau.

5. Mr. ALFARO explained that paragraph 2 of his interpretation was intended to indicate that, contrary to what happened in the cases provided for in other articles, in the particular case of paragraph 2 of article 18 the Commission was not obliged to wait for the decision of the General Assembly.

6. Mr. SCELLE considered the Chairman's question more satisfactory in that it embraced the whole problem.

7. Mr. KORETSKY pointed out that the text of Sir Benegal Rau, like that of Mr. Alfaro, contradicted the obvious meaning of the Statute, and was an arbitrary modification of a provision which had been approved by the General Assembly. As for the Chairman's question, it could receive only a negative reply, for the same reason.

8. Mr. SANDSTROM explained that, in reality,

paragraph 2 of article 18 could be interpreted in three different ways. According to the first interpretation, the Commission should submit the topics it had chosen to the General Assembly for approval and await the Assembly's reply before beginning codification of the topics. According to the second interpretation, the recommendations envisaged in paragraph 2 of article 18 would be identical with those which accompanied the final text of the draft, once the work of codification was completed. The third interpretation was a kind of compromise between the first two: the topics should be submitted to the General Assembly, but the Commission would have the right to begin the codification without awaiting the Assembly's reply.

9. Mr. SPIROPOULOS, while preferring the text of Sir Benegal Rau, thought that by adopting either of the texts submitted to it, the Commission would clearly establish the fact that its Statute granted it the initiative in the matter of codification. As the Chairman had pointed out, the Commission's decision on that point could be amended in the future. There was therefore no reason to attach undue importance to the choice of the formula.

10. Mr. ALFARO pointed out that the Chairman's formula made the mistake of mentioning article 23 of the Statute, which referred specifically to cases in which the Commission had to wait for the Assembly's reply before proceeding with the work of codification.

11. The CHAIRMAN stated that he was willing to delete that article from the list.

12. Mr. HSU did not think the deletion of that article would be enough, for the allusion to the remaining articles might prevent certain Members from replying to the question in the affirmative.

13. Mr. CORDOVA suggested that the Chairman's question should be amended as follows: " Has the Commission competence to carry out its work of codification without awaiting the General Assembly's decision on the recommendations submitted by the Commission under article 18, paragraph 2? "

14. Mr. HSU objected that th words " work of codification ", which had already been used by Mr. Alfaro, were too vague. He would prefer to retain the Chairman's formula, which stated the question clearly, on condition that the articles it mentioned were limited to those concerning which there was no doubt. It might be that only article 19 was of that nature. The Commission could not disregard the intentions of those who had drawn up the Statute. The preparatory work was an adequate indication that two contradictory tendencies had come to the fore at the time of the drafting of what had since become article 18. Some members, among them the representatives of the United States and China, who had submitted to the Committee on the Progressive Development of International Law and its Codification a joint proposal (A/AC.10/33) which had been one of the chief bases of the discussion, felt that the Commission should possess all the necessary initiative for undertaking its work of codification at once. Other representatives, however, wished to reserve to the General Assembly a right of control over the work of the Commission. Thus, from the report of the Committee on the Progressive Development of International Law and its Codification (A/AC.10/51 and A/331) to the final text of the Statute, with the report of Sub-Committee 2 of the Sixth Committee (A/C.6/193) intervening, such changes had occurred that the powers of the Commission had undoubtedly been reduced considerably as compared with those in the initial draft. Thus it no longer had the power to carry out all the work envisaged in articles 19 to 23 before it received the General Assembly's reply to the recommendations it submitted in accordance with paragraph 2 of article 18. It was for that reason that the Chairman's formula, which was too general, should be modified in that respect.

15. The CHAIRMAN thought that as agreement could not be reached on another formula, it would be better for the Commission to give an affirmative or negative answer to the question he himself had asked, the text of which was the following: " Has the Commission competence to proceed with its work according to the procedure provided in articles 19 to 23, without awaiting the General Assembly's decision on the recommendations submitted by the Commission under article 18, paragraph 2? "

By 10 votes to 3, the Commission replied in the affirmative to that question.

16. Mr. ALFARO stated that he had voted in the affirmative although he did not agree to the reference to article 23, which had been retained in the text of the question. It was obvious that in the case of the recommendations envisaged in that article, the Commission had to await the Assembly's reply before undertaking the work of codification.

17. Mr. KORETSKY explained that he had voted in the negative because of the objections that he had raised earlier to the proposals of Mr. Alfaro and Sir Benegal Rau. In his opinion, the General Assembly might justifiably be surprised at the result of the vote, which was in contradiction to the directives it had given the Commission.

18. Mr. HSU stated that he had not been able to vote in the affirmative, as he would have done had the formula applied to article 19 only.

(b) General plan of codification

19. The CHAIRMAN recalled that, at the suggestion of Mr. Spiropoulos, the Commission

had decided to start considering the second part of the memorandum submitted by the Secretary-General on the survey of international law. In his opinion, the simplest method would be to review rapidly the different questions set out in that part of the memorandum, to delete certain of them and retain others, and thus to establish a preliminary list of suitable topics for codification.

20. Mr. AMADO observed that the Commission had heard various opinions on the method of selecting topics the codification of which appeared necessary or desirable: Mr. Spiropoulos thought that the choice would necessarily be purely subjective, rather than logical, while Mr. Sandström thought it should be subjective but based on practical considerations, upon the relative value of which the Commission would have to decide. Mr. Amado was afraid that such a procedure could only lead to contradictory conclusions, or at best to an undue variety of opinions. In his opinion, it would be better to have an exchange of views on the different criteria which influenced each member of the Commission to select a particular topic. Mr. François, for example, preferred to choose topics the codification of which was easily realizable, in that results could be obtained almost immediately; other members of the Commission, on the other hand, thought that the Commission could begin to study topics the codification of which did not appear to be easily realizable, but seemed necessary or desirable. In view of such a divergency of ideas, it would seem that a general discussion of the second part of the Secretary-General's memorandum (A/CN. 4/1/Rev.1) was necessary so that the Commission could take into account the preferences of its members. Such a discussion would give a general indication of the topics for codification, without any final list having to be established during the current session.

21. He had already had occasion to state that in his opinion the Commission should work according to a systematic plan, taking into account certain conditions mentioned in the Secretary-General's memorandum. He attached special importance to the conditions implied in paragraphs 39 and 66 for example, namely, that the work of codification should be animated by the interests and aims of the United Nations. The creation of that Organization called for a particularly thorough study of numerous traditional principles of international law, based on the conception of the complete sovereignty of States in order that they might be brought into harmony with the principles of the Charter. A certain hesitancy had been noticeable on the part of political organs of the United Nations to ask for advisory opinions from the International Court of Justice on the legal aspects of certain situations. The main cause of such hesitancy was the fear that the rules of existing international law would not agree with the aims of the Organization; such a fear must disappear.

22. Among the questions of particular interest to the United Nations must be mentioned that of seeing that the creation or recognition of legal situations was carried out in conformity with the principles of the Charter. In that domain States could not continue to have the liberty of action which they had so far enjoyed. For example, the provisions of the Charter regarding non-self-governing peoples made it imperative for the international effects of a state of hostility or revolution among colonial or oppressed peoples to be studied, since such a state was fundamentally different from the revolt of a national political party. The question of the recognition of international legal situations was dealt with in the Secretary-General's memorandum (pp. 26 onwards) which stated that in spite of political difficulties that question might be a subject for codification.

23. Another important question was that of deciding which subjects came under international law. The Charter emphasized the international rights of subjects other than States, especially those of individuals. That idea did not agree with the classic notions, which must therefore be changed.

24. Mr. AMADO felt that the Commission might well begin its work of codification with those two topics:—subjects of international law and recognition of legal situations, especially as they were on a par with one of the questions referred to it by the General Assembly, that of the rights and duties of States. At the same time, the Commission might contemplate undertaking the codification of subjects which were " realizable ": the law of the sea, the importance of which was emphasized in paragraph 73 of the Secretary-General's Memorandum; the law of war, especially aerial warfare, a subject which might be studied jointly with item 3 (*a*) of the agenda relating to the formulation of the principles of Nürnberg; nationality and other questions of direct interest to the individual, although it seemed preferable to wait until those subjects had been referred to the Commission by the Economic and Social Council.

25. Mr. Amado stated that, taking into account the preferences of other members of the Commission, he had indicated his choice of two topics for codification. The general discussion upon which the Commission had embarked would help it to outline a plan of work in accordance with the terms of the first paragraph of article 18 of its Statute.

26. Mr. KORETSKY pointed out that there were two proposals before the Commission: first, the proposal he himself had submitted, to the effect that a sub-committee should study the question of a plan before the second session of

the Commission; and secondly, the proposal that a sub-committee should study the question during the current session.

27. Mr. SCELLE recalled that it had been agreed at the third meeting to proceed to the study of the second part of the Secretary-General's memorandum, deleting those topics which it did not seem necessary or desirable to codify at that time. The procedure suggested by Mr. Amado did not appear to conform to that which had already been adopted.

28. The CHAIRMAN agreed with Mr. Scelle and proposed that each point mentioned in the second part of the Secretary-General's memorandum should be examined in turn.

29. Mr. SPIROPOULOS thought that it would be better to begin with a general discussion of the second part of the Secretary-General's memorandum, which was divided into nine sections, each dealing with a general question which included several specific subjects. The question was whether it would be preferable to choose general questions or specific subjects included in them.

30. In other words, the Commission should decide whether it proposed simply to codify certain subjects of international law, or whether it intended drafting a code of international law. If the second course was adopted—and there was nothing in the Commission's Statute against it—a plan of codification should first be drawn up; the plan should make a distinction between subjects to be studied at once, and those which should be dealt with only in the more or less distant future. So far the only existing conventions were those on particular topics. It did not seem that the International Law Commission was called upon to duplicate a task already done; its task would seem rather to be the preparation of a general code of rules of international law.

31. He criticized the use of the word *appropriés* in the French text of article 18, paragraph 1, of the Statute as unjustifiable: every topic of international law could and should be codified.

32. Mr. LIANG (Secretary to the Commission) explained the development of article 18 and showed that the word *appropriés* had been used in the French text for drafting reasons only; there was no need to see in it an additional criterion, unless the Commission should decide otherwise.

33. Mr. CORDOVA agreed with Mr. Spiropoulos. The International Law Commission was a permanent commission of the General Assembly, and its work would continue after the codification of the first topics it selected, since its task was to promote the progressive development of international law and its codification. A general plan of international law should therefore be established first; only after that had been done should the Commission select the topics it considered " realizable " for immediate codification.

34. The word *appropriés* should not be considered as imposing an additional criterion: it was enough for the codification of a topic to be judged necessary or desirable.

35. Mr. AMADO recalled that up till that time codification had been defined as the systematization of positive law. He wondered whether the Commission should confine itself to classical topics in its choice of those to be codified, namely topics the codification of which had been attempted earlier, or whether it should take into account the new conditions arising out of the signing of the Charter and the creation of the United Nations.

36. Mr. SCELLE thought that the tremendous task before the Commission must force it to the conclusion that it was impossible to draw up a general plan of codification. The only possible solution was to choose a limited number of topics, after having decided whether they would be of a general or specific character. Such a procedure was actuated by an essentially pragmatic and not a scientific conception: the Commission must produce concrete results as soon as possible.

37. He therefore urged the necessity of choosing topics by the elimination of those which the Commission deemed unnecessary or undesirable for codification at that time. The memorandum of the Secretary-General did not contain all the possible topics, but it undoubtedly included all those the codification of which seemed particularly necessary. General subjects should be chosen first, after which it could be decided which were the specific topics on which the Commission might set to work immediately.

38. The preparation of a general treatise of international law would require too much time; moreover, that was not what the General Assembly expected of the Commission. It merely wished to know what were suitable topics for codification, even if they were not " realizable " at the existing time.

39. The CHAIRMAN shared the opinion of Mr. Scelle. There was no need to draw up a general plan, first because that was a long and delicate task and secondly, because a plan would take shape as the Commission's work progressed.

40. Mr. ALFARO agreed with Mr. Scelle that the selection of topics should be started immediately. All the members of the Commission were thoroughly acquainted with the whole field of international law; a new survey by the Commission would therefore be unnecessary. It was sufficient to draw up a list of the topics which covered the whole field of international law and to eliminate from that list topics the codification of which was not necessary or desirable at that time. A small committee could very well accomplish that task and report to the Commission, giving the reasons for its selection of those topics. Such a procedure would comply with the various suggestions submitted during the discussion and,

at the same time, with the first paragraph of article 18 of the Statute.

41. Mr. SPIROPOULOS wished to point out that, in proposing a general discussion of the second part of the Secretary-General's memorandum, he was not contradicting the proposal he had submitted at the third meeting, that that part of the memorandum should be considered subject by subject. It would naturally be advisable, before choosing the topics to be codified immediately, to determine whether the Commission wished to codify the whole of international law. He had therefore raised that question without implying that it was necessary to draw up a general plan. It was obvious that the Commission could codify only certain parts of international law at first, but that need not prevent recognition of the fact that a general plan might be useful for the Commission's future work.

42. Mr. Spiropoulos agreed with Mr. Scelle and Mr. Alfaro that the Commission should submit to the General Assembly plans for the codification of a very limited number of topics; nevertheless, it might at the same time prepare a general plan.

43. Mr. SCELLE noted that the members of the Commission were in agreement to defer the question of the general plan of codification. In that connexion he pointed out that there was no need for a long discussion on the question, since the Commission could adopt any one of the plans that appeared in the various treatises on international law that had been published up to that time.

44. He shared the views of Mr. Alfaro, except with regard to the committee proposed by the latter. The value of such a committee was questionable, since the Commission itself would not be able to avoid a further discussion of the questions dealt with by the committee.

45. Mr. AMADO, speaking as Rapporteur, asked the members of the Commission to specify exactly what they meant by " suitable topics for codification".

46. The CHAIRMAN emphasized the importance of the question the Rapporteur had raised. The point at issue was whether the members of the Commission could agree upon a common criterion which would enable them to decide what subjects of international law could be retained for codification and what others could be rejected. Certain members, among them Mr. Sandström (A/CN.4/SR. 2, para. 47), had already stated what factors, in their opinion, should be borne in mind in selecting topics for codification.

47. The survey prepared by the Secretariat did not take in either the fields already covered by existing international conventions, or subjects of private international law (A/CN.4/1/Rev.1, para. 25). In that connexion, he drew the attention of the Commission first to the danger which various jurists had indicated on several occasions of detracting from the authority of customary international law by the codifying of international law by means of conventions (see footnote 32 to paragraph 23 of the Secretary-General's memorandum), and secondly on the danger of trying unsuccessfully to codify certain subjects of international law. He recognized the cogency of Mr. Amado's remarks: the creation of the United Nations had brought about considerable modifications in international law; that fact must obviously be taken into account, but the danger of a premature crystallization of principles which had not received adequate consideration must also be borne in mind as also the danger that codification might impede the development of international law.

48. Mr. AMADO pointed out that the Commission was in no way limited to questions of international law about which there was no controversy. In his opinion, the question to decide was whether the Commission was going to select topics according to their possibility of rapid codification, or if it was going to include all topics for codification in a pre-established plan.

49. Mr. SANDSTROM could see no advantage in a discussion of the common criteria whereby the Commission should be guided in its choice of topics for codification. Criteria varied according to the topics, and the particular circumstances of each case should be taken into account.

50. Mr. SCELLE supported Mr. Sandström's recommendations. Each member of the Commission had his own personal views in regard to the criteria which should be considered in deciding whether the codification of a topic was necessary or desirable. The important thing was to establish the criteria which the Commission, as a whole, wished to adopt. The simplest method would be to undertake an immediate study of the various subjects of inernational law: the criteria would automatically appear in each case.

51. The CHAIRMAN noted that the prodecure suggested by Mr. Scelle appeared acceptable to the majority of the Commission. He therefore proposed examining the second part of the Secretariat's memorandum point by point.

(c) Subjects of international law

52. Mr. SPIROPOULOS thought that that purely theoretical question would not lend itself to codification. Just as the Civil Code did not define the persons who in civil law were subjects of law, so the code of international law, which the Commission was called upon, to some extent, to draw up, should not catalogue subjects of international law.

53. Mr. LIANG (Secretary to the Commission) explained that in the Secretariat's view the codification of subjetcs of international law was not a matter of stating purely and simply that

States, or any particular legal ntity, were subjects of international law; it was a matter of drafting rules on those subjects.

54. Mr. SCELLE was somewhat surprised by Mr. Spiropoulos' remarks. The principal articles of the French Civil Code, for example, were devoted to the question of which legal agents under French law were subjects of law. It was likewise a question of determining which individuals or bodies should be granted legal powers in international law.

55. Mr. SANDSTROM thought that the question was quite suitable for codification, but that it would be better, for the moment, not to retain it.

56. Mr. ALFARO shared Mr. Scelle's views. Ever since the San Francisco Conference, it had been recognized that the individual could be a subject of international law. He stressed that at a time when the world was witnessing the evolution of a conception according to which States alone could be subjects of international law, it was essential that rules on that question should be drawn up.

57. The three points which made up the section entitled " The General Part of International Law ", namely: subjetcs of international law, sources of international law and obligations of international law in relation to the law of the State were suitable subjects for codification.

58. Mr. BRIERLY admitted that the question of subjects of international law could be codified, but he thought that it was not advisable to do so at that time. It was true that certain international organizations, and even individuals, enjoyed international status to a certain extent. Those were still rather vague concepts, however, and, as the Chairman had pointed, out, there was a certain danger in prematurely crystallizing topics which were not yet ready for codification.

59. Mr. CORDOVA supported Mr. Scelle's remarks. The fact that the General Assembly had instructed the Commission to draw up the general principles governing crimes against peace was one more reason for favouring the codification of the question of subjects of international law. The code of international penal law which the Commission was to draw up would apply not only to States but also to individuals who had become subjects of international law.

60. Mr. FRANÇOIS and Mr. HSU shared the view that the question of subjects of international law should be codified, but not in the immediate future.

61. Mr. SCELLE pointed out that the fact that a topic was not ready for codification was not an adequate reason for the process to be deferred. He cited, as an example, a number of topics which the *Code Napoléon* had codified at a time when they had not been ripe for codification.

62. Mr. ALFARO stressed the fact that the important thing at that time was to choose the topics the codification of which seemed desirable or necessary. The question whether those topics were or were not ready for codification should be settled later; that question would undoubtedly arise in connexion with the question of the priorities to be granted to the different topics chosen.

63. Sir Benegal RAU stated that it did not matter very much whether a topic was or was not ready for codification, since the Commission was bound to give priority to the examination of the questions in items 2, 3, and 4 of its agenda.

64. Mr. SPIROPOULOS, while not wishing to stress his own point of view unduly, drew the Commission's attention to the fact that provisions concerning subjects of international law which did not define the scope of their rights would be of no practical value.

65. Mr. KERNO (Assistant Secretary-General) recalled that under the terms of article 23 of the Statute of the Commission codification could be carried out in four ways. If the Commission thought that a subject of international law was not sufficiently developed to be the subject of the recommendations contemplated in sub-paragraphs (*c*) and (*d*) of that article, it could still apply to that subject the action outlined in sub-paragraphs (*a*) and (*b*) of the same article.

66. The CHAIRMAN noted that there was a difference of opinion in the Commission as to the advisability of placing the question of subjects of international law on the list of topics for codification.

The Chairman concluded that it was preferable for the moment not to place the question on the list of topics for codification.

(d) Sources of international law

67. Mr. BRIERLY considered that from the point of view of clarity the codification of sources of international law would have more disadvantages than advantages.

68. Mr. SPIROPOULOS observed that the question was of no practical interest.

In the absence of any further remarks, the Chairman concluded that the Commission preferred not to place the question of sources of international law on the list of suitable topics for codification.

(e) The obligations of international law in relation to the law of the State

69. The CHAIRMAN pointed out that paragraphs 34, 35 and 36 of the Secretary-General's memorandum referred to the question of incorporating the provisions of international law and of validly concluded treaties in the national law of States. He personally saw no reason why the principles governing relations between two States should be incorporated in the national law of each of those States.

70. The Secretariat's memorandum quoted the advisory opinion of the Permanent Court of International Justice, according to which " in the relations between Powers who are contracting Parties to a treaty, the provisions of municipal law cannot prevail over those of the treaty ". The Court had pronounced the opinion that no State could escape its international obligations by invoking the provisions of its municipal law.

71. Mr. SPIROPOULOS considered that that subject should not be codified for the time being. States could not be forced to amend their Constitutions, for that question was exclusively within their own jurisdiction.

72. Mr. SANDSTROM acknowledged that the subject could be codified but, like Mr. Spiropoulos, he was of the opinion that it should not be done at the moment.

73. The CHAIRMAN recalled that an international convention was not the only means of codifying that topic. The Commission might perhaps limit itself to a statement affirming the priority of international law over the law of States, and leave each State free to determine the way in which it would comply with its international obligations.

74. Mr. BRIERLY pointed out that a declaration of the type suggested by the Chairman would have a certain value, but the Commission must go no further than that. States must be left to decide for themselves how they would comply with it.

75. Mr. ALFARO drew the Commission's attention to the fact that the draft declaration on the rights and duties of States, which was item 2 on the Commission's agenda, contained provisions relating to that question.

The Chairman noted that the Commission seemed to be of the opinion that it would be better to postpone until later the question of the obligations of international law in relation to the law of the State.

(f) Fundamental rights and duties of States

76. The CHAIRMAN said that that question would be examined at the same time as the draft declaration on the rights and duties of States.

The meeting rose at 6 p.m.

5th MEETING

Tuesday, 19 April 1949, at 3 p.m.

CONTENTS

Chairman: Mr. Manley O. HUDSON.
Rapporteur: Mr. Gilberto AMADO.

Present:

Members: Mr. Ricardo J. Alfaro, Mr. James L. Brierly, Mr. Roberto Córdova, Mr. J. P. A. François, Mr. Shuhsi Hsu, Mr. Vladimir M. Koretsky, Sir Benegal N. Rau, Mr. A. E. F. Sandström, Mr. Georges Scelle, Mr. Jean Spiropoulos, Mr. Jesús María Yepes.

Secretariat: Mr. Kerno, Assistant Secretary-General in charge of the Legal Department; Mr. Feller, Principal Director of the Legal Department; Mr. Liang, Director of the Division for the Development and Codification of International Law, Secretary to the Commission.

Planning for the codification of international law: survey of international law with a view to selecting topics for codification. (Article 18 of the Statute of the International Law Commission) (A/CN.4/1/Rev.1) *(continued)*

(a) Recognition of States

1. The CHAIRMAN recalled that at the previous meeting he had pointed out that that subject had several aspects and had often been considered a political rather than a legal question. The recognition of States included the question of the recognition of belligerents, to which Mr. Amado had referred at the previous meeting, as well as that of insurgents. The question of collective recognition was mentioned in paragraph 42 of the Secretary-General's memorandum and observed that the transition from individual action of States to collective recognition would mark a step forward in the development of international law.

2. Mr. YEPES stated that it would be very difficult to solve the question of the recognition

of States by relying solely on legal principles in view of its very marked political character. There were various theories on the subject, but so far it had been impossible to reach agreement on any one of them. He recalled that the Ninth International Conference of American States (Bogotá, 1948) had not been able to reach a decision on the question of the recognition of States.[1] It had had to refer that matter to the next conference, to be held in Caracas. Mr. Yepes considered that for the time being the Commission should not codify that question.

3. The CHAIRMAN drew the Commission's attention to the fact that the observations submitted by the United Kingdom Government on the Draft Declaration of Rights and Duties of States, pointed out that the whole question of the recognition of States, Governments (*de jure* and *de facto*), of belligerency and insurgency, might well form the subject of a special study by the International Law Commission (A/CN.4/2, p. 187, para. 6 of the English text).

4. Mr. CORDOVA considered that the Commission should study and codify the question of the recognition of States and Governments, and especially that of the collective recognition of those States and Governments. By providing for the admission of new States to the United Nations, the Charter had tacitly acknowledged that collective recognition of such States was possible. That was further reason for not omitting that question from the list of subjects suitable for codification.

5. The CHAIRMAN remarked that the question of the definition of the State had been raised in the Permanent Court of International Justice in connexion with the admissibility of appeals addressed to the Court.

6. Mr. KERNO (Assistant Secretary-General) pointed out that current practice in the United Nations offered a number of examples of the recognition of States or of the succession of States and Governments; he mentioned in particular the cases of India and Pakistan, Indonesia, and Israel.

7. Mr. FELLER (Secretariat) added that no question had preoccupied the Legal Department of the United Nations more than that of the recognition of States. The Department had been asked to give its opinion on what should be understood by the word " State ", in order that a decision might be taken whether communications from certain bodies of people should be communicated to all representatives on the Security Council in accordance with the Council's rules of procedure. The same question had arisen in connexion with the deposit of international conventions, the texts of which sometimes had to be communicated to non-member States.

8. Mr. SCELLE was of the opinion that, since it had been agreed that States possessed international personality, the State should first of all be defined and the manner in which it should be recognized determined. The objection that had been raised that the question was political rather than legal was not pertinent; the Commission's task was precisely to distinguish what was legal even in the most political questions. It should endeavour to enlarge the field of international law at the expense of that of politics.

9. Mr. ALFARO recalled that two articles of the draft Convention on the Rights and Duties of States dealt with the question of the recognition of States. One of them concerned the right of any State to have its existence recognized, and the other enunciated the principle that the political existence of a State was independent of its recognition by other States. It would be well to fix universally accepted criteria, as a guide in deciding which bodies of people could be recognized as States. He considered that on account of its great importance, the codification of that question was both necessary and desirable.

10. Mr. SANDSTROM agreed with Mr. Alfaro's remarks, and added that the codification of the question should be granted a certain priority.

11. Mr. YEPES pointed out that the recognition of a new State should not be confused with that of a new Government. It was the latter only which had a political rather than a legal character. He agreed with Mr. Scelle that the Commission should avoid introducing politics into its work, and that it should give priority to the question of the recognition of new States.

12. Mr. BRIERLY observed that the memorandum submitted by the Secretary-General (A/CN.4/1/Rev.1, para. 40) quoted an opinion expressed by him before the League of Nations Committee of Experts, in which he had requested the Committee to refuse categorically to discuss the question of the recognition of Governments. In the twenty years that had passed since then his opinion had changed and he now thought that an attempt should be made to codify the question, even if it was not certain to be successful.

13. The CHAIRMAN remarked that the general opinion of the Commission was that the question of the recognition of States was a suitable topic for codification.

Following some remarks by Mr. Brierly and Mr. Scelle, the Chairman stated that for the time being the whole question would be placed on the list of selected topics, without any indication as to whether it included the recognition of Governments, belligerents or rebels.

[1] See *Final Act of the Ninth International Conference of American States*. Pan American Union, Washington, D.C. 1948, p. 51.

(b) Succession of States and Governments

14. Mr. CORDOVA considered that the Commission should take up the above topic, which was closely linked with that of the recognition of States.

15. Mr. FRANÇOIS, as well as Mr. SCELLE and Mr. ALFARO, agreed and Mr. François pointed out that the subject had fewer political aspects than the preceding one.

There being no other observations, the Chairman announced that the question of the succession of States and Governments would be included in the list of topics considered suitable for codification.

(c) Domestic jurisdiction

16. Mr. YEPES drew the Commission's attention to the question of domestic jurisdiction which, although of considerable interest from the point of view of the nature of international law and its codification, appeared to have been omitted in the memorandum submitted by the Secretary-General.

17. In the opinion of Mr. Yepes, the Commission's work would be incomplete, it would be deprived of one of its main foundations, if the question of domestic jurisdiction were omitted. Consideration of that question was both necessary and desirable because, if contemporary international policy and the discussions of the main United Nations bodies were analysed, it would be found that the best plans for ensuring international peace and security had always come up against the domestic jurisdiction of the State, the worst enemy of international law.

18. Article 2, paragraph 7 of the United Nations Charter marked a retrogressive step as compared with the Covenant of the League of Nations in that it authorized each State to define its domestic jurisdiction by itself, whereas Article 15, paragraph 8 of the Covenant had given the Council the necessary powers to do so. Since it was absolutely necessary to lay down clearly what was meant by domestic jurisdiction, he proposed that that question should be included in the list of suitable topics for codification.

19. In reply to a question by Mr. BRIERLY, Mr. Yepes explained that he wished a general study to be made of the question and not just of the meaning to be given to domestic jurisdiction as indicated in Article 2, paragraph 7 of the Charter.

20. The CHAIRMAN pointed out that the Permanent Court of International Justice, in its advisory opinion No. 4 concerning the Nationality Decrees issued in Tunis and Morocco (French Zone),[2] had had occasion to state that the question whether a matter did or did not fall solely within the domestic jurisdiction of a State was essentially relative and depended primarily upon the development of international relations. Thus during the fifty preceding years the list of questions coming under international jurisdiction had grown longer, whereas the list of questions coming solely under the domestic jurisdiction of a State had been correspondingly reduced.

21. Mr. SPIROPOULOS supported the Chairman's remarks. He also pointed to the difficulty of codifying in such a relative matter. At the most, the Commission might indicate some limits to domestic jurisdiction.

22. Mr. SCELLE, though he had certain reservations to make on the way in which the Court had expressed its opinion, felt that it would be better to say, as Article 15, paragraph 8 of the League of Nations Covenant had done, that international law determined the scope of domestic jurisdiction.

23. In his opinion the Commission should study the provisions of Article 2, paragraph 7 of the Charter in relation to those of Article 15, paragraph 8 of the Covenant and decide whether international law or a State's own opinion must determine whether a given act did or did not fall within the domestic jurisdiction of the State in question. As far as that question was concerned he felt that the Commission's work could be completed quite speedily.

24. The CHAIRMAN remarked that opinion on the question was divided. According to certain authors, as long as there existed no positive rule of international law on a question, it belonged to domestic jurisdiction; conversely, as soon as a rule of international law was established on any given question, that question ceased to be exclusively a matter of domestic jurisdiction.

25. Mr. LIANG (Secretary to the Commission) wished to point out that the Secretariat had indeed examined the question of domestic jurisdiction, but had reached the conclusion that it was unnecessary to make a special topic of it, as it formed a part of many other topics considered in the Survey. Mr. Liang noted that the Institute of International Law had requested last year in Brussels that a report should be submitted to it on the question of domestic jurisdiction, in the general meaning as well as in that of Article 2, paragraph 7 of the Charter. That report could be most useful to the Commission. It would also be useful to consult the jurisprudence of the various organs of the United Nations on that question. The Secretariat had already undertaken the task of collecting that jurisprudence.

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[2] See *Collection of Advisory Opinions*, Publications of the Permanent Court of International Justice, Series B, No. 4, February 7th, 1923.

26. The CHAIRMAN stated that in his opinion, it was difficult to draw a clear dividing line between domestic and international jurisdiction.

27. Mr. SPIROPOULOS, while he recognized the importance of the question of domestic jurisdiction, from a theoretic as well as from a practical viewpoint, thought that the Commission should not, for the time being, undertake its codification. It would be useless to draw up a list of the acts that a State was free to perform and of those in which its authority was limited, for as the Chairman had emphasized, the question was a very relative one and it was often necessary to take into account the theory of the abuse of law. Mr. Spiropoulos thought the Commission should wait until it had drawn up a code of international law before considering the question of including in it provisions concerning domestic jurisdiction.

28. Mr. SCELLE agreed with Mr. Liang that the question of domestic jurisdiction would be raised in connexion with the study of several other questions. In the circumstances, he would not press that it should be a separate topic for codification.

29. Mr. YEPES too did not wish to press the matter, but the debate had proved the necessity of discussing the question at length.

The Chairman announced that the question of domestic jurisdiction would not be entered on the list of topics suitable for codification.

(d) Recognition of acts of foreign States

30. The CHAIRMAN thought the title of the topic unsatisfactory, in view of the fact that the word " recognition " had in this case a different meaning from the one it had in the words " recognition of States ". The recognition of the acts of foreign States signified the effect given in a State to the acts of another State. It would first have to be decided whether the topic came under public or private international law.

31. Mr. LIANG (Secretary to the Commission) explained that the Secretariat had felt it should include the question of the recognition of the acts of foreign States in its Survey. The Commission, however, should decide whether that question constituted or not a suitable topic for codification.

32. The CHAIRMAN said there was a considerable amount of documentation on certain aspects of the question. There were, for example, two conventions on the recognition and enforcement of the arbitral awards of foreign courts which had been concluded under the auspices of the League of Nations. One of the Conventions prepared by The Hague Conference on Private International Law dealt with the enforcement of judicial decisions of foreign courts in a limited field. Moreover, Mr. Feller had made a valuable contribution to the draft convention on judicial assistance prepared by the Harvard Research.[3]

33. Mr. FELLER (Secretariat) pointed out that the subject was a very broad one in view of the numerous acts of States and of the complexity of the problems that each of those acts might raise. The Legal Department, while recently studying a question of such secondary importance as the international effect of the declaration of the decease of a person reported missing during the war, had had occasion to ascertain that even on so limited a subject there already existed a great deal of documentation and that numerous difficulties were occasioned by differences in national legislation. It did not seem, therefore, that the Commission could, at that juncture, do more than codify certain specific questions that might be of some particular interest, such as the procedure to be followed in the hearing of witnesses in a foreign country.

34. Mr. SANDSTROM thought that since national courts were so often seized of cases involving recognition of legislative or judicial acts of a foreign State, uniform laws on the subject should be adopted. The question did in fact border on both international public and private law; but it none the less fell within the competence of the Commission, which should consider it a subject for codification, without, however, giving it any special priority among the questions to be studied.

35. Mr. SPIROPOULOS shared Mr. Feller's views. Although the questions under discussion were already ripe for codification and came within the scope of international public, private and even administrative law, the Commission could not begin work forthwith in so vast and complex a field. With regard to the advisability of standardizing the laws in that field, to which Mr. Sandström had referred, Mr. Spiropoulos pointed out that the Commission's task was to codify existing laws, not to standardize them.

36. Mr. ALFARO observed that the Commission apparently wished to shelve the question for the time being, even though it fully recognized its importance for the future.

The Chairman stated that the question of the recognition of acts of foreign States would not be included in the preliminary list of topics for codification.

(e) Jurisdiction over foreign States

37. The CHAIRMAN pointed out that the title in question should be completed as follows: jurisidiction over foreign States and their property. The problem actually embraced the jurisdictional

[3] See *Research in International Law under the Auspices of the Faculty of the Harvard Law School.* Supplement section to the American Journal of International Law, Vol. 33, 1939, pp. 15-25.

immunities not only of States, of their sovereigns and their armed forces, but also of their property and vessels. There was a wealth of domestic jurisprudence in that branch of international law. The Secretariat's Survey very rightly drew attention to the particular problems raised by the increased economic activities of States in the foreign sphere, and to the special position of protectorates with respect to jurisdictional immunities, together with the disadvantages inherent in the fact that the executive power was partly responsible for the admission of the right to jurisdictional immunity. With respect to the Brussels Convention, to which reference was made at the end of paragraph 51, the Chairman recalled that the Convention had been amended since 1926, and that, in any case, it had only been ratified by a few States.

38. Mr. SPIROPOULOS considered that in view of its nature, importance and practical scope, that well-defined question of public international law should be given priority on the list of topics to be codified.

39. Mr. SANDSTROM supported that opinion.

The Chairman said that he would accordingly put the question of jurisdiction over foreign States on the preliminary list.

(f) Obligations of territorial jurisdiction

40. The CHAIRMAN thought the English title of the question, which in fact concerned the damage caused by one State to the property of another, lacked clearness. Two famous decisions illustrated the problem; the *Trail Smelter Arbitration* [4] case and the *Savarkar* case.[5]

41. Mr. BRIERLY objected to the inclusion of the topic on the list. As was pointed out in paragraph 60 of the Memorandum, the various matters enumerated in that section were entirely unconnected. In the circumstances, it appeared difficult to codify them.

42. Mr. SPIROPOULOS agreed with Mr. Brierly. The matters included under the heading in question were not connected, and some of them raised general principles, such as the *Trail Smelter Arbitration* case, which was bound up with the idea of abuse of a right.

43. Mr. SANDSTROM also thought that that topic should not be retained for the moment and that some of the questions which it raised could be considered when the responsibility of States was examined.

44. Mr. LIANG (Secretary to the Commission) thought that what all those obligations had in common was the fact that they corresponded to the duties of States as already specified in the draft declaration submitted by Panama, submitted to the Commission under item 2 of the agenda. If then the Commission did not retain them at present, those questions would come up again when that draft was examined.

45. Mr. ALFARO emphasized that in effect the questions enumerated in paragraph 60 of the Memorandum all concerned cases where one State injured another State through the exercise of its territorial jurisdiction. The principle that a State should not injure another State was the very foundation of the draft Declaration of the Rights and Duties of States. It appeared again in article 9 which dealt with the respect of the rights of the State by other States; in article 10 which stated that the exercise of the rights of the State had no other limit than the exercise of the rights of other States, in accordance with international law, and that it was the duty of every State not to overstep that limit; in article 1, which stated that the right to exist did not imply any excuse or justification for the State which, in order to protect and preserve its existence, committed unjust acts towards other States; and lastly, in article 21 which made it incumbent upon the State to ensure that the conditions prevailing within its territory did not threaten international peace and order. However, in Mr. Alfaro's opinion, those questions could not as yet be codified in the form of articles.

46. The CHAIRMAN, reverting to the table of duties of the State outlined by Mr. Alfaro, recalled that the fourth principle of future international law imposed on every State the duty of forbidding all activities within its territory aimed at fomenting civil war on the territory of another State. That principle, which had been discussed in great detail, was an important one, owing to the rapidity of communication in the modern world.

With regard to the question of duties in connexion with territorial jurisdiction, the Chairman noted that the Commission was not in favour of inscribing it on the preliminary list.

(g) Jurisdiction with regard to crimes committed outside national territory

47. The CHAIRMAN recalled the study devoted to that question by the Harvard Research; that body's Draft Convention was mentioned in paragraph 63 of the Secretariat's Survey. In effect, the whole problem of national criminal jurisdiction was being raised in this connexion; the problem was rather a complex one in view of the fact that some legal codes considered aliens

[4] See *Reports of International Arbitral Awards*, United Nations publication, Sales Number: 1949.V.2. Vol. III, pp. 1905-1982.

[5] See *Les travaux de la Cour Permanente d'Arbitrage de la Haye* New York, Oxford University Press, 1921, pp. 294-302.

who had committed crimes abroad as subject to their jurisdiction.

48. Mr. SCELLE thought that that question was of the utmost interest both in itself and also in so far as it related to the formulation of the principles of Nürnberg and the drafting of an international criminal code.

49. The CHAIRMAN, supported by Mr. KORETSKY, pointed out that the question concerned national jurisdiction only in the case of crimes committed abroad by aliens, and that, viewed from that angle, it had no connexion with the principles of Nürnberg nor with the code of laws on crimes against the peace and security of humanity.

50. Mr. SCELLE objected that the question of extradition, for example, and that of responsibility for damages caused abroad by aliens should be included in an international criminal code.

51. Mr. CORDOVA thought a distinction should be made between crimes committed abroad against a State and those committed against an individual. The first category only could be considered an appropriate topic for codification. In his opinion, the question of criminal jurisdiction in the matter of crimes committed outside national territory should not be codified at present.

52. Mr. BRIERLY wished to see that question included in the provisional list, as he shared the optimistic views on the possibility of codification expressed in the Introduction to the Draft Convention of the Harvard Research cited at the end of paragraph 63 of the Memorandum.

53. Mr. SPIROPOULOS also thought that the problem of the jurisdiction of a State in criminal matters was clearly a question of international law of great practical interest. However, the judgment of the Permanent Court of International Justice in the case of the *Lotus* [6] had decided the question temporarily. For that reason the study of that question was not a very urgent one.

54. The CHAIRMAN noted that it was generally agreed that The Hague Court had shown excessive discretion in the case of the *Lotus*. A further study of the problem could therefore usefully be made, the more so as there were among States more points of agreement in the matter of criminal jurisdiction than was usually supposed.

In accordance with the Commission's decision, the question of jurisdiction with regard to crimes committed outside national territory was inscribed on the list of topics for codification, but without any mention of priority.

[6] See *Collection of Judgments*. Publications of the Permanent Court of International Justice, Series A, No. 10, pp. 4-108.

(h) The territorial domain of States

55. The CHAIRMAN thought that certain questions dealt with under the above heading in the memorandum lacked clarity, particularly the doctrine of *post-liminium* and the reference to the conflicting claims in the polar regions. Paragraph 65 of the Memorandum drew attention to the question of acquisitive prescription on which very little positive law existed except for the *British-Venezuelan Guiana Arbitration*.[7]

56. In regard to the role of conquest as conferring a legal title to territory which was recognized by earlier treatises on international law, the Chairman agreed with Mr. Amado and Mr. Koretsky that the time was ripe for a revaluation of that concept in the light of the new principles of the Charter. In paragraph 67 of the Memorandum, reference was made to the protection of residents of territories affected by transfers of sovereignty. The right of option was one of the ways in which such protection was ensured.

57. Mr. ALFARO recalled that article 18 of the Panamanian draft Declaration on the Rights and Duties of States met the need, which the Chairman had pointed out, to renew that part of international law which dealt with the acquisition of territory by conquest. That article made it the duty of every State to refrain from recognizing territorial acquisitions obtained through the use or threat of force. He did not think that the problem of the territorial domain of States was suitable for immediate codification.

58. Mr. SPIROPOULOS shared that view. There was very little connexion between the various questions raised under that topic. The study of prescription should come under the general part of the code, and not merely under the heading of territorial acquisitions. The right of option was a problem which should be settled in peace treaties, for there would be some difficulty in making general rules about it.

59. Mr. LIANG (Secretary to the Commission) pointed out that there was some reason for speaking of prescription in connexion with territorial domain, since only acquisitive prescription was involved; the Napoleonic Code also dealt with the question in the chapter on property laws. It was extinctive prescription which should be included in the general part mentioned by Mr. Spiropoulos. Speaking of transfers of sovereignty, Mr. Liang said that they were not always necessarily the result of a war; they might also be brought about by plebiscites, recourse to which had been much more frequent in recent years. A general work on codification should include a chapter corresponding to the property laws to be found in the civil code, which would deal with the

[7] See *British and Foreign State Papers* (1899-1900), p. 160.

prescription and transfer of rights in cases of change of sovereignty.

60. Mr. SPIROPOULOS agreed that those questions could be studied, but he thought that there were more pressing problems which were demanding the Commission's immediate attention.

61. The CHAIRMAN pointed out a matter which, though not suitable for codification, deserved study, namely, the principles governing the frontiers of States and also certain recent practices such as, for example, the arrangement for neutral zones between States made between Saudi Arabia and Iraq in order to protect the interests of the nomad populations by avoiding a fixed frontier.

As the Commission did not intend to take up now the question of the territorial domain of States, it would not be included on the list of topics for codification.

(i) The régime of the high seas

62. The CHAIRMAN observed that the question of the régime of the high seas seemed suitable for rapid codification. Certain of its aspects had been the subject of numerous conventions, particularly conventions dealing with the exploitation of the products of the sea. The fundamental idea in most of the conventions on fisheries, especially in the most recent of them, was that fishing should be so regulated as to ensure the preservation of the sea's natural resources. Reserved zones affecting the sea approaches to various territories had thus been established despite the time-honoured principle of the freedom of the high seas. Another question was that of the " continental shelf " to which a rather vague reference was made at the end of paragraph 72 of the Secretary-General's memorandum. Moreover, the freedom of the seas had also been restricted in order to ensure the safety of navigation. The Chairman drew attention to the failure to mention, among the conventions listed in paragraph 70 of the memorandum, the rules relating to sea routes which had been in existence since 1863 and were still of considerable importance.

63. Mr. FRANÇOIS thought that, in view of the importance of the subject and the very wide measure of agreement that had been reached in that field, the topic should be one for codification. It would also be very useful for the Commission to study the modern regulations regarding the " continental shelf ", although that question fell within the scope of the progressive development of international law rather than of its codification.

64. Mr. ALFARO, Mr. SCELLE and Mr. SPIROPOULOS agreed that the topic was suitable for codification.

The Chairman accordingly included the régime of the high seas in the list of topics to be codified.

(j) The régime of territorial waters

65. The CHAIRMAN recalled that Mr. François had been rapporteur for that question at The Hague Codification Conference of 1930.

66. Mr. FRANÇOIS explained that the attempt at codification at The Hague had failed mainly because of lack of time agreement on the extent of the territorial waters; the Conference had been nearing agreement, on the other points, and he thought that the difficulties which had arisen at that time might have diminished since. He therefore considered that the question should be retained for codification.

67. The CHAIRMAN recalled that since 1930 many countries had modified their national legislation on the extent of territorial waters and that the current practice of States, which should be taken into account above all else, as Mr. Koretsky had so justly pointed out at the beginning of the current session, differed greatly from what had been advocated at The Hague and from the views expressed in recent publications. Consequently, it was still not known where the line of demarcation should be drawn between the high seas and territorial waters.

68. Mr. SPIROPOULOS shared Mr. François' opinion, because apart from the question of the limit of territorial waters, it seemed that agreement had been reached at The Hague Conference on the juridical status of territorial waters in general. Some results could thus be achieved on that point. It was also possible that agreement on the extent of territorial waters might be more easily reached than had been believed, as questions of prestige, important at the time, might have been followed by a more conciliatory attitude.

The Chairman, noting the opinion of the members of the Commission, added the question of the régime of territorial waters to the list of topics to be codified.

(k) Pacific settlement of international disputes

69. The CHAIRMAN invited the Commission to state its opinion on the topic proposed by Mr. Alfaro, namely: the pacific settlement of international disputes.

70. Mr. ALFARO thought that question should be codified, because in practice the procedures established by The Hague Conventions had undergone important modifications. The Commission should take account of the current work of the Interim Committee of the General Assembly, but it was for the Commission to formulate new methods for the pacific settlement of international disputes; its work could be parallel to that of the Interim Committee, and must not duplicate it.

71. The CHAIRMAN drew the Commission's attention to the Secretariat's publication entitled

A Systematic Survey of Treaties for the Pacific Settlement of International Disputes, 1928-1948 (Lake Success, New York, 1948). The Interim Committee had taken as a basis for discussion the General Act of Geneva, 1928; the International Law Commission could obviously draw up more effective models of arbitration treaties than those included in the General Act, by basing itself on Article 33 of the Charter; it was open to doubt, however, whether such work would really be codification.

72. Mr. SPIROPOULOS did not share Mr. Alfaro's opinion. In his view, the codification of international law and that of certain rules of procedure should not be confused. Furthermore, the examples of The Hague Conventions and the General Act of 1928 were not encouraging. The Interim Committee was now studying the question of the pacific settlement of international disputes; it would therefore be premature for the International Law Commission to undertake the codification of that topic.

73. The CHAIRMAN drew attention to certain special problems which had arisen in connection with attempts to reach pacific settlements; that might be material for codification.

74. Mr. FELLER (Secretariat) pointed out that the question could be considered from two points of view: the Commission could either view the problem of the pacific settlement of international disputes as a whole, as Mr. Alfaro had done, or, as the Chairman suggested, it should simply consider the various questions arising from the operation of Mixed Arbitral Tribunals of other arbitral bodies. The first alternative governed the work of the Interim Committee; the second had been partially dealt with in section IX of the second part of the Secretary-General's memorandum concerning arbitral procedure. Mr. Feller thought that the question of the pacific settlement of international disputes should be considered by the Commission from one of those two points of view.

75. Mr. LIANG (Secretary to the Commission) indicated that the report of the Sub-Committee of the Interim Committee [8] stated that the work of the Interim Committee should be carried out in close collaboration with the International Law Commission. Theoretically, it was difficult to contend that the codification of the pacific settlement of international disputes did not come within the scope of the International Law Commission's activities, but in practice, it was useless to undertake a task analogous to that which had already been undertaken by the Interim Committee. However, since the latter hoped that the International Law Commission would study that question, all possibility of its consideration should not be excluded.

76. Mr. ALFARO wished to confirm Mr. Feller's explanations: he envisaged the question of the pacific settlement of international disputes as a whole, in accordance with Article 2, paragraph 3, of the Charter. A similar provision was to be found in the draft Declaration of Rights and Duties of States. The International Law Commission should thus promote the application of those important clauses by deciding to include the question of the pacific settlement of international disputes in the list of topics which it was necessary or desirable to codify.

77. Mr. SCELLE supported Mr. Alfaro's views. He thought the work of the Commission should include that topic, but without duplicating the work of the Interim Committee.

78. Mr. SPIROPOULOS thought the question, viewed as a whole, had a clearly political aspect; that was what had made the Interim Committee deal with it; it should consequently not be considered by the International Law Commission. But the question of arbitral procedure was a topic of international law and the Commission could include it in the list of topics to be codified.

79. Mr. BRIERLY thought there was no reason for retaining the question proposed by Mr. Alfaro. The General Act of 1928 had always been a dead letter, and there was every reason to fear that the same fate would befall any similar document. States adopted the procedure which they judged advisable to settle their disputes, without concerning themselves about the opinions which jurists might give them; the Commission would therefore not be performing any useful task in undertaking the codification of such a topic.

80. The CHAIRMAN pointed out that, while the General Act had never literally been applied, it was none the less true that it had served as a model for several treaties.

81. Mr. SANDSTROM thought the question of the pacific settlement of international disputes was connected with the progressive development of international law and not with its codification. He was therefore of the opinion that there was no reason to retain that topic.

82. Mr. CORDOVA suggested that consideration of that question should be deferred, because the time did not seem ripe for establishing a procedure for pacific settlement which might have a reasonable chance of being observed; however, in view of the provisions of Article 2, paragraph 3 of the Charter, that topic would have to be codified sooner or later.

The Chairman concluded that the general opinion for the moment did not favour retaining the question of the pacific settlement of international disputes among the topics the codification of which seemed necessary or desirable.

[8] A/AC.18/SC.6/4.

(l) The law of Nationality

83. Mr. YEPES expressed his satisfaction at the way in which the Secretariat had treated the section relating to the individual in international law, in particular the paragraphs concerning the law of nationality. The question of statelessness was of particular importance at the existing time: whereas there had only been 200,000 stateless persons in 1930, there were now 3,000,000. The possession of a nationality was the only bond between the individual and the law of nations; stateless persons were therefore deprived of the essential rights which the Charter guaranteed to all human beings. The stateless person had no guaranteed civil status, no consular protection, no passport enabling him to move about; he was faced with difficulties in such matters as marriage, wills etc. The International Law Commission could not remain indifferent to such a problem which was both human and legal. The Charter, which made the individual a subject of international law, would be inoperative so long as no solution had been found to the problem of stateless persons.

84. Mr. Yepes thought that the Commission should give priority to the examination of that subject, whose solution, moreover, was quite simple: all that need be done was to establish as a fundamental right of the individual the right to possess a nationality, which could not be lost unless a new nationality had been acquired.

85. The CHAIRMAN said he had been impressed by Mr. Yepes' arguments, but it must be realized that the question of statelessness was a very complex problem. As Mr. Koretsky had pointed out, economic and social phenomena must be taken into account, as must also the differences of opinion between those States which had a large immigrant population and those whose population had a marked tendency to emigration. The problem of migration was at the very basis of the question of nationality.

86. Mr. LIANG (Secretary to the Commission) drew attention to footnote 63a to paragraph 78 of the Secretary-General's memorandum, which stated that the Economic and Social Council had asked for a study of the problem of statelessness. The Secretary-General had presented a comprehensive document on the subject (E/1112). It could be asked whether the Commission should examine the problem of statelessness, deciding to include the subject of nationality in the list of topics for codification, or if it should leave to the Economic and Social Council the task of applying the resolution which guaranteed to each individual the right to a nationality.

87. Mr. FELLER (Secretariat) pointed out that the Economic and Social Council had before it the whole of the question dealt with in that section of Part II of the Secretary-General's memorandum. The International Law Commission might therefore be duplicating the work of the Economic and Social Council and its subsidiary organs, in particular the Commission on Human Rights and the Commission on the Status of Women, not only in the question of statelessness but in other subjects dealt with in that Section. It would pershaps be advisable, therefore, to consider whether the Commission's report to the General Assembly should not contain suggestions on the relations of the International Law Commission with the Economic and Social Council.

88. Mr. SPIROPOULOS did not think that the question of nationality should be dealt with by the Commission; there were indeed few rules in international law which related to it. Besides, it had already been said during the meeting that the question of nationality came within the domestic jurisdiction of States. He pointed out that the Codification Conference of 1930 had dealt with that question; the only positive results had been obtained by the Nationality Commission, thanks to the skill of Mr. Politis; they were but trifling results, however, compared with the importance of the question as a whole. Divergences of political views had prevented the drawing up of a general convention on nationality. He stressed that in the matter of nationality it was a question of unifying existing law; that question was not within the domain of the Commission, whose mission was to codify law. At the moment, the question of nationality came within the competence of the Economic and Social Council, which was a political organ; the Commission would not have to study that question unless it was referred to it by the General Assembly following the work of the Economic and Social Council.

89. The CHAIRMAN thought that the Commission might point out to the General Assembly that it was necessary to unify the provisions of domestic law relating to nationality; such a recommendation might be made in accordance with article 23, paragraph (*d*), of the Statute of the Commission.

90. Mr. SCELLE did not think the arguments advanced against the selection of the subject of nationality convincing. The Commission had already decided that it should not be deterred by the fact that another United Nations organ was already seized of a question it proposed to examine; moreover, there were no grounds for deciding whether the question of nationality actually came under private or public international law: it could scarcely be admitted that such an important matter as statelessness came within the domestic jurisdiction of States. The Commission must take up the question; public opinion was keenly interested in the Commission's first work: it would be very surprised if a question which concerned millions of human beings did

not appear on the list of subjects to be studied, particularly since that question was closely connected with the Universal Declaration of Human Rights and the draft Declaration on the Rights and Duties of States. He again affirmed his conviction that the question of nationality should appear on the list of suitable topics for codification.

91. Mr. HSU shared Mr. Scelle's opinion. The priority to be given to that subject would have to be discussed, but there seemed no doubt whatever that it was among those topics whose codification was necessary or desirable. The failure of the League of Nations in that field should be an incentive rather than a deterrent. Moreover, the situation had changed: the International Law Commission was a technical organ; it was not required to elaborate a convention, as had been the case for the League of Nations, but it could recommend that the General Assembly should adopt one of the four solutions envisaged in article 23 of the Statute.

92. The CHAIRMAN pointed out that many States were in the process of making great changes in their national legislation. It would therefore be advisable to wait until the upheavals of the war had calmed down before undertaking a study of the question of nationality.

93. Mr. SANDSTROM pointed out that, if the topic were retained, a shorter or longer period, according to the priority it was given, would elapse before it was examined. There was therefore no need to wait before placing that question on the list of topics for codification.

94. Mr. SCELLE stressed that the difficulties arising from the conflicting laws relating to nationality constituted one of the barriers to the formation of an international universal society and even to normal relations between individuals. The mission of the International Law Commission was to promote the integration of that international society; it would be contrary to the spirit of its work to decide not to undertake the study of the question of nationality.

95. Mr. FRANÇOIS and Mr. YEPES supported the point of view expressed by Mr. Scelle.

The Chairman concluded that the general opinion was in favour of including the question of nationality in the list of suitable topics for codification.

(m) The treatment of aliens

96. The CHAIRMAN thought that the question of the treatment of aliens could be linked up with the question of State responsibility, dealt with in Section VIII of Part II of the Secretary-General's memorandum, since the State responsibility visualized was connected with damages caused to aliens.

97. Mr. SANDSTROM thought there might be some value in retaining the question of the treatment of aliens, for it served as an introduction to the question of State responsibility.

98. Mr. SCELLE was also in favour of including that question, for he considered it a necessary complement to the question of nationality, whose inclusion had been decided upon. He pointed out that the question of State responsibility was subordinate to that of the treatment of aliens, since the responsibility only arose if the State was under an obligation to treat aliens in a certain way.

99. Mr. SPIROPOULOS said that his position with regard to that question was identical to that which he had stated in connexion with the question of nationality: it was a question of unification and not of codification. In view, however, of the decision taken by the Commission on the question of nationality, the question of the treatment of aliens should be placed on the list of topics for codification.

The Chairman concluded that the question of the treatment of aliens would be placed on the list of suitable topics for codification.

The meeting rose at 6 p.m.

6th MEETING

Wednesday, 20 April 1949, at 3 p.m.

CONTENTS

Chairman: Mr. Manley O. HUDSON.
Rapporteur: Mr. Gilberto AMADO.

Present:

Members: Mr. Ricardo J. Alfaro, Mr. James L. Brierly, Mr. Roberto Córdova, Mr. J. P. A. François, Mr. Shuhsi Hsu, Mr. Vladimir M. Koretsky, Sir Benegal N. Rau, Mr. A. E. F. Sandström, Mr. Georges Scelle, Mr. Jean Spiropoulos, Mr. Jesús María Yepes.

Secretariat: Mr. KERNO, Assistant Secretary-General in charge of the Legal Department; Mr. FELLER, Principal Director of the Legal Department; Mr. LIANG, Director of the Division for the Development and Codification of International Law, Secretary to the Commission.

Planning for the codification of international law: survey of international law with a view to selecting topics for codification. (Article 18 of the Statute of the International Law Commission) (A/CN.4/1/Rev.1) (*continued*)

(a) EXTRADITION

1. The CHAIRMAN pointed out a serious omission in the comments in the Secretary-General's memorandum, which were otherwise very comprehensive. There was no mention therein of the fact that the first extradition treaties contained a detailed list of crimes for which a person could be extradited, which had progressively become considerably longer; in recent years a tendency had been noted not to include that list in treaties, and to replace it by a general description of the characteristics of the crimes for which a person could be extradited. That tendency had been noticeable in the Convention on Extradition signed at Montevideo in 1933.[1]

2. He was glad to note that the Secretary-General's memorandum stated that the law of extradition was an instrument of international co-operation for the suppression of crime. He thought it unnecessary to emphasize the five questions [2] chosen by the League of Nations Committee of Experts as being proper subject matter of codification by way of a general international convention. He drew attention to the rule that an extradited person should not be tried for an offence other than that for which he was extradited; that rule had been erroneously interpreted in certain countries.

3. Mr. FRANÇOIS did not consider that the topic should be included. Extradition was an act of mutual assistance for the suppression of crime; it depended on the existence of similar political conditions in the two States concerned. Seeing that identical political conditions did not exist in all States, it would be useless to attempt to create uniform rules for extradition. He thought it would be preferable to maintain the existing practice of regulating the conditions of extradition by means of bilateral or regional treaties.

4. Mr. BRIERLY concurred in the views expressed by Mr. François. Multilateral conventions were founded on mutual confidence between the signatories and on an identical conception of the administration of justice. The facts showed that generally speaking those conditions were not fulfilled at the existing juncture. It seemed therefore that the law of extradition should continue to be regulated by bilateral treaties.

The Chairman observed that none of the members of the Commission was in favour of the codification of that topic; it would therefore not be included in the list of topics of which the codification appeared necessary or desirable.

(b) THE RIGHT OF ASYLUM

5. The CHAIRMAN considered that the Secretary-General's memorandum contained expressions which were not warranted when it spoke of "the obligation not to extradite" persons accused of political offences and of "a positive duty" to receive them.[3]

6. Mr. LIANG (Secretary to the Commission) pointed out that in diplomatic correspondence the right of asylum was frequently "claimed"; if the right of asylum was admitted to exist, it could logically be asserted that that right, which could be claimed, implied a corresponding obligation.

7. Mr. YEPES requested that the subject of the right of political asylum should be given special priority; the question appeared to be one of those the codification of which was eminently necessary and desirable. The right of asylum occupied a very important place in the customary law of Latin America and its universal codification was called for by the existing world situation. He emphasized that the right of asylum had been the means of averting holocausts in a number of countries; if it had been universally respected, the world would have been spared the tragedies it had known.

8. The Conventions of Havana and Montevideo, concluded in 1928 and 1933, could be used as a basis in drawing up an important chapter of international law which the world was anxiously awaiting. He therefore proposed that the codification of the right of political asylum should be placed on the agenda of the first session of the Commission; it might be useful to set up a sub-committee to consider the question and submit a special report to the Commission.

9. Mr. SCELLE also felt it was highly important to include that topic. He wished, however, to emphasize that there was a close connexion between the question of extradition and the question of the right of political asylum. He had not expressed himself in favour of the codification of the right of extradition, since it was obvious that the codification of that right would lead the

[1] See Manley O. Hudson. *International Legislation*, Vol. VI, 1932-1934, pp. 597-606.

[2] See A/CN.4/1/Rev.1, para. 85.

[3] *Ibid.*, para. 88.

Commission too far. The difficulties that would be encountered in the codification of the right of extradition would not arise, however, in the codification of the right of asylum. The Commission should include the topic of the right of political asylum, at least for the elaboration of some broad general principles if not for complete codification.

10. Mr. BRIERLY said he found it difficult to form a precise opinion on the subject, as he wondered what was meant by right of asylum. Did it refer to the right of a State to grant asylum? Such a right was indisputable. Or was it the right of an individual to demand admission to a State? The latter right did not exist at that time, and there was no reason to suggest that it should be established.

11. The CHAIRMAN thought that the right of asylum should be interpreted as the right of a State to grant asylum to certain individuals, in legations, warships and military camps, for instance. There could be no question of the right to demand asylum, but only of the right of a State to offer asylum and to have that asylum respected by the State which had jurisdiction over the individual concerned.

12. Mr. ALFARO pointed out that there was, on the one hand, the right of a State to grant asylum and the corresponding obligation on the part of another State to respect that asylum and, on the other hand, the right of an individual to seek asylum. The latter right had been examined for the first time in 1865 after a revolution in Peru in the course of which the deposed Ministers had sought asylum in the French legation which, on the instructions of the Government of Napoleon III, had refused to hand them over. A conference then convened in Peru had given formal recognition to the right of asylum. The highly humanitarian character of that right had been respected ever since throughout the American continent. The right of a State to grant asylum and the obligation of another State to respect that asylum was a most important question which, as Mr. Yepes and Mr. Scelle had suggested, should be selected as a topic for codification.

13. Mr. LIANG (Secretary to the Commission) pointed out that the right of an individual to seek asylum was dealt with in article 14 of the Universal Declaration of Human Rights. There could therefore be no question of contesting an expression used in so important a document.

The Chairman concluded that the question of the right of asylum would be included in the list of topics to be retained.

(c) The law of treaties

14. The CHAIRMAN drew the Commission's attention to certain observations in the Secretary-General's memorandum. He did not agree that there was " uncertainty as to the necessity of ratification with regard to treaties which have no provision for ratification ", nor did he think that there was any uncertainty " in the matter of the important subject of the relevance of the constitutional limitations upon the treaty-making Power ".[4]

15. Mr. BRIERLY proposed that the topic should be selected for codification and should be given a certain priority. The only possible objection to its inclusion in the list was that it was a very wide question which might take up several meetings of the Commission. He would like to have seen some reference in the Secretary-General's memorandum to the possible consequences of the breach of a treaty by one of the parties: would such a breach release the other party from its obligations under the treaty?

16. Mr. SCELLE supported Mr. Brierly's statement. It was undoubtedly difficult to undertake the codification of the whole question of treaties; there were still many points, however, that were not well defined and in that respect the work of the Commission would be useful and even essential.

17. Mr. SPIROPOULOS also supported Mr. Brierly's proposal. The question of treaties was one of the most important questions of international law, both in its theoretical and practical aspects. The Permanent Court of International Justice had established a jurisprudence in the matter which far from preventing the work of codification should on the contrary encourage and help it.

18. Mr. ALFARO agreed entirely with the views expressed by the previous speakers. He wished to draw the Commission's attention to the need of establishing specific rules on the value of the principle of *pacta sunt servanda* in relation to the clause *rebus sic stantibus*. There was regrettable uncertainty on that question. He would like to see a " code for the observance of treaties ".

19. Mr. FRANÇOIS noted that Mr. Brierly had emphasized the particular importance of the question. It seemed to him, however, that there were two aspects to that question: the unification of the drafting of treaties on the one hand, and the unification of the fundamental principles of treaties on the other. The Commission could therefore devote itself first of all to the elimination of any divergencies in the wording of treaties, so as to avoid any contentious interpretations or at least unnecessary doubts. The Secretariat would be able to give the Commission particularly effective help in that work.

20. Mr. YEPES thought, like the other members of the Commission, that the question of treaties

[4] *Ibid.*, para. 91.

was most important and he was therefore in favour of its inclusion on the list of topics for codification. He pointed out that paragraph 92 of the Secretary-General's memorandum presented the question in a way that might give the impression that the revision of treaties was favoured: it should be made clear that such an interpretation of the paragraph would be wrong.

The Chairman said the subject of treaties would be included in the list of topics to be retained.

(d) Diplomatic intercourse and immunities

21. The CHAIRMAN noted that the Secretary-General's memorandum dealt principally with the question of immunities. It was to be regretted that the memorandum did not also examine "the various aspects of diplomatic intercourse in general."

22. Mr. BRIERLY thought the topic should be retained but not given any kind of priority, since there was no immediate urgency for its consideration.

23. Mr. SCELLE and Mr. SPIROPOULOS shared Mr. Brierly's opinion.

As there were no objections, the Chairman said the subject of diplomatic intercourse and immunities would appear in the list of topics to be retained.

(e) Consular intercourse and immunities

24. The CHAIRMAN pointed out that bilateral treaties provided abundant material for the study of the above question; he mentioned among others the Convention adopted by the Sixth International Conference of American States held at Havana in 1928 [5] and the work of the Harvard Research.[6] He noted that new ideas had recently appeared in consular conventions.

25. Mr. ALFARO observed that having retained the subject of diplomatic intercourse and immunities, the Commission should also retain, with the same priority, the subject of consular intercourse and immunities.

26. Mr. SPIROPOULOS and Mr. BRIERLY supported Mr. Alfaro's proposal.

The Chairman concluded that the general opinion was in favour of retaining the subject of consular intercourse and immunities.

(f) State responsibility

27. The CHAIRMAN thought the observations in the Secretary-General's memorandum would have gained by being more detailed. He pointed out that the subject had first been considered to concern the responsibility of States for damage to the person and property of aliens; it had then been extended to the penal responsibility of States and of individuals acting in the name of the State. It was therefore related to the principles of the Nürnberg Charter. He drew the Commission's attention to the comment on "extinctive prescription" in the memorandum. He was sorry the memorandum made no reference to a question which was of great importance, particularly in the eyes of the Latin-American countries, namely the *Calvo doctrine:* how far would domestic laws have the last word in the matter of State responsibility?

28. Mr. CORDOVA thought that the question of State responsibility was of particular importance and that the Commission should retain it among the topics for codification. The question was closely connected with that of the position of aliens, whose codification had been envisaged. Replying to the Chairman, he stated that the Commission should not restrict itself to the question of State responsibility toward aliens, but should study all infringements of the duties incumbent on States.

29. Mr. FRANÇOIS recalled that the study of those questions had completely broken down at The Hague Conference in 1930; the failure had been so complete that a report had not even been drawn up. The situation did not appear to have developed sufficiently to justify a hope of success at the existing time. He therefore proposed that the subject of State responsibility should not be retained.

30. Mr. BRIERLY observed that that question was one of the most legal of all those set forth in the Secretary-General's memorandum; the Commission would therefore fail in its duty if it did not undertake the codification of that topic. There were certainly difficulties, as Mr. François had indicated, but it could be imagined that there had been a certain development of ideas since 1930. It would undoubtedly be inadvisable to recommend the adoption of a convention, but the Commission might recommend to the General Assembly one of the other measures visualized in article 23 of the Statute. It would therefore be a pity to exclude that subject from the list of topics for codification.

31. Mr. SPIROPOULOS shared Mr. Brierly's point of view. While the facts to which Mr. François had drawn attention were admittedly correct, it must not be forgotten that the opinion of Governments was after all that of the jurists who represented them: it was not therefore an objective opinion, and an evolution might well have taken place since the previous attempt at codification.

32. Mr. SCELLE did not consider that the failure at the 1930 conference was an adequate

[5] See Manley O. Hudson, *International Legislation*, Vol. IV, 1928-1929, pp. 2394-2401.

[6] See Supplement to *American Journal of International Law*, Vol. 26, 1932, pp. 189-449.

reason for not undertaking the codification of the subject. The Commission should of course be very cautious and should approach the subject in such a way as to avoid any very great difficulties, at least in the early stages. The question of State responsibility would recur constantly during the study of the majority of the subjects which the Commission had already placed on the list of topics for codification; it would therefore be difficult not to include that question also.

The Chairman concluded that the general opinion was in favour of including the question of State responsibility on the list of topics to be retained.

(g) Arbitral procedure

33. The CHAIRMAN called upon members of the Commission to state their views on the inclusion of arbitral procedure in the list of topics suitable for codification. He drew their attention to the observation in paragraph 99 of the Secretary-General's memorandum that the codification might include provision for the appellate jurisdiction of the International Court of Justice.

34. Mr. ALFARO favoured the inclusion of that question in the list of topics for codification. He suggested, however, that to bring the title of that topic into line with the provisions of Article 2 of the Charter, it should be changed to " The Law of Pacific Settlement ". There were few bilateral agreements which established the obligation of the contracting parties to settle their disputes by arbitration. Only optional recourse to arbitration had met with some success. The Commission should inquire into and establish rules for the means of compelling States to settle their disputes by pacific methods.

35. The CHAIRMAN expressed some doubt as to the acceptability of Mr. Alfaro's suggestion in view of the fact that the Commission had decided at the preceding meeting not to retain for the time being the question of pacific settlement of international disputes which Mr. Alfaro had proposed as a topic for codification.

36. Mr. BRIERLY, supported by Mr. SPIROPOULOS, was of the opinion that arbitral procedure should be included without change of title in the list of topics for codification.

37. Mr. LIANG (Secretary to the Commission) drew the Commission's attention to the report of Sub-Committee 6 of the Interim Committee (A/AC.18/SC.6/4), to which he had referred at the preceding meeting. It was stated in the report that the Sub-Committee's Working Group had worked out the plan of study on the question of peaceful settlement of disputes among nations " with the responsibilities of the International Law Commission in view ", and that the " future studies in this field should also be co-ordinated with the work of the International Law Commission " (page 4).

38. Mr. SPIROPOULOS pointed out that when the Commission had taken its decision at the preceding meeting on the topic proposed by Mr. Alfaro, it had not been in possession of the facts which Mr. Liang had just put before it. Since it seemed to be the intention of the Interim Committee that the International Law Commission should deal with the question of the peaceful settlement of disputes, that question might perhaps be included in the list, without, however, being given high priority.

39. Mr. KORETSKY emphasized that the International Law Commission took its directives from the General Assembly only. That was the only United Nations organ that had the right to submit suggestions to the Commission. Mr. Koretsky did not want to delay the Commission's work by stating his views on the Interim Committee, which in his opinion was illegal and had been set up in violation of the Charter, but he asked the Commission to disregard the report of the Interim Committee's Sub-Committee 6, in order to avoid unnecessary complications.

40. In reply to a question by the CHAIRMAN, Mr. HSU, who was the representative of China on the Interim Committee, explained that the report in question had been adopted without any amendment by Sub-Committee 6 and by the Interim Committee itself. He thought that in submitting that report to the Commission, Mr. Liang had not had the slightest intention of submitting a request from the Interim Committee; he had no doubt simply wished to draw the Commission's attention to the fact that the Interim Committee had expressed the view that part of its work might be carried out by the International Law Commission.

41. Mr. HSU explained that he had not intervened in the preceding meeting's debate on Mr. Alfaro's proposal because he had felt that it had not been presented at a suitable time. Since arbitration was one of the methods of peaceful settlement of disputes, it seemed that the time had come to consider the question as a whole, in the form in which it had been presented by Mr. Alfaro.

42. Mr. KERNO (Assistant Secretary-General) pointed out that the organs of United Nations other than the General Assembly were referred to in two articles of the Statute of the Commission: article 17, which mentioned the principal organs of the United Nations, thus excluding the Interim Committee, and paragraph 1 of article 25, where reference was made to " any of the organs ", which applied to the Interim Committee as well as to the others. Mr. Kerno recalled that the Interim Committee had been set up by a decision of the General Assembly and that certain Members of the United Nations considered that organ illegal.

43. The CHAIRMAN pointed out that according

to the terms of paragraph 2 of article 25, the documents of the Commission which were circulated to Governments would also be circulated to such organs of the United Nations as were concerned. That same paragraph permitted those organs to furnish information and to make suggestions. He was of the opinion that if an organ of the United Nations wished to make a suggestion to the International Law Commission, it should communicate with it to that effect. It was not for the Commission itself to take the initiative of looking through the documentation of the various organs of the United Nations for any reference to its activities. In view of the fact that the Commission had not been in possession of all the factors of the question at its last meeting, he asked the members of the Commission if they wished to reopen the debate on the proposal submitted the previous day by Mr. Alfaro.

44. Mr. ALFARO stated that he was quite ready to submit his proposal again at a later stage in the work of the Commission.

The Chairman thought that there was general agreement to include the law of arbitral procedure, without changing its title in any way, on the list of topics to be retained.

(h) The law of war

45. Mr. ALFARO asked the members of the Commission to decide whether the question of the law of war, which had been suggested by Mr. François, and that of neutrality should be included on the list of topics to be retained.

46. The CHAIRMAN read paragraph 14 of the working paper prepared by the Secretariat (A/CN. 4/W.1). He pointed out that in his opinion the principles upon which the Charter and the judgment of the Nürnberg Tribunal were based were those dealing with wars of aggression.

47. Mr. SCELLE thought that the topic should be examined, but under another heading. Since the Charter had outlawed war, there could in fact no longer be any question of the law of war, namely, of the right of a State to commit a criminal act. On the other hand, the Commission would have to consider the regulation of the use of force in international relationships.

48. According to the concept of the Briand-Kellogg Pact, war was the right of a Government, acting in virtue of its sovereignty, to have recourse to the use of force in order to ensure the triumph of a national ambition. The Charter of the United Nations, contrary to the spirit of the League of Nations Covenant, had endeavoured to organize an international police system for the prevention of war. War and the use of an international police force were two essentially different and even diametrically opposed ideas. While war was an anarchistic phenomenon, whereby a State made use of force in order to ensure the prevalence of what it considered to be law, the use of an international police was a resort to force in order to maintain international order.

49. Mr. SCELLE was of the opinion that the regulation of the employment of an international police force should be one of the chief preoccupations of the Commission, that specific rules should be established for that most dangerous executive function, and that there should be no further mention of the law of war.

50. Mr. SANDSTROM wondered whether the question presented by Mr. Scelle did not fall within the province of the progressive development of international law rather than that of its codification. In his opinion, the Commission would be well advised to postpone the study of that question until a later time. Mr. Sandström pointed out that an International Red Cross Conference was to take place in Geneva on 21 April 1949; it would deal with war conventions. That proved that if the law of war belonged to the past, war itself still remained a reality.

51. Mr. SPIROPOULOS agreed with Mr. Scelle, but for different reasons, that there was no need to codify the law of war. War was unfortunately a possibility; it could result from a decision of the Security Council; again it could arise from a conflict between two States and could involve all the other States. In such a case, the law of war had necessarily to be applied. Mr. Spiropoulos recalled that in spite of the agreement of the signatories of the Briand-Kellogg Pact, to have no recourse to war, it had been necessary to apply the law of war to World War II. The Commission should not, however, take up that question immediately, because the greater part of the law of war had already been codified by international conventions, in particular by The Hague Convention and by the London Declaration of 1909, which, if they were to be applied, would prove highly efficacious, whereas nothing had as yet been codified in the field of the law of peace.

52. Mr. HSU thought that the only question was that of the priority to be given to the study of that subject. The Commission had in fact to regulate the law of war, in particular that of aerial war, for the situation had changed considerably since the signature of the international conventions mentioned by Mr. Spiropoulos It was true that war had been outlawed as an instrument of national policy. It could, however, be ordered by the Security Council. The possibility of a defensive war might also be envisaged. It was essential, therefore, to draw up regulations governing the laws of war.

53. Mr. KORETSKY could not conceal his astonishment at the fact that certain members of the Commission refused to place such items as the peaceful settlement of international disputes among the appropriate subjects for codification, and asked that the laws of war should be retained as a necessary or desirable subject for codification.

54. The horrors of the Second World War were known to everyone, and no one should be ready to forget them. Mr. Scelle had suggested that the Commission should regulate the employment of international police. If the Commission did so, it could be justly reproached with having taken part in political and legal preparation for a Third World War. The Commission should not transform itself into a legal general staff which would pursue its activities in concert with the general staff of the North Atlantic Treaty Organisation. It should categorically refuse to discuss war. It should not even contemplate the possibility of a Third World War, as Mr. Spiropoulos had done, for its mission was to prepare legal formulas which were most likely to ensure the peace and security of the peoples and to regulate friendly relations between States.

55. Mr. BRIERLY supported Mr. Koretsky's remarks. Contrary to Mr. Spiropoulos's opinion, he felt that international conventions regarding war were far from satisfactory. The Commission should however, refrain from taking up the question of the laws of war because if it did so its action might be interpreted as a lack of confidence in the United Nations and the work of peace which the latter was called upon to carry out, and as a proof of the very relative value which might be attached to the obligation assumed by the signatories to the Charter to settle their disputes by peaceful means. Nothing would create a worse impression of the Commission's work, nothing would upset public opinion more.

56. The Commission's task was to lay the foundations of a peaceful world. It could be rightly criticized if it turned its consideration to war. Furthermore, Mr. Brierly did not think that the members of the Commission were qualified to study the technical aspects of the problem of war. In fact, jurists should neither study new methods of warfare, which developed with amazing rapidity, nor regulate the use of various weapons of war. Attempts had been made to regulate the use of certain weapons, but they had always failed. For those reasons, and particularly for the first, he considered that the Commission should not place the law of war among the suitable topics for codification.

57. Mr. CORDOVA stated that he was somewhat surprised that Mr. Alfaro had asked for the law of war to be placed among those subjects chosen by the Commission for codification. The Latin-American countries took credit for having played an important part in the fight against war. It was the Mexican delegation that had first submitted to the Havana Conference in 1928 a proposal that wars of aggression should be outlawed. Some months later the Briand-Kellogg Pact had forbidden its signatories to have recourse to war, whatever its nature. The members of the Commission, as well as the Members of the United Nations, were linked by the Charter. In view of the fact that the latter condemned war, the Commission could not undertake the study of a subject which referred to war, that was to say a question which was counter to the real purpose for which the Commission had been set up.

58. It was true that Article 51 of the Charter referred to the right of self-defence, but it should not be forgotten that even in national legislation the principle of self-defence was not codified. Since the Charter imposed on its signatories the obligation to settle their disputes by peaceful means, the Commission could not apply itself to the task of drawing up standards to govern the settlement by force of those disputes.

59. Mr. ALFARO regretted that his words had been misinterpreted by Mr. Córdova. What he had wished to say was that since the Commission was reviewing the whole of international law, its study would be incomplete if it did not also include the law of war which, as Mr. François had pointed out at the first meeting, constituted one of the longest chapters in the law of nations. He had never, however, had the slightest desire to have that question placed on the list of topics for codification, for what seemed to him the very adequate reason which had just been added to the arguments of Mr. Koretsky and Mr. Brierly, that, having refused to place the question of the pacific settlement of disputes on its list, the Commission could not place the law of war upon it without shocking the conscience of the world.

60. Sir Benegal RAU shared the opinions expressed by Mr. Koretsky and Mr. Brierly. It seemed that the Commission had enough work to do without taking up the study of the law of war, the codification of which at the existing time would not fail to have a deplorable psychological effect on world opinion.

61. Mr. SCELLE observed that the spirit of his previous intervention hat not been correctly understood by Mr. Koretsky. The real question was whether the Commission was going to refuse to codify international criminal law. Could it shirk that duty, when the General Assembly itself had instructed it to draw up the Nürnberg principles, which were an integral part of criminal law and involved all questions connected with the suppression of recourse to war—a crime in itself—and all the additional crimes committed during war, such as the bad treatment of prisoners and the wounded?

62. It was not therefore a question of stating in what cases it was permissible to make war, or of drawing up the law of war in the original sense of the term. It had been recognized once and for all that war was a crime, but from the legal point of view every crime must be defined. The Commission's task was to specify in what circumstances a crime had been committed and to state that the unlawful use of force constituted that crime whereas its lawful use was of quite a

pifferent nature, namely, international police action for the clear purpose of repressing the crime which was being committed and maintaining peace. Following the example of the International Red Cross Conference at Geneva and without thereby being accused of establishing the law of war, the Commission should lay down a certain number of rules making it possible to define the supplementary crimes which might be committed during a war and which formed to some extent the circumstances aggravating the chief crime which lay in the unlawful use of force.

63. To claim that any such regulation became impossible once war had been outlawed would be tantamount to stating that it was impossible to make laws for murder on the grounds that murder also was prohibited, as were all other crimes and offences. The fact that war was prohibited did not mean that the Commission was no longer bound to consider the penalty for that crime and for all those which might be committed in connexion with it. Public opinion was awaiting the establishment of rules which would define the crime of war and all crimes connected with it and the methods for their prevention; that question should be included in the list of topics for codification.

64. Mr. YEPES thought that the outlawing of war by the Charter rendered it a state of international anarchy for which rules could not be established. The New World had laid down final regulations on that question at the Ninth Pan-American Conference in 1948, at which the Bogotá Pact had been drawn up making it obligatory for all the States to settle their disputes by peaceful means and categorically prohibiting war. It would certainly create an unfortunate impression on public opinion if the law of war were included in the list of topics for codification.

65. Mr. AMADO suggested that the examination of that question should be adjourned until the Commission had studied item 3 of the agenda, the formulation of the principles of Nürnberg, which had been specially referred to the Commission by the General Assembly.

66. Mr. BRIERLY stated that he was opposed to the codification of the law of war in the original meaning of that term but that he did not see any objection to the Commission's considering at a later date the totally different subject introduced by Mr. Scelle.

67. Mr. LIANG (Secretary to the Commission) drew the Commission's attention to item 3 (*b*) of the agenda, which envisaged the preparation of a draft code of offences against the peace and security of mankind. The question raised by Mr. Scelle might be examined at the same time as that item of the agenda. As a general rule, the Secretariat refrained from expressing a definite opinion on the questions submitted to the Commission, but in that particular case he felt that he should state that, in his opinion, the Commission should exclude the law of war from its subjects for codification, since the Charter had clearly condemned the previous conception that war was a natural calamity creating a situation in which the two parties concerned were on an equal footing and enjoyed equal rights.

The Chairman noted that the majority of the Commission was opposed to including the law of war on the list of topics for codification.

(i) NEUTRALITY

68. Mr. ALFARO thought that since the Commission had decided not to study the law of war, it should not retain on its list of topics for codification the subject of neutrality which was merely a consequence of war.

The Chairman stated that subject would not be included on the provisional list.

(j) GENERAL PLAN OF CODIFICATION

69. The CHAIRMAN announced that the provisional list of topics for codification was closed; it comprised the following fourteen points:

1. Recognition of States.
2. Succession of States and Governments.
3. Jurisdictional immunities of States and their property.
4. Jurisdiction with regard to crimes committed outside national territory.
5. Régime of the high seas.
6. Régime of territorial waters.
7. Nationality.
8. Treatment of aliens.
9. Right of asylum.
10. Law of treaties.
11. Diplomatic intercourse and immunities.
12. Consular intercourse and immunities.
13. State responsibility.
14. Arbitral procedure.

70. The CHAIRMAN noted with satisfaction that the Commission had been able to draw the list up rapidly thanks to the carefully prepared document produced by the Secretariat. The list, however, was only preliminary and provisional, and would have to be re-examined at the next session in case the Commission might wish to cut out or to add certain topics. Moreover, the Commission would have to decide on the order to be adopted for the examination of the topics. While the priorities suggested by the members had been noted, the Commission would have to reach final agreement at least on the first topics which it thought should be taken up as soon as possible.

71. Mr. Spiropoulos and other members had expressed the wish that the Commission should

consider drafting a code of international law which would include the various topics as they were codified. The first report to the General Assembly should mention that intention, and should further indicate that the Commission had provisionally chosen certain topics for codification which would come within the framework of that code. A statement of that nature in the report would create a favourable impression in the General Assembly and stimulate its interest in the work of the Commission. Other members of the Commission, however, did not share that view.

72. The Commission should therefore decide whether or not it wished to consider the possibility of establishing, at an advanced stage of its work, a kind of code which, if not complete, would at least be fairly broad. It should also decide whether those topics which had been retained in the provisional list should be included in such a code, bearing in mind the fact that a decision on that matter might have a bearing on the priority given to those topics.

73. Mr. KORETSKY felt that the question merited careful consideration. As the idea was to draw up a general plan in which the different topics for codification would be arranged, the Commission should not simply, by force of habit, adopt the traditional classifications of treaties, manuals and existing draft codes. Mr. Amado had been somewhat justified in stating that a kind of revolution had taken place in international law. From the historical point of view it could not be denied that the recognized law of nations had been drawn up during the era of liberal capitalism, on the basis of contemporary Roman law and by the transposition of the principles of civil rights in the international field. The twentieth century had, however, seen the establishment of new legal systems both at the national and the international level. Co-operation between States which were at different stages of historical evolution required a re-classification of matters of international law which took into account those modern concepts. Instead of placing emphasis on dogmatic problems, such a classification should stress recent aspects of the law of nations, such as the maintenance of international peace and security, co-operation between States, the struggle against the remnants of fascism, and the struggle against war, in the sense in which Mr. Scelle had spoken in his second statement.

74. In that way, the general plan for codification would lose the academic aspect of ordinary classifications and would emphasize the political significance of international law in relation to the existing historical situation, the principal factor of which was the creation of an international organization which was to bring peace and security to the world. It was such a document as that that should be submitted to the General Assembly, which, being an assembly of a fundamentally political nature, would show more interest in a plan for codification reflecting the political conditions of the twentieth century than in a classification which was more than one hundred years old.

75. Mr. Koretsky thought that he himself might be able to submit a draft plan of codification seen from that angle, but he would not be able to do so at the moment, as such work should be the result of slow and careful preparation.

76. The CHAIRMAN said that he would be prepared to examine any new system for classification which took into account the present international community, on condition that he was not asked to stray too far into the political field since that was not within his competence nor that of the Commission. It would be better, in his opinion, for the Commission to limit itself to presenting to the General Assembly each year documents which would modestly bear the imprint of the current year, rather than trying to produce a work bearing the mark of the twentieth century.

77. Moreover, an examination of the topics which had been retained for codification would show that the majority of them constituted a heritage of the past, and yet each of them posed questions which existed today. The Commission should not be deterred from its purpose by the pretext that the world had for centuries attempted in vain to find a solution to those problems. Whatever Mr. Koretsky might have said, it appeared that in principle he accepted the idea of a general plan of codification as an objective to be reached in the not too distant future.

78. Mr. SPIROPOULOS stated that when he had proposed the establishment of a general plan he had had in view the codification of international law as a whole. However wide in scope a codification might be, it was well to follow a plan which would serve as a guide to the work and within which the codified topics could be inserted. That had been the method followed in the conferences held in London and The Hague, when the rules governing war on land and sea had been drawn up. It was all the more necessary to use that method when undertaking the codification of international law in its entirety.

79. The PRESIDENT asked Mr. Spiropoulos whether he would agree to the more practical idea of a plan drawn up on fairly broad lines but which did not cover the whole of International law inasmuch as the Commission had decided against the codification of a certain number of topics.

80. Mr. SPIROPOULOS felt that the Commission could not be too ambitious in that field, and that if for practical reasons the plan could not be drawn up in too great detail, it should at least be as complete as possible. In his opinion, no better impression could be made on the General Assembly than by informing it that the Commission's final aim was to give to the world a complete

code of international law. With regard to Mr. Koretsky's objections, Mr. Spiropoulos pointed out that the general outline of the plan could not prejudge its contents, and that topics could very well be given a new aspect within the framework of the traditional divisions of recognized international law.

The meeting rose at 6 p.m.

7th MEETING

Thursday, 21 April 1949 at 3 p.m.

CONTENTS

Chairman: Mr. Manley O. HUDSON.

Rapporteur: Mr. Gilberto AMADO.

Present:

Members: Mr. Ricardo J. ALFARO, Mr. James L. BRIERLY, Mr. Roberto CÓRDOVA, Mr. J. P. A. FRANÇOIS, Mr. Shuhsi HSU, Mr. Vladimir M. KORETSKY, Sir Benegal N. RAU, Mr. A. E. F. SANDSTRÖM, Mr. Georges SCELLE, Mr. Jean SPIROPOULOS, Mr. Jesús María YEPES.

Secretariat: Mr. KERNO, Assistant Secretary-General in charge of the Legal Department; Mr. FELLER, Principal Director of the Legal Department; Mr. LIANG, Director of the Division for the development and codification of international law, Secretary to the Commission.

Planning for the codification of international law: survey of international law with a view to selecting topics for codification. (Article 18 of the Statute of the International Law Commission) (A/CN.4/1/Rev.1) (*concluded*)

REVISION OF THE PROVISIONAL LIST AND PRIORITY OF TOPICS

1. The CHAIRMAN asked whether the members of the Commission wished to revise the list of fourteen topics which had been retained for codification. He thought for his part that such a revision was hardly necessary at that stage since the Commission was free to re-examine the subject later.

2. Mr. KORETSKY stated that he found it difficult to say immediately which subjects could be codified with any chance of success. He reminded the Commission that he had proposed that it should postpone the detailed and final examination of that question and request the Rapporteur to make a preliminary study of it with the assistance of the Secretariat. Since the Rapporteur had not felt that he should accept that task, Mr. Koretsky thought that it might be useful to set up a sub-committee for that purpose.

3. He recalled that under article 18 of the Statute the Commission was called upon to survey the *whole* field of international law. The preparatory work resulting in that text made it impossible to doubt that its authors had intended the survey to cover both customary international law and the law concerning treaties, of which there were a considerable number. The treaties published and registered by the United Nations during the last two years alone filled thirteen volumes.

4. He considered that the Commission had not so far reviewed the whole field of international law in conformity with the General Assembly's instructions. Its selection had been guided by intuition, scientific considerations and the personal experience of its members rather than by objective realities. It was quite possible that the passivity of the old theories still dominated the conceptions of certain members who had participated in previous attempts at codification. The Statute laid down that the Commission should consider existing codification drafts whether emanating from Governments or private institutions. The Commission had already had occasion to note that if it left aside all political considerations in the selection of topics, it would not achieve the results which were expected of it.

5. Mr. KORETSKY recalled that so far international law had been tinged with the Europeanism of the Nineteenth Century, a period when French capital had supported Czarism, when French had been the diplomatic language *par excellence*, and when French doctrines had predominated. The United Kingdom had also played an equally dominant role at that time, particularly in matters of maritime law. With the Twentieth Century, what might be called Americanism had made its appearance in international law; that was an obvious fact which could not be left out of account. Thus international law had hitherto been dominated by two tendencies the European and the American, which ignored any conceptions that had arisen in other parts of the world. Apparently, therefore, America and Europe wished to retain a monopoly of civilization. It was well

known that the countries of Asia and Africa had not until quite recently enjoyed equal rights; the European and American legal systems had been imposed on those countries together with the régimes of capitulations, extra-territoriality, etc. Europe and America had thereby been able to ensure their supremacy over those countries.

6. Mr. Koretsky stated that it was of primary importance when embarking on the codification of international law that the Commission should wrestle with its own inclinations and tussle against the old conceptions. Under article 8 of the Statute, the Commission and, therefore, its work should be representative of the main forms of civilization and of the principal legal systems of the world. That was essential if co-operation between the States was to be achieved and if the principle of equality for all was to be applied. It was consequently impossible to admit that one group of States should try to dictate its conceptions to other States and to impose standards of life on them. If there was a desire to create laws based on an international organization of peoples rather than laws based on the world domination of one group of States, the progress achieved by countries to which scientists had hitherto paid scant attention must be examined. The countries which had just re-found their independence were entitled to see their political, legal and governmental institutions studied in detail. He recalled the words of Marshal Stalin who had stated that every nation large or small had its own qualities and that each one made its contribution to the cultural heritage of the world. All nations had equal rights, therefore, and the new tendencies appearing among those peoples who had re-found their sovereign liberty were worthy of the Commission's attention.

7. Mr. Koretsky noted with regret that certain members of the Commission had adopted foreign ideas. He deplored the fact that all the members of the Commission were not present. The absence of Mr. Faris el Khouri, to whom he paid glowing tribute, deprived the Commission of his views on one of the principal civilizations of the world, the Arab civilization. As the representative of a people's democracy which rejected the old conceptions Mr. Zourek might also have contributed to the work of the Commission by his ideas as the Abbé Grégoire and Thomas Jefferson had contributed to the evolution of ideas in their time. He therefore considered that in the absence of those two members it would hardly be possible to obtain a general picture of the legal systems of the world.

8. He stated in conclusion that before fixing on a final list it would be necessary to know the reasons, political considerations included, which had led to the selection of any particular topic, to hear an account of the different attitudes and to examine further any topics which formed the background for existing controversies. For all those reasons, he felt that the time was not ripe for adopting a final list. He therefore proposed that the list should be referred to the Rapporteur who should prepare a report, with the assistance of a sub-committee if he wished, to be submitted to the next session of the Commission.

9. The CHAIRMAN also regretted the absence of Mr. El Khouri and Mr. Zourek but stated that unfortunately the Commission could not adjourn for that reason. The Commission had adopted a programme which could be modified. The list in question was not final and was not binding on any member of the Commission or on the Commission as a whole. That said, however, it was essential to proceed with the work as soon as possible. To that end he proposed to ask first whether certain members wished to re-examine the topics on the list and secondly whether there were any other topics which the Commission wished to add to the list. Lastly he would put to the vote Mr. Koretsky's proposal that a sub-committee should be established with a view to making a more detailed study.

10. Mr. KORETSKY considered that it was impossible to reach even a provisional decision on the number of topics which should be codified in view of the fact that several of those topics were still matters of bitter controversy, or belonged to the field of the development of international law rather than to that of its codification. The number of topics should therefore be reduced by bringing it down to certain urgent matters which could easily be codified. The first questions to be examined should of course be those which the General Assembly had referred to the Commission for immediate study. The study of the draft declaration on the rights and duties of States might easily take a considerable time; the formulation of the principles of Nürnberg was also important.

11. Moreover it was possible that at its next session the General Assembly would request the Commission to study other questions. Apart, therefore, from those referred to it by the General Assembly the Commission should only retain the following questions:

(1) The régime of the high seas: that was not a controversial question and there were a certain number of precise treaties on it; it was therefore one of the first subjects to be codified and systematized so that the Commission could try out its powers and harmonize the different legal systems.

(2) The question of stateless persons to which Mr. Yepes had referred, which had considerable political significance.

(3) The question of consular intercourse and immunities which often led to great friction between States.

12. In reply to the CHAIRMAN who considered that that proposal was equivalent to eliminating

from the list eleven of the fourteen topics previously retained by the Commission, Mr. KORETSKY explained that he did not propose any elimination; he asked that provisionally three subjects only should be examined and that the others, plus any additional topics, should be examined later. His proposal was therefore a question of priority. If a list of fourteen specific topics were referred to the General Assembly the right to add others would thereby be forfeit immediately. There was therefore no question of excluding the other subjects on the list.

13. The CHAIRMAN stated that after examining the study prepared by the Secretariat the Commission had provisionally retained fourteen topics; that did not mean that it was impossible to add other topics if necessary. Before discussing the question of priority however he wished to know if certain members desired to add any other topics to the list.

14. Mr. SCELLE recalled that the previous day he had emphasized the necessity for studying the question of a draft international penal code. Since provision had been made for that draft under item 3 (*b*) of the agenda he would not insist on his proposal although he would have preferred that the question should be considered as one of codification rather than as one of perfecting international law. Mr. Scelle therefore withdrew his proposal on condition that the question should be examined as soon as possible.

15. The CHAIRMAN proposed that after it had finished with the questions referred to it by the General Assembly the Commission should examine two topics which could almost certainly be successfully codified. In making its final selection the Commission should bear in mind the failure of the Codification Conference of 1930. The Chairman therefore proposed the following two questions:

(1) The law relating to treaties, on which there was ample documentation including the work of the Sixth International Conference of American States, held at Havana in 1928, and

(2) Arbitral procedure which was directly linked to the application of Article 33 of the United Nations Charter.

16. In reply to Mr. KORETSKY who asked whether the Commission would at that juncture make recommendations to the General Assembly as contemplated in Article 18, paragraph 2, of its Statute, the Chairman stated that no recommendations would be made to the General Assembly before detailed studies had been made.

17. Mr. SCELLE recognized the importance of the question of treaties and said that as it would be most useful to reach concrete results on that subject as soon as possible the question deserved priority. It was, however, a classic question which would produce much less impression on public opinion than the questions of nationality and statelessness. From the very beginning public opinion and Governments would judge the activity and the vitality of the Commission by the way in which it dealt with that latter problem. The question of arbitral procedure could be left in the background without much inconvenience for the arbitration system, which had worked smoothly for a hundred years or so, would not suffer thereby.

18. The CHAIRMAN indicated the three reasons for which he had not put the question of nationality forward. First of all, it had already been examined without appreciable result by the Codification Conference held at The Hague in 1930. The subject was now in full evolution, as many countries had recently adopted new regulations in that field. Some time, therefore, should be allowed to elapse before broaching that question. Lastly, the problem of statelessness, which formed part of the question, was now on the agenda of the Economic and Social Council, which would work on the basis of a very thorough study prepared by the Secretariat (E/1112). The Council's decision on that subject might provide a satisfactory and topical solution.

19. Mr. YEPES reminded the Commission that the question of the right of political asylum had been selected and given priority. He proposed, therefore, that it should be among the first topics to be examined. Indeed, the problem had already been thoroughly studied: it had been the subject matter of two Conventions—the Havana [1] and Montevideo [2] Conventions—and it seemed that its codification could easily be achieved in the form of three or four articles to be inserted in the special chapter which would be reserved for that question in the future code of international law. A committee, working simultaneously with the sub-committee preparing the draft declaration on the rights and duties of States, would be able to deal with the topic in a matter of a few days.

20. The CHAIRMAN believed that the Conventions mentioned by Mr. Yepes did not really solve the problem which, in his opinion, could give rise to serious difficulties and which did not arouse the same interest in all countries.

21. Mr. BRIERLY agreed with the Chairman's choice and the reasons underlying it. He felt that the two questions of treaties and of arbitral procedure were of paramount importance; should their examination be successfully concluded within a relatively short time, that success could have a favourable influence on the fate of the Commission when the three years of its current terms of reference expired.

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[1] See James Brown Scott, *The International Conference of American States, 1889-1928*. New York, Oxford University Press, pp. 434-435.

[2] See *The International Conferences of American States* First supplement 1933-1940. Washington, Carnegie Endowment of International Peace. 1940, pp. 116-117.

22. Mr. HSU said that he also had placed the question of treaties at the beginning of his selection. He was prepared to add arbitral procedure to his list since the scope of that question was to be extended to the whole of the pacific settlement of disputes and thus go beyond the limits laid down by the Secretariat's memorandum.

23. Mr. FELLER (Secretariat) thought that the Commission might wish to have some information from the Secretariat on the frequency with which some of the topics envisaged were arising in the practice of the United Nations. He pointed out that the problem of the recognition of States was the one to arise most often in the daily life of the United Nations. It was followed by the question of treaties and that of nationality, the latter being raised in connexion with both the problem of statelessness and that of discrimination in the acquisition and loss of nationality. The difficulties raised by the question of the recognition of States could not be overlooked. Furthermore, a considerable part of the problem of nationality was being studied by the Economic and Social Council. There remained, however, the question of treaties which was of considerable topical interest for the United Nations.

24. Mr. KORETSKY thought that the part played by arbitral procedure in the United Nations did not justify the need for its immediate codification. The question of treaties was undoubtedly of great importance: it covered a very extensive field and raised numerous political and ideological problems. That question would no doubt require the Commission's attention for several years.

25. In his view, the topic to be codified in the first place was the régime of the high seas. It was in that field that the Commission would provide a true measure of its capacity to carry out its tasks. There was yet another question which could not be neglected, for it arose very often in the current life of States, to wit the question of consular intercourse and immunities. It was no doubt strewn with obstacles, as practice differed in various countries, thus leading to frequent misunderstandings between the States. The selection of topics, however, should be carried out in accordance with what might be called the line of greatest urgency and not that of least resistance. As to the question of nationality, Mr. Koretsky felt that it fell essentially within the domestic competence of States and that, judging by past results, it might best be solved by means of diplomatic agreements rather than through international conventions. The only part of it which should be selected was the question of statelessness.

26. The CHAIRMAN agreed with the wish expressed by Mr. Brierly that the Commission should reach positive results before the expiration of its terms of reference. He pointed out that a study of the régime of the high seas could lead to the examination of numerous problems such as the natural resources of the seas, fishing on the high seas, the sea-bed and the subsoil resources of sea-beds, and that the Commission therefore might spend much time on that subject before reaching a final conclusion. He did not deny the current interest of the question of consular intercourse and immunities which might replace the question of arbitral procedure even though preference for the latter was justified by its direct link with Article 33 of the Charter of the United Nations.

27. Mr. SPIROPOULOS noted that some of the fourteen topics of the provisional list related to the progressive development of international law, while others related to its codification pure and simple. The first stage of the Commission's work should be devoted to the latter topics; among them the topics relating to treaties and to arbitral procedure and perhaps also to the régime of the high seas were of obvious importance. It would be necessary, however, to define exactly the scope of each question and especially that of the régime of the high seas, which in his opinion was confined to a certain number of well-defined standard problems—freedom of the seas, the legal status of war-ships, the status of merchant ships—and should not extend to questions mentioned by the Chairman, such as fisheries, natural resources, and the sea-bed.

28. The CHAIRMAN drew up a list of topics which, according to the views expressed during the debate, should be given priority. The list included: the régime of the high seas, nationality, the right of political asylum, treaties, consular immunities, arbitral procedure. He asked the Commission to express its opinion on the order in which those priority topics should be examined.

The result of several successive votes by show of hands was as follows:

Law of Treaties	12 votes
Arbitral procedure	9 votes
The régime of the high seas	5 votes
Nationality	5 votes
The right of political asylum	3 votes
Consular immunities	3 votes

As the majority of the Commission had expressed itself in their favour, the questions of the law of treaties and of arbitral procedure would head the list of the topics selected for codification.

29. Mr. ALFARO suggested that a third topic should be added to the two selected.

30. The CHAIRMAN proposed, therefore, that the Commission should choose between the questions of the régime of the high seas and of nationality, both of which came third.

A vote was taken by show of hands and the

Commission decided to add the question of the régime of the high seas to the questions of treaties and of arbitral procedure.

31. The CHAIRMAN, summing up the decisions taken by the Commission, pointed out that it had drawn up a provisional list of fourteen topics selected for codification but had as yet taken no decision regarding the need or the opportunity of codifying any one of them; three topics of that list had been given special priority which meant that as soon as the Commission was able to do so—namely when it had dealt with items 2, 3 and 4 of its agenda—it would examine those questions successively in their given order. That decision could be mentioned in the report.

32. Mr. KORETSKY wished that part of the report to make it clear that the choice of those three topics in no way precluded other matters suitable for codification but not mentioned in the list.

33. The CHAIRMAN asked the Rapporteur to bear Mr. Koretsky's observation in mind and to modify the suggested wording accordingly. He also noted that the Commission was agreed that the report should mention the fact that the Commission had discussed the idea of a general plan of codification without definitely establishing a plan.

Order of examination of the questions on the agenda

34. Mr. ALFARO thought the Commission should continue its work in accordance with its Statute and agenda. The Statute provided that the Commission should first survey the whole field of international law and select topics for codification and then submit its recommendations thereon to the General Assembly. In the last stage of its work it should proceed with the drafting of final plans and recommendations relating to the selected topics, particularly those questions to which priority had been given and which the General Assembly had specially refer-referred to the Commission.

35. The Commission had just surveyed the whole field of international law with a view to selecting topics appropriate for codification, in other words, it had completed the task laid down in article 18, paragraph 1, of its Statute. As it did not seem that the Commission was willing to proceed immediately to the following stage of its work, which was to draft recommendations relating to the selection of topics, and as the priority given to the three topics selected from the provisional list would come into play only when final plans and recommendations were drafted, there remained nothing but to pass on to the next item on the agenda.

36. The CHAIRMAN noted that the Commission did not wish for the time being to go any further into the first item on its agenda; it would resume its discussion thereon at the appropriate time, after examining what was to be done with the questions referred back by the General Assembly. The Commission should, therefore, pass on to another item on the agenda.

37. Item 2 concerned the draft declaration on the rights and duties of States: it had been referred to the Commission by the General Assembly resolution 178 (II). Item 3 related to the formulation of the principles of Nürnberg. It had been referred to the Commission by General Assembly resolution 177 (II) which had, therefore, priority over the previous question although it bore the same date. Item 4 dealt with the creation of an international judicial organ: it had been dealt with in General Assembly resolution 260B (III).

38. It was for the Commission to decide the order in which it wished to examine those three items of its agenda. The Chairman thought that it would be preferable to deal first with items 3 and 4 and to leave item 2 for the end, as its examination would probably take longer.

39. Mr. LIANG (Secretary to the Commission), explained the precedence given in the agenda to the question of the rights and duties of States by the fact that it had been pending before the United Nations for a very long time and that a large amount of documentation on the subject was available. On the other hand, the only documentation existing for item 3 was the Charter and judgments of the Nürnberg and Tokyo Tribunals. There was no governmental commentary in the relevant file. Moreover, the order of the items was purely provisional and the Commission was perfectly at liberty to alter it.

40. Mr. FRANÇOIS recognized the importance of the question of the rights and duties of States; it was so vast and so complex that it embraced a number of problems of international law which might be discussed in all its entirety in connexion with those rights and duties. If, therefore, the Commission took up that question immediately, it might well have it on its agenda for several months and would not have time to consider the other topics. It therefore seemed preferable to begin with items 3 and 4 of the agenda and then take up item 2, a study of which might at least be begun and taken as far as possible, provided that its scope was limited.

41. Mr. SCELLE supported Mr. François' proposal. In view of the wide scope of the subject, it was unlikely that any definite result on item 2 of the agenda could be easily reached. That, however, was not so in the case of items 3 and 4, between which there was a close relationship, and which should, it seemed, be dealt with successively before broaching item 2.

42. Mr. SANDSTRÖM shared the opinion of Mr. François and Mr. Scelle. The y should begin by examining items 3 and 4 of the agenda. But,

it would hardly be possible to discuss the substance of the questions before a preparatory study had been made of them.

43. In Mr. KORETSKY's opinion, the order of the items was unimportant; in the end, they would all three have to be examined by the Commission. Annex B of the Secretariat submitted by the Secretary-General on the draft declaration on the rights and duties of States (A/CN.4/2) proved, by the abundance of their comments and observations, that Governments were very closely interested in the question and wished to see the Commission's work follow a predetermined course. In making those comments they were, moreover, simply answering the wish of the General Assembly which in resolution 178(III) had invited the Secretary-General to draw the attention of States to the desirability of submitting their comments and observations without delay and had stipulated that in preparing its draft declaration the Commission should take into consideration all documents and drafts on the subject.

44. He would like the Secretariat to say whether it had done what was necessary to accelerate the transmission of observations and whether it expected to receive further drafts or comments. Most of the comments received dated back to 1947, and only that of the United States was of recent date. Were further comments expected, it would be preferable to postpone the consideration of the draft declaration of Panama until all comments and drafts had been received when a sub-committee could be appointed to examine them. If, on the other hand, the Commission thought it was already in possession of all the facts and evidence concerning the matter, it should obviously take up item 2 of the agenda immediately, whatever the difficulty of the undertaking.

45. Mr. LIANG (Secretary to the Commission) drew the Commission's attention to the last paragraph of page 33 (English text) of the preparatory study submitted by the Secretary-General in which it was indicated that only 17 States and 5 national and international bodies had sent their comments and observations on the draft declaration, although they had been twice requested to do so. The Secretariat had not been able to subordinate the drafting of its preparatory study to the reception of all the comments; it had succeeded in incorporating therein those it had so far received; it thought the Commission should continue its work without waiting for other comments which might not arrive for several years.

46. Mr. ALFARO asked the Commission to begin by the draft declaration on the rights and duties of States not because he was its author, but because it was the oldest and best prepared of the three subjects transmitted by the General Assembly. It was indeed at the San Francisco Conference that that draft declaration had been submitted for the first time by the delegation of Panama. [3] Because of lack of time the question was referred to the first session of the General Assembly which decided to ask the International Law Commission to report to it on the comments and observations on that draft received from member States and national and international bodies concerned (resolution 38 (I)). At its second session, in resolution 178 (II), the General Assembly instructed the International Law Commission to prepare a draft declaration on the rights and duties of States, taking as a basis of discussion the draft of Panama, and taking into consideration the other documents and drafts on this subject.

47. The Commission had at its disposal the preparatory work carried out by the Secretariat in accordance with the instructions of the General Assembly. Mr. Alfaro wished to congratulate the Secretariat on the excellent document it had submitted to the Commission. The study which had been made was absolutely complete: it contained all that had been said or written on the subject of the rights and duties of States. The question being thus ready for discussion, nothing could justify postponing its examination.

48. Mr. CORDOVA thought the question of the rights and duties of States should be examined first. The Commission had indeed decided that it would begin by proceeding to its work of codification, leaving until later the progressive development of international law. The question of the rights and duties of States was unquestionably within the field of codification, whereas it might well be asked whether the other two questions transmitted by the General Assembly were not rather within the domain of the progressive development of international law. That was an additional reason for taking up item 2 first, quite apart from the fact that the Commission had been seized of it since 1946.

49. Mr. SPIROPOULOS shared Mr. Córdova's opinion. The fact that all Governments had not sent their comments to the Secretary-General could not justify postponement of examination of the question by the Commission, for experience showed that Governments did not all reply to requests for observations addressed to them and that sometimes they limited themselves to having their views expressed orally by their delegations.

50. Mr. SPIROPOULOS declared it was necessary to submit concrete and positive results to the General Assembly. He asked the Commission to proceed to the examination of the draft declaration presented by the delegation of Panama in order to be in a position to draw up during its current session the draft declaration on the

[3] Documents of the UNCIO, San Francisco, 1945, Vol. III, pp. 272-273.

rights and duties of States requested by the General Assembly in its resolution 178 (II).

51. The CHAIRMAN asked the members of the Commission to decide what item of the agenda they wished to take up immediately.

As the result of a vote by show of hands, the Commission decided by 9 votes to begin with item 2 of its agenda.

Draft Declaration on the Rights and Duties of States (A/CN.4/2)

GENERAL DEBATE

52. The CHAIRMAN said the Secretary-General had placed at the disposal of the Commission an excellent preparatory study (A/CN.4/2) and he particularly drew the members' attention to the explanatory note by Mr. Alfaro on the draft declaration which appeared on page 38 (English text).

53. At the Chairman's request, Mr. ALFARO explained that he had annotated the various articles of the draft declaration, placing at the end of each article the sources from which the principles enunciated had been drawn. Those annotations were to be found on pages 49, *et seq.* of the preparatory study.

54. The CHAIRMAN proposed that they should at once proceed to the examination, article by article, of the draft declaration of Panama.

55. Mr. KORETSKY thought a general discussion of the whole of the question preceded by an explanation by Mr. Alfaro would be very useful. He recalled that the draft of Panama had been drawn up in 1945 and observed that no important change had since been made in it. It would be very interesting to know the views of members of the Commission on the various aspects of the question before going into a detailed examination, article by article, of the draft. He said that he did not in any way mean to hinder the examination of the draft declaration: the document must be very carefully studied in order that the draft to be drawn up by the Commission might have a good chance of being accepted by States and might thus succeed in ensuring international peace and security.

56. Mr. SANDSTROM and Mr. SPIROPOULOS supported Mr. Koretsky's observations.

57. The CHAIRMAN invited Mr. Alfaro to give a preliminary explanation of the draft declaration of Panama.

58. Mr. ALFARO recalled that the need for a charter on the rights and duties of States had long preoccupied international jurists. Professor Alvarez and Professor La Pradelle had drawn up two drafts, one containing 60 articles,[4] which constituted a summary of international law rather than a declaration of the rights and duties of States, the other, a shorter draft of 45 articles,[5] but conceived on the same general basis as the first. The American States signed at Lima in 1938, and at Mexico in 1945, two well-known Declarations. A Convention was concluded in 1933 at Montevideo: it contained 15 articles, some of which, such as the first article, had no place in a declaration on the rights and duties of States, as they did not enshrine either a right or a duty. Finally, a Commission of Canadian and American jurists, presided over by Mr. Manley O. Hudson, published in Washington in 1944 a document entitled *The International Law of the Future: Postulates, Principles and Suggestions*, which contained a draft of ten articles enunciating the duties of States corresponding to their rights.

59. Drawing on those sources, as well as on the Covenant of the League of Nations and the United Nations Charter, Mr. Alfaro had drawn up the draft declaration in 24 articles submitted by Panama. He then reviewed the various articles of that draft, and pointed out that the principles it proclaimed were all contained in the documents he had just listed and that no new provision had been added. He thought the draft was complete. It was, however, obvious that the Commission was completely at liberty to add any fundamental principles it thought might have been omitted or to suppress any provisions it did not consider essential.

60. Mr. KORETSKY asked Mr. Alfaro if he thought the draft of Panama corresponded to current realities. He himself was not very sure that if the draft had been adopted in 1945 at San Francisco it would have resisted the test of time.

61. Mr. ALFARO replied that in his opinion the draft in question corresponded perfectly to the actual state of international relations.

62. Mr. SCELLE observed that it was important in the first place to establish what was meant by the terms " State " and " Nation ". It was also important, before enunciating the rights and duties of States, to consider whether there might not be a conflict between the rights of the State and those of the nation. It should not be forgotten, for example, that the exercise by a nation of the right of peoples to self-determination might very well entail the destruction of a State.

63. In his opinion, the State was nothing but the instrument which organized the relations of the nation with other nations. If that were so, it would be difficult to attribute rights and duties

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[4] See *Revue de Droit International*, 1931, Vol. VIII, pp. 44-55.

[5] *Ibid.*, pp. 56-63.

to such an instrument. He thought that the expression " rights and duties of States " should not be retained. It was in reality a question of determining the international legal competence of governments towards the nations they governed, or in other words, of indicating what powers were granted them and what were refused.

64. In placing before the Commission the question of the possible alteration of the title of the draft declaration, he pointed out that that was one of the reasons for which he had opposed that item of the agenda being taken up first. The discussion of that item would inevitably lead to the study of questions which the Commission had set aside.

65. The CHAIRMAN pointed out that the expression " rights and duties of States " appeared in resolution 178 (II) and that the Commission was bound by its terms of reference.

66. For Mr. SPIROPOULOS, the question raised by Mr. Scelle was very interesting but of purely academic interest. " Rights and duties of States " was an expression which had long been accepted. It appeared in all the declarations and conventions thus far adopted on that subject as well as in the various resolutions of the General Assembly. It had a very exact meaning which in no way lent itself to misunderstanding. It was therefore preferable to retain it.

67. Mr. SCELLE insisted on the necessity of defining the idea of the State before enunciating the rights and duties of States. It was indispensable to distinguish between the State and the nation, the rights of which were often opposed.

68. Mr. ALFARO recalled that according to the Convention of Montevideo, the State, to be considered as such, should possess the four following qualifications: (1) a permanent population; (2) a defined territory; (3) a government; and (4) capacity to enter into relations with the other States.

69. He pointed out that he had avoided devoting an article of his draft to a definition of that type because he had thought the definition of the State had no place in a declaration on the rights and duties of States. He recalled that in his explanatory note he had indicated that if a country did not satisfy the conditions required for the existence of a State, it was not a State and, consequently, it could not have the rights of a State; on the other hand, if a State existed, that meant that it fulfilled the conditions necessary for its existence and that it could not be called upon to fulfil those conditions (A/CN/4./2, page 41, English text).

70. Mr. SCELLE was glad that Mr. Alfaro had not included in his draft the definition of the State found in the Convention of Montevideo for while it might apply to collectivities which were not States, it did not apply to collectivities which nevertheless were States.

The meeting rose at 6.00 p.m.

8th MEETING

Friday, 22 April 1949, at 10.15 a.m.

CONTENTS

Chairman: Mr. Manley O. HUDSON.

Rapporteur: Mr. Gilberto AMADO.

Present:

Members: Mr. Ricardo J. ALFARO, Mr. James L. BRIERLY, Mr. Roberto CÓRDOVA, Mr. J. P. A. FRANÇOIS, Mr. Shuhsi HSU, Mr. Vladimir M. KORETSKY, Sir Benegal N. RAU, Mr. A. E. F. SANDSTRÖM, Mr. Georges SCELLE, Mr. Jean SPIROPOULOS, Mr. Jesús María YEPES.

Secretariat: Mr. KERNO, Assistant Secretary-General in charge of the Legal Department; Mr. LIANG, Director, Division for the Development and Codification of International Law, Secretary to the Commission.

Draft Declaration on the Rights and Duties of States (A/CN.4/2) (*continued*)

GENERAL DEBATE (continued)

1. The CHAIRMAN asked Mr. Alfaro to introduce the draft Declaration on the Rights and Duties of States which he had prepared.

2. Mr. ALFARO said he had nothing to add to the remarks he had made at the previous meeting.

3. Mr. FRANÇOIS, after paying tribute to the work done by Mr. Alfaro in drafting the Declaration on the Rights and Duties of States, observed that most of the articles contained guiding principles, but that in concrete cases the special circumstances of each justified exceptions. If the Declaration were to contain only general rules, there would be the danger that special circumstances would be denied any influence whatsoever. If, on the other hand, certain exceptions were mentioned in a general way, the Declaration would lose much of its practical value.

4. Mr. AMADO also paid tribute to the work done by Mr. Alfaro in drafting the Declaration

on the Rights and Duties of States, which he entirely supported. Pointing out that he had been present at the signing of the Convention on the Rights and Duties of States at Montevideo in 1933, he stated that the Commission was faced with the problem of whether it should re-assert the principles enunciated at previous conferences or whether it should lay down new principles. In any case, the Declaration must not be allowed to constitute a retrograde.

5. He emphasized the difficulty of defining the words " State " and " nation ", and felt that the Commission should thoroughly study the draft Declaration and examine it paragraph by paragraph. Some favoured the inductive method of codifying specific subjects first and deducting general principles from them. However, the practice of States, judicial decisions, doctrine, legislation and the practice of the United Nations indicated sufficiently how to re-appreciate certain traditional conceptions in that field. The Commission should also decide on the degree of generality to be given to the text of the Declaration, and in that connexion Mr. Amado referred briefly to the remarks made by Mr. François.

6. According to the comment of the Greek Government, in order that non-Member States of the United Nations might sign the Declaration, it should not include any reference to the provisions of the Charter or to any specific treaties. Mr. Amado considered that the Declaration should not ignore the juridical relations which existed between States and between Member States and the Organization, and pointed out that Article 2, paragraph 6, of the Charter laid down that " the Organization shall ensure that States which are not Members of the United Nations act in accordance with these principles so far as may be necessary for the maintenance of International peace and security ". The draft Declaration could not, therefore, ignore the existence of the United Nations: it should not, however, repeat the principles of the Charter. Moreover, its provisions should be of a general character, but precise.

7. Comments submitted by Governments on the various articles of the draft Declaration showed that a majority was in favour of the drafting of a convention and not of a declaration, and he agreed with that opinion. Although the Commission could not arrive at a final decision on the matter until the reactions of the various Governments to the draft to be prepared were known, he felt that it might wish to draw up a draft Convention and at the same time recommend that the General Assembly should adopt a resolution on the rights and duties of States. The draft resolution in question could include general provisions which would be out of place in a convention. The convention might contain more detailed provisions for which a declaration was not a suitable form.

8. Referring to the substance of the Declaration, he stated that according to certain writers sovereign States possessed fundamental rights which were absolute and inalienable. Other writers were of a different opinion, and considered that the enjoyment of such fundamental rights by a sovereign State derived from the international legal order. Still others ignored the theory of the fundamental rights of States. The Commission should avoid any inconclusive theoretical discussions. It could be seen from the practice of States that they had on various occasions based their diplomatic action on the alleged exercise of their fundamental rights. It had always been difficult to define such rights: the most recent attempt to do so had been made in chapters II and III of the Charter of the Organization of American States.

9. Although the so-called fundamental rights of States had sometimes been violated in international life, they had generally been respected. In order to reach agreement on the usefulness of defining the rights and duties of States, which might be called " general ", in case the word " fundamental " appeared unsuitable from the doctrinal point of view, the Commission should consider the international legal order and define the subjects of law subordinate to it, and also their rights and duties. Among those rights and duties there would be some of a more general character, but none would be absolute and inalienable as they might be changed by evolution or even revolution. They were, however, sufficiently stable to warrant their definition.

10. It should be remembered that the rights of States as laid down by international law gave States no sovereign powers beyond those rights. Sovereign rights would become more restricted with the development of an international organization which would guarantee the legitimate interests of States. As long as such an organization was unable to guarantee peace and security, States would have to be allowed a certain liberty of action. The difficulty was to harmonize the fact that the ideal of an effective international organization had not yet been attained with the necessity of maintaining certain traditional conceptions of the rights of States.

11. Sir Benegal RAU felt that some of the articles of the draft Declaration before the Commission would probably give rise to controversy, but that fact should prove an incentive and not a deterrent to the work of the Commission. Some of the articles of the Declaration would lose a great deal of their value unless the Commission defined the word " State ". It was not enough to say that a State was a community fulfilling certain conditions as to its existence, for it depended on who was to decide whether those conditions were fulfilled. In that connexion article 2 of the draft Declaration would have to be clarified. Unless there was an impartial authority to pronounce

on the Statehood of any community, article 2 had no meaning. Sir Benegal Rau welcomed the principles set forth in article 21 of the draft Declaration, as they brought to an end controversies which had arisen regarding paragraph 7 of Article 2 of the Charter and provided that treatment of its own population was no longer a matter reserved for the domestic jurisdiction of the State.

12. Mr. YEPES paid tribute to the initiative taken by Mr. Alfaro in preparing the draft Declaration on the Rights and Duties of States. As Mr. Alfaro had pointed out, that document was based on information obtained from international conferences, from treaties and conventions adopted by Pan-American States and others, and from documents prepared by scientific institutions.

13. While agreeing in general with the draft Declaration, he intented to suggest amendments when the document was discussed article by article. For instance, he considered that the title itself would give rise to misunderstanding, as the definite article (Declaration on *the* Rights and Duties of States) invited the interpretation that the Declaration was exhaustive. In that connexion, he referred to the title " Convention on Rights and Duties of States " which had been adopted by the Montevideo Conference.

14. Referring to article 1, he said the second part of it was limitative and should therefore be deleted. In connexion with article 5 he preferred the wording of the Bogotá Charter which also prohibited intervention by a group of States. It was of course understood that the collective intervention by the international community of States to enforce respect of the law was not included in this prohibition. Article 8 was entitled " Diplomatic Intervention " but he thought it referred more particularly to diplomatic " *démarches* " in favour of nationals of one State who were on the territory of another State. The article should therefore be clarified and it might be advisable to divide it into several parts.

15. Referring to the form in which the Commission should submit the result of its work to the General Assembly, he felt that it might do so in the form of a draft multilateral convention or a draft collective declaration. The drawback of the former was that it was subject to parliamentary ratification, whereas a collective declaration, of which the *ipso jure* obligatory nature might be disputed in certain cases, would have the advantage of simplicity and might create a juridical conscience regarding matters dealt with in collective declarations. No State would place itself beyond the pale of civilization by violating a collective declaration which it had accepted at an international conference and which most of the other States had accepted. He therefore formally proposed that the International Law Commission should submit a draft Declaration on Rights and Duties of States to the General Assembly.

16. Mr. SANDSTROM noted that the topic of the rights and duties of States had been discussed for some three years, but that the General Assembly had now requested that the Commission should urgently consider a draft declaration on the subject. The relevant international law could not be put into the proverbial nutshell, nor could many of the principles involved be established without an accompanying list of exceptions. The Commission should rather endeavour to list certain rules which had crystallized in the course of practice, without weakening them with too much detail. On the question of form, he supported the suggestion of a declaration submitted with an accompanying resolution.

17. On points of detail, it would be advisable to avoid doctrinal controversy; to a considerable extent traditional notions should be accepted. The proclamation of abstract rights as such should be kept to the minimum, since a right only existed by virtue of the corresponding duty imposed upon another State. Definitions should also be restricted, since the Commission was not setting out to write a treatise; the word " State ", however, did appear to require definition. Again, when a rule was taken over from the United Nations Charter, the Commission should take care that the wording in the draft Declaration did not give the impression that something different was intended. The draft should also be drawn up with future modifications and additions in mind.

18. In conclusion, Mr. Sandström said that the draft before the Commission contained instances of the same principle embodied under different aspects in various articles. In the detailed discussion of the draft, he suggested that a group of articles might sometimes be taken for discussion simultaneously.

19. Mr. HSU had no general statement to make, but wished to support the suggestion that the concept of the State should be defined; it would assist all who read the Declaration, especially the public who were not students of international law. The definition should not be included in the Declaration itself, but might be part of the accompanying report.

20. Mr. BRIERLY divided the definition of a State into two points; firstly, what was a State, or what were the conditions which a member of the international community must satisfy in order to be a State; and secondly, how was it to be decided whether or not such a member of the international community satisfied those conditions; in other words, and using the French word, how was the matter to be *constaté* ?

21. It was to be noted that the British Government had stated its opinion that the Declaration on the rights and duties of States should begin with a definition of the word " State ", and that

such a definition seemed essential to the meaning of the whole Declaration. He himself did not agree that there was any such necessity. The definition would be difficult to establish and highly controversial. Logically, no doubt, the Declaration should begin with a definition of the State, but something less than perfection would probably be sufficient. The word was commonly used in documents and speech, and its meaning had been understood without definition.

22. The second point, concerning the authority who was to pronounce whether or not a member of the international community was a State, had also to be left in abeyance until such time as humanity had evolved some organ, perhaps of the United Nations, to perform the act of collective recognition on behalf of all other States. Meanwhile, each nation was left to decide for itself whether a given entity did or did not conform to certain criteria, to be laid down in the Declaration, and therefore was or was not a State. Mr. Brierly hoped that, in drafting the Declaration, the Commission would regard recognition not as creating a State but as an acknowledgement by one State that another State did, in fact, exist as such.

23. In reply to the Chairman, Mr. Brierly said that he would be glad to see attention drawn in the report to the unsatisfactory situation with regard to the impossibility of ensuring collective recognition of a State.

24. Mr. CORDOVA agreed that the Declaration should not start with a definition of the State. The theory according to which a State was regarded as a legal entity and a nation as a territorial unit could not be included in the Declaration. For the sake of convenience, it would be sufficient to consider only the juridical concept of a State as the subject of certain norms of conduct which the Commission was about to codify. It should, of course, be remembered that both States Members of the United Nations and non-member States had duties and corresponding rights. With regard to the method of drafting, Mr. Córdova said that the draft before the Commission appeared to him to contain too much explanation; he would prefer a more concise text.

25. With regard to the value of the Declaration, he agreed that that was not very great if it were regarded as an instrument for securing rights which were continually being violated; but as establishing a norm for the international intercourse of States, and recognized by States as a standard of conduct, it would be a considerable achievement in human progress. The Commission was about to draw up what amounted to the international penal code of the future, though penalties for violations would not yet be provided.

26. Mr. SCELLE felt appalled by the magnitude of the task before the Commission, which seemed to have undertaken to perform a legal feat of the utmost difficulty. The first consideration, however, appeared to be that of defining a State. The view expressed by Mr. Brierly on that point was most valuable, and would help to clarify future discussion: Mr. Scelle could endorse the distinction he had drawn between the State as understood theoretically and as understood practically. Mr. Brierly had shown that, though the situation might be delicate and difficult, yet the fact that some States recognized another offered a certain practical solution to the problem. Various peoples were recognized as having certain international competences, and therefore corresponding obligations, and only they could claim the status of a State.

27. The difficulty, however, was to determine precisely what qualities did constitute the sovereign State. It was perhaps unnecessary to ask the question in such terms, since a State could hardly be said to exist as a body, any more than the town of Paris existed as a body. However, the President of the Municipal Council of Paris existed quite clearly, and he represented the collective entity of Paris; moreover, he had certain powers to act according to his own will, and no one could justly prevent him from carrying out those acts. Surely, then, it was the Government, and not the State, which should be recognized, since the State was not an entity which exercised power. He wished to recommend, not that the title of the draft Declaration should be rejected, but that article 1 should be replaced by a statement to the effect that " rights and duties of States " referred to the powers of Governments of communities which international society recognized as being States. Such a statement would be understood by the man in the street, who was often a better judge of good sense than people of more refined perception.

28. The CHAIRMAN observed that the first question to be decided appeared to be that of the form and status of the instrument which the Commission was preparing. On page 35 of the draft (A/CN.4/2) Mr. Alfaro had worded the concluding sentence of the preamble as follows: " The representatives of the signatory states have agreed to make the following DECLARATION . . ." If the Declaration were to be signed, subject to ratification, it might be urged that if it failed to obtain many ratifications, its value would be diminished. An alternative would be for the Declaration to be submitted for adoption by the General Assembly. Even though not adopted as an instrument for creating specific legal obligations upon Members, it would still be of considerable value and comparable to the Universal Declaration of Human Rights. The latter had been adopted as "a common standard of achievement for all peoples and all nations ". The Chairman emphasized the fact that much of the contents of the instrument depended upon the form in which it would be presented.

29. The notion that the Commission was drafting a treatise on international law must be firmly rejected ; the Declaration could not be a complete list of the rights and duties of States. The general theory of approach, however, should be consistent, and every paragraph must have a practical value. The general discussion might also deal with the fact that rights and duties were correlative. Mr. Alfaro had stated that rights implied duties. The list of rights and duties might, therefore, be drawn up, each right showing its corresponding duty and *vice versa*. In that case, the list on page 47 of document A/CN.4/2 would not be relevant, unless the emphasis was to be intentionally placed either on the rights or on the duties of States.

30. Mr. SPIROPOULOS recalled that Mr. Alfaro had suggested that the Declaration on the Rights and Duties of States might be regarded as the introduction to, or a general part of, the codification of international law. He did not share that view, in particular since it would be necessary in the codification to take up every one of the rights and duties embodied in the Declaration. That was not so with the provisions found in introductions to codifications.

31. With regard to the form to be taken by the instrument, he strongly favoured a Declaration to be adopted by the General Assembly; it was precisely that that the General Assembly had requested the Commission to prepare. Concerning the contents of the Declaration, Mr. Spiropoulos endorsed the general observations of the Greek Government (A/CN.4/2, pp. 161-169), particularly that the Declaration should be limited to general precepts acceptable to all and should not contain provisions regarding their practical application.

32. Mr. Spiropoulos agreed with the view expressed by Mr. Brierly on the question of defining the concept of a State. No domestic legislation had found it necessary to define a juridical person, though some definition of what was not a juridical person had been found necessary; by analogy, it was not necessary to define what was a State, though it might be necessary to define what was not a State. He could not accept Mr. Scelle's argument that the State did not, in fact, exist as a power or as a concrete entity, for he had felt the one and seen the boundary of the other. The same argument might as well be advanced to prove that the General Assembly, or the present Commission, did not exist.

33. It had not been found necessary to define the concepts of " peoples ", " nations " or " States " for the Charter, since the meaning of the words was well know; for the sake of convenience it would be wise to avoid attempting such definitions for the purpose of the Declaration.

34. The CHAIRMAN asked Mr. Alfaro for confirmation of the fact that some Governments had submitted draft declarations of the rights and duties of States at the Conference on International Organization in San Francisco.

35. Mr. ALFARO said that the representatives of Mexico, Cuba and Panama had introduced the idea of a draft Declaration. The Netherlands representative had proposed that Article 1 of the Charter should begin as follows: " The purposes of the United Nations are: 1. To maintain international peace and security *in conformity with the principles of international law and justice* . . ."; a draft prepared by Dr. James Brown Scott of the American Institute of International Law was to be appended as a provisional list of those principles. The Great Powers had, however, rejected the suggestion, and all mention of international law and justice had been carefully avoided. China had been first to introduce those words, but Panama alone had presented a draft Declaration.

36. In reply to a further question by the Chairman, Mr. Alfaro explained that the word " signatory " in the conclusion of the preamble to his draft did not imply that the Declaration was to be a treaty; the phrase was used in the sense in which it had been used in the United Nations Declarations of 1942. When the Declaration had been drafted in 1945, it had been thought that if it were signed by States it would carry more weight; since then, however, the Universal Declaration of Human Rights had provided a suitable precedent whereby the actual signature by States was not required.

37. The CHAIRMAN suggested that the General Assembly should be requested to adopt the Declaration, not as it had adopted the Declaration on Human Rights, " as a common standard of achievement ", but perhaps in the present case " as a common standard of conduct ".

38. Mr. ALFARO agreed with the last suggestion.

39. The CHAIRMAN explained that if that view were generally accepted, the task of the Commission would be much simplified.

40. Mr. ALFARO pointed out that when a draft declaration had been prepared, it could be converted into a convention at the discretion of the Commission or other bodies concerned. He thought that for the moment, however a draft declaration would suffice as a standard of conduct for the States in the international community.

41. Mr. CORDOVA, supported by Mr. Spiropoulos, thought that the Commission was in general agreement on that question.

42. Mr. YEPES requested that his proposal that the International Law Commission should draw up a draft Declaration on rights and duties of States should be put to a vote.

43. Mr. KORETSKY thought there was no doubt, from the General Assembly resolution, that the Commission had been requested to prepare a draft declaration and thus there was no

need to vote on the question. Although the matter seemed perfectly clear to him, other proposals had been made he thought that as a matter of procedure none should be voted on until a more thorough discussion had taken place.

44. Mr. YEPES had thought that the Commission was to decide the question during that meeting. If his understanding was correct, he would request a vote on his proposal.

45. The CHAIRMAN thought it might be profitable to expand the discussion a little further. He pointed out that it was possible to have a declaration which could be signed and ratified. There was another proposal before the Commission, namely, that it should state it had in view a draft Declaration on rights and duties of States to be adopted by the General Assembly as a common standard of conduct. That wording would resolve many problems and objections. He wondered whether the sense of the Committee was that it wished to prepare a declaration to be adopted by the General Assembly on the same par as the Declaration of Human Rights.

It was so agreed.

46. Mr. ALFARO pointed out that the question which had been raised with regard to the need for a definition of the term " State " was a clear indication that the codification of that concept was necessary. He might insist at a later date on the inclusion of that topic in the list of matters to be codified. He gave great weight to the opinion of Mr. Spiropoulos, who had pointed out that the terms " State " and " nation " had been used alternately by the authors of the Charter to refer to the same concept.

47. With regard to Mr. Scelle's proposal, he thought it would be useful if Mr. Scelle would agree to draft a preliminary article of the type he had described, to be added to the Declaration instead of a definition of " State ". From the practical point of view, a State was an accepted member of an international community. Although many areas might wish to be considered States, they were not usually considered to be such until they had been generally admitted as members of an international community.

48. Mr. François had pointed out that not only the principles, but perhaps also the exceptions to those concepts should be stated in a positive manner. In Mr. Alfaro's opinion, the general purpose of the Commission's work should be to include all the fundamental rights and duties of a State. The enumeration of those rights should therefore be left open for amendment at the discretion of the Commission.

49. With regard to the table of rights and duties listed on page 47 of document A/CN./4/2, every right had a correlative duty just as every duty had a corresponding right; the table in question had been intended to stress the nature of certain rights from the standpoint of a State, which implied the duty of others to respect those rights.

50. The CHAIRMAN thought it should be pointed out that it would be necessary to consider not only the duty owed by one State to another, but also the duties owed by each State to the international community as a whole.

51. Mr. ALFARO agreed with that point of view. He added that he would distribute to the members of the Commission a table indicating the equivalences of the ten articles appearing in " The International Law of the Future " and the twenty-four articles contained in the preparatory study of the draft Declaration on the Rights and Duties of States, and a document on the formulations prepared by the American Institute of International Law.

52. Mr. SPIROPOULOS thought the Committee should not take a decision on the question until it had examined the contents of the articles.

53. Mr. SCELLE agreed that a right implied a corresponding duty. If the Commission accepted that simple approach to the problem it would mean that when recognizing the right of a State to act according to certain rules, the State would be allowed to carry out a juridical act which was a right for it and a duty for others. He thought further that the notion of competence was sufficient to explain the idea of rights and duties.

54 Mr. ALFARO wondered whether it would be desirable to amend the title of the draft declaration to read " on the Fundamental Rights and Duties of States ".

55. The CHAIRMAN pointed out that the General Assembly resolution used the word " on ".

56. Mr. CORDOVA preferred to retain the word " on ", since it did not imply that all the rights and duties of States had been codified.

57. Mr. BRIERLY thought that the term " fundamental " had a certain specific meaning in natural law, from the eighteenth century. He would prefer to avoid using a word of such technical meaning. He had no objection to the word " important " or " essential " and he would, moreover, favour the retention of the word " on ".

58. Mr. SPIROPOULOS pointed out that the task of the Commission was not to codify the rights of States; it need not therefore concern itself with the inclusion or exclusion of any particular rights. He thought that the Declaration had a purely demonstrative character. He also shared the views expressed by Mr. Brierly and would prefer to retain the word " on ".

59. Mr. YEPES proposed that the question should be left pending until enough progress had been made in the drafting of the Declaration to enable the Commission to determine the outlines of its final character.

60. Mr. AMADO stated that he could not accept

the term " fundamental ", which would indicate a step backward.

61. The CHAIRMAN thought the sense of the Commission was that it was engaged in the preparation of a draft Declaration on the rights and duties of States, the French text to be translated *projet de déclaration sur les droits et les devoirs etc.* The Commission would review that decision after the draft had progressed. The two opinions expressed in the Commission were to be interpreted as guides for the work of the next few meetings.

62. In reply to Mr. Spiropoulos, the Chairman added that Mr. Alfaro and Mr. Scelle would present for the Commission's consideration a draft of a preliminary article intended to replace a definition of the term " State ".

63. With regard to the definition of State in Article 1 of the Montevideo Convention to which Mr. Alfaro had referred on the previous day (A/CN. 4/2, p. 139), he could not accept the use of the term " permanent population " which, as Mr. Alfaro had explained, had been inserted in order to differentiate between established or fixed populations and nomadic ones. The qualification of a defined territory could be criticized on the grounds that the boundaries of some States had not yet been defined, but that qualification and the succeeding one were objective facts and thus preferable to qualifications (*a*) and (*d*). He presumed that the term " capacity " in (*d*) meant legal capacity, in which case the application of international law to that State was presupposed. He thought that that qualification begged the question.

64. Mr. ALFARO explained that the fourth qualification, " capacity to enter into relations with other States ", would more or less correspond to the stipulations of the Charter that " membership in the United Nations is open to all other peace-loving States which accept the obligations contained in the present Charter and, in the judgment of the Organization, are able and willing to carry out these obligations."

65. Mr. YEPES pointed out that a fifth condition was listed in article 1 of the project prepared by the International Commission of American Jurists, 1927 (A/CN.4/2, p. 142). That definition, including the requirements " degree of civilization such as enables it to observe the principles of international law ", had been the basis for the Convention of 1933 drafted at the Montevideo Conference.

66. The CHAIRMAN objected that that qualification seemed to imply that only one kind of civilization was acceptable. He suggested that the Commission could start by stating the fact that there were States in the world bound together in a legal community and that it was attempting to deal with the rights and duties imposed by that system. He had found the United Kingdom statement on that point: " Independence in one sense will have found its place in the definition of a State " (A/CN.4/2, p. 59) to be extremely persuasive.

67. Mr. SCELLE thought that it would be almost impossible to arrive at a universally satisfactory definition of the term " State ". He thought, therefore, that it would be wise to include in the draft declaration a statement as follows: " It is understood that the Declaration, when it speaks of the rights and duties of States, refers to the rights and duties of Governments whose juridical competence is recognized by the international community." He would be willing, with the help of Mr. Alfaro, to draft a text for the Commission's consideration.

68. The CHAIRMAN thought that the question of the recognition of Governments by the international community, and as also the recognition of States by that community, should be left open.

69. Mr. AMADO pointed out that a re-drafting of Article 1 might greatly influence the drafting of succeeding articles.

70. Mr. CORDOVA thought that, instead of being inserted in the Declaration on Rights and Duties of States, the definition of the term " State " should be considered under the question of the recognition of States. In the declaration the Commission should confine itself to codifying the norms of conduct for such entities and should only enumerate rights and duties, without considering the question of capacity.

71. Mr. SPIROPOULOS pointed out that, apart from the legal aspect of the question, which would not require a definition, he felt that by reason of the very nature of the document any definitions should be excluded from the text.

72. The CHAIRMAN pointed out that the definition of a series of terms in legal instruments was common practice, but he hoped that that procedure could be avoided.

The meeting rose 1 p.m.

9th MEETING

Monday, 25 April 1949, at 3 p.m.

CONTENTS

Chairman: Mr. Manley O. HUDSON.

Rapporteur: Mr. Gilberto AMADO.

Present:

Members: Mr. Ricardo J. ALFARO, Mr. James L. BRIERLY, Mr. Roberto CÓRDOVA, Mr. J. P. A. FRANÇOIS, Mr. Shuhsi HSU, Mr. Vladimir M. KORETSKY, Sir Benegal N. RAU, Mr. A. E. F. SANDSTRÖM, Mr. Georges SCELLE, Mr. Jean SPIROPOULOS, Mr. Jesús María YEPES.

Secretariat: Mr. KERNO, Assistant Secretary-General in charge of the Legal Department; Mr. LIANG, Director of the Division for the Development and Codification of International Law, Secretary to the Commission.

Request from Mr. Belaúnde, Chairman of the Peruvian delegation to the General Assembly to be heard by the International Law Commission

1. The CHAIRMAN stated that a letter had been received from Mr. Belaúnde, Chairman of the Peruvian delegation to the General Assembly, expressing his interest in the work of the International Law Commission, particularly in the draft Declaration on Rights and Duties of States, on which subject Mr. Belaúnde had been Rapporteur at the Ninth International Conference of American States at Bogotá (1948). He requested permission to be heard by the Commission on that subject. In that connexion the Chairman quoted Article 16, paragraph (*e*) of the Statute of the International Law Commission (A/CN.4/4):

> " The Commission may consult with scientific institutions and individual experts; these experts need not necessarily be nationals of Members of the United Nations. The Secretary-General will provide, when necessary and within the limits of the budget, for the expenses of these consultations of experts; "

and Article 26, paragraphs 1 and 4, of the same Statute:

> " 1. The Commission may consult with any international or national organization, official or non-official, on any subject entrusted to it if it believes that such a procedure might aid it in the performance of its functions."
>
> " 4. The advisability of consultation by the Commission with inter-governmental organizations whose task is the codification of international law, such as those of the Pan-American Union, is recognized."

2. Mr. CORDOVA thought the Commission should exercise great caution in a matter of that kind. The Statute of the Commission did not grant the right to be heard to any person or organization. In his opinion the application from the Chairman of the Peruvian delegation should be considered on the basis of the personal qualifications of the applicant and not on the basis of the fact that he had been a member of the Pan-American Conference. In view of his very high qualifications, Mr. Córdova thought that the Commission might decide to hear Mr. Belaúnde, but did not feel that that should establish a precedent.

3. Mr. SANDSTROM suggested that the Commission might request Mr. Belaúnde to meet informally with the members before a meeting.

4. Mr. SPIROPOULOS thought that as a rule the Commission should hear persons only when it was in need of their expert opinion on specific technical topics, but not in connexion with topics of a general nature.

5. Mr. BRIERLY felt that the application was a little premature. The Commission had hardly begun its work and to solicit an outside opinion at this time would not be particularly useful.

6. The CHAIRMAN said that he would be especially interested in hearing the comments of Mr. Belaúnde on the ideas which had dominated in the drafting of certain articles of the Charter of the Organization of American States during the Ninth International Conference of American States at which Mr. Belaúnde had been the rapporteur on the subject of the fundamental rights and duties of States (A/CN.4/2. pp. 141-142). He did not, however, wish to establish a particular procedure or precedent.

7. Mr. KORETSKY agreed in general with the remarks of Mr. Brierly. As a rule, private individuals should not be invited to participate in the work of the International Law Commission. If the Chairman of the Peruvian delegation to the United Nations were invited to attend a meeting a precedent would of necessity have been established. On succeeding occasions the Commission might find itself in the difficult position of having either to refuse similar requests from other eminent personages or of having to open its doors to all applicants who requested a hearing. For that reason he would oppose granting the request of Mr. Belaúnde. If, however, the Commission felt it was important to secure data on documents such as the Charter of the Organization of American States it might be possible to invite the Chairman of the Peruvian delegation to meet informally with the members of the Commission before its meeting on the following day, as Mr. Sandström suggested. That procedure would not create a precedent and would enable members to consult with Mr. Belaúnde on the articles of the said Charter which were relevant to the draft Declaration on the Rights and Duties of States.

8. Mr. KERNO (Assistant Secretary-General) pointed out that the Chairman might extend an invitation to Mr. Belaúnde to attend an unofficial meeting of the group explaining that requests such as his came under item 6 of the agenda (A/CN.4/3) which had not yet been discussed and therefore the Commission could not yet extend an official invitation.

It was agreed that Mr. Belaúnde would be invited

to an informal discussion the next day at 3.00 p.m. and that the meeting of the Commission would be postponed accordingly.

Draft Declaration on the Rights and Duties of States (A/CN.4/2, A/CN.4/2/Add.1) (*continued*)

GENERAL DEBATE (concluded)

9. Mr. KORETSKY stated that in his opinion the draft Declaration under consideration was not the document which humanity required at this epic moment in its history. He had reached that conclusion after giving profound thought to the document and he would explain his reasons. He found the document unsatisfactory not only because he perhaps viewed the world otherwise than the other members of the Commission nor because of the fact that the course of Soviet history differed from that of other peoples of the world. Looked at from the principles which the members of the Commission had in common, he still did not consider the document to be a satisfactory one.

10. He had listened with great attention to the comments of other members of the Commission. Attention had been drawn to the difficulty of establishing definitions for some of the basic terminology of the document. It had been asked how the Commission could speak of the relationship between nations and States. Mr. Scelle in particular had been very clear on that subject when he had pointed out the need of defining what was a State. If the Commission followed the proper scientific approach to that problem it would be easy to define both the term " nation " and the term " State "—terms which had been worked out with great clarity by Soviet leaders. Mr. Stalin had written a definition of " nation " in which he had said that a nation was a historically, stable community of language, territory, economic life, and of psychological features which found their expression in a community of culture. There was obviously a need for a definition of the term, as Professor Scelle had pointed out. When the latter had declared that he had never seen a State, he was to a certain extent repeating the philosophy that the world was a question of sensation and that if one could not perceive an object through the senses it did not exist.

11. It would be possible to define the term " State " if an attempt were made to go beyond the concrete concept of a whip in the hands of a policeman. However, although a simple definition could be arrived at, in Mr. Koretsky's opinion, it should be different from that accepted in English and American literature. His approach to the question would necessarily be influenced by the difference in the Soviet materialist or class concept of history. Obviously, there were many approaches to such a definition and he did not feel that the Commission should attempt at that stage of its work to define such a controversial term. In certain circumstances a definition might be devised which could be interpreted to mean that an international authority would be given the right to decide whether any community was a State or not. However, that right belonged to the community itself. If, however, the Commission should decide that a definition were needed, an explanation of terms might be appended to the completed draft Declaration. Mr. Koretsky would, however, prefer to avoid theoretical discussions of concepts which the Commission knew existed.

12. In evaluating the draft Declaration the Commission should be realistic. By that he did not mean that everything which existed was justified, but the Commission should approach the draft Declaration from a practical point of view. It should not allow the introduction of transcendentalism in the debates but should link the substance of the Declaration to reality.

13. With regard to the document as a whole he could neither approach it dogmatically nor as divorced from reality because each sentence, if viewed historically, was a living thing and would react on every individual as a living being. The draft Declaration should be considered in a historical light. It would undoubtedly develop and the Commission should bear in mind the possibility that it had been conceived in circumstances which could hinder its future development. It was the duty of the Commission to see that the draft Declaration on Rights and Duties of States was not bound and trammelled in its development by a dead past. That document had been born out of historic events and it was difficult to say whether it would prove adequate to the exigencies of the new historic era in which the world was living. Undoubtedly it had a tendency to turn people's minds to the past. The document had been conceived on the basis of relations existing between nations and States in the American continent, on inter-American grounds, where relationships had developed in the shadow of the superiority of one State. In the draft Declaration it was possible to trace the results of a struggle for power, the resultant supremacy of one power and the ways in which that supreme power had intervened in the life of other States of the continent.

14. Non-interventionist principles had always been supported by the smaller countries. Nevertheless, some sixty years earlier in the 1890's, Burgess had contended that it was the duty of Anglo-Saxons to establish law and order wherever the people native to an area were unable to do so. In the interests of civilization it was therefore the duty of the Anglo-Saxon to intervene in the internal affairs of a nation or a people so that law and order would reign supreme; intervention and the use of of force were therefore completely

justified. In 1942 Samuel Inman had described the difficult situation of the smaller countries, pointing out that under the heel of the oppressor violent hatreds were being created which were of great potential political significance. In 1923 Charles Evans Hughes had detailed the rights and duties of the United States, thereby causing anxiety in many countries; nations had struggled against interventionist tendencies and had devised covenants and declarations which reflected the feelings of peoples who had fought for their freedom and who wished to reject the claims of spokesmen of the more powerful State.

15. There was not much difference between the draft Declaration on the Rights and Duties of States and the covenants which had preceded it, but that was not strange since the situation between the States of the Western hemisphere had not changed significantly in the preceding centuries. For that reason Mr. Koretsky felt that the draft Declaration really contemplated the problems of the Western hemisphere and could not be applied to the whole of the globe.

16. The Chairman had made reference to the word " signatory " in the Preamble of the draft Declaration. It was possible that that reference might be a vestige from the first drafting prepared at the San Francisco Conference when the document had been intended as an annex to the Charter and consequently subject to the same type of ratification as the Charter.

17. Mr. Koretsky considered that an attempt to extend American interrelationships to the rest of the world was reflected in the draft Declaration. In that connexion he wished to sketch briefly for the Commission the formation of other declarations of that type. The United States Declaration of Independence had been issued at the onset of a struggle to liberate a people from the feudal yoke imposed by the mother country. The principles of national sovereignty of the people and equality were the basic tenets of that document. Each State had declared itself free and independent. The sovereignty of a foreign power had been cast off and immediately bestowed upon the people who had liberated themselves from the yoke of the oppressor. The Declaration of Independence had been a declaration of the hopes of the American people. It had been the instrument most adequate to enable them to continue their struggle for freedom.

18. In the Declaration of the French Revolution the Abbé Grégoire had embodied the principles of independence, freedom, sovereignty, the power to organize a government on the basis of the freely expressed wishes of the people and on the principle of equality. The provisions condemning alliances, if considered in the frame of the age in which they were written, indicated the struggle of a people to be master of its own political destiny against the Holy Alliance organized at that me. The Declaration of the Rights of the Peoples of Russia of 15 November 1917 had been a declaration of the rights of the people, a challenge to throw off the yoke of the landowner and the employer, to free the people from the principle of class superiority and establish the doctrine of equality. National and religious privileges had been abolished for the sake of establishing a new government based on the true will of the people. Lenin and Stalin in their appeal to all Moslem working people of Russia and the East had exhorted the people no longer to permit their hearths and homes to be plundered, calling upon them to become masters of their land and to fashion their life in their own image. They had told them: "You have a right to that for you hold your fate in your own hands". In the Panamanian draft Declaration, however, there was not the same challenge to the peoples of the world to create for themselves a better future but rather it represented a step backwards, a virtual narrowing of the field.

19. One of the corner-stones of the United Nations was the principle of the sovereign equality of all Members and the principle of self-determination of peoples. The Panamanian Declaration, however, deviated from the basic tenets of the world organization, making no reference to those two cardinal principles. The members of the Commission knew that nations throughout the centuries had fought for equality. The oppressed peoples of both the Eastern and Western Hemispheres had struggled to obtain their freedom. The conditions under which the conception of sovereignty had developed were well-known. However, in the draft Declaration the true sense of sovereign equality had been distorted and deprived of all meaning. Article 2, paragraph 1, of the Charter specifically referred to the sovereign equality of all the Member nations and he wondered why the word "sovereign" had been deleted from the draft Declaration. At San Francisco the representatives had insisted upon its retention, stating that the important principle was not merely the equality of Members but the sovereign equality of nations. That qualification was vital for the protection of their political independence and territorial sovereignty. For States, in order to be equal, must be sovereign, and in order to be sovereign, they must be equal. Those concepts could not be separated and in Mr. Koretsky's view it was consequently not enough to say that " every State is, in law and before the law, equal to all the others . . ." (Article 6) (A/CN.4/2).

20. The reference in Article 13 to the sovereignty of a State was in a limiting context in spite of the fact that sovereignty was one of the main characteristics of a State. While reference was made to independence of States in the draft Declaration, which might be interpreted to mean exactly the same thing as sovereignty, Mr. Koresky felt, however, that the concept of independence was too diluted. He considered that the

author of the draft Declaration had been obliged to retreat from the basic principles of the Charter of the United Nations and of the Atlantic Charter which had proclaimed that it was essential to establish sovereign rights and self-government. Nothing in the draft Declaration was as challenging to the imagination of the world as the Atlantic Charter had been.

21. The omission of reference to sovereignty and sovereign equality only reflected what was happening in the General Assembly and other organs of the United Nations. Professor Brierly had written that States were interested in the social links between themselves, in the recognition of their duties to each other. He had stated further that independence hindered the possibility of developing international relations and had asked for better mutual relationships among nations. Mr. Koretsky thought that that was the desire of everyone in the world but that principle could have dangerous consequences for some nations if it meant that in order to further international relations a country would have to sacrifice part of its independence. In a capitalist society it was true that of necessity one people was dependent upon another. Stalin had written that under capitalism the mutual relationships between peoples and the economic interrelationships of nations were based on the submission of a less developed people to, and on its exploitation by, a more developed people, on the system of colonial slavery and the struggle between " civilized " nations for the control of the so-called uncivilized nations. That was the framework in which mutual relationships had developed. In such a situation, however, it could not be said that the nations in such a community represented the coming together of truly sovereign peoples. If the Commission accepted that principle, it would be tantamount to handing over the control of a country into the hands of those who wished to keep other peoples in slavery. It was not enough to say that sovereignty was important for the nations of the world; that principle had to be carried through. If Soviet statesmen fought for the principle of sovereignty, it was because that principle protected democratic governments and encouraged the battle against world domination by one group. Those who were opposed to sovereignty were mistaken. As the head of the Soviet delegation had said recently in the General Assembly, the sovereignty of States should be shielded from the attacks of those who were attempting to promote their own greedy interests to the detriment of the other nations of the world.

22. The world was being frightened with the atomic weapon, and some people proposed that those who did not possess that weapon should be made to submit to those who did possess it. He felt that one of the basic errors committed by those who had drawn up the draft Declaration was that they had deviated from the principle of sovereign equality and from that of self-determination which were so clearly set out in the Charter. The draft Declaration did not emphasize the liberation of nations which had been enslaved and did not discriminate between those who own colonies and those who did not. It would be a great mistake to give up the sovereign equality of all Members of the United Nations.

23. The draft Declaration did not protect States from intervention in purely domestic matters by international organizations or groups of States. The sovereignty of the States limited international law. International law must so regulate relationship between States that the mastery or superiority of one State over another could not exist. Sovereignty was so important that the Commission should define it with the greatest care. It was interesting to note in that connexion that Article 2, paragraph 7, one of the most important in the Charter, was being by-passed by certain States. It had also been suggested that the draft Declaration should establish international limits to the powers of States, even to the power of States to decide how to deal with its own citizens. He felt that such suggestions came from reactionary groups who wished to impose their views on other States. For to limit the power of one's own State was to open the gates to the intervention of other States. The international field must not be dominated by those who interfere in the internal affairs of others, by reactionaries who sought to organize other countries by force.

24. The principle of self-determination had been travestied in the draft Declaration. In America the Monroe Doctrine, which had first been progressive, had become aggressive. Now the North Atlantic Treaty was intended to be used as a a weapon against the USSR and other people's democracies. Such so-called treaties of collective self-defence had nothing defensive in themselves but were part of a campaign to prevent self-determination and impede the struggle for independence. The concept of the community of nations set down in the draft Declaration was rather vague, and the United Nations would be replaced by some mythical international community. Some people wished to repeat what had happened in the days of the Roman empire when the peasants had been dispossessed of their lands. If States were deprived of their sovereignty and independence, the international community would become a voting machinery, controlled by those Powers which directed that machinery.

25. The draft Declaration did not mention the most important obligation of States—to take measures to ensure peace and security, to prohibit the use of atomic weapons and to carry out an over-all reduction of armaments and armed forces. In taking such measures, States would be lightening the heavy burden of taxation falling upon

their citizens. Mr. Koretsky pointed out that certain States were preparing the ground for the return of Fascism in Germany and Japan. He felt that those members of the Commission who came from countries which had suffered from aggression during the Second World War would agree that the draft Declaration should include a reference to the struggle which must be made against the recurrence of Fascism; in that respect article 21 of the draft Declaration was not sufficient, and it was a dangerous formula in the hands of States which wished to dominate other States.

26. No mention was made in the draft Declaration of the obligation of States to see that the rights and privileges of citizenship were granted to all without distinction as to race, sex, language or religion. Mention should be made in the Declaration of the right to happiness, i.e. the right to work and to protection against poverty. Everyone should have the right to work and to protection against unemployment, but that, too, was not mentioned in the draft Declaration. What has been said in the Declaration of Human Rights must be partly repeated in the Declaration of the Rights and Duties of States. Mr. Koretsky did not believe that man was a subject of international law. He did not agree with the concept of the individual subject of international law. Nevertheless, human rights must be mentioned, particularly in view of the crimes which had been committed by Fascism.

27. In conclusion Mr. Koretsky declared that the authors of the draft Declaration had failed to accomplish their historic task and failed to proclaim that each people had the right to organize its own government. They had also failed to demand general disarmament, which would constitute a defence against the North Atlantic Treaty, which was an organization for war, and they had not arrested the recurrence of Fascism, which was reapparing in some countries occupied by foreign armies, like Japan. Finally it seemed that the draft Declaration did not follow the course laid down by General Assembly resolution 178 (II).

28. Mr. ALFARO wished to reply to the points raised in Mr. Koretsky's speech, which he considered had contained little substance in relation to its length, and had been more political than juridical. Mr. Koretsky apparently wished the Declaration to contain, not those legal rights and duties of States which had been recognized and practised for three centuries, but a political version of such rights and duties. Much ground had been covered, and instances including the ancient Roman struggle between the Plebeians and the Patricians and the allegedly " aggressive " Monroe Doctrine—which, however, had been developed by countries which had freed themselves from the status of colonies—had been quoted, but he proposed to take up only those points which referred directly to the draft Declaration.

29. The first objection raised by Mr. Koretsky had been against the absence of the phrase " sovereign equality " from the Declaration. That phrase, which appeared in Article 2, paragraph 1 of the Charter of the United Nations, had been a novelty in international law when it had first been proposed at the Dumbarton Oaks Conference. Much discussion had resolved the question of its meaning into the exact equivalent of " legal equality ", a definition which would be found in the reports of the Drafting Sub-Committee of the First Committee at San Francisco. In any case, the expression would serve no particular purpose in a Declaration on the rights and duties of States, though it might perhaps usefully find a place in a chapter on the codification of the attributes of States. The whole draft Declaration was based on an implicit recognition of the concept of the sovereign State, since a State was taken to mean a people master of its own destiny in internal and external affairs.

30. The concept of sovereignty had been much in the minds of the drafters of the Declaration, as was shown by the sentence on page 43 of document A/CN.4/2: " The manifestation of sovereignty in tangible form is jurisdiction, which constitutes the subject matter of article 7; ". If Mr. Koretsky wished that an article dealing with the sovereignty of States should be embodied in the Declaration, Mr. Alfaro would welcome a proposed draft for discussion, but in his view such an article was unnecessary as there could be no State without sovereignty.

31. With regard to Mr. Koretsky's reference to the Atlantic Charter, Mr. Alfaro said he would be glad to incorporate into the Declaration any part of that Charter which appeared to be relevant. Mr. Koretsky had also regretted that the Declaration omitted all reference to self-determination. In Mr. Alfaro's view such a term applied only to a people desirous of becoming a State, and had no place in a Declaration concerned only with communities which had already attained statehood.

32. Referring to Article 2, paragraph 7 of the Charter, which prohibited intervention in matters essentially within the domestic jurisdiction of a state, a principle which Mr. Koretsky would wish to be included in the Declaration, Mr. Alfaro said that there was no place in a Declaration for any reference to such a specific obligation. The draft Declaration conceded the duty of all States to conform with the principles of the Charter, but that did not mean that they should adopt the Soviet Union's interpretation of Article 2, paragraph 7. During the discussion concerning relations with Franco Spain and also concerning the treatment of Indians in the Union of South Africa, however, Mr. Alfaro recalled that the representatives of the USSR had endorsed the view that human rights could be violated only within a State's own jurisdiction, and that collective intervention in the domestic affairs of a State was

justified in such cases. Moreover, Article 12 of the draft Declaration, to the effect that a State might not plead limitations arising out of its own Constitution or its laws as an excuse for failure to discharge its obligations under international law, and Article 21, concerning the treatment of its own population by a State, referred to the relation between an individual and the State in a manner which might meet Mr. Koretsky's requirements. Any further reference to human rights would be out of place in a draft declaration on the rights and duties of States.

33. A further objection had been that the draft failed to mention the duty of States to ensure peace and security. Articles 19, 20, 21 and 22, were in fact aimed at precisely that objective. If those articles did not lead to world peace and security, it would be difficult to draft any that would; however, Mr. Alfaro said he would welcome any such drafts that might be presented.

34. The obligation of a State to give employment to its citizens, which Mr. Koretsky wished to see embodied in the Declaration, was more properly included in the Universal Declaration of Human Rights, but was, nevertheless, implied in the provisions of Article 21 of the draft.

35. In conclusion, Mr. Alfaro said he thought the objections raised by Mr. Koretsky were not well founded. The draft Declaration undoubtedly was not perfect, and suggestions for corrections would be welcomed, though he hoped they might be made without the Commission becoming a political forum. He emphasized that the Declaration concerned the relations between Governments and not between individuals and Governments.

36. In reply to Mr. Alfaro, Mr. KORETSKY agreed that his comments had been made on a political basis, and urged that other members should admit the same in their own cases instead of pretending otherwise. Referring to the specific criticisms made of his speech by Mr. Alfaro, Mr. Koretsky stated that neither Article 2, paragraph 7 of the Charter, nor the USSR position taken in the discussions on Franco Spain and on the treatment of Indians in South Africa referred to the present issue. Mr. Vyshinsky had made it clear that his delegation had regarded the treatment of Indians in South Africa as violating a treaty, and the objection to Franco Spain has been that it was ruled by a Fascist Government which was inimical to every principle of the Charter. Mr. Alfaro had quoted articles 19-21 as providing the necessary measures in favour of peace and security; however, the provision was a negative one, and no specific and positive measures were proposed.

37. Mr. SPIROPOULOS said he had listened with great interest to the statement made by Mr. Koretsky, which had afforded him an opportunity of seeing international law as viewed by a lawyer of the USSR. The ideas put forward by Mr. Koretsky would be examined in the subsequent detailed discussion, but in the general discussion Mr. Spiropoulos wished to express agreement with the premise that international law was limited by sovereignty, which was as true as his own premise that international law limited sovereignty. Both concepts were correct, though hardly novel and of little practical value. Mr. Spiropoulos said he would welcome the discussion of any proposed amendments to the draft Declaration in which Mr. Koretsky might embody his ideas.

38. Mr. BRIERLY suggested that before proceeding to detailed consideration of the draft, the Committee might wish to decide on three questions concerning the form of the proposed Declaration. He asked whether it was intended that the Declaration should apply to all States, or only to Members of the United Nations. In the latter case, some twenty States of the world would be excluded from its application. If the Declaration were to apply to all States, however, article 17 at least would require modification, as it indicated the duty of a State to advise an organ, presumed to be the Security Council, of any exercise of the right of legitimate defence. Secondly, he asked whether it was intended that all the rights and duties of States laid down in the Charter should be embodied in the Declaration; and thirdly, he proposed that where a right or duty was reproduced from the Charter, the exact words of the Charter should be used, even though it might be possible to suggest improvements.

39. The CHAIRMAN pointed out that the last point was very aptly expressed in the penultimate paragraph of the first communication from the Swedish Government (A/CN.4/2, p. 183), where the fear was expressed that a " double series of partly overlapping rules " might result, unless the Declaration corresponded more closely than the present draft with the wording used in the relevant part of the Charter.

40. Mr. SCELLE pointed out that Article 2, paragraph 6 of the Charter indicated the duty of Members of the United Nations to ensure that non-member States acted in accordance with the principles of the United Nations so far as might be necessary for the maintenance of international peace and security.

41. The CHAIRMAN confirmed that the General Assembly resolution containing the terms of reference of the current discussion did not suggest that the application of the Declaration should be limited to Member States.

42. Mr. SANDSTROM asked whether the Universal Declaration on Human Rights had been limited to Member States.

43. The CHAIRMAN explained that that Declaration had applied to all humanity without exception. He asked whether it was the sense

of the Committee that the Declaration should apply to all States without exception.

44. Mr. KORETSKY emphasized that the General Assembly, to which the Declaration was to be submitted, was not empowered to deal with others than States Members of the United Nations, and that it was therefore illogical that it should address itself to non-member States.

45. Mr. ALFARO agreed with the view expressed by Mr. Brierly; he hoped that the Declaration was an instrument not for the present alone, but also for a future when all States would be Members of the United Nations; that intention had been made clear in his explanatory note given in the Secretariat document on page 40, second and fourth paragraphs and page 42, fifth paragraph.

46. Mr. CORDOVA pointed out that international law in general was not confined in its application to Members of the United Nations, and that there was no reason why the present Declaration should be so limited.

47. Mr. AMADO recalled that he had drawn attention earlier in the discussion to the point which Mr. Brierly was now emphasizing, and he therefore supported that view.

48. Mr. KERNO (Assistant Secretary-General) stressed the fact that no obligation undertaken by Member States in signing the Charter would be affected by the present Declaration.

It was agreed that the Declaration should be drafted so as to apply to all States.

49. The CHAIRMAN asked the Commission to note that Member States would have obligations that non-member States would not have. This should be borne in mind in drafting the Declaration.

50. Mr. SPIROPOULOS endorsed the view of the Greek Government that there was particular international law and general international law; the Charter concerned the former, whereas it was the latter with which the Commission was concerned at present.

51. The CHAIRMAN asked if it was the sense of the Commission that the Declaration should not attempt to repeat all the points contained in the Charter, but should be restricted to cover those parts which it felt belonged to general international law.

It was so agreed.

52. The CHAIRMAN asked if the Commission would agree that where the Declaration repeated rights and duties of States which were included in the Charter, the words of the Charter should be followed literally.

53. Mr. SANDSTROM felt that an attempt should be made to maintain the wording of the Charter, but he wondered whether that could be done in the case of the question of self-defence.

54. Mr. ALFARO, agreeing with Mr. Sandström's remarks, suggested that the wording of the Charter should be adopted as far as possible.

55. Mr. BRIERLY said he had merely wished the Commission to have guidance in its work. He had not wished any fixed rule to be adopted in connexion with the wording of the draft Declaration.

56. The CHAIRMAN felt it was the sense of the Commission that, in order to avoid a double series of partly overlapping rules, it should, in redrafting the Declaration, adhere as closely as possible to the language of the Charter if the subject matter in question was covered by that document.

57. Mr. SCELLE said he was not in favour of drawing up a special article in the Declaration referring to ideas regarding sovereignty, and reserved his right to speak again on that question when the occasion arose.

58. Mr. CORDOVA, referring to the question of non-intervention, reserved his right to speak on that matter when it would be dealt with.

59. The CHAIRMAN said that, as there were no further speakers on his list, the general discussion on the draft Declaration of Rights and Duties of States was closed.

60. Mr. ALFARO suggested that the Committee should discuss the preamble of the draft Declaration last, and that the discussions at the following meeting should begin with article 1.

It was so agreed.

The meeting rose at 5.55 p.m.

10th MEETING

Tuesday, 26 April 1949, at 3 p.m.

CONTENTS

Chairman: Mr. Manley O. HUDSON.

Rapporteur: Mr. Gilberto AMADO.

Present:

Members: Mr. Ricardo J. ALFARO, Mr. James L. BRIERLY, Mr. Roberto CÓRDOVA, Mr. J. P. A. FRANÇOIS, Mr. Shuhsi HSU, Mr. Vladimir M. KORETSKY, Sir Benegal N. RAU, Mr. A. E. F. SANDSTRÖM, Mr. Georges SCELLE, Mr. Jean SPIROPOULOS, Mr. Jesús María YEPES.

Secretariat: Mr. KERNO, Assistant Secretary-General in charge of the Legal Department; Mr. LIANG, Director, Division for the Development and Codification of International Law, Secretary to the Commission.

(Before the meeting was called to order, at the request of the Chairman, Mr. Belaúnde, head of the Peruvian delegation to the second part of the Third Session of the General Assembly, took a place at the Commission table.

The CHAIRMAN welcomed Mr. Belaúnde who had been Rapporteur of the Committee on Rights and Duties of States at the Ninth International Conference of American States held at Bogotá in 1948.

He asked Mr. Belaúnde whether the fundamental rights and duties of States, reproduced on page 141 of the memorandum submitted by the Secretary-General (A/CN.4/2), formed a series of articles in the Bogotá Charter. He noted that the Final Act of the Bogotá Conference included two other instruments, one called the Charter of Social Guarantees and the other a Declaration of Rights and Duties of Man. He asked why the Bogotá Charter was given the binding character of a treaty and the two instruments mentioned were simply declarations not open for signature and ratification.

Mr. BELAUNDE said that, as far as he could remember, it had been decided at Bogotá to incorporate the Declaration on the Fundamental Rights and Duties of States in the Bogotá Charter in order to give that Declaration the binding force of a treaty. The other two instruments were in a different category.

The CHAIRMAN said that most of the articles from the Bogotá Charter, quoted on pages 141 and 142 of the Secretary-General's memorandum, referred to States generally, but that articles 7 and 18 referred to American States only. He asked whether those who drafted the Bogotá Charter intended that all other articles of that document should refer to all States and not only to American States.

Mr. BELAUNDE said that the Bogotá Charter would be binding on American States only, but it had been felt that the rights and duties laid down in that Charter expressed general principles of international law applicable to all States.

Replying to a further question by the Chairman, Mr. Belaúnde said that the "existing treaties" mentioned in article 19 of the Bogotá Charter included the Charter of the United Nations.

Mr. BELAUNDE withdrew.)

Draft Declaration on Rights and Duties of States (A/CN.4/2; A/CN.4/2Add.1) (*continued*)

ARTICLE 1: THE RIGHT TO NATIONAL EXISTENCE

1. The CHAIRMAN declared the discussion open on article 1 of the draft Declaration of Rights and Duties of States submitted by Mr. Alfaro.

2. Mr. ALFARO pointed out that article 1 of the draft Declaration was based on article 1 of the Declaration of Rights and Duties of Nations drawn up by the American Institute of International Law. Article 1 consisted of two parts: the first part stated that "every State had a right to exist and the right to protect and preserve its existence;" and the second part read "this right does not, however, imply that a State is entitled to commit, or is justified in committing, unjust acts towards other States in order to protect and preserve its existence."

3. He could not accept the suggestion that article 1 should be deleted or that it should be limited to a mere declaration of the right of a State to exist. The State was a living thing, made up of living beings seeking a life of peace, freedom and happiness. Therefore, the natural corollary of the basic fact of the existence of a State was its right to protect and preserve such existence. In his opinion Leone Levi's declaration (A/CN.4/2 p. 51) was quite unsatisfactory, even dangerous.

4. Certain objections had been raised to the second part of the article. He pointed out that when he included that part in his text he had had in mind the necessity of avoiding the possibility of the right to national existence being defined in such broad and absolute terms that it could be construed as a justification for conquest, should any State decide that conquest, or the use or threat of force, was necessary in order to "protect and preserve" itself. Everyone had heard of the theory of *Lebensraum* and of cases of treaty violation in which the so-called doctrine of "national necessity" was invoked. The second part of the article was intended as a legal deterrent against that doctrine or any similar doctrine. The declaration should clearly state that no State had the right to commit unjust, illegal or illicit acts against other States in order to "protect and preserve" its existence. In no case could the needs, convenience or ambitions of a State justify conquest, aggression, violence, coercion, threat of force or the commission of any unjust or illegal act violating the rights of other States. The second part of article 1 of the Declaration was in complete harmony with the principles laid down in paragraph 4 of Article 2 of the United Nations Charter.

5. The limitation of the right of existence by respect due to the rights of other States was different from the right of self-defence, and in that connexion Mr. Alfaro referred to the comments by the United States Government which appeared at the bottom of page 191 of the Secretary-General's memorandum (A/CN./4/2). It was not intended that article 1 of the draft Declaration should deal with the question of self-defence. That matter was dealt with in article 17, which was based on Article 51 of the United Nations Charter.

6. The right of self-defence arose in the abnormal circumstances created by armed attack, and that right imposed the obligation on a Member State of the United Nations to report to the Security Council the measures it had taken against such attack. The exercise of that right ceased when the United Nations took and enforced such measures as were necessary to stop the aggression. Self-defence was, therefore, an emergency right, subject to the conditions set forth in Article 51

of the United Nations Charter as well as to the results of action taken by the Security Council under Articles 39 and 49 of the Charter. In spite of the fact that self-defence might be an emergency manifestation of the general right of the State to protect and preserve its existence, it should be borne in mind that that right was different from the standard rule of conduct laid down in the second part of article 1 of the draft Declaration, which was complemented by articles 9 and 10 of the Declaration.

7. Replying to a question by the Chairman, Mr. Alfaro agreed that the technical subject matter of article 1 was not entirely covered by article 10, although the purpose of the articles was the same.

8. The CHAIRMAN felt that article 10 was a repetition of the second part of article 1, unless some special meaning was attached to the word " unjust " which appeared in article 1. That word had been criticized in certain Government commentaries.

9. Mr. ALFARO pointed out that the rule of the limitation of rights was one that covered all rights, and therefore some confusion might arise if the rule were attached to a specific right. If a reference to article 1 was made in article 10 the whole of the second part of article 1 would have to be changed.

10. Mr. CORDOVA said that article 1 seemed to refer to the preservation and protection of a State and not to the expansion of a State, and that fact had led some members to feel that the article really related to the right of self-defence. He suggested, therefore, that the article should be redrafted.

11. Mr. FRANÇOIS also considered that article 1 should be redrafted. There was no definition of " State ". It could not be admitted that any community which fulfilled the conditions of a State had the right to exist as a State and that it possessed the same rights as a legally constituted State. It should be borne in mind that a State might be set up in violation of the rights of another State or of the principles laid down in the draft Declaration. On the other hand, a State's right of existence might end because its population wished to divide the State into further States.

12. In his opinion, there was an essential difference between recognition of the existence of a State, which was a question of fact, and the attribution to any State of the right of existence which is a legal matter. Article 1 recognized a right to existence which, in his opinion, could not be accepted. Having declared that a State had the right to exist, that article suggested that ehe State had the right to protect and preserve its txistence—the second part of the article was therefore superfluous. The third part of the article shulod also be deleted. The use of the word " unjust " was especially bad because of the difficulty of defining what was just or unjust. The article as drafted would not give any protection in a case of Nazi aggression because a State which wished to take aggressive measures would say it was justified by circumstances in doing so.

13. Mr. SANDSTROM asked whether article 1, in proclaiming the right to existence and to preservation and protection of that existence, implied other duties than those resulting from the respect due to the independence and territorial integrity of another State and the right of self-defence.

14. Mr. ALFARO stated that the right of a State to exist and to protect and preserve its existence implied the duty of other States to respect that right of existence, protection and preservation. The right of self-defence was entirely different. That was an emergency right that arose only in case of armed attack.

15. Mr. SCELLE supported Mr. François and felt that article 1 was repetitive. Pointing out that in the Declaration of the American Institute of International Law[1] mention was made of nations and not States, he said the first question which arose when article 1 of the draft Declaration was studied was what were the necessary conditions to be fulfilled by any community before it could be considered a State. It was not sufficient for a community to say that it was a State for it to be recognized as such. A State existed only when it had been recognized by the international community as a State.

16. Referring to the second part of the first sentence of article 1, he shared the opinion of the Chairman that the right of existence was the same as any other kind of right and could not be defended by illegal means, but only using the competences provided by international law. Then came the question: from when could a government defend the rights of a State?

17. In conclusion, he said article 1 was too vague and might give rise to the whole question of self-determination of peoples, a subject which should not be dealt with in the Declaration. He suggested that article 1 should say that a State recognized as such had the right to defend its existence by the legal means which international law placed at its disposal.

18. The CHAIRMAN drew the Commission's attention to the comments submitted by the Venezuelan Government (A/CN./4/2, p. 50); the second sentence corroborated Mr. François' statements regarding limitations in the second part of article 1. Referring to Mr. Alfaro's remarks on article 10, he said that if that article was meant to refer to rights of States in general, it should be placed in a distinctive place, either at the beginning or at the end of the document.

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[1] See A/CN.4/2, p. 158.

19. Mr. ALFARO said he would not object to article 10 being placed at the beginning of the draft Declaration, provided that article 9, which was closely linked to it, was also placed at the beginning. If that were done, agreement might be reached on the deletion of the second part of article 1.

20. Mr. SANDSTROM questioned the advisability of having any provision in the draft Declaration referring to the right to existence. It seemed from Mr. Alfaro's remarks that such a right meant nothing more than the right to independence and territorial integrity together with the right of self-defence, and the draft Declaration should state that fact.

21. Mr. BRIERLY said that, after hearing Mr. Alfaro's explanation, he saw in the draft Declaration a good many ideas which had not been obvious to him when he had read it. He suggested that the Danish Government's proposed redrafting of article 1 (A/CN.4/2, p. 49) might be acceptable, an appropriate word being substitued for the word " recognition " in the first line.

22. The CHAIRMAN agreed with Mr. Scelle's proposal and suggested that article 1 should be redrafted to read:

> " When a State has juridical existence in international law, it has the right to defend that existence by all methods permitted by international law."

23. Mr. SANDSTROM, referring to the Chairman's suggestion, said that the question might be raised as to when a State existed. The text of the draft Declaration should not be ambiguous.

24. Mr. CORDOVA agreed with Mr. Brierly that article 1 should be worded as suggested in the Danish Government's comments. A sentence referring to the right of self-defence, taken from the comments of the Danish Government (A/CN. 4/2, pp. 107-108) should be added to that article. He considered the formula suggested by Mr. Scelle and the Chairman too wide.

25. Mr. KORETSKY pointed out that confusion might possibly arise from the use of the terms " nation " and " State ", which did not mean exactly the same thing in continental Europe and in America, where with respect to federal States the word " nation " was used for the Federation and " State " for the States forming the Federation.

26. With regard to the question of the existence of States, Mr. Koretsky noted that several proposals had been made. Professor Scelle had suggested the existence should be termed juridical; Mr. François had employed the term legitimate. Mr. Koretsky thought that in those proposals there was a certain danger of returning to the doctrine of legitimism or the policy of non-recognition by which one group of States could virtually control the existence of another. That would be a step backward. In the twentieth century colonial territories were seeking freedom and independence. An article drafted in the terms which had been proposed by Professor Scelle and Mr. François would prove to be a barrier to that development.

27. In the original formula, as presented in the draft Declaration, those problems had not been raised. Under its terms every people which had been able to set up a State would be considered a State. Every State had the right to struggle and to fight for its existence. It was only after it had come into being as a State that the question of recognition would arise. " Illegitimate " States in Mr. Koretsky's opinion had the right to exist as well as so-called legitimate States. Any attempt to legitimize such entities would be tantamount to establishing control over their formation and contrary to the principle of self-determination. On those grounds, he would oppose the suggestions made by Professor Scelle and Mr. François.

28. Mr. ALFARO asked whether there was a tautology in the terms right to exist and right to preserve the existence of a State; mention of one was indispensable for consideration of the other. That opinion had been held by James B. Scott, men in the Pan-American Union, Francesco Cosentini and others. If however the International Law Commission did not feel it was necessary to say that a State had a right to exist it might then choose to adopt a formula similar to that in article 11 of the Bogotá Charter (A/CN. 4/2, p. 51), namely that " the right of each State to protect itself and to live its own life does not authorize it to commit unjust acts against another ". He did not believe, however, that to state the right of an entity to exist and to preserve its existence could be considered a tautology.

29. With regard to the suggestion of the Danish Government on article 1 (A/CN.4/2, p. 49) he thought that mention of recognition was premature since that term was covered in a succeeding article of the draft Declaration. It might be possible to accept that proposal if the word " respect " were substituted for the word " recognition " although he would consider that tautological since article 9 of the draft Declaration dealt with the principle of the respect of the rights of the State by other States. For those reasons he did not feel that the Danish formulation could be adopted.

30. With regard to the comment by the Venezuelan Government to the effect that the exercise of the right to exist and to protect its existence was dependent on a subjective appreciation of the justice of the action, Mr. Alfaro pointed out that in most cases a subjective determination of the facts involved had to be made. He did not feel it was necessary to define the term " unjust acts " which he thought was understood to mean

acts not permissible under international law. If the Commission considered the question doubtful, however, he would support Professor Scelle's proposal to add the phrase " in accordance with international law " at the end of article 1 of the draft Declaration.

31. In reply to Mr. Koretsky, he wished to state that the question of the right of secession was a purely internal problem which had no connexion with the rules of conduct governing relations between States until the question of recognition was raised.

32. An alternative suggestion might be to adopt the formulation which Cosentini had presented on the right to constitute a State and the right of existence (A/CN.4/2, p. 52). He thought that if in its general debate the International Law Commission could arrive at a satisfactory solution of those various aspects of the problems which had been brought out during the general discussion, a definitive form for article 1 could be worked out.

33. Mr. SPIROPOULOS reminded the Commission that in the course of its general debate at the preceding meeting it had decided to prepare a Declaration on the rights and duties of States and not a treaty, not a purely legal instrument. He thought it was the task of the Commission to draw up an instrument with certain political connotations and consequently article 1 should be considered with that fact in mind. Proceeding from that viewpoint the first part of the article: " Every State has the right to exist " would seem quite acceptable and proper to a Declaration on the rights and duties of States. In his opinion, acknowledgement of that right would have to be enunciated in a declaration of that kind. The only task of the Commission however, and there he agreed with Mr. Alfaro, was to proclaim that right and nothing more.

34. Mr. Spiropoulos could not favour the retention of the rest of article 1 as set forth in Part IV of the memorandum submitted by the Secretary-General (A/CN.4/2). He did not agree with the theory on which that part of the article was based because he believed that under international law a State did have the right to protect itself even by unjust acts if its existence was in danger. He realized however that that concept might be controversial To avoid the inclusion of controversial questions in the draft Declaration, therefore, he would suggest that only the first phrase of article 1 should be retained.

35. Mr. Spiropoulos felt the draft Declaration should begin with article 1 and not with articles 9 and 10. He thought Mr. Scelle's proposal was correct from the theoretical point of view but he did not feel that purely legal considerations should be included in the draft Declaration.

36. The CHAIRMAN saw a certain contradiction in the remarks of Mr. Spiropoulos. If the declaration had certain political aspects the document would of necessity give rise to controversy. He pointed out further that the draft Declaration had been presented to the General Assembly and that the First Committee had recommended that it be submitted for study to a legal committee.

37. Mr. SCELLE agreed with Mr. Brierly that the Commission should be careful to differentiate between the recognition of the existence of a State and the affirmation or noting " constatation " of the existence of a State.

38. With regard to the remarks made by Mr. Koretsky, he wished to point out that he was not opposed to the right of self-determination. People had a right to become a sovereign State but the question was when did that State come into existence. It would not be for the nation which had hitherto exercised its authority to decide that. If, for example, Morocco declared itself independent, it would not be France but the international community which would decide when Morocco had achieved statehood. He cited further the example of the French protectorate which had been established over Morocco, not by the consent of France, but through a treaty between France and Germany which had been approved by the international community. In his view a State was only in possession of its full powers when it had been recognized as a State capable of governing itself. He maintained that the recognition of a State should be affirmed by the international community. Only then would it have the full competence of a State and be able to defend itself in the complete sense of article 1. In any case, however, international recognition was an indispensable condition of being a State. A State fighting for freedom had the power to defend its claims to independence and sovereignty but undeniably a *de facto* State did not have the same powers as a *de jure* State in the practice of existing law. The draft Declaration should not be concerned with *de facto* States but with *de jure* States.

39. Mr. AMADO supported the conclusions of Mr. Spiropoulos, although he did not agree with the reasoning by which Mr. Spiropoulos had led up to those conclusions. He thought that the only fundamental right of States was the right to exist. That right was the source of all other rights of States. He thought it would be difficult to define the extent of the right to exist and the limitations of other rights based thereon without resorting to the use of vague terminology such as " unjust acts ". He would suggest that the Indian proposal might be accepted; it stated that: " This right does not, however, imply that a State is entitled to commit or is justified in committing acts towards other States which are not in accordance with the principles of international law or the United Nations Charter." (A/CN.4/2, p. 50). That exposition, except for the reference

to the United Nations Charter, fitted into Mr. Amado's concept of what the Declaration on the Rights and Duties of States should contain.

40. Since all States rights were governed by international law, as was stated in article 13 of the draft Declaration, he thought it would be wiser to draft article 1 in very simple terms, using the first phrase of the draft of article 1, as proposed by the Panamanian delegation: " Every State has the right to exist ". Those words would acquire definite meaning from the succeeding articles of the Declaration in which it would be clearly stated what a State could and could not do in order to protect its existence.

41. Mr. HSU would support Mr. Alfaro's suggestion that article 1 might be drafted in terms similar to those of article 11 of the Bogotá Charter. That solution would include the ideas implied in the second part of Mr. Alfaro's article 1. Mr. Hsu preferred to keep some reference to the second part of that article because he felt that the most important element of the right to exist was the right to protect that existence. The history of Hitlerian aggressions and the existing political situation indicated clearly that some nations were still intent upon pursuing policies of aggression and for that reason he did not think it would be wise to delete reference to the fact that a State was not entitled to commit or justified in committing unjust acts towards other States in order to protect and preserve its existence. While it was true that that idea had been covered in part in article 10, he felt that the question was of such importance that it would be wise to clarify it. He would not, however, insist on his view and was prepared to accept any formula adopted by the Commission.

42. Sir Benegal RAU thought that Professor Scelle had indicated the defect in article 1. In Sir Benegal's opinion, the right to exist was necessarily related to a period of time, which had both a beginning and an end. The right to exist could come to an end should a State decide to merge with another State or otherwise terminate its own existence. Some attempt should be made to specify when the right of a State to exist began and when it ended. He would agree that while a State had the right to protect its existence, there was nevertheless the question of how that right should be limited. If articles 9, 10 and 13 were reviewed or some reference to the United Nations Charter added, that might solve the problem.

43. Mr. HSU thought that article 11 of the Bogotá Charter was superior to article 1 of the draft Declaration because it was simpler. Since both contained the term " unjust ", it might be advisable to define or clarify the term in some way in the light of the Commission's debates.

44. Mr. YEPES would prefer a simpler wording throughout the draft Declaration. He would support Professor Scelle's draft of article 1, but without limiting the means which a State might use to preserve its existence.

45. Mr. SCELLE thought it would be difficult to accept the word " unjust " and proposed the substitution of the word " unlawful " or to use the term " right to preserve its existence by all means permitted in accordance with international law ". He pointed out that while the term " unlawful " might be criticized as too narrow, it nevertheless referred to decisions based on law, whereas justice might be quite another thing in certain circumstances. He would prefer the wording " in accordance with international law " since that would be interpreted to mean international law as understood at a given moment.

46. Mr. BRIERLY agreed with Professor Scelle. The word " unjust " should be avoided because it was ambiguous, having both moral and legal connotations. He would support the word " unlawful ".

47. With regard to the question of recognition by an international community, he would point out that at that time there was no established procedure by which the international community recognized or refused to recognize the existence of certain States. For that reason he could not quite see how recognition by the international community could be propounded as a criterion.

48. Mr. YEPES proposed the wording " accepted by the international community ".

49. The CHAIRMAN asked the Commission to decide on its method of work and whether it was advisable to appoint a Rapporteur to prepare a report for consideration at the next session. The draft Declaration dealt with many topics, but should be a consistent whole. He was not sure whether it would be possible to complete it before the fourth session of the General Assembly. He wondered whether the Commission would prefer to continue consideration of the draft Declaration article by article. The comments of members on each article could be referred to the Rapporteur who would report to the Commission at its second session.

50. Mr. SPIROPOULOS could not understand why the Commission should deviate from the normal procedure at international conferences of proposals, amendments and decisions taken by voting. A general discussion on the draft Declaration prepared by Mr. Alfaro had been held and the Commission had then commenced consideration of the Declaration article by article. He could not, of course, predict whether the Commission would be able to finish its study of the draft Declaration in time to present that document to the General Assembly at its fourth session in 1949, but he thought that the Commission could continue as it had begun. Whenever there were conflicting opinions or proposals on various articles, the Commission could indicate its opinion by a

vote and thus complete its task in the proper manner.

51. Mr. ALFARO thought that it was the primary function of a meeting of experts called for the purpose of drafting an international instrument to agree on the general formulation of the text. It seemed to him that the Commission had now reached a stage at which it could come to a conclusion in respect of article 1.

52. As regards the first part of that article, there had been some expressions of doubt concerning the need to establish the right of existence of States with its corollary right to protect that existence. He therefore thought that, in accordance with Mr. Spiropoulos' proposal, the Commission should decide whether it (1) wished to retain the right of existence together with the qualifying clause; (2) would delete the qualifying clause; or (3) adopt the idea put forward in some of the annotations that the right of existence of States should be taken for granted, and simply say: " Every State has the right to perpetuate and preserve its existence ".

53. Two views had been expressed on the third part of the article. One was that it was unnecessary in the light of the provisions of articles 9 and 10. The other was that it was necessary in view of the policies recently pursued by the Nazi and Japanese Governments under the *Lebensraum* doctrine. It should be easy to settle the matter by a vote.

54. Mr. Alfaro also noted a general feeling of concern over the word " unjust "; while prepared to accede to the majority view on the matter, he hoped that another formula might be found. He drew attention, in that connexion, to the Indian suggestion (A/CN.4/2, p. 50) of the preparatory study, which he thought excellent in that it provided a deterrent from the dangerous *Lebensraum* doctrine. By taking up the three alternative suggestions, the Commission might finally arrive at a tentative formula.

55. Mr. CORDOVA, noting the need for a rapporteur to re-draft the Declaration in the light of the Commission's decisions, suggested that the Chairman's proposal might be modified as follows: the rapporteur should prepare a new draft; that draft should not be submitted to the fourth session of the General Assembly, but be reviewed at the Commission's following session, at which time a rapporteur might be appointed to work out the final draft. He therefore proposed that a rapporteur should be appointed inmediately to draft each article after, and in the light of, the relevant discussion.

56. The CHAIRMAN thought that the Commission should first decide on the different proposals in respect of article 1, leaving its further procedure to be determined later. He then put to the vote the question whether the Commission desired an article on the right to existence of States.

It was decided by 10 votes in favour to retain an article on that subject.

57. The CHAIRMAN then put to the vote the title of article 1, proposing that the word " national " should be deleted so that it would read " The Right to Existence ".

The title, as amended, was adopted.

58. The CHAIRMAN put to the vote the first few words of article 1, which read: " Every State has the right to exist ".

59. Mr. YEPES supported those words if amended as follows: " Every State accepted by the international community has the right to exist".

60. Mr. SCELLE suggested that the text should read " Every State recognized by the international community has the right to exist ".

Mr. Yepes' amendment was rejected, receiving only 1 vote in favour.

Mr. Scelle's amendment was rejected, also receiving only 1 vote.

The original text " Every State has the right to exist " was provisionally adopted by 6 votes to 5, with 2 abstentions.

61. The CHAIRMAN then took up the second part of the first sentence, reading " and the right to protect and preserve its existence ". He suggested that the words " protect and " should be omitted, as alluding to self-defence.

62. Mr. ALFARO suggested that the words " to protect " should be replaced by the words " to perpetuate ".

Mr. Alfaro's amendment was rejected, receiving only 3 votes.

The second part of the first sentence, as amended by the Chairman, was adopted by 6 votes to 5.

63. The CHAIRMAN then turned to the second part of article 1 beginning with the words " this right does not however imply . . .". Recalling the suggestion that the word " unjust " should be replaced by " unlawful ", he put to the vote the idea contained in the second part of article 1, with the understanding that a decision would subsequently be reached on the word " unjust. "

The second part of article 1 was deleted by 5 votes to 7.

64. The CHAIRMAN noted that that decision was taken on the understanding that article 10 would be retained.

Article 2: Recognition of the existence of the State

65. The CHAIRMAN read the text of article 2 in respect of which a number of annotations were listed on page 52 of the preparatory study (A/CN.

4/2). The article contained three ideas, the first of which dealt with the right of States to have their existence recognized.

66. Mr. ALFARO noted a typographical error in the text which should read " the personality of the State " instead of " the person of the State. . .".

67. Mr. YEPES, speaking on the article in general, suggested that the words " by other States " should be added to the first sentence of the article so as to make its meaning clearer.

68. As regards the last part of the article stating that recognition was unconditional and irrevocable, he thought that it should be deleted as it did not correspond to historical facts. Thus, when Czechoslovakia, Poland and a number of other States had had been set up after the first World War, they had to fulfil certain conditions in order to obtain recognition. Similarly, the late President Roosevelt had predicated United States recognition of the Union of Soviet Socialist Republics on the fulfilment of certain conditions by the latter. Recognition of the State of Israel had also been considered in the light of fulfilment of certain conditions laid down in the Charter. While it was true that in recent years there had been a tendency to reverse that position—the 1933 Convention on Rights and Duties of States, for instance, stated that recognition was unconditional and irrevocable—Mr. Yepes thought that it would be preferable to delete the last part of article 2.

69. Mr. ALFARO was not satisfied with the manner in which the act of recognition was dealt with in the article, nor with the provision concerning the consequent relationship between States. As pointed out by Mr. Yepes, the first sentence did not make clear by whom States were entitled to be recognized. Mr. Alfaro drew attention to the considerations submitted by the United Kingdom on the question (A/CN.4/2, p. 53) one of which was that a State which existed had the right to be recognized, and that recognition should be regarded as a legal, rather than a political, matter. That, however, was a provision of international law seldom complied with, and there were many cases in which there had been no expression of recognition of existing States. Some progress had been achieved in that regard under the United Nations where States like Yemen, which had no diplomatic relations with other States and which formerly would not have been recognized, had achieved recognition through admission to membership in the United Nations.

70. Consequently, in view of the fact that the right to recognition had frequently not been implemented and that there was no provision for sanction against those failing in their duty to recognize other States, it might be preferable to adopt the Indian proposal, which laid the emphasis on the recognizing State: " Every State has the right to recognize another State " (A/CN.4/2, p. 52).

71. The primary difficulty of the article was that its provisions had not been sufficiently implemented in diplomatic relations or in international law.

72. The CHAIRMAN thought that the Commission should first decide whether an article on such a controversial question was desirable. In his view, it was not desirable, as the Commission's mandate was to draw up provisions concerning the rights and duties of States after their existence had been recognized.

73. Mr. SPIROPOULOS thought that it was a dangerous question which should be thoroughly analysed. As regards the first part of the article, there was no obligation under internatioonal law for a State to recognize another State. The second part of the article, which dealt with the meaning and implications of recognition, involved a technical question and did not constitute a fundamental right. And finally, the last part stating that recognition was unconditional and irrevocable did not correspond with State practice. In the light of those considerations Mr. Spiropoulos supported the Chairman's suggestion that the article should be deleted.

74. Mr. FRANÇOIS wished to take up the defence of the article. There was a difference between the recognition of the existence of a State, and the *de jure* or *de facto* political recognition. The former should precede the latter. National tribunals of States had frequently recognized the existence of a State, even though it had not been granted *de jure* or *de facto* recognition by their Governments. Political recognition of a State was different from the recognition of its existence, and implied the will to enter into relations with the State. The same idea had been put forward by the United Kingdom in its comments on article 2. Mr. François therefore supported article 2, objecting only to its last part dealing with the irrevocability of recognition.

75. Mr. SCELLE agreed with Mr. François. In view of article 9 which stated that all rights and duties were correlative, it was only logical that article 1, which proclaimed the right of States to exist, should be followed by an article laying down the obligation of States to recognize that right.

76. With reference to the last part of the article, Mr. Scelle pointed out that recognition was unconditional, but irrevocable only as long as the State continued to exist. Consequently, while some change in the text might be necessary, the article should not be deleted. Article 1 would have no meaning without it.

77. Mr. AMADO thought that the first sentence of the article raised considerable difficulty. It appeared that contemporary international law did not establish an obligation to recognize States. The Inter-American instruments signed at Montevideo in 1933, and at Bogotá in 1948, did not embody the principle of the first sentence of

article 2. Moreover, most authorities on international law did not consider that a State had a legal right to have its existence recognized.

78. The present tendency, however, seemed to be in favour of the right of a State to have its existence recognized. Thus, the Institute of International Law, at its 1921 session in Rome, had recognized that right, though subject to the fulfilment of certain conditions by the State.

79. Pointing out that the United Kingdom Government favoured express recognition of that right (A/CN.4/2, p. 53), he thought that a number of other Governments might be of a similar view. If the Commission were to decide in favour of the provisions contained in the Panamian draft, it should also bear in mind the fact that the right to be recognized was subject to limitations derived from other principles of international law, such as the establishment of a State through a third Power's intervention by force, as in the case of Manchukuo. Such limitations, however, might be omitted from the present article in view of the fact that they were covered by the provisions of other articles of the Declaration.

80. Mr. BRIERLY agreed with the speakers who had stressed the importance of the article and had favoured retention of some provision on that subject. He thought the second part of the article was unnecessary and could be deleted in view of the subsequent provisions of article 3, which provided all the essential elements for a clear understanding of the question of recognition.

81. As regards the last sentence, he thought that it might be omitted and the important United Kingdom comment (A/CN.4/2, p. 53), that recognition of an entity as a State in no way required the entry into diplomatic, or any other particular relations with, the State so recognized, be substituted for it.

82. The CHAIRMAN thought that it seemed from the discussion that the article was considered as applying to new States only. Pointing out that the article did not make clear whether *de jure* or *de facto* recognition was involved, he suggested that it should be deleted.

83. Mr. SANDSTROM also thought that the wording of the article was inadequate and that it seemed to anticipate the provisions of article 3. In his opinion article 2 applied to *de facto* recognition only.

84. Mr. CORDOVA felt that the article did not draw the necessary distinction between recognition of newly formed and existing States. While all States were obliged to recognize existing States, different questions arose in the case of new States.

The meeting rose at 6 p.m.

11th MEETING

Wednesday, 27 April 1949, at 3 p.m.

CONTENTS

Chairman: Mr. Manley O. HUDSON.

Rapporteur: Mr. Gilberto AMADO.

Present:

Members: Mr. Ricardo J. ALFARO, Mr. James L. BRIERLY, Mr. Roberto CÓRDOVA, Mr. J. P. A. FRANÇOIS, Mr. Shuhsi HSU, Mr. Vladimir M. KORETSKY, Sir Benegal N. RAU, Mr. A. E. F. SANDSTRÖM, Mr. Georges SCELLE, Mr. Jean SPIROPOULOS, Mr. Jesús María YEPES.

Secretariat: Mr. KERNO, Assistant Secretary-General in charge of the Legal Department; Mr. LIANG, Director, Division for the Development and Codification of International Law, Secretary to the Commission.

Draft Declaration on the Rights and Duties of States (A/CN.4/2,A/CN.4/2/Add.1) (*continued*)

ARTICLE 2: RECOGNITION OF THE EXISTENCE OF THE STATE (continued)

1. The CHAIRMAN reviewed the amendments to article 2 which had been presented during the previous meeting.[1] He noticed that the second sentence of article 2 did not provide for any specific procedure and recalled that Mr. Brierly wanted to omit the second sentence.

2. Mr. SANDSTROM thought it could be taken for granted that the first sentence of article 2 referred to *de jure* recognition. Since that would not be contrary to common practice in international law, inasmuch as it allowed every State to decide for itself whether or not it wished to recognize the existence of another State, he could accept the first sentence of the draft. He could not accept the second sentence, which was a definition and should not be included in the draft Declaration, nor could he agree to the third sentence, which was a secondary provision and had no place in the draft Declaration.

3. Mr. YEPES proposed the following amendment to the amendment he had submitted the

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[1] See A/CN.4/SR.10, paras. 67 and 70.

previous day: " Any new State admitted as such in the international community has a right to be recognized ".

4. The CHAIRMAN pointed out that in article 1 the Commission had tentatively accepted the statement that every State had a right to exist. How then could it in the following article allow other States to deny that right? The Commission was presupposing that the subject was a State. He wondered whether it could go further and say that that entity had a right to recognition.

5. Mr. ALFARO would favour retaining two articles on existence and recognition. He thought that article 1 stated the right of a State to exist and to develop even without recognition. Article 2 should be included because it stated the right of every State to have its existence recognized and the duty of every other State not to deny that existence. In that connexion he considered the comments of the United Kingdom (A/CN.4/2, p. 53) illuminating. It was clear that a State had the duty to recognize the existence of other States. Whether that State fulfilled the conditions of statehood as understood in international law was a political question and did not concern article 2.

6. He would accept Mr. Yepes' original amendment to add " by other States ", but could not agree to the insertion of the word " new " before the word " State " since recognition might finally be granted to a State long after it had come into being and was consequently no longer a " new " State. With regard to the second sentence of article 2, Mr. Alfaro agreed that if it was included in a chapter on the codification of recognition it could be eliminated from the draft Declaration.

7. With regard to the third sentence he pointed out that it appeared in article 6 of the Montevideo Convention of 1933 on recognition. It was further supported by the opinion of the eminent jurist John Bassett Moore (A/CN.4/2, p. 193). The question was a controversial one, however, and if the Commission agreed to insert it in a chapter on codification of recognition he would agree to delete it from article 2.

8. The CHAIRMAN pointed out that the position of the United Kingdom to which Mr. Alfaro had referred was not very helpful since it would allow a country to declare that it did not feel that a particular entity constituted a State and was not therefore bound under article 2 to recognize it as such.

9. Mr. BRIERLY pointed out that that would imply an intent on the part of the State not to observe its legal duty. If a Government was convinced that a State's claim to statehood was legitimate it would, of course, recognize it. He could not accept Mr. Yepes' amendment: " Any new State admitted as such in the international community " because that would imply that old States were not entitled to recognition and, he felt, would lead to chaos in international law. He would prefer Mr. Yepes' original wording: " Every State. . . ".

10. Mr. YEPES wished to remind Mr. Alfaro that the reference in the Montevideo Convention of 1933 to unconditional and irrevocable recognition had been deleted from the Bogotá Charter because experience had shown that provision to be defective. By his amendment " any new State. . . " he had not meant to imply that old States were not entitled to recognition or the right to exist. He thought it was futile to say that existing States had the right to exist, since they obviously already enjoyed that right. His amendment had been intended to provide for the case of States newly formed, such as Israel. In that connexion he would state that while the Commission should recognize the right of secession it should not encourage it. It should require new States to fulfil the conditions of statehood under existing international law.

11. Since the Commission had decided not to define the term " State " he thought it would be advisable to explain in that article to what kind of State its provisions applied. For that reason he had suggested the wording " any new State admitted into the international community ".

12. Mr. CORDOVA thought that if in the first article the Commission stated that every State had a right to exist, it was redundant to re-state the same thing in other words in article 2. The text of article 2 should be rephrased to indicate that it was the duty of States to recognize new States and he would therefore propose the following wording: " All States have a duty to recognize as a State any political entity which fulfils the requirements of statehood under international law ".

13. Mr. SPIROPOULOS did not consider that the duty of recognition had been implied in article 1, which did not mention relations between States. That was a social problem. Article 2 was drafted to deal with the legal problem of the recognition of a State. Under existing international law, a State, in his opinion, had no right to claim recognition and he did not believe that such a claim would be upheld by any court. He thought, however, that he would agree with Mr. Alfaro in that question. The Commission should accept the right of a State to be recognized. In so doing it would have advanced significantly the science of international law. In its report, however, the Commission could explain the reasons for its decision to adopt that principle.

14. With regard to the wording of article 2, Mr. Spiropoulos would accept " Every State has the right to have its existence recognized " but he would prefer to delete the rest of the article.

15. Mr. AMADO pointed out that his position as he had outlined it the previous day was the same as that of Mr. Spiropoulos. The right to

be recognized, however, should be subject to certain limitations. The *lex lata* does not provide for a State any right to have its existence recognized. From the moral point of view it was not lawful for a State to withhold recognition from another State complying with the conditions of statehood as established under international law. The act of recognition could not be left to the discretion of each individual State. It should not be declarative.

16. Mr. SCELLE agreed with Mr. Córdova. He thought that the right to exist entailed the right to be recognized. Since there was no superior authority to decide when a particular entity had become a State, the individual State would have to decide in each case whether or not it thought that a particular legal entity constituted a State. Should it decide in the affirmative, it was automatically obliged to recognize that State. He would support Mr. Córdova's suggestion that article 2 should be worded to indicate that recognition was a duty.

17. Sir Benegal RAU would support Mr. Córdova's suggestion. He further wished to point out that the term " State " would be used in every article of the draft Declaration. Therefore the Commission should begin by saying that the word " State " in the draft Declaration was used to refer to a community which fulfilled the conditions required by international law for its existence as a State. In the absence of such a definition, as the Chairman had pointed out, the recognition of a State would be left to the discretion of every other State and in that way the first three articles of the draft Declaration could easily be circumvented. He thought that if article 9 were adopted there might be no need to include the whole text of article 2.

18. The CHAIRMAN pointed out that a definition such as Sir Benegal had proposed and Mr. Córdova's suggestion would both raise the very controversial question of what were the requirements of statehood in international law. He would agree with the opinion of the United Kingdom that there was bound to be considerable scope for political judgment in deciding whether an entity fulfilled the conditions for recognition as a State. For that reason it would be difficult to specify the requirements for statehood. He noted further that the discussion had concerned the recognition of a State, whereas article 2 referred to recognition of the existence of the State. He wondered whether the Commission intended the two phrases to mean the same.

19. From the point of view of drafting he thought that every paragraph in the Declaration should begin by a statement of a right or a duty. In that particular case the Commission might wish to declare a correlative duty of recognition dependent upon article 1, which was an acknowledgement of the right to existence.

20. Sir Benegal RAU hoped that a chapter on the State could be included in the codification. He hoped, too, that the Commission might be able to suggest a super-authority which could decide doubtful cases of statehood.

21. The CHAIRMAN proposed the following text for the Commission's consideration:

> " The admission of a State to membership in the United Nations constitutes its recognition as a State by all the Members of the United Nations."

22. Mr. KORETSKY wondered whether it was necessary to set down the requirements for statehood, since until that time the declarative method in conjunction with diplomatic recognition had sufficed. He thought that the new proposal offered by the Chairman would be a check on the legitimacy of the birth of new States, recognition authorizing existence. It was not based on the fundamental principle which in his opinion should guide the Commission, namely, the principle of self-determination. By that proposal the Commission would introduce a new criterion transferring to the international community a power which rightfully belonged to the people. That super-authority would be substituted for the principles of international law and he could not support that suggestion. Only the sovereign people created the State; therefore he felt that the people's sense of sovereignty would object to that proposal, since it overlooked their fundamental right to choose in complete freedom the government they desired.

23. Mr. SPIROPOULOS did not feel that Mr. Córdova's proposal could be retained. Only States that were recognized as such by international law could be recognized. In international law no specific requirement was laid down for statehood. While Article 4 of the Charter referred to " peace-loving nations ", that could not really be considered a requirement for statehood. He did not feel, moreover, that any specific requirements could be added to article 2.

24. Mr. ALFARO said that, although there was a great deal of merit in Mr. Córdova's proposal, it might give rise to certain difficulties. The draft Declaration referred to rights and duties of States and, if Mr. Córdova's proposal were adopted, it would mean that the draft Declaration could provide for entities in the process of formation. In that connexion, Mr. Alfaro referred to the statements made by Fiore and Lapradelle memorandum (A/CN.4/2, p. 55). He agreed with Sir Benegal Rau's suggestion that a document, to complement the draft Declaration, should be drawn up regarding the formation, existence and attributes of a State.

25. Mr. Alfaro suggested that the word " political " in Mr. Córdova's text should be deleted, as it should be borne in mind that the Vatican State was purely spiritual and disclaimed

any political purpose. He also proposed that the words " in its own judgment " should be inserted in Mr. Córdova's text after the words " which fulfils ". He agreed that the question of recognition should be stated as a duty and not as a right.

26. Mr. CORDOVA, referring to Sir Benegal Rau's proposal, said that when he had made his suggestion he had had in mind that there might be difficulties in ascertaining the requirements of international law for a political entity to become a State, and pointed out that the Commission had agreed that the draft Declaration should not give a definition of what was meant by " State ".

27. The formula read by the Chairman referred only to collective recognition by Member States of the United Nations. Such a formula could not be applied in general, because there were many States recognized as such which were not Members of the United Nations.

28. Mr. HSU supported Mr. Córdova's remarks regarding the Chairman's proposal. He felt that the draft Declaration should contain an article on the recognition of the existence of the State, and he agreed with Mr. Córdova's amendment, although he felt it might be put in a more simple form. The remainder of article 2 should be deleted, and a statement inserted such as that contained in the commentary of the United Kingdom Government (A/CN.4/2, p. 53) and which stated that " the recognition of an entity as a State in no way required the entry into diplomatic, or any other particular relations with, the entity so recognized ".

29. Mr. SANDSTROM said that as article 1 on the right to national existence had been tentatively approved, he felt that as a corollary the Commission should take up the question of the recognition of the existence of the State. He suggested, however, that those two subjects should be dealt with in one article. He agreed that the word " right " should be replaced by the word " duty ".

The Commission decided by 10 votes to none that the draft Declaration should contain an article on the recognition of the existence of the State.

The Commission decided by 9 votes that a statement along the lines of the first sentence of article 2 should appear in the draft Declaration.

The Commission decided by 6 votes to 5 that the word " duty " should replace the word " right ".

30. The CHAIRMAN put to the vote Mr. Córdova's proposal that the first sentence of article 2 should read as follows:

" All States have a duty to recognize as a State any political entity which fulfils the requirements of Statehood according to international law."

The proposal was rejected by 6 votes to 5.

31. The CHAIRMAN then pointed out that Mr. Yepes' proposal that the words " by other States " should be inserted at the end of the first sentence would not apply as it had been decided that the word " duty " should be replaced by the word " right ".

32. After several drafting amendments had been suggested, the Chairman put to the vote the following text for the first sentence of article 2:

" Every State has the right to have its existence recognized by other States."

The amended sentence was tentatively approved by 6 votes to 1.

The Commission decided by 6 votes that it would not deal with the subject matter of the second sentence.

The Commission also decided that the third sentence should be deleted.

33. Mr. BRIERLY suggested that a statement on the lines of the sentence in the United Kingdom Government's comments (A/CN.4/2, p. 53), beginning with the words " It should be made clear that recognition of an entity . . ." should be inserted in the Declaration.

34. Mr. CORDOVA could not support Mr. Brierly's proposal, as article 2 dealt with the recognition of States and not with the recognition of Governments.

35. Mr. SANDSTROM suggested that a statement such as that proposed by Mr. Brierly should appear in the Commission's report.

36. Mr. BRIERLY agreed with Mr. Sandström's suggestion and withdrew his proposal that an extract from the United Kingdom Government's comments should appear in the draft Declaration.

Article 3: The right to existence, independent of recognition

37. The CHAIRMAN said that the consideration of article 3 would be influenced by the tentative retention of the equivalent of the first sentence of article 2. He felt that the Commission should not deal with the subject matter of article 3.

38. Mr. ALFARO said the idea of article 3 was to assert the fact that a State had a right to exist and develop itself even if it had not been recognized by all States. He cited, in that connexion, the case of Outer Mongolia which, although it had been recognized only by the Union of Soviet Socialist Republics and five or six other States, and not by the great majority of States, still had the right to exist and develop its personality.

39. Article 3 was based on the Montevideo Convention on Rights and Duties of States, and many other documents which recognized that the political existence of a State was independent of its recognition by other States.

40. Mr. HSU suggested that the subject matter covered by article 3 should be placed in the Commission's report.

41. Mr. SCELLE felt that article 3 should be deleted, since the Commission was not called upon to deal with matters affecting a State which had not been recognized as such. It would be very interesting to deal with *de facto* governments but that was not the place. Entities which were not yet States, which might or might not become States could not be considered in a Declaration of Rights and Duties of States, namely, of existing States, of entities which had become States.

42. Mr. SPIROPOULOS shared the Chairman's opinion that article 3 should be deleted. The first sentence of that article was a repetition of what was said in article 1, and the remaining part of the article should not appear in a legal document.

43. Mr. CORDOVA felt that article 3 was not entirely superfluous, although it was true that the first sentence repeated what was said in article 1. However, the existence of a State was entirely independent of the obligation of other States to recognize it as such.

44. Mr. BRIERLY felt that the first sentence only of article 3 should be retained. That sentence made it clear that a State did not come into existence when was recognized and by virtue of such recognition. An important point which should be emphasized was that the Commission did not accept the constitutive view of recognition but supported the declaratory view. The second sentence was unnecessary, as the draft Declaration stated that a State had the right to exist, and it therefore had the right also to do everything which was enumerated in that sentence. It would be dangerous to include such a sentence.

45. The CHAIRMAN put to the vote the proposal that the Commission should not deal with the subject matter of article 3.

The proposal was rejected by 6 votes to 5.

46. Mr. FRANÇOIS suggested that the word " political " in the first sentence of article 3 should be deleted.

47. The CHAIRMAN, supported by Mr. ALFARO, agreed. The latter pointed out, however, that the wording of the first sentence had been taken from the Montevideo Convention.

48. The CHAIRMAN suggested also that the words " is not dependent on " should replace the words " is independent of ", and that the first sentence should be reworded as follows:

> " The existence of a State is not dependent on the recognition of its existence by other States. "

49. He pointed out, however, that according to Mr. Alfaro's remarks it seemed that that sentence should read: " The existence of a State is not dependent on the recognition of its existence by *all* other States. " If that was what was meant, it was very different from the explanation given by Mr. Alfaro. In that connexion, he saw a very logical objection to stating in article 2 that every State had a *right* to have its existence recognized. To do so would be to attempt to assess the consequences of other States failing to live up to the duty which was correlative to the right declared in article 2. He did not see any practical reason for dealing with that point, which should be dealt with in a treatise on recognition of a State. The second sentence of article 3 should be deleted.

50. Mr. AMADO felt that article 3 should be retained.

51. Mr. ALFARO explained that the word " all " referred to the community of States in general. The second sentence of article 3 meant that from the moment a State became an entity it had the right to develop its own national and international personality independent of its being recognized as a State by other States. He felt that that sentence should be retained.

52. The CHAIRMAN pointed out that if the second sentence of article 3 was retained the first sentence should be deleted.

53. Mr. ALFARO emphasized that the second sentence enumerated the rights of a State. He could not accept the wording suggested for the first sentence of article 3.

54. Mr. SPIROPOULOS pointed out that the first sentence had nothing to do with a declaration on the rights and duties of States.

55. The CHAIRMAN announced that he would put to the vote the retention of the following wording:

> " The existence of a State is not dependent on the recognition of its existence by any other State."

There were 6 votes in favour and 6 against.

56. After a short discussion on the interpretation of the vote, and an intervention by Mr. KORETSKY, who reminded the Commission that the vote was only a way to crystallize the opinion of the members, the CHAIRMAN announced that he would not apply rule 122 of the rules of procedure; the report would record that the vote had been equally divided.

Second sentence of article 3

57. The CHAIRMAN felt that the words " even before its *existence* has been recognized " should be substituted for the opening words of the second sentence and that it should continue " the State has the right to preserve its existence " in order to make that sentence conform to article 1.

58. Mr. ALFARO suggested the formula " to provide for its preservation and prosperity " but pointed out that in the meantime the Commission had to decide whether to retain the substance of the sentence.

The substance of the sentence was rejected by 7 votes to 4.

59. Mr. ALFARO pointed out that as the first

sentence stood after the deletion of the second sentence, it did not state any right or duty; it was simply a rule of law, which had no place in the Declaration. He therefore wished to recall his vote in favour of the first sentence, as a result of the vote on the second sentence.

60. The CHAIRMAN asked the Commission whether it wished to retain the first sentence in view of the fact that the second sentence had been rejected.

The first sentence was rejected by 10 votes.

The whole of article 3 was therefore rejected.

ARTICLE 4: THE RIGHT TO INDEPENDENCE

61. Mr. ALFARO stated that the basis for article 4 was article 2 of the Declaration by the American Institute of International Law, with some drafting modifications. That Declaration was contained on page 157 of the document.

62. Since the second part of article 1 had been rejected as being covered by articles 9 and 10, article 4 should be considered with the deletion of the last phrase beginning with the words " provided always that. . . ". The American Institute of International Law had been impressed by the facts which had given rise to the First World War, for example the German theory of national necessity. Since the situation had changed and since a similar qualifying phrase had been removed from article 1, it should also be removed from article 4.

It was so agreed.

63. Mr. YEPES proposed a new draft to read as follows: "Every State has the right to have its own political independence and territorial integrity respected by other States ". As the article stood, it restricted independence to the fact of a State being free to provide for its own well-being and he felt that such a restriction was not in place.

64. Mr. SANDSTROM felt that it would be preferable to draft the article in the form of a duty to other States.

65. The CHAIRMAN wondered whether article 4 added anything to article 5, which referred to the duty of non-intervention.

66. Mr. ALFARO pointed out that there were several concepts which were very closely linked, such as sovereignty, non-intervention, jurisdiction and independence. He felt that the concept of independence should be treated separately and in detail. Whereas non-intervention was a negative concept, independence was a positive one; it was one of the greatest of all State rights. A separate article on independence was essential in order to bring to the mind of the layman a clearer concept of that subject. Duty, however, was covered by article 7 and the proposal to include it in article 4 was therefore superfluous.

67. He referred to Mr. Koretsky's earlier statement[2] with regard to the Atlantic Charter and emphasized that it was desirable that article 4 should specifically mention the right of peoples to choose their own government. He therefore suggested that the words " one of the manifestations of independence is the right of a State to choose its own form of government and to govern itself " should be added to article 4.

68. Mr. FRANÇOIS wondered whether that formula took into account semi-sovereign States such as protectorates. He also felt that the words " its own " were not very clear and that the word " independence " would be sufficient. The word " spiritually " was an inadmissible personification of the State which did not lead a spiritual life; it should therefore be deleted.

69. Mr. SCELLE remarked that the idea of independence was not similar to that of sovereignty. An entity was either sovereign or subject of law. Once it had received a competence, that could be exercised with entire freedom. He referred to the International Court of Justice's pronouncement with regard to the Austrian *Anschluss*, which contained a precise definition of independence as opposed to sovereignty. Independence was the right of a government to use its international competence freely without being subject to the influence of any other government. That was precisely the idea contained in article 4. It was a very important principle in international law and should therefore be included in a declaration of that type.

70. Mr. SPIROPOULOS stated that article 4 was quite inadmissible, for the following reasons: first, it was not suitable for that type of declaration; secondly, it was full of unconnected ideas; thirdly, some of those ideas were already covered by other articles, article 10 for example. He could accept the first phrase; with regard to the second phrase he pointed out that independence and well-being were not the same. He had never before read any similar definition of independence.

71. The fact that the existing wording was not admissible did not mean that there should be no article on independence. He would support Mr. Yepes' suggestion in principle as he felt that some statement of that sort would have to be included in the Declaration, which must to some extent have a political character.

72. In reply to Mr. Spiropoulos, Mr. AMADO drew attention to paragraph II of the Declaration of the American Institute of International Law, (A/CN.4/2, p. 157). He particularly liked the phrase " pursuit of happiness ". Mr. Spiropoulos had stated that, together with the Montevideo Treaty of 1933, that Declaration was of merely historical interest. Its legal content, however, was sufficient to warrant its inclusion in the

[2] See A/CN.4/SR.9, para. 20.

Declaration under consideration. He reserved his right to speak again on the subject later.

73. Mr. BRIERLY felt that neither the Commission nor the General Assembly would accept a declaration which did not contain an article on independence; it was absolutely essential. He did not like the definition given in Mr. Alfaro's text, particularly the words " spiritual well-being ", which were not appropriate to a State. He preferred Mr. Scelle's suggestion and hoped he would draft something on those lines.

It was decided by 9 votes to retain an article on independence.

74. The CHAIRMAN explained that the Commission had before it three draft texts: Mr. Yepes', Mr. Scelle's and Mr. Alfaro's.

75. Mr. YEPES pointed out that his text was based on paragraph 4 of Article 2 of the Charter, which he quoted.

76. Mr. SCELLE agreed with Mr. Yepes but pointed out that there was another form of independence. His provisional draft would read as follows: " The government of a State, when it has been recognized as such, has the right to exercise the powers to which it is entitled under international law without pressure from any other State. " Pressure was not quite the same as intervention and was not as emphatic as a threat. Political influence, too, could prevent free action.

77. He suggested that he and Mr. Brierly should discuss together the drafting of a definition of independence based on the pronouncement of the International Court of Justice on the Austrian case. The Court had avoided any confusion of competences.

78. Mr. ALFARO wished to explain the word " spiritually ". It had been inserted to cover one State which was purely spiritual, namely, the Vatican City. If it was subject to misinterpretation, however, he would withdraw it. He proposed that the final text should read:

> " Every State has the right to its own independence in the sense that it is free to choose its own form of government, to govern itself, to provide for its own well-being and, in general, to exercise all its powers without being subjected to the domination of any other States."

79. After a short discussion on the word " domination ", Mr. BRIERLY pointed out that the various proposals before the Commission required mature consideration. He would like to see Mr. Scelle's draft. The decision should be postponed until the following meeting.

80. Mr. SPIROPOULOS agreed and suggested that a sub-committee consisting of Mr. Alfaro, Mr. Brierly, Mr. Scelle, Mr. Yepes and one of the Vice-Chairmen should meet to draw up a precise text.

It was so agreed.

Article 5: The duty of non-intervention

81. The CHAIRMAN felt that in view of the nature of the Declaration and of the heading of article 5, that article should be redrafted in terms of duty.

82. Mr. ALFARO agreed and suggested the formula: " Every State has the duty to refrain from interfering . . . ".

83. Mr. BRIERLY felt that " interfering " was too vague; he would prefer " intervening " and Mr. RAU cited principle 3 of the principles of International Law, contained on page 161, in support of that proposal.

84. The CHAIRMAN stated that the phrase " intervention in internal affairs . . . " was sanctioned by American usage but he could not quite understand the significance of the phrase " intervention in external affairs ".

85. Mr. CORDOVA and Mr. ALFARO cited pressure by an outside party not directly concerned as an example of intervention in external affairs.

86. Mr. SPIROPOULOS said that an article on non-intervention was essential but that the text proposed was not in conformity with international law under which intervention was not prohibited.

87. Mr. SCELLE emphasized the difference between an intervention by one State and a collective intervention by an international organization. The right of intervention by one State was a negation of independence and as such should be excluded. If, however, all intervention were excluded, the result would be anarchy. In an international community it was impossible to let one State go beyond its own rights and violate international law. Every State must be able to denounce before the competent international organization the illegal acts of other States. The principle of intervention by an international organization was extremely important to the organization of international government. Article 5 neglected that most important aspect of the question. A State should have the right to ask the United Nations to consider the opportunity of a collective intervention in a given case. That was the purpose of international organizations.

The meeting rose at 6 p. m.

12th MEETING

Thursday, 28 April 1949, at 3 p.m.

CONTENTS

Chairman: Mr. Manley O. HUDSON.

Rapporteur: Mr. Gilberto AMADO.

Present:

Members: Mr. Ricardo J. ALFARO, Mr. James L. BRIERLY, Mr. Roberto CÓRDOVA, Mr. J. P. A. FRANÇOIS, Mr. Shuhsi HSU, Mr. Vladimir M. KORETSKY, Sir Benegal N. RAU, Mr. A. E. F. SANDSTRÖM, Mr. Georges SCELLE, Mr. Jean SPIROPOULOS, Mr. Jesús María YEPES.

Secretariat: Mr. LIANG, Director, Division for the Development and Codification of International Law, Secretary to the Commission.

Draft Declaration on the Rights and Duties of States (A/CN.4/2, A/CN.4/2/Add.1) (*continued*)

1. The CHAIRMAN proposed to begin by discussing article 5 pending distribution of the redraft of article 4 prepared by the sub-committee set up at the preceding meeting.

ARTICLE 5: THE DUTY OF NON-INTERVENTION

2. The CHAIRMAN said that the proposed wording for article 5 was:

> "Each State has the duty to refrain from intervention in the internal or external affairs of another State."

3. Mr. BRIERLY pointed out that in an article intended to prohibit intervention it was important to be quite clear what was meant by that word. It was not defined with certainty in international legal terminology.

4. He felt that an act of intervention was an act of dictation by one State to another with regard to its internal or external policy backed by the use or threat of force, express or implied. He emphasized that if there was no force or threat or force any action, however improper or unfriendly, could not be qualified as intervention though he realized that opinions might differ on that point.

5. Mr. SANDSTROM suggested that, as proposed by the Greek Government, article 5 and article 8 might be considered together. At all events, article 8 should immediately follow article 5.

6. Mr. YEPES felt that the Commission had not been explicit enough in its definition of intervention; it should adopt the formula included in article 15 of the Bogotá Charter (see A/CN.4/2, p. 63). He proposed that the whole of article 5 should be replaced by that article with the addition of the following paragraph:

> "The measures taken by the international community under the treaties in force in order to ensure peace or guarantee a free exercise of essential rights or fundamental freedoms of the human being shall not constitute intervention within the meaning of this article."

7. It was essential to specify that collective intervention—in which case the word had rather a different meaning—was permissible in certain cases.

8. Sir Benegal RAU emphasized that the Declaration could not be self-contained. Certain exceptions and limitations recognized by international law would have to be mentioned together with certain exceptions under the United Nations Charter. He felt that insertion of a general clause to the effect that the provisions of the Declaration did not affect the provisions of the Charter might simplify the task of drafting the Declaration. If the Commission said that every State had the duty to refrain from intervention, it would have to consider article 8, which recognized a certain kind of intervention. Both articles should be examined together.

9. Mr. ALFARO explained that in article 8 the word "intervention" had a different connotation; it referred to diplomatic interposition by a State in favour of its own nationals. He would eliminate the word "intervention" from article 8 in order to avoid misunderstanding.

10. Sir Benegal RAU drew attention to the phraseology of article 13 and suggested that by analogy the words "except as permitted in international law" might be added in article 5 after the word "refrain".

11. Mr. CORDOVA agreed with Mr. Brierly's definition of intervention but felt that it need not be introduced into article 5. It was unnecessary, as everyone understood the meaning of the term and it was almost impossible to find a satisfactory formula. The same difficulty had been encountered at the San Francisco Conference and he thought that Article 2, paragraph 7, contained the only reference to intervention in the Charter.

12. Article 5 prohibited collective intervention as did all the instruments drawn up by the American States. The actions of the United Nations which derived from the Charter should not be called intervention but punitive action or some similar phrase, as the word intervention had a very restricted and confined connotation.

13. With regard to Mr. Yepes' suggestion to adopt article 15 of the Bogotá Charter, he did not agree with the last phrase "economic and

cultural elements ". If a definition were necessary, the first part of the Bogotá article might be included.

14. Mr. FRANÇOIS felt that Mr. Brierly's interpretation of the word " intervention " was too limited. Intervention could take place without the use or threat of force and the latter term, moreover, was very vague. As used in Article 2, paragraph 7 of the Charter, intervention had a wider significance.

15. With regard to a previous statement by Mr. Scelle that legitimate intervention under international law must be taken into account, he wondered whether that constituted intervention in internal affairs. He personally felt that where international law recognized the legitimacy of the intervention that proved that the matter in question was not one of domestic jurisdiction.

16. Mr. SCELLE emphasized that in order to constitute intervention, the action must be backed by the use of force or the explicit or implicit threat of force. Article 2, paragraph 7, of the Charter was not relevant to the question under consideration as it only referred to the relationship between Members of the United Nations and the Organization itself. He referred to the " discretionary competence " of a State, namely to those cases in which a State was free to do what it wished because international law had recognized its power to take decisions. That might cover pressure by one State on another. If any real progress was to be made in international law, the idea of legitimate intervention must be given up and replaced by the taking of steps to initiate collective intervention by the international organization concerned. The State which formerly would have intervened should denounce to the competent international organization the failure of another State to comply with its obligations. The idea that a State could make itself the judge of another State should be abandoned and it should be agreed that it would leave the decision to the international organization. If some such formula were not adopted international anarchy would result.

17. Mr. ALFARO stated that the subject of intervention had had many repercussions lately. It was a very important question in inter-American relations. Article 5 was based on the Montevideo Treaty and he did not wish to change the language of that Treaty since the formula had been reached after much discussion. He emphasized that the Latin-American countries had always understood the formula to mean unilateral, arbitrary and unjustified intervention and not collective action by the United Nations to maintain peace and security and promote human rights. The Montevideo clause did not refer to action of the type taken by the United Nations with regard to Franco Spain or with regard to the treatment of Indians in the Union of South Africa. The General Assembly had decided by a two-thirds majority that that was not an act of intervention and not contrary to Article 2, paragraph 7. He drew attention to article 19 of the Bogotá Charter (A/CN.4/2, p. 142), when " existing treaties " referred to the Charter of the United Nations. He was in favour of adding a clause to the effect that collective action by the United Nations in conformity with the Charter did not constitute intervention and he therefore supported Mr. Yepes' proposal.

18. Mr. KORETSKY could not support Mr. Brierly's definition. The concept of intervention was very complex and might be defined in many ways. The principle of non-intervention must be formulated unconditionally since any definition would weaken the article to be included in the Declaration. As matters stood, intervention by a State or group of States was still practised and could always be justified by a legal pretext unless it was unconditionally prohibited. Later it might be necessary to define intervention but no definition was required for the time being.

19. The Declaration could not change but only strengthen and enforce the Charter, Chapter VII of which would remain in force. Intervention was extremely dangerous particularly in current times when blocs were forming and small States were compelled to follow the policy of great States. The action envisaged in Chapter VII of the Charter was not intervention.

20. He did not agree with Mr. Scelle's idea of discretionary competence; USSR experts approached the question from the viewpoint of sovereignty. He supported Mr. Alfaro's text and pointed out that the Montevideo Convention had been drawn up in view of intervention as it had been practised in the South-American Continent. Article 15 of the Bogotá Charter on the other hand did not cover every possible means of intervention. The " whip " was covered by that Charter but not the " sugar pill ". He therefore demanded an unconditional declaration of the principle of non-intervention.

21. Mr. YEPES pointed out that under the Statute of the International Law Commission each member of the Commission represented a different legal system in the world. It was therefore quite natural that the Latin-American countries should have a particular view of intervention, but he felt it was necessary to state the reasons underlying their special criteria.

22. The Latin-American position with regard to intervention was the result of events which had taken place during the nineteenth century and the first three decades of the twentieth century. During that period, the Latin-American countries had been the victims of a series of unilateral and unjustified interventions by a large number of European nations and by the United States. He quoted as an example the intervention by France

and the United Kingdom in Argentina and Uruguay ostensibly for the purpose of protecting their nationals and the peaceful blockade of Venezuela by the United Kingdom in 1902. He also mentioned United States intervention in Mexico in 1836, 1845, 1848 and 1849, which had led to an unjust war during which Mexico had lost some of its richest provinces. That intervention had been carried out in the name of the doctrine of " manifest destiny ". It had been much criticized in the United States. All those events had created very strong opposition to unilateral intervention in Latin America which had consistently affirmed the principle of non-intervention; it was one of the main ideas underlying Latin-American legal thought.

23. He referred to Mr. Koretsky's previous criticism of the Monroe Doctrine. Mr. Koretsky seemed to have misinterpreted that doctrine which, viewed in its true light, constituted a formidable barrier to European intervention in the New World and safeguarded the independence of Latin America. Mr. Yepes read the theory of non-intervention as defined by President Monroe in his Doctrine. The principle of non-intervention had been accepted for the first time by the United States at the Second International Conference of American Legal Experts in 1927 but it had not been included in a convention until the Montevideo Treaty of 1933, the adoption of which constituted a legal and political victory for Latin America, as well as for President Roosevelt.

24. He emphasized once more that the Latin-American conception of intervention only referred to unilateral intervention when the State constituted itself as a judge to impose its views on another State by force, propaganda or any other means. In the eyes of the Latin-American countries such intervention was worse than war itself since the State initiating it expected to obtain the advantages of a victorious war without its risks. It was hypocrisy to condem war and not to condemn intervention which often led to war. Collective intervention was not condemned in the Latin-American countries. It was quite a different type of action directed against a State which had infringed international law, or action intended to ensure human rights or fundamental freedoms.

25. Mr. SPIROPOULOS noted that some members favoured the provisions of the Bogotá Charter, while others had referred to " collective intervention ". Collective intervention, however, was understood to refer to action taken under the United Nations Charter to enforce its provisions. The task of the Commission was not to redraft the Charter, but to codify international law. Consequently, the term " collective intervention " should not be used in the article under discussion.

26. As regards article 15 of the Bogotá Charter, Mr. Spiropoulos was opposed to its vague, inadequate formulation; its contained certain notions outside the field of international law. Concerning the suggestions made with reference to article 19 of the Bogotá text, he felt that there was no need for reference to the United Nations Charter in a document dealing with international law in general.

27. Looking at the legal situation apart from the terms of the article under discussion, he felt that intervention in the widest sense, namely, by threat of force only and without attack upon the integrity of a State, theoretically did not constitute a violation of positive international law as currently applied by States. If State A told State B to sign a certain treaty or not to sign a treaty it contemplated concluding with State C, that would not be intervention under existing international law; it would be a matter of power.

28. In view of those considerations, he felt that the Commission should decide whether it wanted to restate the existing law or to take a step forward and, adopting Mr. Brierly's definition of intervention which included use or threat of force, prohibit such intervention; or omit any mention of the subject in view of the difficulties it presented. As regards the second alternative, while the Commission was competent to adopt such a new definition, Mr. Spiropoulos appreciated Mr. Koretsky's objections that specific prohibition of one kind of intervention would make all other types of intervention appear permissible.

29. Consequently Mr. Spiropoulos felt that the original article 5, though it might raise questions of interpretation—which, after all, might happen in the case of most of the articles—presented, subject to minor drafting changes, the most satisfactory solution by approaching the matter both as a legal principle and a political postulate.

30. Mr. AMADO said he was prepared to vote in favour of retaining the article in its present form. Mr. Brierly's definition was not sufficient as intervention could involve not only the threat or use of force, but also other forms of pressure. While he was prepared to go so far as to support Sir Benegal's original draft of the article, Mr. Amado stated that if the Commission favoured the Bogotá draft, he would support its decision, provided the last few unnecessary words were deleted.

31. In reply to a question by Mr. CORDOVA, the CHAIRMAN stated that the Commission had now before it the original draft of article 5 to which a number of amendments had been presented by Mr. Yepes, Sir Benegal Rau, Mr. Scelle and Mr. Brierly.

32. On the suggestion of Mr. CORDOVA that a drafting sub-committee should be appointed to work out a composite text, Mr. SPIROPOULOS proposed that the Commission should give some

guidance to such a sub-committee by putting the different proposals to a preliminary vote.

33. The CHAIRMAN then put to the vote Mr. Yepes' proposal for substituting article 15 of the Bogotá text together with an additional paragraph, for the existing text of article 5.

34. Mr. ALFARO, speaking on Mr. Yepes' proposal, stated that he found the Bogotá text unsatisfactory for a number of reasons. First of all, the expression " group of states " was ambiguous and could be misunderstood to mean such bodies as the United Nations and the Organization of American States. Secondly, the words " directly and indirectly " were inappropriate in view of the form of intervention permitted under the United Nations Charter. And thirdly, the rest of the text contained a confusing number of elements. How, for instance, could " cultural intervention " be determined? Mr. Alfaro recalled, in that connexion, the difficulties experienced by the Sixth Committee of the General Assembly in connexion with the concept of cultural genocide, and its final decision to abandon it. He therefore preferred the terse and adequate Montevideo Convention on which the original text of article 5 was based.

35. Mr. CORDOVA would not object to adopting the beginning of the second sentence of article 15 of the Bogotá Charter if a definition of the concept of intervention was necessary. That text embodied the same principle as the one contained in the existing article 5, providing, moreover, a definition of a State's obligation not to intervene either by force, threat of force, or other methods, in the affairs of another State. On the other hand, however, that text did not cover all possible aspects of intervention, and Mr. Córdova thought that if the Bogotá text was rejected the original text of article 5 might be retained and the other suggestions considered.

36. The CHAIRMAN put to the vote Mr. Yepes' proposal for substituting the text of article 15 of the Bogotá Charter for article 5 of the declaration.

Mr. Yepes' proposal was rejected by 9 votes to 1.

37. The CHAIRMAN then took up Sir Benegal Rau's proposal to insert in article 5 the words: " except as permitted in international law ".

38. Sir Benegal RAU, illustrating his proposal, pointed to the possibility of one State permitting its territory to be used by a second State as a base of operations against a third State. The third State then, by using force against the first State in order to dissuade it from opening its territory to the second State, would be committing an act of intervention in the narrow sense, although its object would be prevention of aggression. Such intervention was not prohibited by the United Nations Charter or the present declaration. It was with such cases in mind, that Sir Benegal had proposed his addition in order to limit the scope of the otherwise too sweeping provision of article 5.

39. Mr. CORDOVA thought that in the example given by Mr. Rau, the first State would actually be participating in the aggression against the third State, and the action of the latter would be self-defence, not intervention.

40. Mr. SPIROPOULOS thought to go into details was dangerous, and the duty of non-intervention should be adopted in principle without any additional qualifications.

41. The CHAIRMAN was against making sweeping exceptions under international law in a document which was supposed to define international law on the subject. He then put to the vote Sir Benegal's proposal.

Sir Benegal Rau's proposal was rejected by 12 votes to 1.

42. The CHAIRMAN put to the vote Mr. Scelle's proposal to insert a clause saving the possibility of collective action by the United Nations.

Mr. Scelle's proposal was rejected by 8 votes to 3.

43. The CHAIRMAN then turned to the original text of article 5 as redrafted at the beginning of the meeting.

44. Mr. SPIROPOULOS suggested the deletion of the words " external and internal ".

45. Mr. AMADO remarked that " intervention in internal and external affairs " was a customary expression in international law.

46. The CHAIRMAN put Mr. Spiropoulos' proposal to the vote.

Mr. Spiropoulos' proposal was rejected by 10 votes to 1.

47. The CHAIRMAN put to the vote the tentative retention of article 5 as it stood.

Article 5 was tentatively retained by 10 votes to 2.

Article 4: The right to independence
(resumed and concluded)

48. The CHAIRMAN read the sub-committee's composite draft of article 4:

> " Every State has the right to independence, including the right to choose its own form of government, to provide for its own well-being and, in general, to exercise freely all its legal powers, without being subjected to the dictates of any other State or States. "

49. He wished to raise a number of questions in respect of that draft. First, did the text refer to the right of a State to provide for its own well-being or for that of its people? Secondly, the words " in general " seemed superfluous. Thirdly, what was the meaning of the words " legal powers "? Did they mean powers under the State's Constitution or under international law?

50. On Mr. BRIERLY's replying that " legal powers " referred to powers under international

law, the CHAIRMAN stated that the words were not clear and should be deleted together with the words " in general".

51. Mr. ALFARO, referring to a statement by Mr. Scelle at a previous meeting, pointed out that deletion of the words " in general " would place exercise of legal powers in the same category as the rights mentioned before which were only given as outstanding examples of the right to independence. The substance of the right to independence, however, lay in the free exercise of legal powers.

52. Mr. SPIROPOULOS thought that the composite text was obviously the result of compromise, which in the case of a legal document was undesirable. He was opposed to that draft as it was not clear whether the word " including " implied other rights in addition to that of independence, or whether it denoted rights forming part of the general " right to independence ".

53. Furthermore, the words " provide for its own well-being " were inappropriate in a legal text. As regards the words " exercise its legal powers ", their meaning was implied in the right to independence. In view of these considerations, Mr. Spiropoulos would prefer the following clear and concise text: " Every State has the right to independence and to its integrity. "

54. Mr. KORETSKY objected that in developing the concept of independence of States, the drafters had not included the concepts of sovereignty and self-determination, the important principles laid down in the Atlantic Charter. He was surprised that Mr. Alfaro did not mention them. As regards the article's last provision, it was already covered by article 5. In view of those considerations, he thought that the redraft, which was not based on the proper principles, was unsatisfactory and should be redrafted to include the concepts of independence, sovereignty, self-determination and right to choose a form of government.

55. Mr. SANDSTROM, pointing out that the sequence of ideas in the text was illogical, suggested the following re-arrangement:

> " Every State has the right to independence and thus to exercise freely, without being subjected to the dictates of any other State or States, all its legal powers, including the right to choose its own form of Government, and to provide for its own well-being. "

56. On the CHAIRMAN asking if he wanted any addition Mr. KORETSKY replied that the wording should be changed, but he did not want to suggest any draft. Actually the text was narrowing the ideas of the Atlantic Charter when they had to be broader.

57. Mr. FRANÇOIS suggested that the words " legal powers " should be replaced by the words " legal rights ".

58. The CHAIRMAN stated that he was opposed to the words " legal powers " as long as there was no clear indication of what they meant. He then put to the vote Mr. Sandström's re-arrangement of the text.

Mr. Sandström's re-arrangement was adopted by 8 votes to 1.

It was agreed to delete the words " or States ".

59. The CHAIRMAN then moved his own proposal that the word " legal " should be deleted.

60. Mr. BRIERLY objected to the Chairman's proposal. The word " power " meant the ability to do something. By deleting the word " legal ", States would be given the right to exercise any power, such as military power, which would be contrary to the purpose of the Declaration. He therefore suggested the phrase " all powers accorded to it by international law ".

61. Sir Benegal RAU repeated his opinion that the Commission could not make the draft Declaration self-contained and would find it necessary to include some kind of limitation in nearly all the articles. If the Commission was proceeding on the assumption that it would later codify various generalities, he saw no objection to including the phrase " legal powers " on the understanding that it would be defined elsewhere.

62. The CHAIRMAN thought the reference to " legal powers " could be deleted thus stressing the provisions on the right to choose a form of government and provide for the well-being of the State.

63. Mr. SPIROPOULOS agreed with that point of view.

64. Mr. SCELLE was strongly opposed to deletion of the phrase " legal powers ". The most important attribute of independence was the power of a State to exercise its competence in conformity with international law, a juridical expression which he understood in the same terms as Mr. Brierly. If that qualification of the State's powers were deleted, he would feel that the rest of the article had little place in the Declaration and would abstain from voting on it.

65. With regard to Mr. Koretsky's remarks, he would agree that the concept of sovereignty should be included but he felt that independence was synonymous with sovereignty. In the material and anti-juridical sense sovereignty was the power to decide one's competence, *Kompetenz-Kompetenz* as German authors called it.

66. However, the conception that a State could do as it wished without concerning itself with the rights of other States, must be rejected. A State was not sovereign in the absolute sense. Were the Commission to declare that a State had the right to exercise the powers conferred on it by international law, it would have done something useful. Subject in law the State formed in the rule of law the source of all its powers without being submitted to any other State. Every State has a right to exercise freely all its legal powers

without being subjected to any other State. This was already stated in other words in article 15, paragraph 8 of the Covenant of the League of Nations. In his opinion it would be advisable to add a clause: " It is in this sense that States are sovereign."

67. In his view the only justification for the article was the inclusion of the phrase " to exercise freely all its legal powers " which he thought derived solely from international law. Mr. Scelle could not accept the Chairman's suggestion to replace the phrase in question by: " and thus to exercise its sovereignty freely ", because he wished to stress the word " independence " as meaning the same thing as " sovereignty ".

68. Mr. AMADO pointed out that the right of independence was a correlative of the right of existence.

69. Mr. ALFARO had been convinced by Mr. Scelle's arguments in favour of retaining the phrase " legal powers ". He always had in mind the powers of the State under international law.

70. In his intervention Mr. Koretsky had seemed to imply the need of an article on sovereignty. Many rights were included in the term " sovereignty ". The draft Declaration was composed of a series of articles explaining how those fundamental rights of States were to be exercised and he felt that the Declaration as a whole was therefore concerned directly with sovereignty. For that reason he would oppose the idea of including a special article on that concept. In article 13 there was a reference to the sovereignty of the State as subject to the limitations of international law. If the Commission desired, he would agree to an enlargement of the concept of sovereignty in that article. On page 59 of the Secretary-General's memorandum (A/CN.4/2) a reference was made to the only paragraph of the Atlantic Charter which he considered applicable to the draft. It used the term " sovereign rights " which were really legal rights or rights under international law. In that paragraph the term " self-government " had been used in the sense of " independence ". He would point out in that connexion that the draft Declaration was concerned with constituted States and not entities which were aspiring to self-government. He would however welcome any specific proposals from Mr. Koretsky on the question of sovereignty, self-government or self-determination.

71. Mr. KORETSKY noted that the Commission had expressed two points of view on sovereignty. According to one interpretation, every State derived its rights from international law. He did not feel, however, that that approach was in accordance with the facts. The supremacy of international law was a concept invented in an attempt to set up a supreme authority and should be rejected. For that reason he could not accept the amendment proposed by Sir Benegal Rau.

72. He saw no reason for introducing the concept of absolute sovereignty. In the twentieth century the doctrine of unlimited sovereignty created in France in the times of the absolute monarchy had no place. The concept of sovereignty should be considered in the light of the current historical circumstances in which the nations of the world were directly concerned. He could not agree that the terms " sovereignty " and " independence " were synonymous. Mr. Alfaro's statement that independence was the essence of sovereignty did not open up the full field of that concept. The Commission should indicate that sovereignty was a broader term than self-government, just as sovereign rights were broader than legal rights. Those terms could not be equalized. In view of the fact that some States were subordinate to others, he thought that " independence " could not replace " sovereignty ". The draft Declaration should say that all States, including semi-sovereign States were entitled to full sovereignty. It was the task of the Commission to emphasize the right of every State to full enjoyment of all its rights.

73. If the Commission accepted the principle of sovereignty, there would be no need to include a condition such as that incorporated in the text of article 4 proposed by Mr. Alfaro, Mr. Brierly, Mr. Scelle and Mr. Yepes: " without being subjected to the dictates of any other State ".

74. To declare that a State had the right to choose its own form of government was not the same as saying that it had the right to self-government since in some cases a State might choose to be governed by another State. Unless the Commission in the draft Declaration set forth in unequivocal terms the right of every State to sovereignty, self-government and self-determination, it would be limiting and weakening the other rights it proclaimed in the Declaration.

75. Mr. CORDOVA thought that it was necessary to include a limitation on powers and would favour the retention of the word " legal ". In that connexion, a parallelism between the concept of freedom in national law and the concept of sovereignty in international law had often occured to him since neither was absolute, both needed limitations. He proposed that the article might be amended to read: " to exercise freely all its legal powers, its sovereignty, etc."

76. Mr. SPIROPOULOS proposed the following wording for article 4: " Every State has the right to independence, and thus the right to exercise freely all its legal powers, including the right to choose its own government."

77. Mr. SCELLE thought it necessary to include in Mr. Spiropoulos' text the phrase " without being subjected to the dictates of any other State ".

78. Mr. AMADO suggested the term: " all acts of its juridical competence ". If that were not

accepted, he would favour the retention of the qualifying term " legal " for the reasons put forth by the authors of the new draft of article 4.

79. The CHAIRMAN'S objection to the word " legal " was based on the fact that he did not believe every power of the State to be derived from international law.

80. Mr. AMADO proposed the deletion of the phrase " to provide for its own well-being ".

By 8 votes to 1, the Commission agreed to delete that phrase.

81. The CHAIRMAN then put to the vote Mr. Sandström's re-arranged text, reading as follows: " Every State has the right to independence and thus to exercise freely, without being subjected to the dictates of any other State, all its legal powers including the choice of its own form of Government ".

That proposal was adopted by 12 votes.

82. Mr. SCELLE proposed the addition of the following sentence to article 4: " It is in this sense that States are sovereign."

83. Mr. ALFARO thought that the addition of such a sentence might lead to confusion if the concept of sovereignty were linked only to independence and not mentioned in other articles of the draft Declaration.

84. Mr. SCELLE did not agree with Mr. Alfaro because he considered independence to be the very notion of sovereignty itself. The other articles concerned the exercise of that independence or sovereignty.

85. Mr. YEPES agreed with Mr. Scelle. He considered that the Commission would be rendering great service to the science of international law if it could in some way clarify the rather vague term of sovereignty.

86. Mr. CORDOVA proposed to insert after " all its legal powers " the words: " its sovereignty ", between two commas.

87. Mr. AMADO pointed out that the Commission was drafting a Declaration on Rights and Duties of States and should not try to deal with definitions.

88. The CHAIRMAN proposed the wording: " It is in this sense that the State has the right of sovereignty."

89. Mr. SCELLE could not accept that text because sovereignty was also a duty.

90. Mr. SANDSTROM thought that if the Commission adopted Mr. Scelle's proposal it would be violating the principle it had established of not including definitions in its draft Declaration. If it preferred to amend the article he would support Mr. Córdova's proposal.

91. Mr. SCELLE pointed out that if the Commission had until that time excluded definitions from its draft Declaration, it was because it had been unable to reach agreement on the definitions of certain concepts. In the case under discussion, however, he felt that there was an almost general agreement on article 4 which would become more substantial than the preceding articles by the incorporation of his amendment.

Mr. Scelle's proposal was adopted by 8 votes to 3.

Article 6: Legal equality

92. Mr. ALFARO explained that article 6 on " legal equality " was based on an article in a Declaration drafted by the American Institute of International Law (A/CN.4/2, p. 68). He had not used the term " sovereign equality " because of a statement from the General Assembly to the effect that that term should be understood to mean " legal equality ".

93. The CHAIRMAN pointed out that the Governments of Greece and India would prefer to end the article at the words " the community of States ", while the Mexican Government felt it would be preferable to omit any allusion to philosophical ideas and consequently any reference to natural law. He proposed that the Commission should take up consideration of the first part of the text reading: " Every State is, in law and before the law, equal to all the others which make up the community of States."

94. Mr. BRIERLY objected to the term: " in law and before the law " and thought it sufficient to state: " Every State is equal before the law " or " Every State is in law equal to all others."

95. The CHAIRMAN pointed out that in its present form the article declared neither a right nor a duty. If the Commission decided to retain only the first part of the article it should be recast as follows: " Every State has the right to equality in law with every other State." With Sir Benegal Rau he questioned the advisability of introducing the term " community of States ".

96. Mr. ALFARO objected that it was inaccurate to say: " Every State has a right to equality " since he considered that right to be inherent in the State. He would support Jefferson's philosophy that equality was acquired at birth. For that reason he would prefer to retain the article in its original wording.

97. The CHAIRMAN wondered in that connexion whether it could not then be argued that the right to exist was also inherent. If the second part of the article were omitted, the first part would require redrafting. He pointed out that the term " Powers " had been in use in the nineteenth century but he would prefer in the draft Declaration to use the term " State ". He suggested that article 6 should read: " Every State has the right to claim and assume a position of equality in law ". If the Commission desired, the phrase " and assume a position " could be deleted.

98. Mr. SPIROPOULOS could support the Chairman's first proposal but not the second.

99. The CHAIRMAN then put to the vote the following text: " Every State has the right to equality in law with every other State."

That text was tentatively adopted by 9 votes.

The meeting rose at 6.05 p.m.

13th MEETING

Monday, 2 May 1949, at 3 p.m.

CONTENTS

Chairman: Mr. Manley O. HUDSON.

Rapporteur: Mr. Gilberto AMADO.

Present:

Members: Mr. Ricardo J. ALFARO, Mr. James L. BRIERLY, Mr. Roberto CÓRDOVA, Mr. J. P. A. FRANÇOIS, Mr. Shuhsi HSU, Mr. Vladimir M. KORETSKY, Sir Benegal N. RAU, Mr. A. E. F. SANDSTRÖM, Mr. Georges SCELLE, Mr. Jean SPIROPOULOS, Mr. Jesús María YEPES.

Secretariat: Mr. KERNO, Assistant Secretary-General in charge of the Legal Department; Mr. LIANG, Director of the Division for the Development and Codification of International Law, Secretary to the Commission.

Draft Declaration on the Rights and Duties of States (A/CN.4/2, A/CN.4/2/Add.1) (*continued*)

ARTICLE 6: LEGAL EQUALITY (concluded)

1. The CHAIRMAN recalled that at the previous meeting there had been an inclination to reduce the text of article 6 to one sentence indicating that every State had the right to equality in law with every other member of the community of States.

2. Mr. ALFARO noted that a certain number of Governments had expressed the opinion that the text of article 6 should be limited to the first part of the article. The same opinion was to be found in the drafts prepared by various intergovernmental and non-governmental organizations.

3. It was the desire of the Commission, however, that each article of the draft declaration should state a right or a duty. If article 6 were to be deprived of its final part it would contain no more than a postulate of international law, for the inclusion of which in a declaration of the rights and duties of States there would be no justification. The true aim of article 6 was to show that every State exercised its rights and fulfilled its obligations on an equal footing with other States. In view of that fact and of the comments of various members of the Commission, he suggested that the Commission might adopt some such formula as the following, which seemed to him to eliminate most of the objections: " Every State has the right to legal equality in the sense that its rights, its duties and its capacity in law are equal to those of all the other members of the community of States. "

4. Mr. SPIROPOULOS pointed out that that text might be understood to mean that all States enjoyed identical rights, which was obviously not the case, since certain States had more rights than others. It would be well to specify that the equality of rights referred only to rights held under international law.

5. Mr. CORDOVA thought that the addition of the word " fundamental " before the words " rights and duties " would have the effect of excluding those rights and duties which were assumed voluntarily by the State, and would thus avoid any confusion.

6. Mr. BRIERLY thought that once it was admitted that two rights were not identical, it could no longer be claimed that they were equal. Even if one State exercised a right in a certain domain and another State exercised an identical right in a different domain, could those rights be compared, and could there be any question of equality where they were concerned? Moreover, the same right, as for example that of a member of the Security Council, would differ according to whether it were exercised by a permanent or non-permanent member. It was therefore extremely difficult to define the idea of " equal rights ".

7. Mr. SANDSTROM shared that opinion, and pointed out that although certain rights might, in the final analysis, be termed fundamental, it would be extremely difficult to define exactly what was meant by fundamental rights.

8. The CHAIRMAN stated that it would be necessary to specify in the preamble what were fundamental rights and duties and what were not. In order to avoid that new difficulty, he proposed that the very general wording which had been adopted provisionally at the previous meeting

might be used, the more so as Mr. Alfaro's formula did not appear to satisfy the Commission.

9. Mr. KORETSKY wondered why the Commission could not simply use the wording of Article 2, paragraph 1, of the United Nations Charter, which proclaimed the sovereign equality of all Members.

10. Mr. ALFARO recalled that at its ninth plenary meeting on 25 June 1945 the San Francisco Conference had defined what meant by the sovereign equality of Members, when it had adopted the report of Committee 1 of Commission I, from which the following quotation was taken:

> " The Sub-Committee voted to keep the terminology 'sovereign equality' on the assumption and understanding that it conveys the following:
>
> " (1) That States are juridically equal;
>
> " (2) That they enjoy the rights inherent in their full sovereignty;
>
> " (3) That the personality of the State is respected, as well as its territorial integrity and political independence;
>
> " (4) That the State should, under international order, comply faithfully with its international duties and obligations. "

11. In other words, the term " sovereign equality " denoted nothing more or less than the juridical equality of States, account being taken of that equality in all its aspects as given in the formula proposed by Mr. Alfaro.

12. Mr. KORETSKY remarked that sovereignty was mentioned in the above-mentioned interpretation of Article 2 of the Charter; in his opinion, it should also be mentioned in the article under discussion.

13. Mr. SPIROPOULOS thought that the concept of juridical equality was sufficiently clear to dispense with any further explanation; it would suffice to say that every State was the equal in law of every other member of the international community.

14. The CHAIRMAN observed that if the Commission adopted the formula chosen provisionally at the previous meeting, it would in no way depart from the Charter, according to the interpretation cited by Mr. Alfaro.

15. Mr. KORETSKY felt that it was not enough to say that States were equal in law as some States belonging to the community of nations did not enjoy complete sovereignty. In modern society it sometimes occurred that a given State extended its domination over others. Moreover, dependent and semi-sovereign States also existed. For such reasons, the affirmation of the juridical equality of States should be strengthened by a mention of their sovereign equality—a term which was entirely unambiguous. To refuse to use it would be to run counter to the democratic evolution of international law. It was for that reason that Mr. Koretsky had from the first opposed the draft declaration under discussion. In advocating the use of the expression " sovereign equality ", he was merely following the precedent set by certain Governments at the San Francisco Conference which had defended the concept of political and juridical sovereignty, alone capable of ensuring international equality, and which had succeeded in having that concept included in the Charter.

16. The CHAIRMAN pointed out that the sovereign equality of the Member States of the United Nations had already been proclaimed in the Charter. By accepting Mr. Koretsky's suggestion and including that term in the draft declaration the Commission would be proclaiming the equality of Member and non-member States and the equality of the latter among themselves.

17. Mr. BRIERLY was opposed to the insertion in article 6 of the term " sovereign equality ", which in his opinion was altogether unclear. The reader would not give that expression the same meaning as that established by its author in San Francisco.

18. The CHAIRMAN noted that the Commission, with the exception of Mr. Koretsky, preferred to confine itself to the following general text for article 6: " Every State has a right to equality in law with every other member of the community of States. " As to the second part of article 6, it had been simply dropped by the author of the draft.

Article 7: Exclusive jurisdiction

19. The CHAIRMAN, after reading article 7, proposed that the word " aliens " should be substituted for " foreigners " in the English text.

20. Mr. ALFARO agreed that there was a faulty translation from the Spanish and agreed to the substitution. On the assumption that the second paragraph of article 7 was likely to result in controversy, touching as it did on the very difficult question of the responsibility of States, Mr. Alfaro proposed that only the first paragraph of the article, which affirmed States' rights to exercise exclusive jurisdiction, should be retained. The rest of the article might be discussed later when the Commission dealt with the corresponding topic for codification.

21. The CHAIRMAN noted the Commission's agreement on that point. Regarding the first paragraph of the article, he drew attention to the United Kingdom's comments, (A/CN.4/2, p. 71), which objected to the exercise of exclusive jurisdiction on the grounds that international law recognized both territorial jurisdiction over all persons and things within the territory, and a personal jurisdiction over nationals wherever they might be. He agreed that, when aliens resided in the territory of a State, they could continue to be subject to their national legislation in certain

matters, such as personal status. But it was not certain that personal jurisdiction extended over nationals wherever they might be. At all events, it was the word " exclusive " in the draft text which seemed to trouble the United Kingdom particularly.

22. He wondered, moreover, whether there was any point in saying that a State was entitled to exercise exclusive jurisdiction " over its territory ", since the duty of non-intervention had already been recognized. The text of the first paragraph of the article would be clearer if it were worded to read: " Every State has the right to exercise jurisdiction over all persons in its territory whether nationals or aliens ".

23. Mr. SPIROPOULOS reminded the meeting that his Government had proposed a very concise formula (A/CN.4/2, p. 70) which read: " Every State is, in principle, entitled to exercise exclusive jurisdiction over its territory ". There was no point in speaking of nationals or aliens, as all persons residing in the territory came under that jurisdiction, which could, however, only be termed exclusive if the words " in principle " were added. There were, in point of fact, exceptions to exclusive jurisdiction, such as the capitulations in the Middle East.

24. The CHAIRMAN thought that whatever formula was adopted—jurisdiction over the territory or jurisdiction over the persons residing in that territory—a State would always be entitled to permit other States to exercise certain special kinds of jurisdiction over its territory.

25. Mr. CORDOVA observed that what had to be done was to express in article 7 a general principle of international law. Every fully sovereign State must be entitled to exercise exclusive jurisdiction over its territory. It was only as a result of its own desire, expressed in an agreement or otherwise, that it could limit such exclusive jurisdiction by transferring or leasing territory. The right was therefore absolute and it should not be said that jurisdiction was only exclusive in principle.

26. Mr. FRANÇOIS objected that the right to exercise exclusive jurisdiction was in no way a principle of international law. There were, on the contrary, cases known to international law, where another State could exercise concurrent jurisdiction both in criminal matters and under private law. It could not therefore be said that a State's right to exercise jurisdiction was exclusive, even in principle.

27. The CHAIRMAN said that, in a recent article in the *International Law Quarterly*, Mr. Liang had referred to a doctrine according to which the State's right to exercise jurisdiction was absolute and subject to no limitations other than those to which it agreed.[1]

[1] Liang, Yuen-li, *The legal status of the United Nations in the United States*, in the International Law Quarterly. London, 1948. Vol. 2, pp. 577-602.

28. Mr. SCELLE noted that a large part of the difficulty came from the use of the word *juridiction* which in French meant the right to administer justice, while the English word " jurisdiction " meant the right to legislate, to administer justice and to execute the law and its judgments. It could not be denied that a large number of foreign laws, for example those dealing with the personal status of aliens, were applicable to the territory of a State. That State's jurisdiction was, therefore, not exclusive. To say that it was exclusive only in principle did not solve the problem, because it would then be necessary to fix the line between the rule and the exception.

29. The truth was that in principle the State had jurisdiction over its nationals and aliens, but there were cases where international law, private or public, conventional or customary, admitted the continuation of the jurisdiction of the country of origin over its nationals abroad. He therefore agreed with Mr. François that it would be a capital error to use the expression " exclusive " jurisdiction.

30. Mr. AMADO stressed the fact that exclusive jurisdiction was not admitted in public international law either, as was to be seen from the section of international law devoted to extraterritoriality. The right of the State to exercise its jurisdiction over all the inhabitants of its territory was subject to limitations inherent in the application of international law. The word " exclusive " should thus be deleted from the text; as for the remainder, it did not seem that it would be difficult to find a satisfactory text to express the universally admitted idea of the State's right of jurisdiction over all the inhabitants of its territory.

31. The CHAIRMAN pointed out that the word " inhabitants " did not cover persons in transit.

32. Sir Benegal RAU proposed a text which in his view had the advantage of extending the jurisdiction of the State to things while allowing it to be presumed that the jurisdiction of the State which was full and exclusive could be limited by a voluntary act of the State itself, in the case of, say, extraterritoriality. Sir Benegal's text read: " Every State has the right of full jurisdiction over its territory and over all persons and things within that territory ".

33. Mr. YEPES noted that in reality the source of article 7 was to be found in the Montevideo Convention, in which the authority of the State was recognized over all persons residing in its territory. There was a historical background to that principle, which it had seemed necessary to proclaim in Latin America where the opinion was widespread among aliens that they were subject to the jurisdiction of their national authorities. The same reason did not hold for a declaration of a universal nature such as the draft under discussion. It was therefore preferable to delete the notion of exclusive jurisdiction of the State

from article 7. Mr. Yepes suggested that article 7 should be a pure and simple reproduction of article 12 of the Bogotá Charter (A/CN.4/2, p. 72).

34. Mr. ALFARO opposed Mr. Yepes' suggestion because article 12 of the Bogotá Charter did not proclaim a right or a duty, as each article of the declaration should.

35. Certain members of the Commission had raised objections to the term " exclusive jurisdiction ". Mr. Alfaro stressed the fact that in article 7, the word " jurisdiction " was used in the generally accepted sense; it meant the power to enact, administer and enforce the law. That power could not be other than exclusive: it could not be shared with another State.

36. In opposing the use of the word " exclusive ", cases had been cited where the applicable law was the law of a foreign country. Mr. Alfaro pointed out that, if the law a foreign country was applicable in a State, it was because that State had permitted it to be. If a given State did not consent to aliens being governed by their national laws, they would be subject to the laws of that State.

37. The fact that a State had delegated part of its powers to another State in no way signified that it did not have exclusive jurisdiction over its territory and over the persons and things therein. If the article as drafted seemed unsatisfactory, it might be possible to find another wording but it would be necessary to retain the concept of the exclusive jurisdiction of the State.

38. As to the wording proposed by Sir Benegal Rau, Mr. Alfaro pointed out that the term " jurisdiction over its territory " included " jurisdiction over the things in that territory ". It was therefore unnecessary to mention the latter.

39. Mr. CORDOVA proposed the following formula in which he had avoided using the word " jurisdiction " which had given rise to so many difficulties: " Every State has the exclusive right to proclaim, administer and enforce the law with regard to things as well as to nationals or foreigners within its territory ".

40. Mr. SCELLE pointed out that the word " jurisdiction " comprised the whole of the powers of the State. Since as a general rule international law admitted a certain exclusivity in that field, the word " jurisdiction " could be replaced by the phrase " territorial competence " and the following formula could be adopted: " Every State has the right to exercise its territorial competence over all its inhabitants, nationals or aliens, except where conventional or customary international law decrees otherwise. "

41. Mr. Scelle explained that he had mentioned conventional or customary international law because it was not only by virtue of an express authorization from the State certain laws of foreign countries were applicable in the territory of that State. There was, in practice, international custom in private law as well as in public law. Inasmuch as it was inconceivable that a State would refuse to admit that for matters of personal status aliens could be subject to their national laws, it was impossible to imagine that a State would refuse to apply the rule of *locus regit actum*. Thus there were in private international law compulsory rules for all States which lessened the exclusive nature of their competence.

42. Mr. Scelle did not object to speaking of " the exclusive right of the State to exercise its competence " provided that his reservation was accepted, but he refused to adopt a formula as absolute as that proposed by Mr. Alfaro.

43. The CHAIRMAN feared that the introduction of private international law into the discussion might lead to some confusion. In his opinion, the Commission should only consider the provisions of public international law when drafting a declaration on the rights and duties of States.

44. Mr. SPIROPOULOS supported the comments of the Chair. He pointed out that when, in a State, foreign laws were applicable in given cases or when certain acts such as the celebration or dissolution of marriages were performed by foreign diplomatic officials, that state of affairs was not imposed by international law; it resulted from agreements freely entered into by the said State which could very well cede part of its jurisdiction to another State.

45. Mr. Spiropoulos thought that agreement could be reached on the following wording: " Every State has a right to exercise exclusive jurisdiction over its territory. "

46. The CHAIRMAN wondered if the word " jurisdiction " could be kept in English and translated by the word *compétence* in French.

47. Mr. KERNO (Assistant Secretary-General) called the Commission's attention to the fact that in Article 2, paragraph 7, of the Charter, the word " jurisdiction " had been translated in French by the word *compétence*.

48. Mr. SCELLE thought that Mr. Spiropoulos's comments were accurate from the angle of executive jurisdiction but not in connexion with legal jurisdiction. He expressed reservations on the subject of the complete separation which the Commission seemed to wish to make between private and public international law. Governments served only to organize relations between individuals. International law imposed both private and public juridical discipline. There could be no question of making any distinction between the two and of stating that the declaration of the rights and duties of States concerned only the relations between States. International law, like all other juridical systems, was a law made for rulers and ruled alike: relations between rulers had no meaning if there were no ruled. It was

therefore indispensable to consider the provisions of private international law.

49. Mr. FRANÇOIS pointed out that to admit that State A had the right to exercise its jurisdiction over one of its nationals who had committed, in the territory of State B, an offence against the security of his country of origin was to admit that the jurisdiction of State B was not exclusive.

50. Mr. SPIROPOULOS replied that the fact that State A was also competent to judge the person guilty of a crime committed in the territory of State B did not affect the general rule according to which that State had the right of exclusive jurisdiction over its own territory.

51. Mr. SANDSTROM thought that the wording proposed by Sir Benegal Rau was the most satisfactory.

52. Mr. SCELLE was prepared to support that wording if the word " jurisdiction " was translated in French by *compétence territoriale*. He thought that the French text of article 7 might be worded as follows: " Every State has the exclusive right to exercise territorial jurisdiction over all its inhabitants, national or foreign ".[2]

53. The CHAIRMAN, supported by Mr. BRIERLY and Mr. CORDOVA, remarked that it was impossible to include in the definition of " inhabitants " persons who crossed a territory without residing therein.

54. After consulting the members of the Commission, the Chairman said that agreement had been reached on the text proposed by Sir Benegal Rau subject to deletion of the word " full " before " jurisdiction ". The text read: " Every State has the right to exercise jurisdiction within its territory over all persons and things therein. "

55. Mr. FRANÇOIS said that it was impossible completely to ignore the question of the exterritoriality of warships and embassies.

56. Sir Benegal RAU pointed out that the declaration which the Commission was drawing up proclaimed general principles. There were obviously exceptions to those principles; the Commission should decide whether it wished to include such exceptions in the declaration.

57. The CHAIRMAN remarked that the Commission should confine itself for the time being to the text on which it had just reached agreement, subject to a subsequent consideration of the question of the exterritoriality of warships and embassies.

Article 8: Diplomatic intervention

58. The CHAIRMAN recalled that, in accordance with Mr. Alfaro's proposal, the word " intervention " must be replaced, wherever it appeared in article 8, by the word " intercession ". He stated that the second part of article 8 could be dealt with at the time of the codification of the question of the status of aliens, and that the third part of article 8 duplicated article 15 of the draft declaration. In his opinion, the Commission should confine itself to considering only the first part of article 8.

59. Mr. ALFARO explained that he had suggested replacing the word " intervention " by the word " intercession " in order to avoid any confusion with the intervention mentioned in article 5 of the declaration. He stressed the fact that it was indispensable to declare that a State would have the right to intercede in favour of its nations only when the latter had exhausted the local remedies provided for in the laws of the State against which they exercised their rights. The declaration must affirm the validity of the Calvo doctrine.

60. Mr. Alfaro called attention to the comments of the Governments of Mexico, the United Kingdom and Venezuela (A/CN.4/2, pp. 74-76) and recognized that, on account of the complexity and the controversial nature of the questions raised by those comments, it was preferable to deal with them when the Commission took up the question of the codification of the status of aliens.

61. If the Commission decided to omit the third part of article 8, it could adopt the following text: " Every State has the right to intercede with another State in favour of its own nationals, acting through diplomatic channels and in a reasonable and friendly manner, and it is its duty to refrain from such intercession with regard to controversial rights until local remedies have been exhausted by the national claiming such rights ".

62. The CHAIRMAN thought that the second part of that article pertained to the same field as the second part of article 7 and that it should consequently be considered at the same time as the general question of the status of aliens.

63. Mr. ALFARO stated that he had retained the second part of article 8, as even the most violent opponents of the Calvo doctrine admitted the principle that local remedies should be exhausted before a State could intervene in favour of its nationals. In that connexion he drew the attention of the Commission to the observations made by the Government of the United States, (A/CN.4/2, p. 199).

64. The CHAIRMAN pointed out that the Permanent Court of International Justice had dealt with the question in a judgment which was authoritive in the present instance (The Panevezys-Soldutiikis Railway Case, P.C.I.J., 28 February 1939, series A/B, No. 76).

65. Mr. CORDOVA thought that the right of a State to intercede with another State on behalf

[2] " *Tout Etat a le droit exclusif d'exercer sa competence territoriale sur tous ses habitants, nationaux ou étrangers.* "

of one of its nationals could not be contested when the rights of that national were not recognized; but that right could not be stated without mentioning at the same time that it was subject to the condition that it could be exercised only after all local remedies had been exhausted.

66. The CHAIRMAN said that there were two possible cases: either a State interceded in favour of one of its nationals in a given specific case, or it submitted a general claim on behalf of all its nationals. In the first case, the State upheld the special claim of its national, and it was essential that all domestic remedies should be first exhausted. In the second case, there could be no question of referring to the courts of the State to which the intervention was addressed, and therefore intervention should not be limited to diplomatic negotiations, because the interceding State could ultimately appeal to the Permanent Court of International Justice or invoke arbitration treaties. It therefore seemed that the text proposed by Mr. Alfaro contemplated the intervention of a State in favour of its own nationals only in specific cases. Provision should, however, be made for the second possibility, and article 8 should therefore be drawn up in far more general terms. The consideration of the article in question could be postponed until the question of the status of aliens came up for consideration.

67. Mr. CORDOVA made it clear that, in his opinion, the question of diplomatic intervention should be considered after the questions concerning the status of aliens and the responsibility of States, for those matters were correlative. In practice, a State could exercise the right of intervention only when the other State had failed to respect the obligations incumbent on it from its responsibilities towards aliens.

68. Mr. ALFARO said that the idea expressed by Mr. Córdova was the same as that which he had tried to convey in article 8. The right of intervention could not be stated without some indication of the restrictions to which it was subject, in other words, without a statement that the remedies provided under the domestic laws of the State to which the intervention was addressed were first to be exhausted. In his opinion, if the article could not be drawn up in the manner in which he suggested, it would be better to omit it entirely.

69. Mr. SPIROPOULOS drew attention to the observations of the Greek Government, which had expressed doubts as to the value of including an article relating to diplomatic intervention.

70. The CHAIRMAN then asked the members of the Commission for their opinions.

It was ultimately decided by 9 votes to none that the consideration of the question of diplomatic intervention would not be continued at the current stage of the Commission's work.

Article 9: Respect of the rights of the State by other States

Article 10: Limitation of the rights of the State

11. The CHAIRMAN was of the opinion that the matters discussed in articles 9 and 10 were so closely related that they should be considered simultaneously. He personally did not see the value of article 10, since it only repeated, in different terms, the provisions of article 9. It was merely a truism to say that in the exercise of its rights a State must respect the rights of other States. Article 10 would be necessary only if a definite statement were required to the effect that a State should refrain from the abusive exercise of the rights to which it was entitled; that view of article 10 had been expressed in the observations of the Greek Government. The Chairman proposed that article 10 should be dropped.

There being no objection, the Chairman's proposal was adopted.[3]

72. The CHAIRMAN thought that article 9 should not be included in the list of articles establishing the rights and duties of States. As had been suggested by Sir Benegal Rau, it would be advisable to set aside the ideas contained in that article for the preamble of the draft declaration or for an introductory article. As to the text of article 9, the Chairman said that in their observations a number of Governments had objected to the use of the word " protected ".

73. Mr. ALFARO agreed that the objections against the use of the word " protected " were entirely justified. He suggested, therefore, that the word should be deleted.

It was so decided.

74. Mr. SPIROPOULOS called attention to a proposal made previously by Sir Benegal Rau for a definition of the relationship between rights and duties.

75. The CHAIRMAN drew attention to the fourth postulate enounced in the " International Law of the Future " which stated the international community was directly affected by the failure of any State to fulfil an obligation imposed upon it by international law.[4] If the Commission accepted that postulate, the idea expressed in the second part of article 9 might be interpreted as follows: " The rights and duties of States being correlative, each right entails a corresponding duty of other States, and each duty entails a corresponding right of other States." In his

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[3] See A/CN.4/SR.16, para. III.

[4] " Any failure by a State to carry out its obligations under international law is a matter of concern to the Community of States. " *The International Law of the Future.* Carnegie Endowment for International Peace, Washington, 1944, p. 6.

view, such a paragraph was indispensable, as the draft declaration laid down the rights and duties without defining the corresponding duties and rights.

76. Mr. AMADO felt that a duty created a corresponding right and vice versa, and that that went without saying.

77. Mr. ALFARO accepted the suggestion made by Sir Benegal Rau, and supported by the Chairman, that article 9 should be omitted and that the ideas expressed in it should be used in the preamble or the introduction to the draft declaration.

78. Whatever the wording and position of that paragraph, it was important to retain its substance. In proposing article 9, he had simply reproduced, with a few drafting changes, article V of the " Declaration of the Rights and Duties of Nations " drawn up in 1916 by the American Institute of International Law. It was not the correlation between the rights and duties stated in the declaration which required to be defined, but the correlation between all the rights and all the duties of nations. It was possible to modify the terms, but the idea itself could not be improved upon.

79. The CHAIRMAN proposed that consideration of article 9 should be postponed until members of the Commission had a clearer idea of the general lines of the draft declaration.[5]

It was so decided.

Article 11: Observance of treaties and sanctity of the pledged word

Article 12: Discharge of international obligations

80. The CHAIRMAN pointed out that the obligations remained the same, whether they arose out of treaties or out of international law. He said that the first part of article 11 and the first part of article 12 were identical. Articles 11 and 12 might therefore be considered together.

81. In his opinion, a special article should be devoted to the principle of *pacta sunt servanda.* As however the articles dealt with an obligation flowing from international law, he thought that the first part of article 11 and the first part of article 12 might well be combined. The second part of article 12 concerned another question, which was also connected with the subject-matter of articles 11 and 12, and should therefore be dealt with in a separate article. If the two articles were maintained, the Chairman suggested that article 11 should be drafted in the same terms as article 20 of the Draft Convention on the Law of Treaties drawn up in 1935 by the Harvard Research in International Law. (A/CN.4/2, p. 85).

82. Mr. ALFARO stated that article 12 reproduced the first principle laid down in the " International Law of the Future " (A/CN.4/2, p. 161). He had proposed two separate articles in order to cover the provisions of the third paragraph of the preamble to the Charter, which mentioned " treaties and other sources of international law ".

83. The principle *pacta sunt servanda* was so important that a separate article should be devoted to it, similar to that proposed in the draft declaration or to that adopted by the Harvard Research in International Law. All the other obligations arising out of international law could be included in another article, for which the text of the first principle of the " International Law of the Future " warranted retention.

84. Sir Benegal RAU proposed that the Commission should adopt only a single article, which should repeat the provisions of the third paragraph of the preamble to the Charter; that is to say:

> " . . .the obligations arising from treaties and other sources of international law. . . "

85. The CHAIRMAN thought it was difficult to regard a treaty as a source of international law; the text of the preamble to the Charter seemed to him to be too elliptical.

86. Mr. CORDOVA wondered whether it was possible to bring in the principle *pacta sunt servanda* without at the same time considering the question of the *rebus sic stantibus* clause. He pointed out that the preamble to the Charter took that condition into account and he considered, therefore, that treaties did constitute a source of international law: when the conditions were changed, it should be possible to revise the treaties.

87. The CHAIRMAN said that the rule *rebus sic stantibus* was an anarchical idea and had been repudiated by the French Constitution in 1946.

88. Mr. BRIERLY suggested that articles 11 and 12 should be retained in the form in which they had been proposed by Mr. Alfaro. It was true that a treaty constituted an obligation arising from international law; but the principle *pacta sunt servanda* was so important in international law that it should be stated separately. Article 11 did so clearly and concisely. The question of the clause *rebus sic stantibus* had not to be discussed in the draft declaration; it belonged to the sphere of codification of treaty law.

89. Mr. SANDSTROM thought that the two articles could be combined as follows: " . . .obligations arising from treaties, and its duty to discharge, in the same way, other obligations under international law ".

90. Mr. YEPES thought that emphasis should be laid on the principle *pacta sunt servanda.* It was a good thing, moreover, to call attention to

[5] See A/CN.4/SR.16, para. III.

the obligation of States to keep their word in good faith, to quote the expression used by the Harvard Research in International Law.

91. The CHAIRMAN concluded that the general wish was to keep two separate articles. He suggested that the Commission should proceed to examine the text of article 11. He himself thought it would be preferable to omit the word " public ", as well as the second part of the article.

92. Mr. ALFARO explained that he had inserted the word " public " to show that the article referred to treaties concluded with a certain solemnity; there was no intention to allude to the provisions of Article 102 of the Charter, but in order to avoid the possibility of a false interpretation, he agreed to omit the word " public ". He felt that the second part of the article should be included as there were agreements other than the treaties, such as declarations or the exchange of notes through diplomatic channels.

93. Mr. CORDOVA supported the view expressed by Mr. Alfaro. He observed that the Charter emphasized the difference between treaties and other agreements by requiring the registration of the former.

94. The CHAIRMAN suggested that the difficulty might be met by using the following phrase: " by treaty or any other international agreement ". By omitting the word " public " that phrase covered all other engagements undertaken by the State, such as that undertaken in 1919 by Mr. Ihlen, Minister for Foreign Affairs of Norway, in connexion with the legal status of Eastern Greenland.[6]

The Chairman's proposal was adopted.

95. Mr. YEPES proposed that the phrase " in good faith " should be replaced by " in full good faith ".

Mr. Yepes' proposal was rejected by 6 votes to 3.

96. Mr. SANDSTROM proposed that the words *pacta sunt servanda* should be added in parentheses at the end of the article.

97. The CHAIRMAN said that such an addition would be valued by jurists, but would be useless to the general public.

Mr. Sandström's proposal was rejected by 7 votes to 5.

98. The CHAIRMAN proposed the adoption of the following text: " Every State has the duty to carry out in good faith the obligations which it has assumed by treaty or any other international agreement."

The Chairman's text was adopted.

The meeting rose at 6 p.m.

[6] See *Legal Status of Eastern Greenland*, Permanent Court of International Justice, XXVI session, 1933.

14th MEETING

Tuesday, 3 May 1949, at 3 p.m.

CONTENTS

Chairman: Mr. Manley O. HUDSON.

Rapporteur: Mr. Gilberto AMADO.

Present:

Members: Mr. Ricardo J. ALFARO, Mr. James L. BRIERLY, Mr. Roberto CÓRDOVA, Mr. J. P. A. FRANÇOIS, Mr. Shuhsi HSU, Mr. Vladimir M. KORETSKY, Sir Benegal N. RAU, Mr. A. E. F. SANDSTRÖM, Mr. Georges SCELLE, Mr. Jean SPIROPOULOS, Mr. Jesús María YEPES.

Secretariat: Mr. KERNO, Assistant Secretary-General in charge of the Legal Department; Mr. LIANG, Director of the Division for Development and Codification of International Law, Secretary to the Commission.

Draft Declaration on the Rights and Duties of States (A/CN.4/2, A/CN.4/2/Add.1) (*continued*)

ARTICLE 12: DISCHARGE OF INTERNATIONAL OBLIGATIONS (concluded)

1. The CHAIRMAN opened the discussion on article 12 of the draft declaration, which, as had been pointed out at the end of the previous meeting, was closely linked with article 11.

2. Mr. ALFARO said that articles 12, 13 and 14, although closely connected, were nevertheless different in scope. Article 12 proclaimed the supremacy of international law over the domestic law of States; article 13 restricted the sovereignty of States; article 14 provided that international law should if necessary make up for the deficiencies of the domestic law of States. He proposed that before beginning the discussion of those articles the Commission should decide whether their provisions should be combined to form one article.

3. The CHAIRMAN considered that article 14 raised a question of purely academic interest and that it should not be included in the draft declaration. Article 13, in his opinion, stated a principle analogous to the one in the first part of

article 12, which he proposed should be worded as follows:

" Every State has the duty to carry out, in good faith, its obligations under international law. . ."

The first part of article 12 was adopted.

4. The CHAIRMAN proposed that the word " plead " should be replaced by the word " invoke " in the second part of article 12. Moreover, he wondered whether there were not grounds for also applying to article 11 the provision of article 12 which stipulated that a State could not invoke its own constitution or its national laws as an excuse for not discharging its obligations.

5. Mr. ALFARO pointed out that the text of article 12 was taken from principle 1 of " International Law of the Future " (A/CN.4/2, p. 161). That text had, however, been translated into Spanish and then retranslated into English.

6. Mr. SPIROPOULOS accepted the first part of article 12 but not the second.

7. The CHAIRMAN recalled that the provision in the second part of article 12 had been taken from an advisory opinion of the Permanent Court of International Justice,[1] the authority of which could not be challenged. He advocated the inclusion of that provision in article 11 concerning the observation of treaties. He recalled, however, that there was a theory according to which obligations arising from treaties concluded contrary to the constitution of a State did not bind the Contracting State. Anzilotti opposed that theory and regarded treaties as binding upon their signatories in every case. That had been expressly stated in the Eastern Greenland affair.

8. At all events, the Chairman considered that if the first theory were admitted it would be necessary to add after the word " obligations " in article 12 the words " apart from treaties " to avoid repeating what had already been included in article 11.

9. Mr. CORDOVA thought that since treaties were theoretically always concluded in accordance with the constitutional laws of the Contracting State, they were necessarily binding upon those States.

10. Mr. SPIROPOULOS went further and considered that every treaty, even if not in accordance with domestic constitutional law, was binding on the parties according to international law.

11. Mr. ALFARO proposed that articles 11 and 12 should be combined as follows:

" Every State has the duty to carry out in good faith its obligations under international law as well as the obligations it has assumed by treaty or other agreement, and it may not invoke limitations arising out of its own Constitution or its laws as an excuse for failure to discharge this duty. "

12. Mr. SPIROPOULOS objected to the phrase " as well as the obligations it has assumed by treaty or other agreement ".

13. The CHAIRMAN put to the vote the question whether article 12 should begin by laying down that obligations arising either from international law or from treaties should be respected.

It was decided by 6 votes to 4 to state first of all the principle that obligations under international law should be respected.

14. Mr. SPIROPOULOS emphasized that nothing was to be gained by drawing a distinction between obligations under international law and those arising from treaties. The second part of the new article proposed by Mr. Alfaro therefore appeared to him to be redundant.

15. The CHAIRMAN recalled that the Commission had decided the previous day to reaffirm the principle *pacta sunt servanda*. He put before the Commission Mr. Liang's suggestion that the words used in the preamble to the Charter should be used, namely, " the obligations arising from treaties and other sources of international law ". Even though the words of the Charter were not altogether satisfactory, it was better to use them rather than others.

16. He then read Mr. Alfaro's text for combining article 11 and article 12 as amended: " Every State has the duty to carry out in good faith its obligations arising from treaties and other sources of international law and it may not invoke limitations contained in its own Constitution or its laws as an excuse for failure to perform this duty. "

The above text was adopted by 10 votes to 1.

Article 13: Authority of international law

17. The CHAIRMAN observed that, as article 13 was based on postulate 4 of the " International Law of the Future ",[2] it would be appropriate to begin with the principle enunciated in that postulate. He therefore proposed that article 13 should be drafted as follows:

" Every State has the duty to conduct its relations with other States in accordance with international law and the sovereignty of each State is subject to the limitations of international law ".

18. Mr. SPIROPOULOS and Mr. BRIERLY considered that that article repeated, in different words, the provisions of article 12.

19. Mr. SCELLE disagreed.

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[1] *Treatment of Polish nationals and other persons of Polish origin or speech in the Danzig territory.* Advisory Opinion No. 23, February 4, 1932.

[2] Carnegie Endowment for International Peace, Washington, 1944, p. 6.

20. Mr. ALFARO explained that article 13 was not entirely identical with article 12. The latter provided that a State should discharge its obligations arising from international law and treaties, whereas article 13 stated that it was the duty of every State to subject itself to the limitations of international law. That was the principle of the pre-eminence of international over national law, a broader principle, which should be stated formally in a declaration on the rights and duties of States, if only for its psychological effect on world opinion.

21. Mr. SCELLE endorsed Mr. Alfaro's opinion. It was always useful to say that sovereignty was subject to the limitations of international law.

22. The CHAIRMAN saw no objection to retaining article 13 which read as follows: " Every State has the duty to conduct its relations with other States in accordance with international law, and the sovereignty of the State is subject to the limitations of international law ".

Article 13 was adopted by 9 votes to 3.

ARTICLE 14: NATIONAL AND INTERNATIONAL SCOPE OF THE LAW OF NATIONS

23. The CHAIRMAN proposed that article 14 should be omitted.

24. Mr. ALFARO pointed out that it was based on article 6 of the Declaration of the Rights and Duties of Nations drawn up by J. B. Scott of the American Institute of International Law. (A/CN.4/2, p. 91). It stipulated that a State was required to apply international law whenever necessary provisions were not to be found in its domestic legislation, as for instance in connexion with diplomatic immunities.

25. The CHAIRMAN considered that it would be wrong to declare that States should officially apply the principles of international law whenever certain regulations were not set forth in their domestic legislation. That had been expressly stated by Lord Mansfield but, in his opinion, and it was also the opinion of Anzilotti, the State should somehow incorporate the principles of international law in its own legislation before applying them. The Chairman quoted the French Constitution of 1946, which contained a provision confirming the pre-eminence of treaties concluded by France, regardless of any provisions to the contrary in that country's domestic legislation.

26. Mr. SCELLE pointed out, in that connexion, that the French Constitution had only established the pre-eminence of a treaty without providing for the means by which the contents of that treaty or the principles declared therein would be incorporated in the national legislation.

27. Mr. SPIROPOULOS quoted the comment of the Greek Government (A/CN./4/2, p. 90) which considered that article 14 did not correspond with the practice of several States.

28. The CHAIRMAN drew attention to the comment which the Government of India had made on the same article (A/CN.4/2, p. 91) and put to the vote the question whether article 14 should be omitted.

It was agreed by 10 votes to 2 to omit article 14.

ARTICLE 15: PEACEFUL SETTLEMENT OF DISPUTES

29. The CHAIRMAN proposed that the word " international " be replaced by the words " with other States ", although he appreciated the need to retain, as far as possible, the wording of Article 2, paragraph 3, of the Charter.

30. In view of the opposition of Mr. BRIERLY, the CHAIRMAN agreed to keep as closely as possible to the text of the Charter. He put the following text to the vote:

> " Every State has the duty to settle its international disputes by peaceful means in such a manner that international peace and security and justice are not endangered. "

Article 15 was adopted by 11 votes.

ARTICLE 16: CONDEMNATION OF WAR AS AN INSTRUMENT OF NATIONAL AND INTERNATIONAL POLICY AND OF THE THREAT OR USE OF FORCE

31. The CHAIRMAN pointed out that article 16 repeated the principles set forth in Article 2, paragraph 4, of the Charter, with the addition of another principle, that of the duty not to resort to force for the recovery of debts, which was generally called the Drago Doctrine and which was given on page 205 of the memorandum.

32. Mr. ALFARO thought that it was very important to restate the Drago Doctrine in view of the fact that a certain number of countries, amongst them those of Latin-America and Venezuela in particular, had in that connexion, been subjected in the past to all sorts of pressure, including the use of force. Although the Charter henceforth made recourse to such procedures impossible, that principle should be recalled for psychological reasons.

33. The CHAIRMAN thought that there might be some disadvantages in introducing that principle into the Declaration.

34. Taking up another line of thought, he supported, Mr. Alfaro's expression: " inconsistent with international order ", which he considered more exact than the expression: " inconsistent with the Purposes of the United Nations " which appeared in Article 2, paragraph 4, of the Charter, in view of the fact that the Declaration concerned all States, whether they were or were not Members of the United Nations.

35. Mr. FRANÇOIS pointed out that the provisions of Article 16 were contrary to those of Convention II signed at The Hague, which admitted the use of force for the recovery of

debts, in cases where the debtor State refused arbitration.

36. Mr. ALFARO supported by the CHAIRMAN, replied that under the Charter no State had the right to resort to force by taking advantage of the provisions of that Convention.

37. Mr. SANDSTROM was opposed to any mention of the Drago Doctrine in the article under consideration.

It was decided by 8 votes to 4 to omit the phrase " or for the recovery of public debts from another State ".

38. The CHAIRMAN proposed that the words " as an instrument of national or international policy " be omitted, and that the text should read as follows:

" Every State has the duty to refrain from waging a war of aggression and from resorting to any threat or use of force either against the territorial integrity or the political independence of another State, or in any other manner inconsistent with the maintenance of international order ".

39. Mr. SPIROPOULOS recalled that provision had already been made for the peaceful settlement of disputes and recommended a simpler text such as the following:

" Every State shall refrain from the use of force in its relations with other States ".

40. Mr. ALFARO, after having recalled the beneficial effect of the Briand-Kellogg Pact on the conscience of mankind, stated that world opinion would favour the restatement of the principles set forth in the Pact.

41. The CHAIRMAN appreciated Mr. Alfaro's point of view but pointed out that the Charter authorized, in certain cases, the use of force after a decision by the Security Council.

42. Mr. CORDOVA also supported the omission of the words: " as an instrument of national or international policy ", for it was necessary to eliminate any use of force, in any circumstances whatsoever.

43. Mr. BRIERLY agreed and proposed that the wording of the Charter should be followed as closely as possible.

44. The CHAIRMAN requested the Commission to decide upon the omission of the words " of aggression " from the text of article 16.

It was decided by 11 votes to omit the words " of aggression ".

45. The CHAIRMAN asked if it were the Commission's intention to retain, after the word " war ", the phrase " as an instrument of national or international policy " taken from the Briand-Kellogg Pact.

It was decided by 7 votes to 5 to retain the words " as an instrument of national policy ".

It was decided to omit the words " or international ".

46. The CHAIRMAN thought that the remainder of the article could be retained in its original form.

47. Mr. YEPES did not approve of the words " or in any other form which is inconsistent with international order ". " International order " was, in his opinion, too vague an expression. He suggested substituting for it the words " international law ", which was a more definite concept.

48. The CHAIRMAN doubted whether the expression " inconsistent with international law " had a very precise meaning.

49. Mr. KORETSKY pointed out that the final words of Article 2, paragraph 4, of the Charter which read " or in any other manner inconsistent with the Purposes of the United Nations " referred to Article 1 of the Charter which set forth those purposes. Reference to that Article showed that the aims of the United Nations included not only international order, in other words the maintenance of peace and security, but also the development of friendly relations among nations based on respect for the equal rights and self-determination of peoples and the achievement of international co-operation. Using that Article as a basis a formula should be found sufficiently broad to contain, in a condensed form, the fundamental aims of the United Nations.

50. That was important as historical experience had shown that a State could oblige another State to submit to its will by means which, to all appearances, were not inconsistent with international order but which nevertheless violated the principle of equal rights and self-determination of peoples. Only a very wide formula of that nature would be acceptable in the absence of any direct reference to the United Nations. In that respect, Mr. Koretsky was surprised that the Commission had abstained, when preparing its draft, from making any reference to the United Nations even by the discreet use of the expression " community of States ".

51. The CHAIRMAN pointed out that that expression had been avoided because it had not seemed to suit Mr. Koretsky.

52. Mr. KORETSKY explained that his view on the subject had been misinterpreted. He had previously criticized the expression " community of States ", because the Commission had appeared reluctant from the beginning to make any direct reference to the United Nations in its draft declaration. That was an attitude which was contrary to historical facts, and he would always be opposed to it. The Commission was the International Law Commission of the United Nations. In his opinion, the expression " community of States " would only be a compromise and he would of course prefer a frank and direct reference to the United Nations itself.

53. Mr. SANDSTROM, without being opposed in principle, felt that such a formula as the one suggested by Mr. Koretsky, the purpose of which was the maintenance of peace and security and international justice, would add nothing to the meaning of the term " international order ".

54. Mr. ALFARO stressed that the establishment of the United Nations had created a new international order to achieve the purposes set forth in Article 1 of the Charter, and it was precisely that new order which had been mentioned in the original text of article 16. He did not think it would be necessary to modify that expression which embraced simply and concisely all the principles referred to by Mr. Koretsky.

55. Mr. SCELLE felt that the word " order " in the term " international order " had the meaning of the German word *Ordnung*. International order was therefore a concept very close to international law itself. Nevertheless, in order to satisfy the wishes of the majority of the Commission, those two expressions could be combined to read as follows: " inconsistent with international law and order ".

56. Mr. YEPES supported that proposal.

57. The CHAIRMAN put the proposal to the vote.

The Committee adopted by 8 votes the following text to form the last phrase of article 16: " or in any other manner inconsistent with international law and order ".

58. The CHAIRMAN suggested the following text for the whole of article 16:

" Every State has the duty to refrain from waging a war as an instrument of national policy, and from resorting to the threat or use of force against the territorial integrity or political independence of another State, or in any other form which is inconsistent with international law and order."

It was thus decided by 10 votes to 2.

59. Mr. AMADO said that he had voted against the proposed drafting of article 16 because war was mentioned in it. As war had been outlawed, that text marked a stage which had been passed in the evolution of international public law.

60. Mr. SPIROPOULOS gave the same reasons for voting against the text of article 16.

Article 17: Right of legitimate defence

61. The CHAIRMAN opened the discussion on article 17 which raised, first of all, two drafting questions. He was surprised that the term " inherent " had been used to qualify the word " right ", as it did not appear to serve any useful purpose.

The Commission decided by 9 votes to 2 to delete the word " inherent ".

62. The CHAIRMAN suggested that in the English text the expression " legitimate defence " should be replaced by " self-defence " which was used in Article 51 of the Charter.

63. Mr. CORDOVA saw no objection to that substitution on condition that the term *légitime défense* was retained in the French text and *legitima defensa* in the Spanish text. It should be clearly understood that " self-defence " referred to the right of legitimate defence in the technical sense of the term and not to the right of self-defence of the State.

64. Mr. SPIROPOULOS pointed out that " self-defence " was the exact and technical translation of *légitime défense.*

65. The CHAIRMAN asked the Commission if it agreed to substitute the word " self-defence " for the words " legitimate defence " in the English text.

It was so decided by 10 votes.

66. The CHAIRMAN put before the Commission the substantive problems raised by article 17: first, that of collective self-defence, which was raised in connexion with the words " individual or collective " which preceded the word " self-defence ".

The Commission decided by 8 votes to 4 to delete the words " individual or collective ".

67. Mr. SCELLE called attention to the fact that the right of collective self-defence was mentioned in Article 51 of the Charter. That was a well-known advance in international law which could not be renounced. Every State had the right, and even the duty, to intervene in order to protect the victim from the aggressor, under the supervision of the Security Council. French legislation had even introduced into the national law, the duty of collective self-defence thus enjoining each individual to assist the victim of an attack.

On the proposal of Mr. Brierly the Commission decided by 10 votes to reconsider the question of omitting the words " individual or collective ".

68. Mr. SANDSTROM remarked that Article 51 of the Charter, in recognizing the right of collective self-defence, seemed at the same time to limit it to cases in which an armed attack occurred.

69. The CHAIRMAN shared that opinion.

70. Mr. CORDOVA said that, since the Charter made solidarity and co-operation against aggression incumbent on Member States, that concept must be extended to all members of the community of States, even to those which were not Members of the United Nations. That was the purpose of the collective self-defence mentioned in the draft of article 17 of the Declaration of the Rights and Duties of States. As war of aggression was condemned in article 16 and self-defence was still permissible against an attack, it was logical that article 17 should recognize the right of collective self-defence.

71. Mr. SCELLE thought it possible to consider that such a right had already been implicitly recognized in the Briand-Kellogg Pact. Other States had been entitled to come to the aid of a State attacked. Moreover, in the recent North Atlantic Treaty, such a right applied even to States which were not Members of the United Nations.

72. Mr. BRIERLY believed that, since there was in general international law a right of collective self-defence, it was advisable to proclaim it in the Declaration. As for determining whether the Charter restricted that right in regard to Members of the United Nations, that depended upon the meaning of the expression " armed attack ".

73. Mr. FRANÇOIS pointed out that the Charter made the exercise of that right subject to the supervision of the Security Council and that such a guarantee did not exist in general international law.

74. Mr. SCELLE admitted that such a guarantee was a step forward, but he thought that nothing prevented the right of collective self-defence from being proclaimed an absolute right, pending such a guarantee becoming effective in regard to all States, that is, when they all became Members of the United Nations.

75. Mr. YEPES recalled that Article 51 had always been considered one of the most important Articles of the Charter. Not to include the right of collective self-defence in the Declaration of the Rights and Duties of States, would be most retrograde as far as the provisions of the Charter were concerned.

76. Sir Benegal RAU was also in favour of the retention of the words " individual or collective self-defence ", for he thought that it was advisable to stipulate clearly that every State had the right to defend another State when the latter was attacked. The omission of those words might give the impression that the article established the right of self-defence only for the State attacked.

77. Mr. SPIROPOULOS pointed out that the purpose of the Commission was to codify general international law and not the provisions of the Charter, which were a particular aspect of international law. In accordance with general international law, as it existed before the United Nations and the Briand-Kellogg Pact, any State attacked had always had a natural right of self-defence, and other States had always had the right, under the law of intervention, to come to its defence. Considering the matter from the point of view of general international law, it was sufficient to recognize the right of self-defence without specifying whether it was collective or individual.

78. Mr. SCELLE remarked that international law, as it existed prior to the Charter and the Briand-Kellogg Pact, had been superseded. It was the Commission's duty to codify the new international law resulting from the Briand-Kellogg Pact, the United Nations Charter and the North Atlantic Treaty.

79. Mr. CORDOVA added that, by omitting mention of the right of collective defence, the Commission might give readers of the Declaration the impression that such a right was not a part of existing international law.

80. Mr. AMADO supported the inclusion of collective defence in the Declaration for it was unquestionably a principle of positive law for which the Commission was supposed to make rules.

81. The CHAIRMAN said that comparison of Article 51 of the Charter with the first paragraph of Article 24 clearly showed that, before aggression, the responsibility for the maintenance of peace fell upon the Security Council. It seemed therefore that the right of individual or collective self-defence could be exercised, under Article 51, only when an attack had occurred.

82. Mr. CORDOVA thought that Article 24 became operative only when the right of self-defence ended, as Article 51 stipulated. It was therefore a question of two Articles dealing with different subjects.

83. Mr. ALFARO thought, on the contrary, that there was a close relation between the two Articles which dealt with two successive phases following an armed attack, before and after the intervention of the Security Council.

84. The CHAIRMAN asked the Commission to decide upon the retention of the words " individual or collective " before the word " self-defence ".

The Commission decided by 11 votes to retain those words in the text of Article 17.

The Commission decided by 10 votes to use the word " self-defence " in the English text, the translation of the word " self-defence " in the Chinese and Russian texts and the words défense légitime *and* légitima defensa *in the French and Spanish texts respectively.*

85. The CHAIRMAN proposed that the phrase " if an armed attack occurs " should be inserted after the words " right of individual or collective self-defence ", in order to bring the wording of Article 17 into line with that of Article 51 of the Charter, which restricted such a right of self-defence to cases of armed attack.

86. Mr. SANDSTROM recalled that the Danish Government, in its comment (A/CN.4/2, pp. 107-108) of the English text of the Secretariat's memorandum, had proposed that the right of self-defence should be explicitly restricted, and that it should be clearly distinguished from the traditional defensive war. The exercise of the right must presuppose that an attack was imminent or had already commenced, and it must not be

used to any further extent than necessary to repel such an attack.

87. According to Mr. CORDOVA, the idea of " self-defence " clearly included all those restrictive elements.

88. Mr. SPIROPOULOS also thought that " self-defence " was a technical term which did not need any commentary.

89. Mr. BRIERLY considered that the addition proposed by the Chairman too narrowly restricted the right of self-defence. In his opinion, there could be acts of self-defence even before an attack occurred. A right existing in international law could not be restricted, at least as far as States which were not Members of the United Nations were concerned.

90. The CHAIRMAN pointed out that under Article 2, paragraph 6, of the Charter the Organization should ensure that states which were not Members of the United Nations acted in accordance with the Principles of the Charter so far as might be necessary for the maintenance of international peace and security. Mr. Brierly's argument therefore lost some of its potency, the more so as it was to be hoped that in the near future the United Nations and the community of States would be completely identical.

91. Mr. CORDOVA appreciated the cogency of Mr. Brierly's remarks: the right of self-defence existed not only in the case of armed attack but as soon as there was a threat of imminent armed attack. Under Article 51 of the Charter, however, the right of self-defence could be exercised only when an armed attack had occurred. According to the Charter, therefore, the imminence of armed attack could not be invoked to justify the exercise of the right of self-defence. To follow Mr. Brierly's arguments in the circumstances would involve the risk of drafting an article which would be inconsistent with an important provision of the Charter.

92. Mr. HSU wondered whether the originators of Article 51 of the Charter had really intended to restrict the exercise of the right of self-defence. He pointed out that the wording of the Article might have been conditioned by its place within Chapter VII and not by the intention to state that self-defence was admitted only when an armed attack had actually occurred.

93. Mr. SANDSTROM pointed out that the right of self-defence, as defined in Article 51 of the Charter, was based upon the existence of the United Nations and applied to Member States only. The Charter was binding only for Member States, whereas the Commission was endeavouring to prepare a draft declaration of the rights and duties of States the provisions of which would be observed by all States of the international community without any distinction whatever.

94. Mr. BRIERLY said he did not wish the convention to state explicitly that the right of self-defence could be exercised as soon as there was a threat of imminent armed attack; on the other hand he was against any explicit reservation to the effect that armed attack had to have occurred.

95. Mr. SCELLE did not think it advisable to give too formal a definition of the conditions in which the rights of self-defence could be exercised. He reminded the Commission that in domestic legislations self-defence was defined by jurisprudence and not by the law. Indeed it was impossible to provide an abstract definition of the instances of self-defence and it was for the courts to decide in each particular case. As national legislations gave a very wide definition to self-defence, it might seem presumptuous to try to define it with accuracy in international law.

96. He suggested that the Commission should limit itself to stating the principle of the right of self-defence without seeking to define the conditions under which it could be exercised.

97. Mr. AMADO entirely shared Mr. Scelle's views. He did not think it would be possible to define in international law a question which was not defined in positive domestic law but was left to the judgment of the courts. The principle of the right of self-defence should not be weakened, but neither should an unnecessarily exact definition be sought.

98. Mr. CORDOVA also considered that the right of self-defence should be stated in general terms. He pointed out that Article 51 of the Charter would place Member States in a difficult position in relation to States not Members of the United Nations if the Commission adopted a wording for article 17 which might be interpreted as allowing the right of self-defence to be exercised before armed attack had taken place.

99. Mr. AMADO remarked that, if a Member State were threatened with armed attack, it would at once appeal to the Security Council; it would thus take a first step towards exercising the right of self-defence.

100. Mr. SPIROPOULOS thought that steps taken before armed attack had occurred represented reprisals; self-defence, which could only occur after armed attack, was merely one aspect of reprisals.

101. The provisions of the text to be drawn up should place all States on an equal footing, whether they were Members of the United Nations or not. The terms of the Charter need not necessarily be rigidly adhered to if to do so would endanger the universality of the declaration on the rights and duties of States. He therefore proposed the adoption of the folllowing text: " Every State has the right of self-defence, individual or collective ".

102. Mr. KORETSKY supported the Chairman's proposal, since the provisions which he had proposed should be included were taken from Article

51 of the Charter. Moreover, the suggested addition would enable the cases in which the right of self-defence could be exercised to be defined.

103. There were already fifty-eight Member States in the United Nations; the declaration on the rights and duties of States, which would doubtless be ratified by all States, should not enable States not Members of the United Nations to threaten international peace and security. If it were proclaimed that the right of self-defence could be exercised as soon as there was a threat of imminent armed attack, warmongers would seize the opportunity to claim that they were threatened and thus create a breach of international peace.

104. The text of article 17 should conform as closely as possible to the text of Article 51 of the Charter. If the wording adopted by the Commission were to be wider than that of the Charter, public opinion would conclude that the Commission had sought to remove some of the obstacles to warmongers contained in the Charter. That important aspect of the question should not be lost sight of when the Commission adopted the text of article 17.

105. Mr. BRIERLY pointed out that the addition proposed by the Chairman, and particularly the words "if an attack occurs against *it*" could hardly be adopted if the word " collective " were retained.

106. Sir Benegal RAU suggested completing the expression proposed by the Chairman with the words: " if an armed attack occurs against it or any other State ".

107. The CHAIRMAN asked the Commission to vote on the addition of the phrase: " if an armed attack occurs against it ".

There being only one vote in favour, the proposal was rejected.

108. The CHAIRMAN put to a vote the addition of the phrase: " if an armed attack occurs against it or any other State ".

There being only one vote in favour, the proposal was rejected.

109. The CHAIRMAN asked the Commission to come to a decision on the second part of the text submitted by Mr. Alfaro, namely: " in the exercise of this right, it may use force to counter the unauthorized use of force by another State ".

There being only one vote in favour, the words were deleted.

110. The CHAIRMAN suggested replacing the end of the article submitted by Mr. Alfaro, namely: " provided that it shall immediately advise the competent organ of the community of States " by the following wording: " but the exercise of this right is subject to the measures which may be taken on behalf of the United Nations to maintain international peace and security ". He proposed that wording, firstly, because the Commission had always wished to avoid any mention of " the competent organ of the community of States "; secondly, because it seemed expedient to take cognizance of the existence of the United Nations and of the fact that the Security Council had a special responsibility for the maintenance of international peace and security.

111. Mr. SPIROPOULOS did not think that the United Nations should be mentioned, in view of the fact that the limitation which would thus be imposed on the right of self-defence could apply only to Members of the United Nations; hence such a limitation would be out of place in a declaration on the right and duties of all States.

112. Mr. AMADO drew attention to the fact that the third phrase in the text proposed by Mr. Alfaro was subordinate to the second; since the second had been deleted there was no point in retaining the third, either in the form proposed by Mr. Alfaro or in that suggested by the Chairman.

The Commission decided, by 8 votes to 3, not to retain the last phrase.

The following text was adopted for article 17: " Every State has the right of individual or collective self-defence. "

Article 18: Non-recognition of territorial acquisitions obtained by force

113. The CHAIRMAN asked the Commission to consider article 18, which dealt with the non-recognition of territorial acquisitions obtained by force or threat of force. He drew attention to the comments and observations submitted by the Governments of Mexico, India and the United Kingdom (A/CN.4/2, p. 111). The United Kingdom Government expressed some doubt whether to mention the non-recognition of territorial acquisitions obtained by force as a duty of the State would serve any useful purpose. In view of the observations made by the United Kingdom Government he proposed the deletion of article 18.

114. Mr. SANDSTROM supported the proposal.

115. Mr. ALFARO observed that the strength of international law was chiefly moral. Ever since 1890 it had been the rule among the Latin-American Republics not to recognize territorial acquisitions obtained by force. That principle of non-recognition had been established and confirmed by the treaties and conventions of Rio de Janeiro, Montevideo, Havana and Bogotá; it had also been confirmed during the conflict between Paraguay and Bolivia.[3]

116. The deletion of article 18 would make a very bad impression on public opinion in the American continent; no doubt the wording of the proposed text could be improved, but the substance ought to be included in a declaration on the rights and duties of States.

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[3] Inter-American Declaration of 3 August 1932.

117. Mr. HSU shared Mr. Alfaro's views; the deletion of article 18 would have a disastrous effect upon public opinion, and would be a step backward in international law. The practical results of the carrying out of that duty would certainly be inconsiderable, but it should be borne in mind that the existence of the United Nations would certainly enable it to become really effective.

118. Mr. BRIERLY recalled that the duty in question was the outcome of the Stimson doctrine, which had not had a particularly encouraging history. The objection that it would not be possible for all States to fulfil that duty should not be taken into account; the same argument could be applied to many other articles of the draft declaration. He thought that article 18 should be retained.

119. Mr. SPIROPOULOS agreed with the Chairman. He pointed out that the provisions of article 18 were implicit in article 16, which concerned the condemnation of war as an instrument of national and international policy and of the threat or use of force. To condemn the use of force obviously included a condemnation of territorial acquisitions obtained by force.

120. Mr. YEPES pointed out that article 18 enshrined the principle contained in Article 2, paragraph 4, of the Charter. He considered that article 18 should be maintained; by its deletion the whole declaration would lose a great deal of its value. Furthermore, the declaration thus truncated would be very ill received by public opinion in Latin America, where the principle of the non-recognition of territorial acquisitions obtained by force had formed part of positive law for more than sixty years.

121. Mr. CORDOVA acknowledged that article 18 was implicit in article 16, but he felt that, in that particular case, repetition would not be valueless. The Commission had to codify positive law; the non-recognition of territorial acquisitions obtained by force was an important principle of positive law in Latin America. He pointed out further that the most deplorable result of the use of force was the territorial acquisitions so obtained; it was thus particularly desirable that the duty of all States to refuse to recognize territorial acquisitions obtained by force should be explicitly mentioned.

122. The CHAIRMAN could not see that any useful purpose would be served by mentioning the duty laid down in article 18, which seemed to be totally lacking in practical value. If a State had obtained territorial acquisitions by the use or threat of force, the situation would not be changed by the fact that some States refused to recognize the *fait accompli*. Article 18 would not prevent the use of force; hence it would have no real value.

123. Mr. SCELLE felt that if there was a supranational organization, able to act as a police force in cases of aggression and to enforce the restitution of acquisitions obtained by the use of force, it would be unnecessary to proclaim the principle enunciated in article 18. Unfortunately, however, it must be admitted that the United Nations lacked the necessary force to ensure respect for the law. It must be hoped that a world supergovernment would be established one day, for that was the only possible solution; in the meantime principles such as that of the non-recognition of territorial acquisitions obtained by force must be maintained, since respect for them was one of the substitutes for defence at the disposal of States.

124. The CHAIRMAN put the question of the retention of article 18 to a vote.

The Committee decided by 8 votes to 5 to retain article 18.

125. The CHAIRMAN wondered whether the principle of non-recognition would apply in the case of a State which had come into being through secession on the territory of the original State. He emphasized that even if that were so, there could be no question of making the principle retroactive.

126. Mr. HSU pointed out that there could be two distinct cases; either a revolt by a minority which set up an independent State within the territory of the original State, or else a revolt encouraged and helped by an outside State whose aim was to set up a puppet State, thus obtaining a disguised acquisition. Apparently the principle of non-recognition should not be applied in the former case, but should in the latter.

127. Mr. CORDOVA held that in case of secession there was no territorial acquisition, since the situation developed within the frontiers of the original State. Hence the principle of non-recognition should not be applied.

128. Mr. ALFARO observed that article 18 made no distinction between real acquisitions and disguised acquisitions, and that article 18 would apply in the second case described by Mr. Hsu.

129. Sir Benegal RAU drew attention to the following situation. State A had acquired by force territories belonging to State B; as the principle in article 18 was not retroactive, the position was confirmed. If State B recovered from State A territories which legally belonged to it, States would be bound by article 18 not to recognize the recovery action taken by State B. Such a result seemed particularly deplorable.

130. Mr. SPIROPOULOS considered that the principle should be established without going into detail about methods of implementation.

131. The CHAIRMAN proposed the following text: " Every State has the duty to refrain from recognizing any territorial acquisition made by another State through force or the threat of force. " The addition of the words " by another State " eliminated the case of secession.

That text was adopted by 9 votes to 1.

The meeting rose at 5.55 p.m.

15th MEETING

Wednesday, 4 May 1949, at 3 p.m.

CONTENTS

Chairman: Mr. Manley O. HUDSON.

Rapporteur: Mr. Gilberto AMADO.

Present:

Members: Mr. Ricardo J. ALFARO, Mr. James L. BRIERLY, Mr. Roberto CÓRDOVA, Mr. J. P. A. FRANÇOIS, Mr. Shuhsi HSU, Mr. Vladimir M. KORETSKY, Sir Benegal N. RAU, Mr. A. E. F. SANDSTRÖM, Mr. Georges SCELLE, Mr. Jean SPIROPOULOS, Mr. Jesús María YEPES.

Secretariat: Mr. LIANG, Director of the Division for the Development and Codification of International Law, Secretary to the Commission.

Draft Declaration on the Rights and Duties of States (A/CN.4/2, A/CN.4/2/Add.1, A/CN.4/W.4/Rev.1) (*continued*)

ARTICLE 19: CO-OPERATION IN THE PREVENTION OF ACTS OF FORCE

1. The CHAIRMAN opened the debate on article 19 of the draft Declaration (A/CN.4/2, p. 114). He drew the Commission's attention to the fact that the Greek Government thought that that article should be deleted and that the United States Government had expressed the opinion that the first part of the article presupposed the existence of an organization of the entire community of States. As that community was not yet organized, States might not be willing to agree to lend " every kind of assistance in whatever action " it might take.

2. Mr. ALFARO admitted that some articles of the draft Declaration, articles 19, 20 and 24, for example, mentioned the " community of States " or the " competent organs " of that community. He wished to explain that in using those expressions, which he had borrowed from " The International Law of the Future ", (See A/CN. 4/2, p. 118), he had wished to include not only the States signatory of the Charter which formed the United Nations, but also those which by the Bogotá Charter had constituted the regional international association known as the Organization of American States, as well as States already existing or likely to be formed in the future which might be admitted to the United Nations. He was convinced that a day would come when all the States in the world would be Members of the United Nations. The Declaration on the Rights and Duties of States should be a perpetual instrument, and none of its provisions should bear the mark of temporary situations or conditions.

3. In his opinion, the Commission should first decide whether or not the " community of States " should be mentioned in the Declaration. He pointed out that that procedure would be in accordance with the United Kingdom Government's view that it was for the Commission to consider whether, and to what extent, propositions, such as those in articles 15, 16, 17, 19 and 20 could be laid down as part of general international law applicable to States not members of the United Nations (A/CN.4/2, p. 92).

4. The CHAIRMAN pointed out that " The International Law of the Future " had been published at a time when the United Nations had not been formed; its first proposal was aimed at the organization of the community of States on a universal basis. Personally, he found the expression " community of States " felicitous, but, because of the existence of the United Nations, which did not include all the States of the world, it seemed to him difficult to envisage en action undertaken by the community of States.

5. Mr. SCELLE agreed with the Chairman. In view of the fact that there was as yet no community of States properly speaking, but that there were competent organs of the community of States, he proposed that article 19 should be amended as follows: " It is the duty of every State to afford the competent organs of the community of States . . . ". Drafted in that way, the article would include the United Nations as well as existing or future regional organizations.

6. Mr. SPIROPOULOS noted that article 19 as it stood seemed to give a new definition of the duties of Members of the United Nations. He

wondered whether in general international law all States were obliged to come to the assistance of a State victim of aggression. He thought there was no such obligation on States not members of the United Nations. As article 19 was in contradiction with existing international law, it could not be retained in the Declaration on the Rights and Duties of States.

7. Mr. SANDSTROM thought it would be preferable to refrain from reference to an abstract community of States. He recalled that he had had occasion to suggest that one article in the Declaration should be devoted to the relationship between it and the Charter of the United Nations. Some of the ideas expressed in article 19 might be retained and incorporated in such an article.

8. Mr. BRIERLY agreed with Mr. Spiropoulos' comments. He was afraid that in imposing such a duty as that affirmed in article 19, on all States, the Declaration might be going further than existing positive law permitted.

9. The CHAIRMAN thought that the first part of article 19 should be deleted. However, if the Commission did not share that point of view, it might adopt the following text: " Every State has the duty to give the United Nations assistance in any action it takes for the maintenance of international peace and security. "

10. For the second part of article 19 he proposed to substitute the following draft, based on the provisions of Article 2, paragraph 5, of the Charter: " Every State has the duty to refrain from rendering assistance to a State against which the United Nations is taking preventive or enforcement action. "

11. The Chairman explained that in that form, article 19 would extend to States not members of the United Nations a duty which Members of that Organization had assumed on signing the Charter.

12. Mr. KORETSKY was somewhat surprised that the Commission should tend to regard the organization of the community of States as belonging to the realm of the future, whereas the United Nations had in fact been established specifically to struggle, in the common interest, for the maintenance of international peace and security. Some of his colleagues seemed to forget that and spoke too much of non-member States. Like Mr. Sandström, he thought that abstract wording should not be used in article 19; it should be close to Article 2, paragraph 6, of the Charter. There should be no fear of mentioning the United Nations by name. The United Nations was the centre in which all efforts to accomplish a common task should be harmonized; non-member States should join in those efforts as Article 2, paragraph 6, of the Charter laid down.

13. It should be acknowledged that the United Nations was playing a decisive part in organizing the struggle for international peace and security. It was the Commission's duty to support it to the utmost in its difficult task. Only those who favoured a new war could profit from systematically ignoring the United Nations and omitting any reference to it in the text of the Declaration.

14. The wording proposed by Mr. Scelle was quite unsatisfactory as it made ambiguity possible in article 19. No one really knew exactly what were the " competent organs " mentioned in his text. It put an unknown quantity in the place of the Security Council, and that unknown quantity might be the Atlantic Treaty, which leads to war.

15. Mr. Koretsky, unlike the Chairman, thought that the first part of article 19 should be retained and that it should include a direct reference to the United Nations. He thought that members were closing their eyes to the essential questions: maintenance of peace, prohibition of the atomic weapon and limitation of armaments.

16. Mr. SCELLE emphasized that the text proposed by the Chairman to replace the second part of article 19 implied recognition of the fact that the United Nations was the main organ of the community of States. He felt that that text was satisfactory and accepted it willingly with the hope that, in the near future, the whole international community would be included in the United Nations.

17. Following on Mr. Koretsky's observations, the CHAIRMAN thought that it would be advisable to add the following words from Article 2, paragraph 6, of the Charter to the text he had proposed to substitute for the second part of article 19: " for the maintenance of international peace and security ". He asked Mr. Alfaro whether he would agree to the deletion of the first part of article 19.

18. Mr. ALFARO replied that the provisions of that part of article 19 would place upon non-member States the duty of aiding the Security Council in the re-establishment of international peace and security.

19. Mr. SANDSTROM thought that such a statement should not derogate from the duties of Members of the United Nations.

20. The CHAIRMAN observed that the duties of Members of the United Nations were not being decreased, but that the duties of non-member States were being increased.

It was decided by 9 votes to 3 to retain the idea expressed in the first part of article 19.

21. The CHAIRMAN proposed that that part should read as follows: " Every State has the duty to give the United Nations assistance in any action it takes for the maintenance of international peace and security. "

That text was adopted by 8 votes to 4.

22. The CHAIRMAN then proposed to add: " . . .and the duty to refrain from rendering assist-

ance to any State against which the United Nations has taken preventive or enforcement action."

23. Mr. HSU observed that, as constituted, the United Nations did not comprise the whole community of States. In the circumstances, it might be asked whether the Commission had the power to legislate for all States, whether Members of the United Nations or not. For his part, he had some doubts on the point. Article 2, paragraph 6 of the Charter provided that the Organization should " ensure " that States which were not Members acted in accordance with the Principles of the Charter so far as might be necessary for the maintenance of international peace and security. That provision clearly gave the Organization the power to take political action against non-member States in order to make them comply with the Principles of the Charter, but it did not allow it in any way to impose upon those States the duty of rendering assistance in any action it might take.

24. Mr. Hsu thought that the principle that States should refrain from assisting a State engaged in acts of aggression was excellent. The Commission could lay it down in an article replacing article 19 to be inserted immediately after article 16. He proposed that the article should be as follows: " Every State has the duty to refrain from giving assistance to any State which has failed to perform the duty set forth in article 16."

25. Mr. SPIROPOULOS agreed with Mr. Hsu's interpretation of the provisions of Article 2, paragraph 6 of the Charter. He stressed that the Charter was in no sense a convention containing conditions for others; it could therefore not create duties for States which were not part of the United Nations. It could not create any duty for third parties, for example, a duty which might be contrary to Swiss neutrality. He thought the United Nations should not be mentioned.

26. Mr. SANDSTROM pointed out that the question raised by Mr. Hsu regarding the Commission's power to legislate for States not members of the United Nations had already been raised in connexion with the article on the duty of non-intervention. The Commission had then decided that it was possible to include provisions affecting non-member States as well as States Members of the United Nations in a declaration which was in the form of a resolution and not of a convention.

27. Mr. KORETSKY, in reply to Mr. Hsu's remarks, emphasized that, if the United Nations was not yet universal, it was none the less true that the Charter provided that all peace-loving States could become members of the Organization. The Declaration on the Rights and Duties of States would not be a convention but an appeal addressed to all States, asking them to take cognizance of the need to ensure peace and security in the world. Mr. Hsu's doubts were in no way justified. It was important to fight for world peace, and that fight could only be carried on within the framework of the United Nations by united support of the Security Council.

28. The CHAIRMAN recalled that the Commission had decided at the beginning of its work that the Declaration on Human Rights and Duties of States, like the Universal Declaration of Human Rights, would be a common ideal to be attained. The Commission was not, strictly speaking, legislating by proclaiming the duty of co-operation in article 19. History offered many examples of declarations of the kind the Commission was engaged in drafting. Such declarations had in no way attempted to legislate for all States. They had merely reflected the opinions of their authors.

29. The Chairman thought that States not members of the United Nations could hardly be required to assist the Organization in any action it might take, but that it was quite permissible to request them to refrain from assisting States against which the Organization was taking preventive or enforcement action for the maintenance of international peace and security.

30. Mr. HSU explained that he had used the word " legislate " in its broadest sense. What he had wanted to say was that, in his opinion, the Commission did not have the power to extend to non-member States a duty imposed on Members of the United Nations by the Charter.

31. Mr. ALFARO opposed Mr. Hsu's amendment because it did not express the essential principle which should be laid down. The Declaration should say that it was the duty of States to refrain from assisting States against which the United Nations had taken preventive or enforcement action. That was the principle set forth in Article 2, paragraph 5 of the Charter. It was thus not sufficient to declare that States should not render aid to States which committed acts of aggression. Having said that, Mr. Alfaro was prepared for the sake of compromise to accept the text proposed by the Chairman.

32. The CHAIRMAN explained that according to Mr. Hsu's text, States should refrain from giving assistance to a State which had failed to perform its duty under article 16, namely, the duty not to commit acts of aggression. Under the text he himself proposed, States must refrain from giving assistance to States whose failure to fulfil their duties under article 16 had been established by the Security Council. The whole difference lay in the Security Council's establishing the facts.

33. Mr. SPIROPOULOS considered that the text proposed by the Chairman was narrower than that of Mr. Hsu. By merely saying that it was the duty of States to refrain from giving assistance to States against which the United Nations had taken preventive or enforcement action, cases in which the Security Council had taken no decision were omitted. In Mr. Hsu's formula, no State

should render assistance to an aggressor State, even if the Security Council had not ordered any preventive or enforcement action against it. His proposal thus covered all acts of aggression and not only those acts which had been " established " by the Security Council. Mr. Spiropoulos suggested the addition of the word " aggressor " before the word " State ".

34. Mr. ALFARO proposed to add the following phrase to the text proposed by Mr. Hsu: " and against which the United Nations is taking preventive or enforcement action for the maintenance of international peace and security".

35. Mr. HSU said that he would vote against Mr. Alfaro's amendment although he would have liked to see a provision of that kind included in the Declaration, had that been possible in the existing state of international law.

36. The CHAIRMAN put to the vote the first part of article 19 which was worded as follows: " Every State has the duty to give assistance to the United Nations in any action it takes for the maintenance of international peace and security." He pointed out that if the first part was adopted, the second would be superfluous as any State which had fulfilled its duty to lend assistance to the United Nations would have accomplished *ipso facto* its duty to abstain from rendering assistance to an aggressor State.

37. Mr. CORDOVA was against the first part of article 19. He explained that Mr. Hsu's amendment was based on the principle that the duty of giving assistance to the United Nations could not be imposed upon non-member States. On the other hand, the duty to abstain from rendering assistance to aggressors could be imposed upon all States. Mr. Hsu's amendment was thus designed to preservet he substance of Mr. Alfaro's text, while respecting legal principles.

The first part of article 19 was rejected, only one vote being cast in favour.

38. The CHAIRMAN put to the vote Mr. Alfaro's amendment which read: " and against which the United Nations has taken preventive or enforcement action for the maintenance of international peace and security."

The amendment was rejected by 6 votes to 5.

39. The CHAIRMAN then put to the vote Mr. Hsu's amendment, which read: " Every State has the duty to refrain from giving assistance to any State which has failed to perform the duty set forth in article 16."

The amendment was adopted by 8 votes to 2.

40. Mr. ALFARO wished it to be noted in the records that the new text had only a purely negative significance. It was limited to prohibiting States from rendering assistance to an aggressor State, whereas what was needed was a declaration of the positive duty of States to come to the assistance of the State victim of aggression.

Article 20: Co-operation in the pursuit of the aims of the community of States

41. Mr. HSU considered that the article contained an excellent idea which should be set forth in the Declaration, but he proposed that it should be expressed as follows: " Every State has the right to take measures in support of any State resorting to its right under article 17."

42. The CHAIRMAN felt that the expression " competent organs of the community of States " in the Panamanian draft was dubious, as the community of States did not have any competent organs. Moreover, in his view, the article merely repeated in a different form principles already set forth in the Declaration.

43. Mr. SCELLE recognized that the article presented in a different form ideas expressed, but did not share the Chairman's view of the expression " competent organs of the community of States ". In his opinion, the community of States was identical with the United Nations. Some jurists, like Mr. Brierly and Mr. Spiropoulos, were opposed to such identification in the existing state of international law. However, not only existing international law, but also that of the future, should be taken into consideration. Once such identification was made, the Security Council might be considered the principal organ of the community of States. It was to be hoped that all States would one day be a part of the United Nations and so form a universal community of States.

44. Mr. Scelle concluded by saying that the Declaration should avoid being too specific in stating the principles of existing international law. Otherwise, it would become obsolete in a very short time.

45. Mr. KORETSKY was against deleting article 20, which, he thought, had a wider scope than article 19. Article 20 referred to measures which the United Nations, under the name of community of States, might take with a view to promoting not only peace and security, but also friendly co-operation of nations in the cultural, economic and other fields.

46. The CHAIRMAN affirmed that no organ of the community of States, if there were any, was competent to " prescribe " measures of any kind. Only the Security Council could take decisions. The General Assembly of the United Nations itself had only the power of recommendation. He therefore considered that there was no universal organization of States in existence which would make it possible for the article to be implemented. Moreover, the meaning of the words " or in the general interest " was much too wide.

47. Mr. CORDOVA thought that the question raised by Mr. Hsu's proposal was already covered by article 17.

48. The CHAIRMAN put to the vote the question of deleting article 20.

The Commission decided to delete article 20 by 10 votes to none.

ARTICLE 21: MAINTENANCE OF CONDITIONS CALCULATED TO ENSURE INTERNATIONAL PEACE AND ORDER

49. The CHAIRMAN recalled that the article was based on the second principle of " International Law of the Future " (A/CN.4/2, p. 161). He proposed, with Mr. Alfaro's assent, that the original text of the second principle should be maintained except for the deletion of the word " legal ", and should read: " Each State has a duty to see that conditions prevailing within its own territory do not menace international peace and order, and to this end it must treat its own population in a way which will not violate the dictates of humanity and justice or shock the conscience of mankind."

50. He recalled, in that connexion, that the expression " conscience of mankind " was currently used in international instruments and that it had been sanctioned by the second Hague Conference in 1907. The authors of the article had thought that in view of the bad treatment certain populations suffered at the hands of their own Governments, it was of the highest importance to declare that States had the duty so to treat their populations as not to violate the principles of justice and humanity.

51. Mr. ALFARO also stated that the individual, having become the subject of international law, had a right to protection by the international community.

52. Mr. KORETSKY agreed that the principles of " International Law of the Future ", which dated from 1944, had taken on historic importance at the time when the peoples had been struggling against fascism. But, as he had many times pointed out to members, fascism, or at least the vestiges of fascism, survived in other forms; consequently, a declaration of principles which had marked a milestone in 1944 today stood in need of completion.

53. It was well known that some States followed a consistent policy of discrimination against a part of their population, as was proved by lynching and the lack of civic equality in some countries. The text of the article failed to mention the need to put an end to the policy of religious, racial or other discrimination. In that connexion, Mr. Koretsky pointed out that measures against priests convicted of common law crimes could not be regarded as religious discrimination.

54. Turning to another aspect, Mr. Koretsky remarked that it was not enough to proclaim that every man had the right to work in order to raise the standard of living of peoples. It was necessary to go further and to declare that it was the duty of every State to ensure that its people had work. For all those reasons and because of its omissions, Mr. Koretsky considered the 1944 text insufficient.

55. In reply to the CHAIRMAN, who asked whether he wished to make a definite proposal embodying those ideas, Mr. KORETSKY said that he might submit a proposal later, when the Commission had finished discussing the draft Declaration. In his opinion, article 21 of the Declaration on the Rights and Duties of States was not in conformity with the Universal Declaration of Human Rights, which contained much more far-reaching provisions on the subject.

56. Sir Benegal RAU was in favour of keeping article 21, but proposed the addition to it of the following phrase, reproducing almost exactly the language of Article 1, paragraph 3 of the Charter: " and in a manner which promotes respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language or religion." That proposal had already been made by the Indian Government (A/CN.4/2, p. 121).

57. Mr. ALFARO supported Sir Benegal's proposal, because it brought out the main idea of the article more clearly.

58. Mr. BRIERLY thought that article 21 thus amended would be too long. The Indian Government's proposal, which Sir Benegal Rau had introduced, might be considered as an alternative.

59. Mr. SANDSTROM remarked that Sir Benegal's amendment was outside the scope of article 21, which was intended to prevent the development within the boundaries of the State of any policy threatening international peace and order.

60. The CHAIRMAN stated that the purpose was, indeed, to prohibit any behaviour likely to give rise to such a threat. Peace and order could in fact be threatened by discriminatory measures based on race, language or religion, but they could not be threatened by discrimination as to sex.

61. Sir Benegal RAU agreed that the word " sex " could be deleted from the amendment.

62. The CHAIRMAN suggested that use of the word " promotes " was also unnecessary. It appeared in the Charter because Article 1 dealt with international co-operation. The task in hand was to determine the legal duties of States and not—as had been done in the Declaration of Human Rights—to prescribe general standards of conduct. It would be better, in his opinion, to draft Sir Benegal's amendment as follows: " and

to treat its population with respect for human rights and for fundamental freedoms for all without distinction as to race, language or religion."

63. Sir Benegal RAU remarked that for brevity he was even prepared to delete the last phrase, after the words " without distinction ".

64. Mr. SPIROPOULOS felt that the amendment would make article 21 needlessly cumbersome. It was unnecessary to repeat in the Declaration statements contained not only in the Declaration of Human Rights but in Articles 55 and 56 of the Charter.

65. Mr. ALFARO explained that the main purpose of article 21 was to lay on States the duty to respect human rights and to encourage implementation of them. If, therefore, it was felt that Sir Benegal's amendment was inconsistent with the concept of international peace and order, Mr. Alfaro would prefer to delete the latter, inasmuch as it appeared elsewhere in the Declaration, and to retain the substance of the amendment. The article might then read: " Every State has the duty to treat its own population with respect for human rights and fundamental freedoms and in a manner which does not offend the conscience of mankind."

66. The CHAIRMAN thought that that would be going too far. It had not yet been stipulated in the Declaration that States must not tolerate the existence on their territories of conditions likely to endanger peace and security. That duty had to be stated, as well as the duty not to treat the population in a manner which shocked the conscience of civilized nations. That had been the pronouncement of the Council of the League of Nations in 1937, in connexion with Spain.

67. Mr. BRIERLY would have been in favour of Sir Benegal's amendment, had it not been that, on the one hand, a new element inconsistent with the first part was introduced into the article if the concept of discrimination as to sex were maintained, and that, on the other hand, the deletion of that concept might make a poor impression, as it might appear that the Commission had deliberately eliminated that type of discrimination from the Charter formula which it repeated.

68. Mr. AMADO said that he personally preferred the original text which appeared on page 161 of the memorandum (A/CN.4/2), except that he wished to delete the word " legal ".

69. The CHAIRMAN proposed that the Commission should first decide whether it was desirable to include the idea contained in Sir Benegal's amendment in the article.

Retention of the idea was approved by 7 votes to 6.

70. The CHAIRMAN read the text of article 21 as it would appear with the addition of Sir Benegal Rau's amendment: " Every State has the duty to see that conditions prevailing within its own territory do not menace international peace and order, and to this end, it must treat its own population in a manner that respects human rights and fundamental freedoms for all, without distinction as to race, sex, language or religion." In his opinion, it would be better for the text to end with the words " fundamental freedoms for all ". Article 62 of the Charter merely said " human rights and fundamental freedoms for all."

71. Mr. ALFARO also thought that that formula would be sufficient.

72. The CHAIRMAN then proposed another wording, which read: " . . .and to this end, it must treat its own population with respect for human rights and fundamental freedoms for all."

73. Mr. KORETSKY wished to maintain the phrase " without distinction as to sex, race, language or religion ", which was, as it were, the banner of the peoples' struggle for equality. To delete that formula would give the impression that the Committee wished to draw a veil over the discriminatory measures still in force in some States.

74. Sir Benegal RAU accepted the second draft proposed by the Chairman rather than lose both. Although less satisfactory than the first, it seemed likely to obtain more support.

75. The CHAIRMAN then put to the vote the text of article 21 amended as follows: " Every State has the duty to see that conditions prevailing within its own territory do not menace international peace and order, and to this end, it must treat its own population with respect for human rights and fundamental freedoms for all."

That text was adopted by 8 votes.

Article 22: Duty not to foment civil disturbances in other States

76. The CHAIRMAN recalled that the article was based on principle 4 of " International Law of the Future " and appeared on page 161 of the Secretary-General's memorandum (A/CN.4/2). The difference between that text and the Panamanian draft was due to the fact that its authors had considered it necessary to be circumspect with regard to freedom to criticise the situation in other States and that, consequently, the activities in question should be forbidden only if they were of such a kind as to foment disturbances in other States. Even in that form, the text had met with some opposition, which was based on fear of an unjustified intervention to suppress the right of free criticism of another State. However, the Committee might at least substitute the word " calculated " for the words " for the purpose of " in the draft text.

77. Mr. ALFARO said that that principle was already included in the Convention relating to Duties and Rights of States in the Event of Civil

Strife between the American Republics, signed at Havana in 1928.

78. The CHAIRMAN pointed out that the detailled provisions of that Convention appeared on page 210 of the Secretary-General's Memorandum. He added that behind that principle there was an ancient principle of international law that States could not tolerate the organization on their territories of armed forces intended for an attack on another State.

79. The Chairman informed the Committee that he had received a letter from Mr. Kerno, Assistant Secretary-General, who, on the instructions of the Secretary-General, had transmitted a communication from the American Federation of Labor, dated 28 April 1949; the annex contained a copy of a note which the Federation wished to submit to the Commission in connexion with the discussion of article 22 of the draft Declaration on the Rights and Duties of States.

80. Mr. LIANG (Secretary to the Commission) remarked that the Commission had not yet decided how it would deal with such communications, and that it was therefore free to take any decision on the matter.

81. Mr. BRIERLY, supported by Mr. CORDOVA; Mr. HSU and Mr. ALFARO, requested that cognizance should be taken of the document.

82. Mr. KORETSKY observed that it was for the Chairman to decide whether the document was relevant to the Commission's discussions.

83. The CHAIRMAN said that he would examine the document with Mr. Brierly and Mr. Córdova. The Commission would be kept informed of the result of their study, so that, if necessary, it could discuss the contents of the document at the time of the second reading of the draft Declaration.[1] He requested the Commission to continue the debate on article 22.

84. Mr. HSU approved the principle of article 22, but felt that its scope was too limited inasmuch as it did not forbid the State itself to foment civil war in another State. The article should first state that primary duty of the State and then the duty to prevent all activities with the same purpose on its territory.

85. The CHAIRMAN objected that the case of a State fomenting civil war constituted a form of intervention which was already prohibited by article 5; it was not possible to enumerate all the forms of intervention in the Declaration.

86. Mr. HSU insisted that that other aspect, of the duty not to foment civil war, which was moreover the most important, should be expressly referred to in the Declaration, whether in article 22 or at some other point.

87. Mr. SCELLE thought that, in view of the very general character of article 5, it would be good to adopt Mr. Hsu's amendment, which emphasized a most important point.

88. The CHAIRMAN asked the Commission to decide on the amendment, which read: " Every State has the duty to refrain from fomenting civil strife in the territory of another State."

That text was adopted by 9 votes to 2.

89. The CHAIRMAN read the whole of article 22, as it stood with Mr. Hsu's amendment and the changes in wording suggested as a result of the comparison with principle 4 of " International Law of the Future ": " Every State has the duty to refrain from fomenting civil strife in the territory of another State, and the duty to prevent the organization within its territory of activities calculated to foment such civil strife."

90. Mr. KORETSKY thought that article 22 was still topical. Its historical origin lay in the *pronunciamientos* which had been rife in Central American countries and there were still reactionary circles which would like to hinder the inescapable course of history by military expeditions. But the scope of the article was too limited, because it did not mention the still active organizations which were seeking to provoke a new world war. That was why Mr. Koretsky reserved the right to make observations on the subject during the second reading of the draft.

91. The CHAIRMAN put article 22 as amended to the vote.

The article, as amended, was adopted by 12 votes.

Article 23: Equality of opportunity and interdependence in the economic sphere

92. The CHAIRMAN recalled that the Governments of Greece and India were of the opinion that the article was out of place in the Declaration. The Government of Venezuela felt that its text was too general.

93. Mr. ALFARO said that article 23 was based on article 4 of the Atlantic Charter and article 2 of the Economic Charter of the Americas, both of which were quoted on pages 210 and 211 of the Secretary-General's Memorandum (A/CN.4/2). Those texts had been the subject of exhaustive commentaries and had raised many difficult questions. That was why the draft of article 23 was, in its author's opinion, nothing more than an attempt to put into effect one of the purposes set forth in the United Nations Charter.

94. The CHAIRMAN wondered whether the article did not duplicate a provision of the Havana Charter establishing the International Trade Organization.

95. Mr. FRANÇOIS felt that the problems raised by the article were not within the Commission's province. The subject had already been dealt with at the Havana Conference and only experts

[1] See A/CN.4/SR.16, paras. 59-66.

in economic science would be competent to discuss it. The meaning of the article was too vague and too general. All the principles established therein called for restrictions without which its adoption would be exceedingly dangerous and would arouse the opposition of all economists.

96. Mr. YEPES recognized the importance of the principle of economic co-operation and free access to raw materials, but felt that economic questions were not the Commission's business. Moreover, the second part of the article, restricting the power of States to control national economy, might constitute a grave danger for those countries which still needed to protect newborn industries. Mr. Yepes was therefore in favour of deleting the article or at least the last part of it.

97. The CHAIRMAN noted that the consensus of opinion in the Commission appeared to be in favour of deleting the article.

98. Mr. ALFARO felt that at least the first part of the article, which dealt with the principle of equal access, should be retained.

99. Mr. AMADO did not think that equal access was a principle of international law, as international law had not yet evolved to that point.

100. Mr. ALFARO recalled that the principle was related to paragraph 3 of Article 1 of the Charter.

101. The CHAIRMAN pointed out that the Charter only established the necessity for co-operation in the economic field.

102. Mr. BRIERLY remarked that Article 1 of the Charter merely expressed a hope for the future.

103. In view of the opinions expressed by the other members of the Commission, Mr. ALFARO withdrew his proposal.

The Chairman stated that article 23 was therefore deleted.

ARTICLE 24: PROHIBITION OF PACTS INCOMPATIBLE WITH THE DISCHARGE OF INTERNATIONAL OBLIGATIONS

104. The CHAIRMAN said that the first part of the article repeated principle 10 of " International Law of the Future " (A/CN.4/2, p. 161).

105. Mr. SPIROPOULOS was categorically opposed to the inclusion of that article in the Declaration. Such inclusion could not be justified as the article did not set forth a basic principle of international law on the rights and duties of States.

106. Mr. FRANÇOIS said that the idea reflected in the article already appeared in article 13 of the draft, dealing with the supremacy of international law.

107. Mr. ALFARO emphasized that article 24 was also based on Article 103 of the Charter.

108. Mr. FRANÇOIS remarked that Article 103 simply declared that the obligations of the Members of the United Nations under the Charter should always prevail over their obligations under any other international agreement.

109. Mr. SCELLE thought that article 24 raised the very difficult problem of contradiction between treaties, which might be summed up as follows: could State A conclude with State B a treaty incompatible with the provisions of a treaty previously concluded between A and C? The study of that problem required careful thought. The Commission could, for the moment, only repeat Article 103 of the Charter by stating, for instance, that when a State joined a community of States, it could do nothing which was contrary to the Charter of that community.

110. In view of the divergences of opinion, the CHAIRMAN thought it better to adjourn the discussion until the next meeting.

The meeting rose at 6 p.m.

16th MEETING

Thursday, 5 May 1949, at 3 p.m.

CONTENTS

Chairman: Mr. Manley O. HUDSON.

Rapporteur: Mr. Gilberto AMADO.

Present:

Members: Mr. Ricardo J. ALFARO, Mr. James L. BRIERLY, Mr. Roberto CÓRDOVA, Mr. J. P. A. FRANÇOIS, Mr. Shuhsi HSU, Mr. Vladimir M. KORETSKY, Sir Benegal N. RAU, Mr. A. E. F. SANDSTRÖM, Mr. Georges SCELLE, Mr. Jean SPIROPOULOS, Mr. Jesús María YEPES.

Secretariat: Mr. KERNO, Assistant Secretary-General in charge of the Legal Department; Mr. LIANG, Director of the Division for Development and Codification of International Law, Secretary to the Commission.

Draft Declaration on the Rights and Duties of States (A/CN.4/2, A/CN.4/2/Add.1, A/CN.4/W.4/Rev.2) (*continued*)

ARTICLE 24: PROHIBITION OF PACTS INCOMPATIBLE WITH THE DISCHARGE OF INTERNATIONAL OBLIGATIONS (concluded)

1. The CHAIRMAN asked the Commission to resume the discussion of article 24, the usefulness of which in the declaration had been disputed.

2. Mr. SPIROPOULOS recalled that he had opposed the retention of this article.

3. Mr. SCELLE supported the retention of the principle stated in article 24, namely, that any State which was a member of an international organization comprising the community of States must comply with the rules of that organization and must not conclude any treaty inconsistent with its pact.

4. Mr. ALFARO explained that article 24, which was based both on Article 103 of the Charter and on Principle 10 of International Law of the Future, provided that it was the duty of States to refrain from concluding not only treaties incompatible with the provisions of the United Nations Charter, but also treaties contrary to the principles of general international law. He urged the retention of this article, which dealt with a problem of capital importance.

5. Mr. SCELLE considered that this idea should be broadened by stipulating that if a State entered an international organization, any treaty or agreement previously concluded by that State contrary to the rules of the organization concerned was *ipso facto* revoked. A provision of this nature had previously been included in Article 20 of the League of Nations Covenant.

6. Mr. SPIROPOULOS stressed that article 24 was of purely academic interest and should not be included in a Declaration on the Rights and Duties of States.

7. The CHAIRMAN proposed that the two parts of article 24 be considered separately, and called upon the Commission to vote on the retention of the first part, reading as follows:

> " It is the duty of every State to refrain from concluding with other States agreements, the observance of which is inconsistent with the discharge of its obligations under international law."

The first part of article 24 was rejected by 6 votes to 5.

8. The CHAIRMAN proceeded to the second part of the article, relating to the prohibition of treaties, the provisions of which were inconsistent with the " constitutive pact of the community of States ". If the term " constitutive pact " was meant to signify the Charter, that should be stated explicitly.

9. Mr. ALFARO said that if the Commission rejected the second part, it would be running counter to the provisions of Article 103 of the Charter itself, which stated that " In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail." The Commission should therefore retain at least the second part of article 24, the principle of which was inspired directly by the Charter.

10. Mr. SCELLE said that if States were permitted to conclude treaties the provisions of which were inconsistent with the principles of the international organization of which they were members, there could no longer be any international organization.

11. The CHAIRMAN pointed out that since the first part of article 24 had been rejected, the second was somewhat unnecessary in view of Article 103 of the Charter, particularly since it could not apply to States not members of the United Nations.

12. Mr. BRIERLY, replying to the argument put forward by Mr. Alfaro, said that the silence of the declaration on this point would not be equivalent to a rejection of the provisions of the Charter, which still remained valid. He had voted against the article because he considered that this provision should not be included in the Declaration.

13. Mr. CORDOVA stated that he would vote against the second part of article 24 because it was based on Article 103 of the Charter, the provisions of which bound only Members of the United Nations.

14. The CHAIRMAN put to the vote the second part of article 24, on the prohibition of treaties incompatible with the " constitutive pact of the community of States ".

The second part of article 24 was rejected by 8 votes to 2.

ADDITIONAL ARTICLE PROPOSED BY MR. SCELLE

15. The CHAIRMAN read the additional article proposed by Mr. Scelle, as follows:

> " It is hereby declared that the words ' Rights and Duties of States ', as enumerated and defined in this Declaration, are to be understood as meaning the legal rules governing the powers with which State Governments recognized as such by the international community are vested by customary, conventional or judicial international law ".

16. Mr. SCELLE explained that the additional article which he was proposing was of an essentially technical character and did not in any way

modify the scope of the articles already adopted. The purpose of the article was to make it clear that States as such could not take action to enforce rights or fulfil duties, but that this rested with the representative organs of States which were the juridical agents of State interests. In other words, the rights and duties of States were exercised through the agency of the governmental authorities which represented them.

17. This additional article supplemented article 4 on the independence of States by defining the manner in which international relations developed between the various members of the international community.

18. The CHAIRMAN pointed out that this article stated neither a right nor a duty, and asked Mr. Scelle whether he would agree to the idea being introduced in the preamble.

19. Mr. Scelle accepted this proposal.

20. Mr. KORETSKY said that it was difficult to give an opinion at first sight on a text of considerable theoretical implications. At the same time, in view of the rejection of article 14, on the relations between the municipal law of States and international law, he considered that there was no reason to insert Mr. Scelle's article in the Declaration. The purpose of the article was to define the rights and duties of States; but it was not the Commission's task to theorize. The word " State " had a generally accepted meaning, and there was no need to start a barren academic argument on the subject.

21. Mr. Scelle's formula tended to replace the idea of the State by that of the Government: according to him there were no States, but only Governments. But this favourite thesis of Mr. Scelle's could not be accepted, in the first place because it was the Constitution of each State which determined the form of its government, and secondly because it rested with the sovereign people to " recognize " its Government, not with the international community. The Commission had decided that the State existed irrespective of recognition by other States; why, therefore, did Mr. Scelle wish to introduce this restriction as regards recognition? Why should the obligations provided for in the Declaration, particularly the obligation of ensuring the maintenance of international peace and security, be the responsibility only of recognized States?

22. Mr. Scelle's proposal was equivalent to replacing the sovereignty of the people by that of a chimerical non-existent super-State; it ran counter to the wishes of the peoples, who were entitled to create Governments in their own image. No super-State law and no world organization competent to recognize or reject the Statehood of any community was yet in existence. The Declaration should not be a theoretical text reflecting the very controversial opinions of a specialist or group of specialists.

23. In conclusion, this article was inacceptable, because it was based on an interpretation of sovereignty reflecting the principles of international law advocated by the colonial Powers which wished to dominate the world.

24. Mr. BRIERLY said that in the absence of any established procedure under which the international community could recognize States, the term " recognized as such by the international community " should not be retained. He asked whether Mr. Scelle would not agree to delete it.

25. Mr. SCELLE agreed to delete this part of his article. In reply to Mr. Koretsky he said that the latter's penetrating analysis, intended to demonstrate the uselessness of the additional article, on the contrary constituted an argument in favour of its retention. Apart from the question of recognition, the " rights and duties of States " signified the decisions which Governments could or could not take; in other words, their powers. The Commission was now faced with two opposed conceptions. The first was just stated by Mr. Koretsky, representing the classical conception of a State vested with an inherent sovereignty which it could, if it so desired, surrender voluntarily. The Briand-Kellogg Pact was based on this conception of the voluntary surrender of sovereignty. The second conception was that to which the community of nations was now tending: the idea that States and Governments had no other rights than those conferred upon them by the international juridical order, which alone possessed sovereignty. It should be made clear, therefore, that an act of State was valid only in so far as it was exercised in virtue of the powers conferred upon the juridical agents of the State by the international juridical order.

26. In France, for example, whenever there was a dispute as to the validity of any act, the first question asked was whether the public agent who performed the act had the power to do so. If it was found that he had not, the act was declared void. This theory had received solemn confirmation at Nürnberg. There the accused had been sentenced only because they had exceeded their powers. The question of the responsability of the German State as such had arisen only as a side issue. The question to be decided had always been whether such and such a " ruler " had exceeded his powers. The State was, therefore, responsible only by reason of the illegality of the acts of its agents.

27. To conclude, therefore, this was not a question of purely theoretical interest. The article would enable an international tribunal to decide whether an act attributed to a State was legal or illegal.

28. Mr. SPIROPOULOS said that in his view the article was unnecessary, but he would nevertheless vote with the majority if it decided to incorporate the principle in the preamble. The

declaration that there were no States but only Governments involved a danger. It was bound to astonish the world, which had long been used to the notion of the State. This notion was merely a fiction; everyone knew that behind the State there was the individual, the official vested with State powers. But the word " State " had for long been traditional, and could not create any confusion. While personally opposed to the article, he could see no major objection to its inclusion, in modified form, in the preamble.

29. Sir Benegal RAU stressed that to identify " States " and " Governments " was a contradiction of article 4 of the Declaration, in accordance with which each State could choose its own form of government. But the choice of a Government rested with the people and not with the Government. Similarly, article 7, on jurisdiction, brought out the same contradiction. Jurisdiction might rest not only with the executive power but with the legislative or judiciary power. Hence, if it was desired to use the word " Government " in the Article proposed by Mr. Scelle, the term should be understood in its broadest sense, including not only the executive power but the judiciary and legislative powers. But even if the word " Government " was given this general significance, the Article would nevertheless be inacceptable since it was inconsistent with article 4.

30. The CHAIRMAN did not understand what Mr. Scelle meant by " international judicial law ". In his view, the tribunals applied only the conventional or customary international law. He therefore proposed that the words " or judicial " be deleted.

31. Mr. SCELLE said that jurisprudence was generally considered to be a source of law. Under Article 38 (*d*) of the Statute of the International Court of Justice, the Court could apply judicial decisions in the settlement of disputes submitted to it.

32. The CHAIRMAN remarked that that Article allowed the Court to apply judicial decisions " as subsidiary means for the determination of rules of law ", that is to say, in his opinion, as a means of determining conventional or customary law.

33. On the other hand, he was opposed to the inclusion of the idea of " powers " in the declaration. It seemed to him inappropriate to speak of the conditions under which States might exercise their powers, since Governments held their powers not only by virtue of international law but also under the constitution of the State. He would prefer to adhere to the Committee's terms of reference and to include in the declaration only a statement of the rights and duties of States. He did not think that Governments had such rights and duties.

34. Mr. FRANÇOIS stated that while sharing Mr. Scelle's opinion that the sovereignty of the State was subject to international law, he could not accept the additional article Mr. Scelle had proposed because in his opinion the State itself and not only the Government was subject to law. The text proposed by Mr. Scelle could only be justified by a negation of this principle.

35. Mr. AMADO hoped that he would one day see Mr. Scelle's doctrines universally admitted and international law become the only authority capable of investing States with their sovereignty. The declaration must, however, confine itself to positive law. He regretted that he would have to vote against the proposal, which in his opinion was out of place in a declaration proclaiming very elementary principles, for it departed too much from present realities.

36. Mr. ALFARO stated that the basis of Mr. Scelle's proposal was entirely in conformity with the essential idea of the first and second paragraphs of the preamble to the Panamanian draft which said " The co-existence of States in the juridical community should be based on the determination in the most accurate terms possible of the rights which each may exercise and the duties which all must fulfil; the definition of the rights and duties of States necessarily involves fundamental principles and rules, the observance of which is essential for the maintenance of international peace and security, the supreme aim of the community of States ". Of the two texts he preferred the more concise, which was Mr. Scelle's.

37. He also considered that under Article 38 of the Statute of the Court, international judicial law was a source of law.

38. Mr. CORDOVA considered that the introduction of Mr. Scelle's theory of the powers of States into the declaration would create confusion in the mind of the public at large and even amongst Members of the General Assembly, and would be an obstacle to the general acceptance of the declaration. If Mr. Scelle's text were adopted, however, the words " or judicial " should be included in it.

39. Mr. SPIROPOULOS supported the Chairman's remarks. If the Commission decided to retain the idea contained in the article in question and embody it in the preamble or in the text of the declaration itself, it would certainly be necessary to modify the form in which it was expressed.

40. Quoting by way of example the Preamble and Article 110 of the Charter, he drew the Commission's attention to the fact that in several international instruments the words " States " and " Governments " were used indiscriminately to designate one and the same thing. Hence the preamble to the Declaration on the Rights and Duties of States might include a phrase indicating that Governments should be inspired in their international relations by the principles set forth in the declaration.

41. Mr. KORETSKY shared the view that the article proposed by Mr. Scelle should not be included in the declaration. The idea expressed

in that article was a variant of the doctrine of the supremacy of the international law, that is supremacy of certain groups of States over others, taught by the Viennese school, a doctrine which had fortunately not prevailed.

42. Mr. SCELLE had declared that States, through their Governments, had no other rights and duties than those conferred upon them by the international legal order. In other words it was not the States which would contribute their rights and duties to the international community, but the international community which would confer those rights and duties upon the States. It was in that sense that Mr. Scelle had interpreted the provisions of article 4 of the declaration. Nothing in that article, however, justified such an interpretation.

43. The debate on article 4 [1] had revealed that the members of the Commission did not all have the same conception of the sovereignty of the State. According to some, the State derived its rights from the people while according to others the State was subject to a higher authority, the international community. In consequence of that divergence of views, agreement could not be reached on the text proposed by Mr. Scelle.

44. In his opinion, the Nürnberg Charter had in no way confirmed the thesis upheld by Mr. Scelle. That Charter had been drawn up by the four victorious Governments to ensure the punishment of the war criminals and destroy the last vestiges of Fascism. None of the principles which it proclaimed supported the idea contained in the proposed additional article, which at bottom expressed the desire of the colonial States to continue their domination, and to suppress possible rebellion. Unlike Mr. Alfaro, he did not think that Mr. Scelle's proposal was in conformity with the preamble to the draft declaration submitted by Panama. The second paragraph of that preamble proclaimed that the supreme aim of the community of States was to ensure the maintenance of international peace and security, which did not mean that States enjoyed only those rights which were conferred upon them by a higher authority.

45. To sum up, he was opposed to the adoption of the additional article proposed by Mr. Scelle, for no people could admit that its rights were conferred upon it by someone else. Apart from the fact that it did not square with the ideas of a large number of international jurists, its addition would only introduce an element of confusion into the declaration.

46. The CHAIRMAN put to the vote the additional article proposed by Mr. Scelle.

By 9 votes to 4, the Commission decided not to include in the declaration the additional article proposed by Mr. Scelle.

[1] See A/CN.4/SR. 11 and 12.

ARTICLE PROPOSED BY MR. HSU TO REPLACE ARTICLES 1 AND 2 OF THE DECLARATION

47. The CHAIRMAN said that Mr. Hsu proposed to replace articles 1 and 2 of the declaration by the following text:

> "Every State has the right to existence and the benefit (or protection) of international law, irrespective of whether it is recognized."

48. Mr. BRIERLY pointed out that the Commission was not yet in a position to decide whether or not it was advisable to reconsider texts that had been provisionally adopted at first reading. It would therefore be better to examine Mr. Hsu's proposal at a later stage in the Commission's proceedings.

49. Mr. HSU stated that he had no objection to the postponement of the examination of his proposal.

The Commission decided to postpone the examination of Mr. Hsu's proposal.

ADDITIONAL ARTICLE PROPOSED BY MR. HSU

50. The CHAIRMAN said that Mr. Hsu proposed to include the following additional article in the declaration:

> "Every State is entitled to take measures in support of any State which exercises the right set forth in article 17."

51. Mr. SPIROPOULOS was of the opinion that it was not advisable to devote a separate article to the application of article 17. Moreover, he pointed out that the idea of collective self-defence included the right to take measures in support of a State which was itself exercising the right of self-defence, individual or collective.

52. Mr. ALFARO supported Mr. Spiropoulos' remarks.

53. Mr. KORETSKY said that it was impossible to express an opinion on the additional article proposed by Mr. Hsu before a final decision had been taken on article 17, since the proposed additional Article was intended to complement the provisions of article 17. It would therefore be advisable to postpone the examination of Mr. Hsu's proposal until after the second reading of the draft declaration.

54. Mr. HSU stated that the question to be settled was whether the right of collective self-defence did or did not include the right to take measures in support of a State which was itself exercising the right of self-defence. Personally he feared that the text of article 17 was not sufficiently precise and provided only for cases in which steps had been taken in advance to deal with aggression. In such a case the contracting parties decided in advance on the kind of measures they would take to support a State which was attacked. It was also necessary, however,

to consider the case in which collective self-defence would come into action after aggression and without any previous agreement. In such a case, if every State had the right to decide for itself the kind of measures it would take to support the State which had been attacked, it would be free to determine the extent and duration of the aid to be supplied by it.

55. Nevertheless, if the Commission was of the the opinion that this last case was also covered by the provisions of article 17, Mr. Hsu would not insist on his proposal.

56. The CHAIRMAN put to the vote the additional article proposed by Mr. Hsu.

The article was rejected by 8 votes to 4.

57. Mr. ALFARO explained that he had voted against the proposed article because he was of the opinion that the right proclaimed therein was included in the right of collective self-defence.

58. Mr. CORDOVA explained that he had voted against the proposed additional article because in his opinion collective self-defence could have no other meaning than that attributed to it by Mr. Hsu.

Communication from the Secretary-General transmitting a note from the American Federation of Labor

59. The CHAIRMAN called upon Mr. Brierly to report to the Commission on the communication from the American Federation of Labor dated 28 April 1949.

60. Mr. BRIERLY stated that he and Mr. Córdova had acquainted themselves with the note which the American Federation of Labor desired to submit to the Commission in connexion with the discussion of article 22 of the Draft Declaration on the Rights and Duties of States. The Federation wished the Commission to make it a crime against international law for any Government to organize or support directly or indirectly any Fifth Column, or Fifth Column activities, in any country with which it was at peace. The Federation had appended to its note a report on Communist Party activities which it described as Fifth Column activities, in France, Poland, Hungary and Chile, and also the text of a statement by Mr. Jules Moch.

61. Mr. Córdova and himself were of the opinion that the terms of the declaration provisionally adopted by the Commission was such as to give satisfaction to the American Federation of Labor, and consequently they recommended that the Commission should not take action on the Federation's note.

62. Mr. KORETSKY regretted that Mr. Brierly had not been sufficiently objective in the explanation he had just given to the Commission. He should have refrained from repeating—and the Chairman should have prevented him from doing so—the calumnious accusations contained in the note from the American Federation of Labor, and he should have confined himself to stating whether Mr. Córdova and he were of the opinion that the note should be submitted to the Commission for study together with article 22 of the draft declaration.

63. He had hoped that the Chairman would himself examine the contents of the note and report objectively to the Commission on the action to be taken in regard to it. He pointed out that in other organs of the United Nations, such as the Commission on Human Rights, for example, when a communication was received, it was studied by a small committee, which subsequently reported to the Commission without revealing the actual contents of the communication. He hoped that no similar incident would occur in the future, and that the Chairman would adopt such a procedure in respect of any futher communication that might be received.

64. In reply to a remark by Mr. SANDSTROM, Mr. KORETSKY stated that to describe as a "Fifth Column" progressive forces struggling for the liberation of peoples was incontestably a calumny.

65. Mr. SPIROPOULOS pointed out that the question raised by the American Federation of Labor was not relevant to the declaration on the rights and duties of states, for the proposal purported to describe something as a crime and not to codify a right or a duty.

66. The CHAIRMAN noted that in accordance with the recommendation of Mr. Brierly and Mr. Córdova, the Commission was of the opinion that the note of the American Federation of Labor not be examined.

Additional article proposed by Mr. Alfaro, Mr. Scelle and Mr. Yepes

67. The CHAIRMAN said that Mr. Alfaro, Mr. Scelle and Mr. Yepes proposed that the following additional article be included in the declaration:

> "Every State has the right to accord asylum to persons of any nationality who request it in consequence of persecutions for offences which the State according asylum deems to have a political character. The State of which the refugee is a national has the duty to respect the asylum accorded and may not consider it an unfriendly act."

68. Mr. YEPES said that the proposed article introduced no new element into the declaration; it merely gave expression to the existing law and endorsed a practice followed by all States.

69. Although the Latin American States were not alone in recognizing the right of granting asylum to political refugees, they had practised this right most often. They were to be congratu-

lated on having acted in this manner, for they had prevented veritable hecatombs from taking place during the civil wars which had ravaged their countries in the nineteenth century. In the modern world, which was constantly threatened by internal revolt or military *coups d'état*, the right of asylum was essential for all nations, and not only for the Latin American countries. By making frequent use of the right of asylum, those countries had enabled political leaders who would otherwise have been sacrificed to the hatred and revenge of their opponents to render their countries invaluable service.

70. The right of asylum was based on the fact that in politics there were no offences or crimes, but only errors or mistakes. A person considered at a given moment as a political criminal might later be brought to the apex of power, perhaps by the very persons who had persecuted him most strenuously. He quoted as an example the case of Masaryk, who had been condemned to death as a traitor by the Austrian-Hungarian courts and had later become the head of the Czechoslovak State. The right of asylum had always existed in all countries of the world and in all eras of history. From the times of ancient Greece until the most recent period of modern history, asylum had been the only safeguard of those who were persecuted for their political convictions. Although it was true that the policy pursued at the time by the Netherlands had forced Grotius—who had been called the father of international law—to seek asylum in France, it had to be remembered that the same Netherlands had decided to give asylum to Kaiser William II at the end of the First World War and had, in a memorable note, called upon all Governments, in the name of the existing law, to respect that asylum. He thought that note contained the best defence of the right of asylum, which the authors of the additional article wished to include in the declaration.

71. The history of countries such as France, Switzerland, the United Kingdom, Greece, the Scandinavian countries, the United States of America and the USSR contained many examples of cases in which the right of asylum had been exercised. He regretted that his insufficient knowledge of the history of India and China prevented him from stating that the right of asylum had also been exercised in those countries, but he had no doubt that they would welcome the insertion of a right which was so much in line with their philosophy.

72. Although the right of asylum had been exercised at all times by all the countries in the world, and although it had been acknowledged as a State right by the custom of many centuries, if not milleniums, the Latin American countries were the only ones to have established its juridical status by convention. He cited the Convention of Havana and Montevideo, concluded in 1928 and 1933 respectively, and stated that the Latin American Republics were proud of having been the champions of the recognition of this humanitarian institution, which mitigated to some degree the violence and ferocity of political struggles.

73. The right of asylum was one of the noblest creations of customary international law. It would be inconceivable not to include it in a general declaration on the rights and duties of States, and the proposed additional article should therefore be included in the declaration which the Commission was preparing.

74. He stressed that recognition of the right of States to grant asylum did not bind them to grant it to all political refugees who asked for it. The States themselves were free to decide whether or not asylum should be given to a political refugee. The duty corresponding to the right of asylum was not that of granting asylum whenever it was requested, but that of respect for the asylum granted on the part of the State of which the refugee was a national. That State should in no case consider the granting of asylum as an unfriendly act against it.

75. It was for the State granting asylum to decide whether the crime imputed to the refugee constituted a political crime or a common law offence. That was the rule laid down by conventional and customary law with regard to extradition. That rule had been expressly included in the Convention on the Right of Asylum adopted in 1933 by the Seventh Pan American Conference and also in another regional Convention concluded in 1939 between several Latin American States.

76. He drew the Commission's attention to the fact that, in order to take into consideration the objections rightly put forward by Mr. Brierly, the authors of the additional article had not mentioned in their text asylum granted on warships or military aircraft. He hoped that the article would be approved unanimously by the Commission, since its purpose was to insert in the declaration a right already recognized in several international instruments and sanctioned by the juridical conscience of the civilized world and by custom, which was one of the most important sources of international law.

77. Mr. HSU warmly supported Mr. Yepes' proposal; he wished to assure the Commission that China was as anxious as any other country to exercise and recognize the right of asylum. He noted the existence of a tendency to turn this right into a duty.

78. Mr. SANDSTROM gave his full support to the proposal submitted by Mr. Yepes.

79. Mr. CORDOVA said that he was a warm supporter of the right of asylum, but he wished to ask for an explanation of the expression " persons of any nationality ". He thought the right of asylum should only be granted to nationals of

the " persecuting " State, and it should be remembered that certain national legislations forbade foreigners to take part in political activities.

80. The CHAIRMAN thought a state had the right to grant asylum to any person regardless of his nationality.

81. Mr. KORETSKY said that he was in favour of the right of asylum, but wished the text of the article to make a reservation with regard to war criminals; certain war criminals had not yet been extradited after the Second World War.

82. Mr. YEPES pointed out that the question of extradition was quite different from that of the right of asylum. He had only alluded to extradition in his statement in order to bring out the fact that it was for the State concerned to decide whether a crime should give rise to extradition or to asylum. He fully shared Mr. Koretsky's opinion on the extradition of war criminals.

83. Mr. ALFARO said that there was no question of including war criminals amongst persons to whom asylum could be granted, since it was impossible to describe the crimes of which they were accused as having a " political character ". The Nürnberg Charter and the Convention on Genocide stated what special provisions were applicable to war criminals.

84. Mr. SCELLE supported Mr. Alfaro's remarks. The question of war criminals was a supra-national one, whereas the right of asylum was a matter of relations between States.

85. Mr. BRIERLY recalled that Mr. Yepes had quoted the case of the Netherlands, which had granted asylum to the Kaiser after the First World War. Clearly any State had the right to receive political refugees and to refuse to give them up, if there were no extradition treaties or if the latter included clauses concerning political refugees, as was usually the case. He drew attention to the practice, especially prevalent in Latin American countries, of granting asylum in legations or embassies. That practice had not been accepted by the majority of European States, and by the United Kingdom Government in particular. He therefore thought that the text of the article should be amended in order to specify that legations and embassies were not considered as places of asylum.

86. Mr. YEPES said that warships, military aircraft and legations or embassies had been enumerated in the original text of the article on the right to political refuge as places of asylum which had to be respected. This list had been omitted, in order to meet the objections raised by Mr. Brierly. The text finally proposed gave each State full latitude in deciding the places where it would grant asylum. The text he had submitted was proposed merely as a basis for discussion; any alterations would be acceptable, provided that the principle of the right of asylum was respected.

87. The CHAIRMAN proposed that, in order to meet Mr. Brierly's wishes, the words " in its territory " should be added after the word " asylum ".

88. Mr. YEPES thought that such a restriction would not be compatible with existing law. The question of the right to political refuge was amongst the subjects which it seemed necessary or desirable to codify. It would therefore be preferable for the Commission to deal only with the principle of the right of asylum, without going into details.

89. The CHAIRMAN thought it might be difficult to deal with the question merely in an article of the declaration on the rights and duties of states. He therefore called upon the Commission to vote on the question whether the principle of the right of political refuge should be included in the draft declaration. In the event of an affirmative reply, the Commission would continue to consider the wording of the text submitted.

By 9 votes 3, it was decided to include an article on the right to political refuge.

90. The CHAIRMAN doubted whether the word " offences " was suitable and thought it might be preferable to replace it by the word " acts ".

91. Mr. ALFARO pointed out that most penal codes contained chapters on crimes against the State; these crimes included revolutions, *coups d'état* and even mere attempts at violence. Thus, both the meaning and the purpose of the article would be restricted by replacing the word " offences " by the word " acts ". He thought that the Chairman's objection might be overcome by using the phrase " . . . acts which the State according asylum deems to be political offences ".

92. Mr. FRANÇOIS doubted whether the addition of the words " in its territory " would be enough to ensure that legations or embassies were not included among places of asylum, and pointed out that some members of the Commission considered legations and embassies as parts of the territory of the States to which they belonged. He could not accept the proposed article unless legations and embassies were expressly excluded.

93. The CHAIRMAN thought that the concept of extra-territoriality was an obsolete one. It had been established by jurisprudence that legations or embassies did not constitute a part of the territory of the State to which they belonged.

94. Mr. YEPES said that if asylum in legations or embassies were excluded, this would constitute a retrogression as compared with the existing situation. The right of asylum in embassies were currently recognized in many countries and should therefore be respected. He suggested that the consideration of the question be postponed until the Commission's next session, if no agreement could be reached on that important point.

95. Mr. BRIERLY having pressed for the adoption of his amendment, as formulated by the

Chairman, the latter pointed out that Mr. François was not sure whether the proposed addition would really have the desired result.

96. Mr. SANDSTROM thought that the Commission should confine itself to stating the principle of the right to political refuge, without going into the details of its application.

97. Mr. SPIROPOULOS thought it would be advisable to investigate the existing legal situation with regard to the right to political refuge and the practical effects of adopting the proposed article. There could be no doubt that every State currently had the right to grant asylum in its legations and embassies; the question was whether that asylum had to be respected. Another question was that of warships and military aircraft; opinions differed on that subject, and it would be desirable to know how the point would be settled by an international jurisdiction.

98. If the Commission adopted the proposed article with Mr. Brierly's amendment, what would the legal position be with regard to legations or embassies and warships and military aircraft? A possible interpretation would be to claim that the right of asylum did not exist in such cases. It seemed, therefore, that there was a risk of altering existing international law.

99. The CHAIRMAN recalled that certain States granted asylum in their legations; that had happened in Spain during the last civil war. On the other hand, many States refused to grant asylum in their legations, and denied this right to other States. The Commission was not in a position to solve the problem.

100. He drew attention to article 14 of the Universal Declaration of Human Rights, which used the expression " . . .to enjoy in other countries asylum. . . ". Those terms were very vague and did not create a precedent which the Commission should follow.

101. Mr. SCELLE pointed out that, since article 14 of the Universal Declaration of Human Rights gave everyone " the right to seek and to enjoy in other countries asylum from persecution ", States had the right and even the duty to grant such asylum. Nevertheless, the main question was the classification of the crime. In this connexion, it had to be remembered that international co-operation in penal matters was one of the duties of States.

102. A State had the right to grant asylum provided that the refugee was being persecuted for offences of a political character. The State might decide in the first instance, but in case of dispute the final decision should rest with the International Court of Justice.

103. He suggested that the text of the article should be amended in order to make that point clear. He thought that was essential, since there was too much tendency to forget that the world was evolving towards international organization, in which the right of decision of States must be subordinate to that of the international jurisdiction; the world was evolving towards " instituted " bodies. He proposed the addition of the words, " This judgment is subject to the decision of the International Court of Justice ".

104. The CHAIRMAN thought it would be difficult to make the addition, in view of provisions of Article 36 of the Statute of the International Court.

105. Mr. FRANÇOIS pointed out that, if two States were not in agreement, they would obviously have to resort to the methods for peaceful settlement given in Article 35 of the Charter and the case would go to the International Court of Justice, if they had accepted its jurisdiction as compulsory. He therefore thought Mr. Scelle's amendment unnecessary.

106. The CHAIRMAN put to the vote the amendment consisting in the addition of the words " in its territory " after the word " asylum ".

The amendment was rejected by 9 votes to 2.

107. The CHAIRMAN put to the vote the first sentence of the proposed article, namely, " Every State has the right to accord asylum to persons of any nationality who request it in consequence of persecutions for offences whith the State according asylum deems to have a political character."

The text was adopted by 8 votes to 3.

108. The CHAIRMAN pointed out that the second sentence of the article dealt with the corresponding duty of other States. That had not been done in the other articles of the draft declaration; it did not seem desirable to create such a precedent, which would involve the revision of all the articles already adopted.

109. Mr. YEPES explained that the main purpose of the second sentence of the article was to make it clear that the fact of according asylum should not be considered as an " unfriendly act ".

110. The CHAIRMAN put to the vote the second sentence of the proposed article, namely " The State of which the refugee is a national has the duty to respect the asylum accorded and may not consider it an unfriendly act."

The sentence was rejected by 7 votes to none.

Article 9: Respect for the rights of the State by other States (resumed and concluded)

Article 10: Limitation of the rights of the State (resumed and concluded)

111. The CHAIRMAN recalled that the Commission had reserved its decision when these articles were originally considered. [1] He thought that article 10 had no place in a declaration on

[1] See A/CN.4/SR.13, para. 71.

the rights and duties of States. With regard to article 9, he proposed that it should be considered together with the preamble, since it was not concerned with a specific right or duty, but rather with a general statement on the rights and duties of States.

The Chairman's two proposals were adopted unanimously.

Formation of a committee

112. The CHAIRMAN pointed out that, although most of the twenty-four articles submitted to the Commission had been adopted in principle, many questions remained to be solved; the most important were the following:

(1) The preamble, which would have to be worded to take into account Mr. Scelle's draft, article 9 and various ideas arising out of the Panamanian draft;

(2) The question whether the declaration on the rights and duties of States should consist of " articles " or " paragraphs ";

(3) The order of these articles or paragraphs;

(4) The style;

(5) The question of the various sub-titles;

(6) A study of the phraseology, in order to achieve uniform texts in the various languages.

113. All these questions involved the consideration of the draft as a whole. In order to do this, it might be advisable to set up a small committee which would report to the Commission as soon as possible after having studied the draft and drawn up a new text. In accordance with the Committee's report, the Commission would decide whether it could proceed to prepare a final draft during its current session or whether that task should be postponed until the second session.

114. The Chairman decided, in accordance with the usual procedure, that the committee should be composed of the following members: Sir Benegal Rau (Chairman), Mr. Alfaro, Mr. Brierly and Mr. Scelle. He recalled that the Committee's special task was the study of the various questions he had enumerated.

115. Mr. KORETSKY thought it would be well to specify whether the committee was merely to prepare the way for a second reading of the draft declaration or whether it was to draw up a final draft, which would be submitted as such to the General Assembly, He thought the first solution preferable, unless the committee could draw up a text which it would recommend for submission to the Assembly.

116. The CHAIRMAN agreed with Mr. Koretsky and thought that the Commission should give the committee a free hand. He specified that Mr. Hsu's first proposal would be referred to the committee.

The meeting rose at 6.05 p.m.

17th MEETING

Monday, 9 May 1949, at 3 p.m.

CONTENTS

Chairman: Mr. Manley O. HUDSON.

Rapporteur: Mr. Gilberto AMADO.

Present:

Members: Mr. Ricardo J. ALFARO, Mr. James L. BRIERLY, Mr. Roberto CÓRDOVA, Mr. J. P. A. FRANÇOIS, Mr. Shuhsi HSU, Mr. VLADIMIR M. KORETSKY, Sir Benegal N. RAU, Mr. A. E. F. SANDSTRÖM, Mr. Georges SCELLE, Mr. Jean SPIROPOULOS, Mr. Jesús María YEPES.

Secretariat: Mr. LIANG, Director of the Division for the Development and Codification of International Law, Secretary to the Commission.

Formulation of the principles recognized in the Charter of the Nürnberg Tribunal and in the judgment of the Tribunal (A/CN.4/5)

GENERAL DISCUSSION

1. The CHAIRMAN invited the Commission to begin the discussion of item 3 on the agenda, which included the following two paragraphs:

(*a*) Formulation of the principles recognized in the Charter of the Nürnberg Tribunal and in the judgment of the Tribunal.

(*b*) Preparation of a draft code of offences against the peace and security of mankind.

2. Those two questions had been included in the agenda in pursuance of resolution 177 (II) of the General Assembly dated 21 November 1947 (See A/CN.4/5, p. 33). Previously, by its resolution 95 (I) of 11 December 1946 (See A/CN.4/5, pp. 14 and 15), the General Assembly had already affirmed " the principles of international law recognized by the Charter of the Nürnberg Tribunal and the judgment of the Tribunal " and had referred the matter to the Committee on the Progressive Development of International Law and its Codification.

3. The report of that Committee (A/AC. 10/52; also A/CN.4/5, pp. 18 and 19) proposed that the General Assembly should request the International Law Commission to prepare a draft Convention incorporating the principles of international law recognized by the Charter of the Nürnberg Tribunal and sanctioned by the judgment of that

Tribunal, and a detailed draft plan of general codification of offences against the peace and security of mankind. The Commission also drew the Assembly's attention to the possible advantages of establishing an international judicial authority with competence to exercise jurisdiction over such crimes. That last recommendation had entirely disappeared from the text of resolution 177 (II), and the first two had undergone modifications. Thus, the resolution was drawn up in more imperative terms than the draft: instead of merely inviting it to prepare drafts, the Assembly " decides to entrust " to the Commission the formulation of the Nürnberg principles and " directs " it at the same time to carry out that task and prepare a draft code of offences against the peace and security of mankind. Of those two tasks only the first should be discussed at the present meeting.

4. The Commission was therefore directed to formulate and not to study critically the principles of international law recognized in the Charter of the Nürnberg Tribunal and in the judgment of the Tribunal. The Tribunal had, moreover, introduced only a few changes into the principles of the Charter. Only on two points had there been a slight deviation from them: first, when, by a restrictive interpretation, the Tribunal decided not to take account of the crimes against humanity committed before the beginning of the 1939 war; and secondly, when it refrained from considering as guilty of war crimes those who had committed violations of the Naval Protocol of 1936 concerning submarine warfare.

5. Although it had confirmed them, the General Assembly had not pointed out what were the principles of international law recognized by the Charter and the judgment of the Nürnberg Tribunal. It seemed therefore that the Commission was to some extent free to determine those principles even though its mandate was solely to formulate them.

6. In examining those principles the Commission could take as a basis for discussion either the various headings in the third part of the memorandum submitted by the Secretary-General (A/CN.4/5), or the summary on page 20 of that document of the French memorandum (A/AC.10/34) submitted to the Committee on the Progressive Development of International Law and its Codification, which proposed the definition of five principles drawn from the Charter and the judgment of the Nürnberg Tribunal.

7. That, moreover, had not been the only attempt to formulate those principles. Sir Hartley Shawcross when addressing the American Bar Association in 1946 had defined three of them in the following terms: [1]

" (1) To initiate a war of aggression is an international crime.

" (2) Individuals who lead their countries into such a war are personally responsible.

" (3) Individuals therefort have international duties which transcend the national duty of obedience imposed by particular States when to obey would constitute a crime against the nations."

8. The Chairman requested the Commission to express its opinion on the analysis he had just made of the task before it.

9. Mr. SANDSTRÖM said that on the whole he shared the point of view expressed by the Chairman. He thought, however, that it would be advisable to define the word " formulate ", which might mean either to analyse the principles and criticize them before deciding whether they were in conformity with international law, or merely to transcribe them, accepting them officially as principles of international law. The second interpretation seemed the better of the two, since, the General Assembly having already confirmed the principles of Nürnberg, there could be no question of the Commission reaching contrary conclusions after a critical examination of them.

10. The CHAIRMAN in that connexion drew attention to the difference in wording that could be noticed between the imperative text of resolution 177 (II) and the text of resolution 260 B(III) of 9 December 1948 in which the General Assembly invited the Commission to study the desirability and possibility of establishing an international judicial organ for the trial of persons charged with genocide. In the case of the Nürnberg principles, it was not a work of criticism which the Assembly was asking the Commission to carry out, but a simple legal drafting of already recognized principles.

11. Mr. SANDSTROM thought it was not the Commission's task to assess the competence of the Nürnberg Tribunal, either. All the evidence seemed to show that the General Assembly had assumed such competence, and the Commission ought therefore to adopt a similar attitude on the point.

12. Mr. CORDOVA stated that both the Charter and the judgment of the Nürnberg Tribunal seemed to him to represent considerable progress in international law. There was, however, some doubt as to the intentions of the authors of resolution 177(II) when they directed the Commission to formulate the principles of that Charter and judgment.

13. First of all, since the Assembly had not pointed out what those principles were, the Commission would have to find them before formulating them. It could not, as Mr. Sandström had suggested, confine its activities to a mere transcription of them.

[1] Sir Hartley Shawcross, " *International Law: a Statement of the British View of its Role* ". *American Bar Association Journal*, Vol. 33, No. 1 (Jan. 1947), p. 32.

14. Secondly, he did not think, as did Mr. Sandström, that the General Assembly had the power to establish principles of international law. In the political field it could state that a given principle was a principle of international law, and its statement would bind the Members of the United Nations, but that would not amount to making that principle a principle of international law. On that point, divergencies of opinion had been revealed during the discussions in the Committee on the Progressive Development of International Law and its Codification. It was characteristic that the original wording of the report advocating a draft convention " in order to give to those principles a binding force for all " should have subsequently simply been suppressed after the representative of Yugoslavia had requested that it should be narrowed down to the expression " binding force for the signatory States " (A/CN. 4/5, p. 21). It appeared therefore that although they were at that time already confirmed by the General Assembly, the Nürnberg principles did not yet possess the character of principles of international law, as otherwise it would be easy to lay down that they were binding on all. For this reason he thought that the Commission should extract and formulate the provisions of the Charter and judgment to which it attributed the character of international law.

15. Mr. SPIROPOULOS agreed with Mr. Sandström that the Commission should confine itself to determining the principles proclaimed in the Charter and applied in the judgment. If there was any divergence between the Charter and the judgment—and it was known that the Tribunal's interpretation had occasionally narrowed the field of application of the principles of the Charter—he thought that only the principle as applied by the Tribunal should by retained. On the other hand, they could not ignore Mr. Córdova's remark to the effect that the Commission did not have to define all the Principles of the Charter and the judgment, but only those which were principles of international law. The work of the Commission could thus be reduced to that of formulating only the principles which were recognized by the Charter, the judgment and international law.

16. Mr. ALFARO stated that for him the question was very clear. It was not the Commission's task to find out whether the principles contained in the Charter and the judgment were in conformity with positive international law as it existed before the judgment. Actually, the problem belonged to the field of the progressive development of international law, and it was precisely the Commission's task to formulate principles which would constitute innovations in that law, such as the principle of the international responsibility of the individual for crimes against peace, war crimes and crimes against humanity.

17. Mr. AMADO was of the opinion that the preliminary difficulties arising in connexion with the formulation of the Nürnberg principles could be disposed of during the present session, but that the work of drafting should be delegated to a committee and deferred. The Charter of the Tribunal included on the one hand substantive provisions some of which were of a general nature (last paragraph of article 6, and articles 7 and 8) and others of a particular nature defining the various modalities of the crime, and on the other hand, provisions relating to procedure and judicial organization. All those principles had been interpreted and defined in the judgment of the Tribunal: it was therefore possible to formulate them clearly and systematically. It would, however, be advisable in the first place to decide to exclude from the formulation everything relating to procedure and judicial organization: such material could be studied at the same time as the second part of item 3 on the agenda.

18. Once that restriction was made, the Commission would have to decide whether the formulation should take the form of a convention or a resolution. The Nürnberg Tribunal had considered that the Charter did no more than embody the principles of existing international law, and the General Assembly had subsequently confirmed those principles: it could therefore be said that they formed part of general international law.

19. Nevertheless, in view of the extended field of application given to those principles by the Tribunal, it would be more appropriate to consider them from the view of the development of international law. He was therefore of the opinion that the principles should be formulated in a convention clearly defining the modalities of the various categories of crimes described in article 6 of the Charter, together with their extenuating, aggravating or justificatory circumstances. Such a convention as an instrument of progress and penal justice would be more sure than a simple statement in the form of a resolution.

20. That work having been accomplished, it would remain for the Commission to carry out a more lengthy task: that of preparing a draft code of offences against the peace and security of mankind. In that code, to a very large extent, a new law would have to be established. It would certainly confirm some conventions, such as the Convention on Genocide and the convention confirming the Nürnberg principles, but it would also have to contain a general section and, according to the suggestions of some Governments, new criminal modalities. On the other hand, it would exclude all international crimes not directly aimed against the peace and security of mankind, such as the traffic in narcotic drugs, or the white slave traffic, for the repression of which international conventions already existed. Such, he said, was his general idea of the Commission's work in that field.

21. The CHAIRMAN agreed that the Committee on the Progressive Development of International Law and its Codification had envisaged in its report a draft convention on the Nürnberg principles. The General Assembly had not, however, taken action on that suggestion. The only part of the Committee's proposal which survived in resolution 177 (II) was the second part, which dealt with the draft code of offences against peace and security of mankind. But it was not a question of a convention there either.

22. The Commission was therefore faced with one alternative only: should it formulate those parts of the Charter and judgment of Nürnberg which in its opinion constituted principles of international law, or should it attempt to formulate what the Charter and the judgment recognized as principles of international law? It was the second course which without doubt was the real task of the Commission: the text of the Assembly resolution was sufficiently explicit on that point. The Chairman also pointed out that the Charter and judgment of the Tokyo Tribunal would also have to be taken into consideration.

23. Mr. SCELLE was of the opinion that although the Commission was not called upon to criticize the principles recognized in the Charter and judgment of Nürnberg, it had nevertheless the right to make reservations. Unless that were so, it would be difficult to understand why the General Assembly had directed a commission of jurists to formulate the principles.

24. Mr. SPIROPOULOS was of the opinion that it was not part of the Commission's task to determine which of the Nürnberg principles were principles of positive international law, but to confine itself to formulating the principles proclaimed in the Charter and applied by the Tribunal. He even thought it would be dangerous at the present time to deviate from those principles or to criticize them.

25. He was, moreover, of the opinion that it would not be advisable to take into consideration the judgment of the Tokyo Tribunal, which was not mentioned in the General Assembly resolution. The Commission should confine itself to formulating without more ado the principles which had emerged at Nürnberg, and at Nürnberg alone.

26. Mr. SANDSTROM did not share the opinion that the Commission should formulate all that was in the Charter and judgment of Nürnberg. As a matter of fact, certain parts of the Charter, such as Articles 9 and 10, did not, properly speaking, enunciate principles of international law, and need not hold the Commission's attention. In his opinion, articles 6, 7 and 8 of the Charter were the only ones which contained principles that should be formulated.

27. Mr. SCELLE pointed out he had not advocated a critical exposition of the Charter or the judgment. He remarked that if the Commission accepted without reservation all the principles contained in the Charter, it would be exposing itself to the necessity which might arise, of contradicting those principles, if, later, when drafting a code of offences against the peace and security of mankind, it enunciated different ones. In order to retain its freedom of action therefore, the Commission should expressly state that the formulation on which it was engaged was purely a piece of research work and the Commission did not necessarily accept all the principles it found proclaimed.

28. Mr. YEPES shared the opinion of those who considered that the Commission's sole task was to formulate the principles recognized both by the Charter and the judgment of Nürnberg. That, in his opinion, was the meaning of the word " and " in section (*a*) of resolution 177 (II). He was of the opinion that the principles should be formulated as a declaration rather than a convention, for which it would be more difficult to secure acceptance.

29. The CHAIRMAN pointed out that the Commission was not empowered to draft either a declaration or a convention.

30. Mr. FRANÇOIS also thought that the terms of reference of the Commission were very simply and solely to proclaim the principles recognized at Nürnberg. He emphasized the harmful effect on world opinion that would be produced by the doubt the Commission had cast on the very principles on which the judgment had been based and by virtue of which a certain number of the accused had been condemned to death or imprisonment. He stated that the General Assembly had not invested the Commission with the right to review that judgment.

31. Mr. BRIERLY admitted that section (*a*) of resolution 177 (II) was drawn up in ambiguous terms and lent itself to differing interpretations. In his opinion, the only consideration that should be borne in mind was that by its resolution 95 (I) the General Assembly had confirmed as principles of international law the principles enunciated in the Charter and judgment of the Nürnberg Tribunal. The Commission's task was not therefore to decide whether a principle enunciated in the Charter or the judgment was really a principle of international law; it must proceed from the assumption that it was such a principle.

32. Mr. CORDOVA found it difficult to admit that the Commission had no other task than that of registering simply and solely, the principles enunciated in the Charter or the judgment of Nürnberg. As a matter of fact, the Commission had a double mandate: to codify the principles sanctioned by positive international law and to formulate new principles arising from the progressive development of international law.

33. Mr. SANDSTROM recalled that the formu-

lation of the principles enunciated at Nürnberg was only a preliminary stage in the process in the drawing up of the draft code of offences against the peace and security of mankind, which was the Commission's main task. The limited character of the Commission's terms of reference as regarded the formulation of the Nürnberg principles should not therefore give rise to astonishment

34. Mr. SPIROPOULOS thought it better to avoid asking whether a given principle existed in positive international law, since the Tribunal had proclaimed that all the principles recognized by the Charter were based on existing conventional or customary international law.

35. The CHAIRMAN proposed that it should be noted in the report that " the conclusion of the Commission is that it is not asked to express any appreciation of the principles applied in the Charter and the Tribunal of Nürnberg as principles of international law. It is asked merely to give formulation to those principles without any indication of their authority."

36. Mr. SCELLE supported that proposal while maintaining the reservation he had previously made.

The Chairman's proposal was adopted.

37. The CHAIRMAN noted that the Commission had agreed to confine itself to the principles enunciated in articles 6, 7 and 8 of the Charter. He also emphasized that neither the Charter of the Tribunal nor the Charter of the United Nations defined a war of aggression, and he wondered whether it would not be advisable to include a definition of a war of agression in the formulation of the Nürnberg principles. He also wondered whether the principle of judgment in the absence of the accused enunciated in article 12 of the Charter should not be included in the formulation.

38. Lastly, the question arose as to whether it would be advisable to examine the provisions of the Charter relating to procedure. He recalled in that connexion that article 6 of the Charter confined the powers of the Tribunal to crimes committed in the interests of the European Axis Powers. The Commission should therefore decide whether the principles enunciated by the Tribunal were or were not of general application. He pointed out that that question had been discussed at length at the London Conference which had drawn up the Charter of the Tribunal, and thought it would be useful for the Commission to take account of the records of that Conference which were the preparatory documents of the Charter.

39. Mr. SANDSTROM stated that the Commission should not concern itself with questions relating to procedure, just as it should avoid questions relating to the Tribunal's powers. He pointed out that the Tribunal had considered the principles enunciated in Article 6 as of general application.

40. Mr. SPIROPOULOS was of the opinion that the Commission should refrain from entering into details of procedure. Questions of procedure could be more usefully discussed when the Commission commenced its discussions on the establishment of an international penal court.

41. Mr. SCELLE remarked that the question of the rights of defence was not a question of procedure.

42. The CHAIRMAN wondered whether it could be inferred from the judgment that the Tribunal had admitted an exception to the principle: *nullum crimen sine lege.*

43. Mr. ALFARO stated that the Commission should confine itself to formulating principles and not concern itself with questions of procedure which would be studied when the establishment of an international jurisdiction was being considered. The principles it had to formulate were four or five in number: the principle of individual responsibility for the crimes of an international character enumerated in Article 6 of the Charter; the principles arising out of Articles 7 and 8 of the Charter; the principle of the guilt of persons who have been members of criminal organizations (articles 9 and 10). He thought that to those principles might perhaps be added the principle of guaranteeing the accused a fair trial.

44. Mr. SPIROPOULOS stated that while the defence had maintained that, in virtue of the principle *nullum crimen sine lege,* the acts imputed to the accused were not punishable, the Nürnberg Tribunal had decided that they were guilty on the grounds that those acts were punishable in virtue of positive law; the Tribunal had therefore maintained the principle in question. The Commission could not consider the exception to the maxim *nullum crimen sine lege* as a principle proclaimed at Nürnberg, because the only principles it had to formulate were those appearing in both the Charter and the judgment.

45. The CHAIRMAN considered that the word " and " in section (*a*) of resolution 177 (II) meant " and/or ", and therefore the Commission would always be able to formulate a principle recognized in the judgment even if it was not included in the Charter, or conversely.

46. Mr. SCELLE did not share that point of view.

47. Mr. CÓRDOVA stated that since the purpose of the formulation was to prevent international crimes, it was advisable to enunciate the greatest possible number of principles, whether they were drawn from the Charter or from the judgment.

48. Mr. BRIERLY stated that the Tribunal had emphasized that the principle *nullum crimen sine lege* was not an absolute rule, but that even if it had been, yet that principle had not been violated.

METHOD OF WORK AND ESTABLISHMENT OF A COMMITTEE

49. The CHAIRMAN requested the Commission to decide on the method of work it desired to adopt. The question to be decided was whether or not it would be necessary to re-word articles 6, 7 and 8 of the Charter of the Nürnberg Tribunal in order to emphasize the principles of international law which they enunciated. For his part he refused to admit that the task of the Commission was merely to extract from the Charter the provisions containing principles of international law and simply and solely recopy them.

50. Mr. AMADO said that it would first be necessary to determine the meaning of the word " formulation ". Some of the principles enunciated in the Charter and the judgment of the Nürnberg Tribunal had considerably modified existing international law. In formulating them, the Commission would sanction those modifications. Its task was therefore extremely important and could not be a mere reproduction of certain provisions of the Charter and judgment of the Nürnberg Tribunal.

51. Mr. SANDSTROM was of the opinion that the Commission should not confine itself to repeating principles enunciated in the Charter and judgment of the Nürnberg Tribunal: it should proceed to make a systematic analysis of those two documents.

52. Mr. CORDOVA shared the views of the Chairman. The Commission should not only register the principles proclaimed in the Charter and judgment of the Nürnberg Tribunal. It should also, to mention only one example, study the question of aggressive operations, which in the Tribunal's opinion did not constitute wars of aggression (A/CN.4/5, p. 59).

53. Mr. FRANÇOIS wondered whether in formulating the principles of Nürnberg the Commission might not be guided by the French proposal (A/AC.10/34) a summary of which appeared on page 20 of the Secretary-General's memorandum (A/CN.4/5). In that case the Commission might take the proposal as a basis for discussion.

54. The CHAIRMAN remarked that the French proposal was drawn up in terms which were too general to serve as a point of departure for the discussion.

55. Mr. AMADO had no objection to taking the French proposal as a basis, but he thought the Commission should first discuss and agree as to what principles emerged from the Charter and the judgment of the Nürnberg Tribunal.

56. Mr. ALFARO recalled that the Commission had agreed to recognize that the principles to be formulated were enunciated in Articles 6, 7 and 8 of the Charter. He thought the Commission might arrange for the formulation of those principles to be preceded by a general statement in the sense of paragraphs (*a*) and (*b*) of the French proposal. Emphasizing the need for a working document to serve as a basis for discussion, he proposed the establishment of a committee composed of two or three members whose task would be to draw up such a document.

57. The CHAIRMAN pointed out that before preparing the document the Committee should study the Charter and judgment of the Nürnberg Tribunal, taking into account the preparatory work on the Charter and the other judgments given by the Tribunal, as well as the Charter and judgment of the Tokyo Tribunal. The question therefore arose as to whether the Committee should draw up the working document during the present session or in the interval between the Commission's first and second sessions.

58. After a brief discussion in which Mr. SPIROPOULOS, Mr. ALFARO and Mr. CORDOVA took part, the Commission decided to set up a committee composed of Mr. François, Mr. Spiropoulos and Mr. Sandström, whose task it would be to draw up during the present session a working document containing a formulation of the Nürnberg principles.[2]

The meeting rose at 5.40 p.m.

[2] The discussion was resumed at the 25th meeting. See A/CN.4/SR.25.

18th MEETING

Wednesday, 11 May 1949, at 3 p.m.

This meeting was held in private and no Summary Record was issued.

19th MEETING

Thursday, 12 May 1949, at 3 p.m.

CONTENTS

Chairman: Mr. Manley O. HUDSON.

Rapporteur: Mr. Gilberto AMADO.

Present:

Members: Mr. Ricardo J. ALFARO, Mr. James L. BRIERLY, Mr. Roberto CÓRDOVA, Mr. J. P. A. FRANÇOIS, Mr. Shuhsi HSU, Mr. Vladimir M. KORETSKY, Sir Benegal N. RAU, Mr. A. E. F. SANDSTRÖM, Mr. Georges SCELLE, Mr. Jean SPIROPOULOS, Mr. Jesús María YEPES.

Secretariat: Mr. KERNO, Assistant Secretary-General in charge of the Legal Department; Mr. LIANG, Director, Division for the Development and Codification of International Law, Secretary of the Commission.

Draft Declaration on the Rights and Duties of States (*resumed*)

SECOND READING

1. The CHAIRMAN drew attention to the draft Declaration on the Rights and Duties of States as proposed by the Sub-Committee [1] on the Draft Declaration.[2]

2. Mr. KERNO (Assistant Secretary-General) wished to make some general comments on the draft Declaration. Recalling that the Commission

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[1] Set up at the sixteenth meeting. See A/CN.4/SR.16, paras. 112-116.

[2] The Draft Declaration read as follows:

" *Whereas* the States of the world form a community and the protection and advancement of the common interests of their peoples require effective organization of the community of States;

" *Whereas* the great majority of the States are organized as a legally constituted community and have established a new international order under the Charter of the United Nations;

" *Whereas* the community of States is universal and participation in its constitutional organization should also be universal and obligatory;

" *Whereas* the maintenance of international peace and security is the supreme aim of the community of States and the United Nations has set forth purposes and principles and has established organs and procedures appropriate for the realization of that aim and conforming to the rules, customs and principles generally recognized by the civilized nations as constituting international law;

" *Whereas* the reign of law is the necessary foundation of international peace and security, and therefore it is important to define the basic rights and duties that States may exercise or must fulfil in their mutual relations; and

" *Having in mind* the principle that rights and duties are correlative and the right of one State implies the duty of other States to respect it;

" *The General Assembly* of the United Nations adopts and proclaims the following:

" DECLARATION ON THE RIGHTS AND DUTIES OF STATES

" *Article 1*

" Every State has the right to maintain its existence and to provide for the well-being of its people.

" *Article 2*

" Every State has the right to have its existence recognized by other States.

" *Article 3*

" Every State has the right to independence and thus to exercise freely, without being subject to the dictates of any other State, all its legal powers including the choice of its own form of government. It is in this sense that States are sovereign.

" *Article 4*

" Every State has the duty to refrain from intervention in the internal or external affairs of any other State.

" *Article 5*

" Every State has the right to equality in law with any other State.

" *Article 6*

" Every State has the right to exercise jurisdiction over its territory and over all persons and things therein.

" *Article 7*

" Every State has the duty settle its international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered.

" *Article 8*

" Every State has the duty to refrain from waging war as an instrument of national policy and from resorting to any threat or use of force either against the territorial integrity or political independence of another State or in any other manner inconsistent with international law and order.

" *Article 9*

" Every State has the duty to refrain from recognizing any territorial acquisition made by another State through force or the threat of force.

" *Article 10*

" Every State has the duty to refrain from giving assistance to any State which has failed to perform the duty set forth in Article 8 or against which the United Nations is taking preventive or enforcement action.

" *Article 11*

" Every State has the right, individually or collectively, to take legitimate measures for its own defence or for the defence of any other State.

" *Article 12*

" Every State has the duty to carry out in good faith its obligations arising from treaties and other sources of international law and it may not invoke limitations contained in its own Constitution or its laws as an excuse for failure to perform this duty.

" *Article 13*

" Every State has the duty to see that conditions prevailing within its own territory do not menace international peace and order, and to this end it must treat its own population with respect for human rights and fundamental freedoms for all.

" *Article 14*

" Every State has the duty to refrain from fomenting civil strife in the territory of another State, and the duty to prevent the organization within its territory of activities calculated to foment such civil strife.

" *Article 15*

" Every State has the right to accord asylum to persons of any nationality who request it in consequence of persecution for offences of a political character.

" *Article 16*

" Every State has the duty to conduct its relations with other States in accordance with international law, and with the principle that the sovereignty of the State is subject to be supremacy of international law. "

had previously decided to base that document on general international law rather than on the United Nations Charter only, he observed that general international law included primarily customary international law, but it also included conventional law, of which the United Nations Charter formed an important part. The Charter set forth a body of international law which had been accepted by 59 States and all other States in the world had indicated their willingness to abide by it, with the exception of traditionally neutral Switzerland and of Franco Spain which was precluded from admission to membership in the United Nations in consequence of resolutions of the General Assembly. The Principles of the Charter were certainly as broadly accepted as those of customary international law. Moreover, by the time the draft Declaration under discussion was adopted, it was to be hoped that there would be even fewer States in the world that had not formally become Members of the United Nations and hence bound by the international law contained in the Charter.

3. In view of the importance of the Charter as a basic source of international law, Mr. Kerno expressed considerable concern that that importance was not manifest in the draft Declaration. There was even reason to fear that some misunderstandings might arise. For example, article 10 of the draft Declaration specifically affirmed as a principle of general international law a principle already contained in the Charter. On the basis of that fact, it might be argued that Principles of the Charter that were not mentioned in the draft Declaration were not obligations under general international law.

4. Mr. Kerno reminded the Commission that the principles recognized in the Charter of the Nürnberg Tribunal, which were first valid for the twenty-three countries that signed the London Agreement, had later been recognized by General Assembly resolution 177 (II). That action of the General Assembly had had important repercussions on the validity of the principles involved. The draft Declaration was designed to be read not only by legal experts but by men everywhere; it should therefore be entirely clear that the Declaration was not framed irrespective of the Charter. Mr. Kerno suggested that there might be need for a general statement in the Declaration to the effect that everything contained therein was subject to the declarations set forth in the Charter.

5. Mr. AMADO, in supporting the views of the Assistant Secretary-General, recalled that he had already outlined his position on that subject at an earlier meeting. The international community, such as it was now organized in the United Nations, had been " institutionalized ". The Charter of the United Nations could almost be considered in itself to constitute general international law. The Charter laid down the most complete form of international co-operation. It was applicable to Member States and, under Article 2, paragraph 6, the United Nations had the duty of ensuring that non-Member States should act in accordance with its principles so far as might be necessary for the maintenance of international peace and security. Therefore it was not *res inter alias acta* for non-member States. The draft Declaration should recognize the general obligations of States toward the international community; it should affirm the existence of the United Nations and the Principles of the United Nations Charter.

6. Mr. ALFARO wondered whether the point raised by the Assistant Secretary-General was not met by the fourth paragraph of the preamble of the draft Declaration, as that paragraph set forth the significance of the United Nations in international law.

7. The CHAIRMAN suggested that the Commission should first consider the various articles of the draft Declaration and later discuss the preamble.

It was so agreed.

Article 1

8. At the request of the CHAIRMAN, Sir Benegal RAU explained why the Sub-Committee had proposed a text for article 1 different from that adopted at the tenth meeting. [3] The new text omitted mention of the right of a State to exist, because the Sub-Committee had considered such a statement superfluous. The draft Declaration was based on the assumption that sovereign States did in fact exist. So it was a tautology to say they had a right to exist.

9. The second part of the earlier text had been amended. The words " the right to preserve its existence " seemed to imply two ideas: first, the right of a State to defend itself against aggression; and secondly, the right to provide for the well-being of its people in peacetime. As the first right was provided for in article 11, it seemed appropriate to define only the second right in article 1. The new wording " to maintain its existence and to provide for the well-being of its people " had therefore been suggested.

10. The CHAIRMAN thought the proposed addition could serve no useful purpose. A State's right to provide for the well-being of its people could scarcely be said to constitute a legal right. He preferred the text adopted at the tenth meeting, possibly limited to the State's right to preserve its existence.

11. Mr. ALFARO considered that text inadequate. Article 1 should not be divested of all its natural and human implications. It should proclaim the right of a State, i.e., a community

[3] See A/CN.4/SR.10, paras. 57-64.

of men—to life, liberty and happiness, the right to develop within the community of States. He could not agree to anything less than the Sub-Committee's text.

12. Mr. BRIERLY preferred the Sub-Committee's text to that adopted at the tenth meeting, but he considered the whole article unnecessary. The right of a State to exist was fully implied in article 3, which dealt with the independence of a State; and the right of a State to maintain its existence was covered by article 11, concerning self-defence. He therefore proposed the deletion of article 1.

13. The CHAIRMAN would support that proposal, particularly if the Sub-Committee's text was to be maintained. He pointed out, furthermore, that article 3 would be appropriate as the first article of the draft Declaration.

14. Mr. SANDSTROM agreed that article 1 might be deleted. It was in fact a postulate that there was no need to state. The substance of the article was implied in article 2.

15. Mr. FRANÇOIS strongly opposed the inclusion of article 1 in the draft Declaration as it was contrary to the principle of self-determination of peoples. If the people of a State should decide upon the constitution of a new State or States, the old State would have no longer the right to exist. Moreover, an illegally constituted State, or one that was the result of the use of force, had no right to exist; that principle was to be found in article 9 of the draft Declaration itself. Mr. François therefore urged that the article should be deleted.

16. Mr. HSU supported the proposal to delete the article. He was also prepared to delete article 2 if the Commission should think that advisable. He recalled that he had previously proposed that articles 1 and 2 should be strengthened. That proposal had been referred to the Sub-Committee, but had not been carried out. The articles as they stood seemed to serve no useful purpose.

17. Mr. AMADO knew of no provision in positive law that corresponded to the " well-being " of peoples. That idea was rather political than legal and went beyond the recognized principles of international law on which the draft Declaration was based.

18. Mr. SCELLE agreed with Mr. François that article 1 might prejudice the right of self-determination of peoples. If in fact the article wished to ensure the democratic right of peoples to form a State of their own choosing, it should be more explicit; if it was not referring to that right, it was meaningless. In order to avoid any misunderstanding, the article should be deleted.

19. Mr. SPIROPOULOS thought the second part of the article, which concerned the well-being of peoples, had no place in the draft Declaration. That was an internal matter and was not of international concern. The statement that a State had a right to exist could have no legal meaning; it could have only a political significance. However, some previous declarations contained such a provision. He would abstain in the vote on the article.

20. Mr. ALFARO thought there was no more need to confuse the right of a State to exist and to develop with its right to independence than there was to confuse the right of an individual to life with his right to liberty. The right to exist was a positive assertion, whereas the right to independence was a negative assertion. Moreover, the existence of a State was not dependent upon its recognition by other States. In that connexion, Mr. Alfaro quoted article 3 of the draft Declaration submitted by Panama (A/CN. 4/2, p. 35). If the right of a State to have its existence recognized was to be mentioned in the Declaration, its right to exist should first be set forth.

21. Mr. AMADO, replying to the point raised by Mr. Alfaro, observed that while an individual could in fact exist and yet not be free, doubted whether a State without independence in fact existed.

22. The CHAIRMAN put to the vote the proposal to delete article 1.

As the result of the vote was 7 in favour and 5 against, the Chairman suggested, and it was agreed, that no definite decision should be taken on the basis of so close a vote.

23. The Chairman wondered whether more general agreement might be reached if the text were amended.

24. Mr. CORDOVA thought the omission of the last part of the Sub-Committee's draft might make the article more acceptable.

25. Mr. ALFARO urged again that the article should be retained. To assert the right of a State to exist was a matter of vital importance. It appeared as drafted by the Institute of International Law and was supported by many jurists. The draft Declaration was intended for the man in the street as well as for jurists and should be perfectly clear. If the Commission decided to reject articles 1 and 2, Mr. Alfaro was certain that the Panamanian delegation would raise the question in the General Assembly.

26. Mr. FRANÇOIS observed that the Declaration was intended for the man in the street, but would be used by politicians. For that reason he was opposed to article 1.

Article 2

27. The CHAIRMAN noted that the Sub-Committee had not changed the draft of article 2 which had been provisionally adopted by the Commission. [4]

[4] See A/CN.4/SR.II, para. 32.

28. Mr. SCELLE wondered whether Mr. Alfaro might not agree that the principle contained in article 1 was, in fact, embodied in article 2, without the implied prejudgement on the way in which a State had come into existence, which he himself saw in article 1.

29. Mr. AMADO considered that article 2 should be maintained because it expressed a principle of law which was universally recognized.

30. The CHAIRMAN recalled that the text of article 2 had been derived from article 3 of the Panamanian draft Declaration, which had declared that " the political existence of the State is independent of its recognition by other States ". That idea had, however, been omitted from the article under consideration, which now appeared to lack foundation. It had not been the practice of States for a century at least to consider that a State was entitled to recognition by other States, and certainly not in the early nineteenth century, when the Latin American States had become independent. The inclusion of the word " existence " appeared immaterial to the substance of that objection.

31. Mr. BRIERLY was in favour of deleting article 2. He was not opposed to the principle it contained but considered that the article would be out of place in the Declaration, as the whole topic of recognition had been retained for separate codification and it was wrong to select one aspect of it in the draft Declaration. Finally, he pointed out that the Commission had decided not to define a State, yet article 2 proposed to indicate one of the qualities of a State, though it was a negative quality, since a State could exist without being recognized by other States.

32. The CHAIRMAN endorsed that opinion, and expressed the view that such a declaration on the broad subject of recognition would be worthless. He referred to the example of Israel. At what time had Israel a right to have its existence recognized by other States? And if some States did not recognize it, did they then violate a duty?

33. Mr. FRANÇOIS suggested that the words " recognition of an entity as a State in no way requires the entry into diplomatic, or any other particular relations with, the entity so recognized ", which had been suggested in the United Kingdom comment, should be added to article 2.

34. The CHAIRMAN objected that such an addition would entail the complete redrafting of the article, which had been accepted in principle.

35. Sir Benegal RAU did not consider the meaning of article 2 to be clear. Since the Commission had decided not to define the meaning of the word " State ", but to take for granted the existence of those entities, why was it necessary to refer to the recognition of their existence? If reference was intended to the duty of a State, acting in good faith, to recognize as a State an entity which satisfied certain conditions, then the article would, at least, mean something.

36. Mr. ALFARO urged again that the declaration was not intended only for legal specialists and should therefore be clear to the lay mind. The essential ideas to be conveyed were the right of a State to exist, its right to have that existence recognized by other States, and its right to maintain its existence independently of such recognition. In the case of the Latin-American republics, it was accepted that they had been in fact and in law independent since 1824, though many European States had not recognized their existence for as long as 18 years after that date. The right which was to be affirmed was the right of a State to develop its own existence in the period between its birth and its recognition by other States. He proposed, therefore, that a combination of the texts suggested by the Greek and United Kingdom Governments in their comments on articles 1 and 2 (A/CN.4/2, pp. 49-50 and 52-53) should be inserted, and that article 2 should read: " Every State has the right to exist, to have its existence recognized by other States and to maintain its existence independently (or regardless) of such recognition."

37. The CHAIRMAN contended that such a text would be self-contradictory, since it declared that other States should recognize the State in question, which was entitled to maintain its existence independently of such recognition.

38. Mr. ALFARO explained that the last clause was to provide for the inevitable delay between the birth of a State and the formal recognition of its existence.

39. The CHAIRMAN pointed out that article 1, the principle of which was included in the proposed phrase, had not been finally rejected.

40. Mr. SCELLE maintained that the principle and practice of recognizing a new State had changed very much since the early nineteenth century, since the time of the independence of the Spanish colonies. Law corresponds to political evolution, With collective recognition possible through the General Assembly of the United Nations, it was absurd to suggest that a State would refuse to recognize another State which had already been recognized by that Organization.

41. He appealed to the Commission not to allow academic considerations to blind them to their objective. He himself had perhaps allowed considerations of logic to weigh too heavily when he had voted against the inclusion of article 1. In his opinion article 2 was important and derived part of its value from the inclusion of the principle originally contained in article 1.

42. Mr. YEPES asked the Chairman whether, in view of the statements by Mr. Scelle and Mr. Amado, the Commission might vote again on article 1 in the form in which it had earlier been provisionally approved by the Commission.

43. The CHAIRMAN said that article 1 would be reconsidered after the discussion on the next few articles had been concluded. He then put to the vote the question whether or not article 2 should be deleted.

It was decided, by 7 votes to 4, that article 2 should not be deleted.

44. The CHAIRMAN said that the Commission would reconsider the wording of article 2 at a later stage.

Article 3

45. The CHAIRMAN said the first sentence of this article would be excellent to start the Declaration. Only a comma had been added to the text [5] of article 3 by the Sub-Committee. He himself proposed that the word " thus " should be changed to " hence " and that " the dictates of " should be amended to " dictates by ".

It was so decided.

46. The CHAIRMAN proposed further that the last sentence should be deleted. The matter of sovereignty was dealt with in article 16, and need not be included in article 3 as well. As it stood, the sentence was in the nature of an interpretation of the preceding sentence, and he considered it superfluous.

47. Mr. FRANÇOIS suggested that article 3 as it stood might provide justification for a protectorate to claim independence as a sovereign State.

48. Mr. SANDSTROM said that he intended to propose the insertion of the word " sovereign " in the title of the Declaration, in order to show clearly that it referred to the rights and duties of sovereign States only. If that amendment were adopted, the objection raised by Mr. François would be met.

49. The CHAIRMAN thought that the draft Declaration did not deal with protectorates which did not have control of their international relations, but only with States which had such control.

50. Mr. SANDSTROM suggested that that point should be explained in the report of the Committee.

51. Sir Benegal RAU added that the drafting Sub-Committee had expressed the hope that an explanation would be given showing that, for the purposes of article 3, protectorates were not regarded as States.

52. The CHAIRMAN put to the vote the first sentence of article 3 as amended.

The first sentence of article 3 as amended was tentatively adopted.

53. Mr. SCELLE attached great importance to the maintenance of the second sentence of article 3. In his view it would help to purge the concept of sovereignty of the sense given to it by some individuals and Governments; that sense was that sovereignty was the justification for indulging a State's own wishes even in defiance of international law. Such was the former sense of the word " sovereignty ". An opportunity was now offered to the Commission of declaring that a State enjoyed no discretionary powers, amounting to a negation of international law, and such a declaration, based on the advisory opinion of the Permanent Court of International Justice on the *Anschluss*, [6] would strongly impress public opinion and influence the conduct of Governments. A State could not be a source of law and a subject of law. Sovereignty should be reduced to legal powers. It was necessary to educate mankind on that new conception of sovereignty.

54. In reply to the CHAIRMAN's objection that his purpose appeared to be beyond the Commission's terms of reference, Mr. Scelle contended that the proper concept of sovereignty entailed the duty of States not to exceed their rights.

55. Mr. BRIERLY thought that the principle that sovereignty was limited by international law was adequately covered by article 16, and might be omitted from article 3, though he supported Mr. Scelle's opinion regarding the great importance of the principle.

56. Mr. SCELLE thought that the Declaration would lose much of its power and value if the last sentence were omitted from article 3. In his view, independence and sovereignty were identical, but while the former had a precise juridical meaning, the latter either had no meaning at all or one which was the negation of international law. He wanted sovereignty defined in connexion with independence and would urge the inclusion of the sentence in article 3, as it emphasized in a more striking manner than article 16 the idea that national sovereignty was necessarily limited.

57. Mr. KORETSKY suggested that Mr. Scelle was introducing the idea of sovereignty only in order to kill it.

58. Mr. SCELLE declared that his intention was only to banish what was evil in the connotation.

59. Mr. HSU agreed that a definition of sovereignty would be welcome, and that such a definition could properly be included in article 3, as the word was not defined in article 16.

60. Mr. YEPES endorsed Mr. Scelle's opinion that the inclusion of the last sentence in article 3 would represent an advance in international law. The notion of sovereignty had been interpreted in many ways, often with unfortunate results,

[5] A/CN.4/SR.12, paras. 81-82. The present Article 3 was originally Article 4.

[6] Permanent Court of International Justice. Series A/B. Fascicle No. 41, *Customs Régime between Germany and Austria.* (Protocol of 19 March 1931).

and a definition by the Commission would have great effect throughout the world.

61. Mr. CORDOVA noted that the concept of sovereignty which Mr. Scelle wished to introduce into article 3 was included in article 16. The second sentence of article 3, however, might introduce a controversial idea on sovereignty; he was therefore in favour of deleting it.

62. Mr. AMADO noted that most members had supported in substance the definition of sovereignty given in the second sentence of article 3. A definition of that concept, however, would be inappropriate in view of the fact that no definition was given for the concepts dealt with in the subsequent articles.

63. The Commission's task was to determine what principles should be included in the Declaration, and not to discuss new concepts of future international law. In view of those considerations, Mr. Amado would vote for the deletion of the second sentence of article 3.

64. Mr. SANDSTROM stated that he had voted against the inclusion of the definition in article 3 at a previous meeting for reasons given by the Chairman and Mr. Amado. He still maintained that position and would therefore vote for the deletion of the second sentence.

65. The CHAIRMAN stated that the Commission must decide whether it would retain the substance of the second sentence in article 3; if so, the text could subsequently be re-drafted. He then put to the vote the question of retaining the substance of the second sentence of article 3, which read: " It is in this sense that States are sovereign ".

Six votes having been cast in favour and 6 against, the Chairman reserved the question until a later date.

66. Sir Benegal RAU thought that if the words " legal powers " in the first sentence were replaced by the words " sovereign powers ", the second sentence might be deleted.

67. Mr. SCELLE did not agree.

68. The CHAIRMAN drew attention to a defect in the drafting of the article. It was not clear which of the two thoughts contained in the first sentence was implied by the opening words of the second sentence: " It is in this sense ". He therefore suggested that the second sentence might be redrafted as follows: " A State is sovereign only in the sense that it is independent ", or " The sovereignty of a State has the meaning of independence ". Thus it would be clear that the right of independence was larger than the choice of a government mentioned in the second part of the first sentence.

69. Mr. SCELLE thought that the French version of the article which read *dans la mesure où* (to the extent that), was quite clear. The words " including the choice of its own form of government " were intended as an illustration of the legal powers which could be exercised by a State.

70. The CHAIRMAN thought that if the Commission decided to retain the concept contained in the second sentence of the article, the Charter phrase " sovereign equality ", although not quite clear, in itself, might be adopted.

71. Mr. KORETSKY pointed out that the problem of sovereignty had not been sufficiently clarified or studied by the Commission, and thought that a group might be appointed to deal with that question. Mr. Scelle's incidental definition of the concept was not sufficient and lost its original meaning in the context of an article dealing with independence. Sovereignty was the important and fundamental principle of statehood and its meaning should be kept clear. The Commission had yet another article dealing with sovereignty, in connexion with which it could later work out a definition of that concept. In the present context, however, a definition of sovereignty would be impossible.

72. Mr. ALFARO, with reference to an earlier discussion of the article, [7] recalled his description of sovereignty as a sheaf of many rights, including three essential rights—(1) right of independence, (2) right to non-intervention, and (3) right of equality. The United Kingdom comment on equality also identified that right with sovereignty. Noting the value of the concept of sovereignty as laid down in article 3, he wondered whether it might not be presented elsewhere as a direct expression of a right or a duty, instead of constituting an isolated postulate in an article dealing with independence.

73. The CHAIRMAN stated that the Commission would revert to that article after completion of the discussion of the remaining articles.

Article 4

74. Mr. KERNO (Assistant Secretary-General), pointing out that the concepts of the Declaration were necessarily the same as those contained in the Charter, wished to know whether the word " intervention " in article 4 was used in the same sense as in Article 2, paragraph 7 of the Charter.

75. The CHAIRMAN replied that intervention, as used in the Declaration, meant intervention by a single State acting on its own authority, whereas in the Charter it meant collective action by the United Nations.

76. Mr. KERNO (Assistant Secretary-General) said that when the expression had been discussed in the General Assembly, a number of delegations had maintained that its meaning in the Charter was the same as under international law.

77. In order to meet the point raised by the

[7] *Ibid.*, para. 70.

Assistant Secretary-General, Mr. YEPES suggested that the article might be re-phrased as follows: Every State has the duty to refrain from unilateral intervention. " Thus collective action by the United Nations would be excluded from the purview of the article.

78. The CHAIRMAN noted that Mr. Yepes' text did not take into account the possibility of intervention by a group of States.

79. Mr. YEPES said that it was with that possibility in mind that he had previously proposed the phrase " Every State or group of States ", which proposal had been rejected.[8]

80. Mr. SCELLE thought that it would be better to say explicitly: " This article does not prevent an international organization from exercising its competence. "

81. The CHAIRMAN recalled, in that connexion, the need for a general clause in the Declaration reserving all rights and duties laid down in the Charter of the United Nations.

82. Mr. SPIROPOULOS thought that the meaning of the word " intervention " in Article 2, paragraph 7 of the Charter, where it laid down the rule of non-intervention by the United Nations in the domestic affairs of a State, was entirely different from its present connotation of political intervention by force or threat of force, which need not be limited to the internal affairs of another State.

83. Mr. CORDOVA thought that the word " intervention " had a very precise meaning in international law. It was mentioned in the Charter only in Article 2, paragraph 7, where it was said that intervention in the domestic affairs of another State was illegal. In other instances the Charter used such words as " coercive action " and " measures of enforcement ". Consequently the word "intervention ", as used in the Declaration, could not include United Nations action. Mr. Córdova suggested, however, that the Rapporteur might state in his report that the Commission understood by that word unilateral intervention or collective intervention without legal authority.

84. The CHAIRMAN put to the vote Mr. Yepes' proposal that article 4 should be amended to read " Every State has the duty to refrain from unilateral intervention . . .".

Mr. Yepes' proposal was rejected by 8 votes to 1.

85. The CHAIRMAN then put article 4 to the vote.

Article 4 was tentatively adopted by 12 votes in favour and none against.

Article 5

86. The CHAIRMAN noted that the Sub-Committee had made no changes in that article.[9] He suggested, however, that the word " any " might be changed to " every ". There seemed to be no need to reopen the discussion of the article's relation to the similar provision in Article 2, paragraph 1 of the Charter.

In the absence of further comment he put the article to the vote.

Article 5 was tentatively adopted by 11 votes in favour and none against.

Article 6

87. Sir Benegal RAU noted that the Sub-Committee had made some changes in the article to take into account the right of the State to cede its territory or territorial rights to another State, and in general to exercise jurisdiction over its territory as well as over all persons and things therein.[10]

88. The CHAIRMAN, on a remark by Mr. FRANÇOIS concerning the right of extra-territoriality, stated that the Commission had reserved the question of the State's jurisdiction over embassies and legations, warships and persons enjoying diplomatic immunities.

89. Mr. KERNO (Assistant Secretary-General) noted that while Article 105 of the Charter dealt with the privileges and immunities of the United Nations and the persons connected therewith, two specific instruments had been adopted on the matter: (1) The Convention on the Privileges and Immunities of the United Nations, providing diplomatic immunity for the Secretary-General and the Assistant Secretaries-General, and (2) The Headquarters Agreement with the United States ensuring diplomatic immunity to members of the delegations and their staffs.

90. Mr. SPIROPOULOS thought that the present text of article 6, dealing with States' right to exercise domestic jurisdiction was self-evident and meaningless in a declaration dealing with principles of international law. The point which should be brought out was that every State had the right to exercise *exclusive*, jurisdiction over its territories. The matter had been discussed previously, and while there had been some disagreement on the appropriate word to denote that exclusiveness, the Commission had felt that a word was necessary. What was meant was that no State could exercise jurisdiction in the territory of another State.

91. Mr. SANDSTROM proposed the deletion of the word " all ".

92. Mr. FRANÇOIS, supported by Mr. ALFARO and Mr. SCELLE, suggested the addition of the clause " subject to the privileges and immunities recognized by international law. "

[8] *Ibid.*, para. 36.

[9] *Ibid.*, para. 99.

[10] See A/CN.4/SR.13, para. 54. Article 6 was formerly Article 7.

93. The CHAIRMAN recalled that that was one of the subjects retained by the Commission as suitable for codification. He did not think, moreover, that such a clause could be included without mentioning the specific exceptions to which it referred.

94. Mr. AMADO suggested that article 16 might provide the necessary limitation of article 6.

95. The CHAIRMAN agreed inasmuch as the privileges and diplomatic immunities were part of international law and must thus be respected by States in accordance with article 16 in the exercise of their rights.

96. Mr. KORETSKY observed that article 12 might serve the same purpose.

97. Mr. ALFARO stated that while generally opposed to listed exceptions to the provisions laid down in the Declaration, in the present case he would favour a limitation clause covering the requirements of international law and of the Charter.

98. Mr. SCELLE agreed with Mr. Alfaro. Moreover, article 16 referred to a specific question and should not be transformed into a blanket clause applying to all articles of the Declaration.

99. The CHAIRMAN put to the vote the amendment to article 6 which read " subject to the immunities recognized by international law. . . "

100. Mr. ALFARO suggested the insertion of the word " privileges " before the word " immunities " in order to bring the words into conformity with the Charter text.

The amendment to article 6 as amended by Mr. Alfaro was adopted by 9 votes to none.

101. The CHAIRMAN then put to the vote article 6, as amended.

Article 6 as amended was tentatively adopted by 10 votes in favour and none against.

Article 7

102. The CHAIRMAN noted that the sub-committee had made no changes in that text [11] which was based on the provision in the United Nations Charter.

103. Mr. CORDOVA questioned the need for the word " international " in speaking of disputes between States.

104. Mr. BRIERLY suggested that the word " international " might be replaced by the words: " with other States ".

105. The CHAIRMAN pointed out that there might also be disputes between one State and a citizen of another State.

106. Mr. YEPES considered that the word " international " was necessary. There might be disputes with other States which were not international. Referring in that connexion to the possibility of a dispute between two States on a matter falling within the domestic jurisdiction of one of those States, he pointed out that the State whose domestic jurisdiction was in question could not be compelled to submit the matter to an international authority. He therefore felt that the word " international " should be retained.

107. Mr. FELLER (Secretariat), referring to Articles 2 (3) and 33 of the Charter, pointed out that the Charter used various expressions to describe disputes. He therefore thought Mr. Brierly's proposal appropriate.

108. The CHAIRMAN then put to the vote Mr. Brierly's proposal that the word " international " should be deleted and the words " with other States " inserted after the word " disputes ".

The proposal was adopted by 9 votes to 2.

109. The CHAIRMAN put to the vote article 7 as amended.

Article 7 as amended was tentatively adopted by 10 votes to 1.

110. Mr. YEPES stated that he had voted against the amendment and the amended article 7 for the reasons already indicated.

The meeting rose at 6.00 p.m.

[11] Formerly article 15. See A/CN.4/SR. para 29.

20th MEETING

Friday, 13 May 1949, at 10.15 a.m.

CONTENTS

Chairman: Mr. Manley O. HUDSON.

Rapporteur: Mr. Gilberto AMADO.

Present:

Members: Mr. Ricardo J. ALFARO, Mr. James L. BRIERLY, Mr. Roberto CÓRDOVA, Mr. J. P. A. FRANÇOIS, Mr. Shuhsi HSU, Mr. Vladimir M. KORETSKY, Sir Benegal N. RAU, Mr. A. E.

F. SANDSTRÖM, Mr. Georges SCELLE, Mr. Jean SPIROPOULOS, Mr. Jesús María YEPES.

Secretariat: Mr. KERNO, Assistant Secretary-General in charge of the Legal Department; Mr. LIANG, Director of the Division for the Development and Codification of International Law, Secretary to the Commission.

Draft Declaration on the Rights and Duties of States: text proposed by the Sub-Committee on the Draft Declaration (*continued*)

SECOND READING (continued)

1. The CHAIRMAN invited the Commission to continue its consideration of the draft Declaration on the Rights and Duties of States as proposed by the Sub-Committee on the draft declaration (See A/CN.4/SR.19, footnote 2).

Article 8

2. The CHAIRMAN pointed out that article 8 was article 16 of the original draft as amended during the first reading.[1] He proposed a drafting change affecting the English text only: to add the words: " to refrain " before the words: " from resorting ", and to insert three commas.

These changes were agreed to.

3. The CHAIRMAN put the English text of article 8, as amended, to the vote.

Article 8 was adopted by 10 votes to nil.

Article 9

4. The CHAIRMAN pointed out that article 9 was article 18 of the original draft as amended during the first reading. [2]

5. Mr. SCELLE proposed a drafting change affecting the French text only: to replace the words: *d'un autre Etat* by the words: *faite par un autre Etat.*

This change was agreed to.

6. Mr. FRANÇOIS recalled that, like some other members of the Commission, he had voiced objections to that article. Peace treaties, and in particular the peace treaty which would shortly be concluded with Germany, had always sanctioned and would still have to sanction territorial acquisitions made through force. It had been observed that the Declaration on the Rights and Duties of States would be a political document, and that public opinion would therefore have to be taken into account: but what would be the reaction of the man in the street to the simultaneous emergence of, on the one hand, peace treaties sanctioning territorial acquisitions made through force and, on the other hand, a declaration condemning such acquisitions?

7. The CHAIRMAN thought Mr. François' remark very relevant. This was not the right moment for including such an article in a declaration on the rights and duties of States.

8. Sir Benegal RAU recalled that he had inquired whether the declaration on the rights and duties of the States would be retroactive. In any case, he was opposed to article 9 as it stood.

9. The CHAIRMAN pointed out that the declaration would not be retroactive, but that Mr. François' remarks related to the situation that would be created by future peace treaties.

10. Mr. ALFARO expressed the opinion that article 9 should be considered merely as a condemnation of the right of conquest, a condemnation which had been proclaimed for the first time by the International Conference of Washington in 1890. Article 9 could, therefore, apply only to territorial acquisitions made in a way condemned by the provisions of article 8. He would answer Mr. François by saying that territorial acquisitions resulting from the peace treaties were really reparations or, in some cases, represented the restitution of territories acquired and held by force or at any rate in violation of international law.

11. He felt that article 9 should stand, firstly because it was not retroactive and, secondly, because it related exclusively to territorial acquisitions made in a way condemned by article 8.

12. Mr. CORDOVA remarked that the Commission's task was to codify the principles of international law. Its work should, therefore, not be interrupted by outside considerations. If it was of the opinion that territorial acquisitions made by force were against the law it should say so explicitly without regard to the repercussions which that might have when future peace treaties were signed.

13. Mr. BRIERLY thought the difficulty pointed out by Mr. François might be solved by omitting the words: " through force or the threat of force " and replacing them by the words: " in violation of article 8 ".

14. Mr. HSU, Mr. SCELLE, Mr. SPIROPOULOS and Mr. AMADO seconded the amendment proposed by Mr. Brierly.

15. The CHAIRMAN put Mr. Brierly's suggested amendment to the vote.

The amendment was adopted by 9 votes to 2.

16. Mr. SANDSTROM explained that he had voted against the amendment because he was of the opinion that it was irregular to sanction territorial acquisitions made through force, whether justified or not. He had always been opposed to the provisions of article 9, for the same reasons as those given during the discussion. Article 9,

[1] See A/CN.4/SR.14, para. 58.

[2] *Ibid.*, para. 131.

as amended, was less acceptable than it had been in its original form. He therefore proposed that the article should be struck out.

17. Sir Benegal RAU said that article 9, as amended, became a natural and logical consequence of article 8 and hence it did not seem necessary to retain it.

18. The CHAIRMAN put Mr. Sandström's proposal to delete article 9 to the vote.

The proposal was rejected by 8 votes to 3.

19. The CHAIRMAN put the following text of article 9 to the vote: " Every State has the duty to refrain from recognizing any territorial acquisitions made by another State in violation of article 8 ".

Article 9 was adopted by 8 votes to 3.

Article 10

20. The CHAIRMAN pointed out that article 10 was article 19 of the original draft as amended during the first reading,[3] with the Sub-Committee's addition of the words: " or against which the United Nations is taking preventive or enforcement action ".

21. Sir Benegal RAU explained that the purpose of the proposed addition was to provide for a case in which State " A " came to the support of State " B " because it considered that State " B " was not acting in violation of article 8. If, on the contrary, the Security Council was of the opinion that State " B " was acting in violation of article 8 and took measures accordingly, State " A " was bound to discontinue its support to State " B ".

22. Mr. CORDOVA was inclined to doubt the need for that addition, since the provisions of Article 51 of the Charter implied that the measures taken by States should be discontinued when the Security Council took the necessary action to maintain or restore peace.

23. The CHAIRMAN pointed out that the addition proposed by the Sub-Committee was in conformity with the provisions of Article 25 and Article 2, paragraph 5 of the Charter.

24. Mr. HSU was opposed to the addition proposed by the Sub-Committee. The obligations of the Charter could not be imposed upon States which were not Members of the United Nations. One might quite properly hope that States which were not Members of the Organization would voluntarily co-operate, but one could not impose upon them a duty for which there was no justification in international law.

25. The CHAIRMAN drew attention to the remarks made by Mr. Kerno and Mr. Amado at the 19th meeting.[4] Mr. KERNO had said, *inter alia*, that all the non-Member States except Switzerland, a neutral by tradition, and Franco Spain, had declared their readiness to respect the principles of the Charter. Hence the Sub-Committee's proposed addition would not seem to give rise to any practical difficulty. Moreover, it was difficult to concede that the General Assembly could accept the text of article 10 if the proposed addition were not allowed to stand.

26. Mr. HSU felt that a question of principle was involved, and that it could not be disposed of by the fact that almost all States were ready to respect the Charter. The Declaration on the Rights and Duties of States should not impose on all the States in the world obligations incumbent on some States by virtue of the rights they enjoyed as Members of the United Nations. If the non-Member States were willing to assume the same obligations as the Member States, that was a source of gratification, but it did not convey the right to impose those obligations upon them.

27. Mr. BRIERLY pointed out that Mr. Hsu's argument would be valid only if the Security Council decided to take steps in violation of international law. The Commission could not entertain such an assumption.

28. Mr. ALFARO recalled that under Article 2, paragraph 6 of the Charter, the United Nations could impose certain obligations upon non-Member States so far as might be necessary for the maintenance of international peace and security. He supported the addition proposed by the Sub-Committee without reserve.

29. Mr. CORDOVA did not agree with Mr. Alfaro's interpretation of Article 2, paragraph 6. He pointed out moreover, that the Security Council was not bound by the Charter to act in in conformity with international law: the Charter empowered it to resort to force without specifying that the Council, in so doing, should respect all the rights of States. The Security Council was a political organ: although it might in fact be hoped that it would respect international law in all circumstances, it was by no means bound by the principles of international law. In its efforts to maintain peace, the Security Council might be obliged to act inconsistently with international law.

30. Mr. HSU said Mr. Córdova had raised an important point. The Security Council was a political organ responsible for taking measures in the interests of the community of States, and not necessarily for enforcing respect for international law. Non-Member States could not be forced to accept the Security Council's judgment. That, however, was what the addition proposed by the Sub-Committee would amount to.

31. Mr. SPIROPOULOS remarked that, contrary to the opinion of Mr. Córdova and Mr. Hsu, the Security Council was bound to act in conformity with international law. That was clearly

[3] See A/CN.4/SR.15, para. 39.

[4] A/CN.4/SR.19, paras 2 and 5.

apparent from Article 24, paragraph 2, of the Charter in which it was stated that " the Security Council shall act in accordance with the Purposes and Principles of the United Nations ". Article 1, paragraph 1, however, provided for collective action by the United Nations for the prevention and removal of all threats to the peace " in conformity with the principles of justice and international law ".

32. The CHAIRMAN put the addition proposed by the Sub-Committee to the vote.

The addition was adopted by 8 votes to 3, with 2 abstentions.

33. The CHAIRMAN proposed that the wording of article 10 should be modified so as to bring it into line with that of article 9. He therefore suggested that the words: " which has failed to perform the duties set forth in article 8 " should be replaced by the words: " which is acting in violation of article 8 ".

The amendment was adopted.

34. The CHAIRMAN put article 10 to the vote as amended.

Article 10 was adopted by 10 votes to none, with 3 abstentions.

35. The CHAIRMAN proposed that the order of articles 9 and 10 should be reversed. The subject matter of article 10 was very closely related to that of article 8. Moreover, the questions dealt with in article 9 arose chronologically after the questions dealt with in article 10. Logically therefore article 10 should come before article 9.

This was agreed to.

Article 11

36. The CHAIRMAN pointed out that article 11 was article 17 of the original draft.[5] The Sub-Committee had modified the wording of the article as adopted at the first reading, and article 11 now read as follows:

> " Every State has the right, individually or collectively, to take legitimate measures for its own defence or for the defence of any other State. "

37. He said the words " individually or collectively " had been adopted for the sake of conformity with the terms of Article 51 of the Charter the expression occurred in the text of Article 51), but it was difficult to accept them in connexion with the right of a State. He proposed therefore that the words " individually or collectively " should be replaced by the expression: " acting by itself or in co-operation with other States. "

The amendment was adopted by 9 votes to none.

38. Sir Benegal RAU explained that the Sub-Committee proposed the expression: " legitimate measures " for the sake of conformity with the provisions of Article 51 of the Charter. Article 51 restricted the exercise of the right of self-defence in two ways: firstly, there must have been armed aggression and, secondly, the Security Council must not yet have taken the necessary action. For States Members, therefore, " the legitimate measures " were those which they could take when those two conditions were fulfilled. For non-Member States, " legimitate measures " were those which were necessary in order effectively to repel aggression.

39. The CHAIRMAN pointed out that the provisions of Article 51 were based on the idea of time (they stipulated *when* a State could exercise the right of self-defence), while the word " legitimate " generally carried a generic connotation (it indicated *what* measures were permissible to a State exercising that right). Hence the word " legitimate " did not apparently reflect the limitations imposed by Article 51 on the exercise of the right of self-defence, but had rather the meaning attributed to it by Mr. Córdova: the only measures permissible were those necessary to repel an attack.

40. Mr. CORDOVA was of the opinion that " legitimate measures " had to be taken to mean measures taken in conformity with international law, that is to say, measures which did not go beyond the necessities of " self-defence. "

41. Mr. BRIERLY supported that interpretation.

42. Mr. SCELLE was of the opinion that the word " legitimate " was not necessary and even had no precise meaning. It might moreover, raise doubts as to a State's ability to defend itself. He proposed that the expression " legitimate measures " should be replaced by the expression " measures necessary ", to bring it into line with the expression used in Article 51 of the Charter. Article 51 admittedly employed the expression " measures necessary " in connexion with measures taken by the Security Council, but it might well be thought that any State which had become the victim of aggression had the right and the duty to employ all means " necessary " for its defence.

43. Mr. SANDSTROM thought it was dangerous to depart from the idea of " self-defence " as generally accepted. He thought it would be preferable to retain the text adopted by the Commission at the first reading.

44. Mr. CORDOVA expressed the fear that the use of the word " necessary " would make it possible for a State to take excessive measures, apossibility which would be ruled out by the use of the word " legitimate. "

45. The CHAIRMAN put Mr. Scelle's motion to replace the word " legitimate " by the word " necessary " to the vote.

The motion was rejected by 1 vote to 4.

[5] See A/CN.4/SR. 14, para. 112.

46. The CHAIRMAN put his proposal to omit the word " legitimate " to the vote.

The proposal was rejected by 5 votes to 4.

47. Mr. ALFARO explaining his vote, pointed out that in the expression *légitime défense* (self-defence) the word *légitime* had a meaning in Spanish because it conveyed the implication that the defence should be proportionate to the attack. When used in juxtaposition with the word " measures " however, it had no precise meaning. After the discussion that had taken place, he would, while recognizing that the use of the word was unfortunate, vote in favour of its retention.

48. Mr. SPIROPOULOS explained that he had abstained because he preferred the text as originally adopted by the Commission. Moreover, to his mind, the word " legitimate " meant merely " that which was not forbidden by international law ".

49. The CHAIRMAN stated that in the present state of international organization it would be disastrous to give States a blanket right of self-defence. History taught that States were unfortunately too prone to disguise aggression under the name of " self-defence ". He pointed to the unfortunate consequences of the reservation formulated by various Powers signatory to the Briand-Kellogg Pact. The reservation was due to the initiative of Kellogg himself, who had said that each State had the inherent right of self-defence and was the judge of when that right would be exercised. That reservation had undermined the very foundations of the Briand-Kellogg Pact and had impaired the authority of the League of Nations.

50. The Nürnberg Tribunal had fortunately not endorsed that provision and had stated that " whether action taken under the claim of self-defence was in fact aggressive or defensive must ultimately be subject to investigation and adjudication if international law is ever to be enforced " (A/CN./4/5, p. 49). That limitation on the right of self-defence, like the limitation provided for in Article 51 of the Charter, represented considerable progress in international law and that progress should be recorded.

51. He therefore proposed that the following words should be inserted at the end of the preamble: " subject to the provisions of the Charter of the United Nations ", and that Article 11 should be worded as follows:

> " Every State has the right, acting by itself or in co-operation with other States, to take legitimate measures of defence against armed attack. "

52. He remarked that he preferred the words " self-defence ", but accepted the decision to allow the words " legitimate measures " to stand.

53. Mr. ALFARO agreed to the Chairman's proposal and recalled that the original text of the article on self-defence (which had been proposed by Panama) had also been based on the provisions of the Charter. In order to meet the arguments advanced by Mr. Córdova and Mr. Scelle, he proposed the following wording: " Every State has the right, acting by itself or in co-operation with other States, to take such measures as may be necessary or legitimate for its own defence against armed attack. "

54. Mr. SCELLE pointed out that in French the word *légitime* in the expression *légitime défense* did not mean " subject to the limitations of international law ": it meant " inherent ".

55. Sir Benegal RAU asked if under the Chairman's new text a State could come to the assistance of an attacked State before the matter had been brought before the Security Council and the Council had taken a decision.

56. The CHAIRMAN said that provided the preamble stipulated that the declaration was subject to the provisions of the Charter, article 11 might be worded as follows: " Every State has the right of self-defence, acting by itself or in co-operation with other States, if an armed attack occurs ".

57. Mr. BRIERLY remarked that the new text did not clearly mention the right to come to the assistance of another State.

58. Mr. SANDSTROM thought it would be preferable in the circumstances, to retain the text originally adopted by the Commission. [6]

59. Mr. BRIERLY pointed out that in that text the expression " collective self-defence " was a contradiction in terms.

60. The CHAIRMAN proposed the following revised wording of his text:

> " Every State has the right of defence against armed attack, either by itself or in co-operation with other States. "

61. Mr. SCELLE explained that the word " collective " in the expression "collective self-defence " had a technical meaning; it covered the case of a State going to the assistance of another State not in a position to defend itself. That was why he was in favour of adhering to the language of Article 51 of the Charter.

62. The CHAIRMAN pointed out that the wording of Article 51 of the Charter, which did not deal with the right of a specified State, permitted the use of the expression " right of individual or collective self-defence ", whereas article 17, which dealt with the right of a State, did not. Hence the expression " either alone, or in co-operation with other States " was preferable.

63. In answer to Sir Benegal RAU's inquiry whether the Commission was agreed as to the

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[6] See A/CN. 4/SR. 14, para. 112.

right of every State, whether a Member of the United Nations or not, within certain limits, to defend itself or to defend another State against armed attack, the CHAIRMAN replied that Article 51 of the Charter limited the right of self-defence to the case of an armed attack.

64. Mr. CORDOVA said he would agree to the addition of the words " against an armed attack " provided the words " individual or collective ", which appeared in the original text, were allowed to stand.

65. Mr. SANDSTROM said that the words " individual or collective " might conceivably be paraphrased by saying: " Every State has the right of self-defence or of coming to the assistance of another State ", but he considered that unnecessary, the first expression being sufficiently precise.

66. Mr. YEPES was in favour of the text as originally adopted by the Commission, which followed the provisions of Article 51 of the Charter. As Mr. Scelle had pointed out, the expression " individual or collective defence " had a precise technical meaning.

67. The CHAIRMAN pointed out that the original article did not limit the right of defence to the case of armed attack. Nevertheless, in view of Mr. Yepes' observation and since the discussion showed that the Commission had changed its mind as to the usefulness of the words " acting alone or in co-operation with other States ", he proposed the following wording: " Every State has the right of individual or collective defence against armed attack ", provided the preamble contained the words " in accordance witht he provisions of the united Nations Charter ".

68. Mr. ALFARO proposed the addition of the words " upon itself or another State ".

69. Mr. SCELLE seconded the Chairman's proposal and said that the expression " against armed attack " had a wider meaning than " if armed attack occurs ". It was advisable to allow States some latitude when it came to deciding at which moment self-defence should come into operation.

70. Mr. SANDSTROM, Mr. BRIERLY and Mr. YEPES also accepted the Chairman's new wording.

71. Mr. CORDOVA opposed it on the grounds that it did not mention the idea that the defence should be proportionate to the attack.

The text proposed by the Chairman was adopted by 8 votes to 1.

72. Mr. YEPES proposed the use of the expression " individual or collective self-defence ".

73. Mr. BRIERLY again pointed out that the expression " collective self-defence " had no meaning in English.

74. Mr. SCELLE, while appreciating the difficulties for the English text, said he would prefer the expression *légitime défense collective* to stand in the French text, as it had a precise meaning for French-speaking jurists.

75. Mr. CORDOVA said that Mr. Scelle's remarks applied equally to the Spanish text.

76. The CHAIRMAN put to the vote the proposal to use the expression " individual or collective self-defence ".

The proposal was adopted by 8 votes to 3.

77. The CHAIRMAN put to the vote the final text of article 11, worded as follows:

" Every State has the right of individual or collective self-defence against armed attack."

Article 11, amended as above, was adopted by 8 votes to 1.

Article 12

78. The CHAIRMAN pointed out that article 12 was article 11 of the original draft and mentioned the Drafting Committee had not proposed any that change in the text provisionally adopted by the Commission.[7] He proposed the substitution of the conjunction " and " by " or ", in the expression " treaties and other sources of international law ", and the addition of a comma after that expression.

79. Mr. YEPES pointed out that the preamble to the Charter contained the expression " treaties and other sources of international law ".

80. The CHAIRMAN withdrew his proposal.

Article 12 was adopted by 11 votes.

Article 13

81. The CHAIRMAN pointed out that article 13 was article 21 of the original draft and that the Drafting Committee had not proposed any change in the text provisionally adopted by the Commission.[8] He proposed that the word " own " before the words " territory " and " population " be struck out of the English text. He also proposed the substitution in the French text of the words *il a le devoir de traiter* for the words *il doit traiter*.

82. Mr. CORDOVA and Mr. BRIERLY proposed the substitution of the word " ensure " for the word " see " in the English text.

This was agreed to.

83. Mr. FRANÇOIS proposed that a semi-colon should be inserted after the expression " international peace and order "; he also proposed that the words " and to this end " should be omitted, as the duty referred to in the second part of the article did not apply only to the case in which a State's treatment of its population menaced international peace and order.

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[7] A/CN.4/SR.14, para. 16.

[8] A/CN.4/SR.15, para. 75.

84. The CHAIRMAN pointed out that the Charter did not expressly make it a duty of States to respect " human rights and fundamental freedoms for all ". It required them to maintain international peace and security. That being so, the duty of a State to " treat its own population with respect for human rights and fundamental freedoms for all " could only be imposed upon it if the purpose was to cause to prevail upon its territory conditions which did not menace international peace and order.

85. Mr. BRIERLY pointed out that one of the purposes of the United Nations was " to achieve international co-operation. . . in promoting and encouraging respect for human rights and for fundamental freedoms for all ". Such co-operation was only conceivable if each State, on its own territory, respected human rights and fundamental freedoms.

86. Mr. CORDOVA said it was not a question of incorporating the Principles of the United Nations Charter in the Declaration, but the general principles of international law. The obligation to respect human rights and fundamental freedoms was an obligation in international law: it had been laid down in several international conventions, for instance certain conventions between the Latin-American States.

87. The CHAIRMAN was of the opinion that, if the second part of article 13 was not linked to the first by the expression " and to this end ", the Declaration would go far beyond existing international law.

88. Sir Benegal RAU drew attention to the introductory passage of Article 55 of the Charter which proved that the United Nations considered respect for human rights essential to good relations between States.

89. Mr. BRIERLY suggested that article 13 be divided into two separate articles: the first dealing with the duty of every State to ensure that conditions prevailing within its own territory did not menace international peace and order, and the second making it the duty of every State to treat its own population with respect for human rights and fundamental freedoms for all. The General Assembly would not agree to the Declaration omitting any mention of the duty to respect human rights. He did not consider that in proclaiming this duty, the Declaration went beyond the principles of the Charter, although it did to some extent go beyond the obligations set forth therein.

90. The CHAIRMAN said it was dangerous to proclaim the duty to respect human rights and fundamental freedoms without defining those rights and freedoms.

91. Mr. YEPES said that in his opinion the Universal Declaration of Human Rights, adopted at the First Part of the Third Session of the General Assembly, defined the fundamental rights and freedoms referred to in the Charter.

The Commission decided, by 10 votes to 2, to delete the words " and to this end " and to divide article 13 into two separate articles.

92. The CHAIRMAN put to the vote article 13 (*a*), worded as follows:

" Every State has the duty to ensure that conditions prevailing within its territory do not menace international peace and order."

Article 13 (a) *was adopted by 12 votes.*

93. The CHAIRMAN put to the vote article 13 (*b*), worded as follows:

" Every State has the duty to treat its population with respect for human rights and fundamental freedoms for all."

Article 13 (b) *was adopted by 11 votes to 1.*

Article 14

94. The CHAIRMAN pointed out that article 14 was article 22 of the original draft and that the Drafting Committee had not proposed any change in the text provisionally adopted by the Commission.[9] He proposed the deletion of the words " the duty " before the words " to prevent ".

Article 14, amended in accordance with the Chairman's suggestion, was adopted by 12 votes.

Article 15

95. Sir Benegal RAU explained that the Drafting Committee had deleted the words " which the State according asylum deems to have " in the text provisionally adopted by the Commission,[10] considering that it could be left to the State according asylum to decide in the first instance as to the nature of the offence. Final decision was a matter for the competent international jurisdiction.

96. The CHAIRMAN said his attention had been drawn to the fact that following the granting of asylum to a Peruvian by the Colombian Embassy in Peru, a dispute had arisen between Peru and Colombia as to the power of the State according asylum to define the nature of the offence. Apparently Peru and Colombia had agreed to submit the question to the International Court of Justice.[11] He asked Mr. Yepes if he was in a position to give the Commission some information on the dispute.

97. Mr. YEPES said that the Chairman's information was correct. It was true that Peru and Colombia had agreed to submit the dispute to the International Court of Justice. He did not

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[9] See A/CN.4/SR.15, para. 89.

[10] Additional article proposed by Mr. Alfaro, Mr. Scelle and Mr. Yepes. See A/CN.4/SR.16, para. 107.

[11] " Asylum Case "

think that the fact that the question was pending before the International Court of Justice stood in the way of the adoption of article 15.

98. Under the text provisionally adopted by the Commission the State according asylum had been given the right to define the offence. A provision of this kind was necessary for if it did not exist, the State of which the person seeking asylum was a national would have the right to define the nature of the offence, and naturally that State would always claim that the offence with which the fugitive was charged was an infringement of the ordinary law and not of a political character. Although he considered that the Drafting Committee's amendment to the text provisionally adopted by the Commission was an absolute mutilation of the text and that the Committee had not the power to make changes of this kind, yet, in deference to the members of the Committee he would be prepared to accept the alteration.

99. He thought the question of the right of asylum deserved more careful study. He therefore reserved the right, after the adoption of this article, to propose that a Rapporteur be instructed to examine the various aspects of the question in the interval between the first and second session of the Commission, and to draft a basic proposal.

100. The CHAIRMAN was opposed to the adoption of article 15, considering that the question of the right of asylum was too complex to be dealt with in a single article on the Declaration on the Rights and Duties of States. The matter should be studied at greater length; it would be of interest to the Commission to have full information on the dispute between Peru and Colombia which he had mentioned.

101. Mr. CORDOVA recalled that when the draft declaration was being considered at the first reading, he had proposed that the discussion on the article concerning the right of asylum should be postponed, but his proposal had been found unacceptable.

102. He considered the Commission unable at that stage to reach a decision upon article 15; the decision of the International Court of Justice on the dispute submitted to it by Peru and Colombia should be awaited.

103. Mr. ALFARO pointed out that both Peru and Colombia had signed and ratified the Havana Convention of 1928 on the right of asylum. The two countries had likewise signed the Convention adopted by the Montevideo Conference in 1933, recognizing the right of the State according asylum to define the offence. Peru, however, had not ratified the Montevideo Convention and that was why Peru had contested Colombia's right to determine whether, in the specific instance quoted by the Chairman, the offence was of a political character or not. That being so, it did not seem to be a question of principle but simply a particular case which had been submitted to the International Court of Justice.

104. Mr. SPIROPOULOS pointed out that in deciding upon what articles to insert in the Declaration on the Rights and Duties of States, the Commission ought not to be influenced by disputes which might exist between States; it should be guided by one consideration only, namely the need of proclaiming this or that right or duty. The task of the Commission was not to judge but to codify.

105. Mr. SANDSTROM stated that, even if he had been unaware of the dispute between Peru and Colombia, he would have proposed the deletion of article 15, in view of the Commission's amendment to article 6 of the Declaration concerning the competence of a State. In fact, as that amendment stood, it was extremely difficult to construe the provisions of article 15 as excluding asylum accorded in Embassies, warships or military aircraft. Moreover, contrary to Mr. Spiropoulos, Mr. Sandström thought the Commission should only insert in the Declaration rights and duties concerning which there was no controversy.

106. Mr. YEPES read article 1 of the Havana Convention, 1928. According to the terms of that article, the contracting States agreed to prohibit the right to grant asylum in their Legations, warships and military aircraft to persons charged with an offence against ordinary law or to deserters. The corollary of that provision, he said, was that it was permitted to grant asylum to persons charged with offences of a political character.

107. According to the terms of article 1 of the 1933 Convention adopted at Montevideo by the Seventh International Conference of American States, it was the State according asylum which had the right to define the nature of the acts with which the fugitive was charged. That Convention had been signed by all the States of Latin America, including Colombia and Peru, but Peru had not ratified it and that was why she had contested Colombia's right to define the offence committed by a Peruvian to whom the Colombian Embassy in Peru had granted asylum. The question submitted to the International Court of Justice by Peru and Colombia was whether the State according asylum had the right to define the offence with which the fugitive was charged.

108. He proposed that article 15 of the Declaration on the Rights and Duties of States be deleted, on the understanding that, as the Commission had decided at a previous meeting, the question of the right of asylum remained a suitable subject appropriate for codification.

109. Mr. ALFARO seconded the proposal.

110. Mr. CORDOVA said he would vote against deletion of article 15, his opinion being that the proper procedure would be to postpone discussion of the article in the Declaration which dealt with

the right of asylum until the whole question of that right had been studied for codification.

111. The CHAIRMAN said that such a procedure was unacceptable at the present stage of their Commission's work. He then put Mr. Yepes' proposal to delete article 15 to the vote.

It was decided to delete article 15 by 10 votes to 1.

Article 16

112. Sir Benegal RAU explained that the Drafting Committee had felt that the words " and the sovereignty of the State is subject to the limitations of international law ",[12] should be replaced by the words: " and with the principle that the sovereignty of the State is subject to the supremacy of international law ", as the word " limitations " is ambiguous and might be interpreted as meaning the imperfections of international law.

113. He pointed out that in addition to the text adopted, two other formulas had been submitted to the committee: (1) " that the sovereignty of the State is limited by international law " and (2) " that the sovereignty of the State is subject to the limitations imposed by international law ". It was for the Commission to select the terms it considered most suitable.

114. The CHAIRMAN said he preferred the phrase " that the sovereignty of the State is subject to the limitations imposed by international law ", which indicated more clearly the limitations on the sovereignty of the State.

115. Mr. SCELLE said he preferred the version " that the sovereignty of the State is subject to the supremacy of international law " as that indicated that international law governed what was known as the sovereignty of the State, which was in reality only the competence of the Governments of States.

116. The wording preferred by the Chairman weakened the text of article 16, whilst he (Mr. Scelle) wished to strengthen the meaning of the article. He therefore proposed that the last words of article 16 should read: " and according to the principle that the so-called sovereignty of the State is subject to the supremacy of international law ".

117. Mr. SPIROPOULOS pointed out that the first part of article 16 would suffice; the second part, which added nothing to the first, might well be dropped.

118. The CHAIRMAN proposed that the expression " the sovereignty of the State " should be replaced by " the sovereignty of each State ".

This was agreed to.

119. The CHAIRMAN then put to the vote the proposal to substitute for the last phrase of article 16 the words " and according to the principle that the sovereignty of the State is subject to the limitations imposed by international law ".

The proposal was rejected by 5 votes to 1.

120. The CHAIRMAN then put Mr. Scelle's proposed wording to the vote, viz., " and according to the principle that the so-called sovereignty of the State is subject to the supremacy of international law ".

The proposal was rejected by 5 votes to 1.

121. Lastly the CHAIRMAN put to the vote article 16, worded as follows:

" Every State has the duty to conduct its relations with other States in accordance with international law, and with the principle that the sovereignty of each State is subject to the supremacy of international law ".

Article 16 was adopted by 11 votes to 1.

The meeting rose at 1.00 p.m.

[12] Article 16 was article 13 of the original draft adopted by the Commission. See A/CN.4/SR.14, para. 22.

21st MEETING

Monday, 16 May 1949, at 3 p. m.

CONTENTS

Chairman: Mr. Manley O. HUDSON.

Rapporteur: Mr. Gilberto AMADO.

Present:

Members: Mr. Ricardo ALFARO, Mr. James L. BRIERLY, Mr. Roberto CÓRDOVA, Mr. J. P. A. FRANÇOIS, Mr. Shuhsi HSU, Mr. Vladimir KORETSKY, Sir Benegal N. RAU, Mr. A. E. F. SANDSTRÖM, Mr. Georges SCELLE, Mr. Jean SPIROPOULOS, Mr. Jesús María YEPES.

Secretariat: Mr. KERNO, Assistant Secretary-General in charge of the Legal Department; Mr. LIANG, Director, Division for the Development and Codification of International Law, Secretary to the Commission.

Draft Declaration on the Rights and Duties of States (*continued*)

SECOND READING (continued)

1. The CHAIRMAN observed that, as thirteen articles of the draft Declaration had been tenta-

tively adopted, there remained only articles 1, 2 and 3, on which he hoped to secure a clearer preponderance of views than had previously been possible (See A/CN.4/SR.19, paras. 22, 44 and 73).

Articles 1 and 2

2. Mr. HSU asked that the first two articles should be considered simultaneously, as they were closely related. In his view, the question of the existence of a State might well be left as an assumption, but a rule was required with regard to recognition. It would be difficult to formulate a text acceptable to all parties because the practice in connexion with the recognition of States varied greatly, as was shown, for example, in the case of the recognition of the thirteen colonies by the French Government, and in the case of the non-admission by the United Nations of Transjordan and Ceylon. He therefore suggested that a new text should be drawn up to contain the essential idea embodied in the two articles. As a guide to the formulation of the draft which he proposed to submit to the Commission, he had taken the question: " What is the effect on a State of non-recognition? " With that question in mind, he had prepared the following text, which he offered as a substitute for articles 1 and 2:

> " Every State, being a member of the community of nations, has the right to the protection of international law, irrespective of whether it is recognized."

He believed that some such text would cover the essential rights which articles 1 and 2 were intended to establish.

3. The CHAIRMAN pointed out that the phrase " being a member of the community of nations " would not be necessary, as the proposed preamble was to contain the statement that every State was a member of the community of States. He suggested that the phrase should be omitted and that the last phrase should read " irrespective of its recognition ". He added that such a phrase would mean that a State would have the right to the protection of international law, even when recognized by no other State.

4. Mr. HSU accepted the proposed changes.

5. In reply to a question by Mr. CORDOVA, Mr. HSU said that " the protection of international law " would mean protection by the appropriate organs, which would be the United Nations organs only when international law placed such an obligation on the United Nations.

6. Mr. ALFARO accepted the general idea of Mr. Hsu's draft, but considered that the meaning of the expression " the protection of international law " was not sufficiently clear for it to be used in the Declaration.

7. At the suggestion of the CHAIRMAN, Mr. HSU agreed that the last phrase should read " irrespective of its recognition by other States ".

8. Mr. SCELLE accepted the first part of the proposed article, but objected to the inclusion of the last phrase. Although the topic of recognition had been reserved for codification, he could agree to the tentative draft of article 2 as it stood in document A/CN.4/W.7, but he felt that a State not recognized as such by any other State should not be entitled to the protection of international law, as it had no status under that law.

9. The CHAIRMAN considered that the ideas in Mr. Hsu's draft were already adequately covered by other articles of the Declaration, e.g. article 16.

10. Mr. ALFARO suggested omitting the idea of recognition and redrafting the composite article in the following form:

> " Every State has the right to maintain its existence and to enjoy the benefits of international law within the community of States".

11. In reply to a question by Mr. FRANÇOIS, Mr. ALFARO observed that " benefits " referred to both rights and duties.

12. Mr. HSU did not accept Mr. Alfaro's amendment.

13. The CHAIRMAN put Mr. Alfaro's amendment to Mr. Hsu's draft to the vote.

The amendment was rejected by 4 votes to 3.

14. The CHAIRMAN put Mr. Hsu's composite draft of articles 1 and 2 to the vote.

The draft was rejected by 6 votes to 2.

15. In response to a suggestion by Mr. YEPES, the CHAIRMAN asked the Commission to vote on the question whether the phrase " and to provide for the well-being of its people " should be omitted from article 1, as proposed by the Sub-Committee. [1]

It was decided, by 7 votes to 2, that the phrase should be deleted.

After a short discussion, it was decided by 9 votes to 1 that the phrase: " to maintain its existence " should read: " to preserve its existence ".

16. The CHAIRMAN then put to the vote article 1 of the Sub-Committee's draft as amended.

The result of the voting was 6 votes in favour and 5 against.

17. Mr. SPIROPOULOS explained that he had abstained from voting because he considered that the article had no meaning.

18. The CHAIRMAN said that article 1 would be reserved for the time, as there was still no clear preponderance of votes. He asked for a vote on the question whether article 2 should be maintained in principle. [2]

The result of the voting was 4 in favour and 4 against.

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[1] See A/CN.4/SR.19, footnote 2.

[2] *Ibid.*

19. Mr. SCELLE requested that the vote should be taken again, as he had decided not to abstain.

The result of the second vote was 6 in favour of retaining article 2 and 5 against.

20. In reply to a request by Mr. AMADO that those opposing the inclusion of article 2 should explain their reasons, the CHAIRMAN said that he considered the proposed text to be an over-simplification of a complicated subject, which could not adequately be dealt with in less than some twenty articles.

21. Mr. BRIERLY endorsed the Chairman's view, and added that not only was recognition a vast subject, which had been reserved for codification, but it was a very controversial one.

22. Mr. ALFARO urged that article 2 should not be considered insignificant because of its brevity. In his view it contained an important point and one vital to the remainder of the Declaration. He suggested that the following combination of articles 1 and 2 might be more generally acceptable:

> "Every State has the right to preserve its existence and to have its existence recognized by other States."

23. The CHAIRMAN asked for a vote on Mr. Hsu's proposal that both articles 1 and 2 should be omitted, prior to voting on the proposal that one article should be substituted for both.

It was decided by 8 votes to 4 that articles 1 and 2 should not be omitted.

24. Sir Benegal RAU expressed the opinion that article 2 should be omitted. As applied to long-established States, such as France, it was superfluous, and as applied to those emerging to statehood, it was not true to say that such an entity was entitled to have its statehood recognized.

25. Mr. YEPES urged that article 2 should be adopted without prejudice to the codification of the topic of recognition. The Declaration would contain the broad principle and the codification would give the substantial rules working out the principle.

26. The CHAIRMAN put to the vote the draft combining articles 1 and 2 as proposed by Mr. Alfaro.

The result of the voting was 7 in favour and 3 against.

27. Following an appeal from the CHAIRMAN to all members of the Commission to vote on Mr. Alfaro's proposal, the vote was taken again.

The result of the voting was 8 in favour and 3 against.

28. The CHAIRMAN concluded that Mr. Alfaro's draft would be retained as article 1, although he thought minor drafting changes might be required.

29. Mr. KORETSKY expressed the view that the text finally adopted by the Commission was still less satisfactory than the two articles proposed by the Sub-Committee. The two articles should not be combined, as they would apply in entirely different circumstances.

30. Article 1 declared the right of a State, already in existence, to maintain its existence, and in view of the attempts by Nazi Germany to eradicate certain States, it was clear that such an article was required. It was necessary to the life of States in the same way as the article in the Universal Declaration on Human Rights, establishing the right of every human being to existence, was necessary to the life of man.

31. Article 2 referred to new States only and implied that every people was entitled to set up a State, thus guaranteeing to national liberation movements international recognition of their right to statehood. Thus, while the great Powers had little interest in articles 1 and 2, the smaller nations had a vital interest in them in connexion with two separate historical circumstances, namely, in time of threatened suppression of a State and at the time of emergence as a State.

32. He was therefore strongly of the view that articles 1 and 2 should not be merged and not be substantially changed from the text proposed by the Sub-Committee, although he would reserve his position on the precise drafting.

33. The CHAIRMAN asked Mr. Alfaro whether he would agree to split his draft into two articles again.

34. Mr. ALFARO agreed.

35. The CHAIRMAN read the following proposed texts for articles 1 and 2:

> "Article 1: Every State has the right to preserve its existence.
>
> "Article 2: Every State has the right to have its existence recognized by other States."

He then took another vote on the question whether articles 1 and 2 should be combined.

It was decided, by 7 votes to 2, that articles 1 and 2 should not be combined.

36. The CHAIRMAN put article 1, as above, to the vote.

Article 1, as above, was adopted by 6 votes to 3.

37. The CHAIRMAN put article 2, as above, to the vote.

Article 2, as above, was adopted by 6 votes to 4.

Article 3

38. The CHAIRMAN recalled that while the first sentence had received considerable support,[3] the Commission had been evenly divided with regard to the second.[4] He called attention to article 16, which had been retained.[5]

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[3] See A/CN.4/SR.19, para. 52.

[4] *Ibid.*, para. 65.

[5] See A/CN.4/SR.20, para. 121.

The second sentence of article 3 was rejected by 7 votes to 5.

39. Mr. KORETSKY, explaining his vote in favour of rejection, observed that the introduction of such a formula was incorrect and contrary to *opinio doctorum* on the question. By adopting it the Commission would be trying to set down as law a theoretical definition with which he and his people were not in agreement. It was most important that the sovereignty of States should be protected; that was particularly true of small States and those that fought for their freedom. The article as drafted undermined the very foundations of the concept of the sovereignty of States; it was theoretically incorrect and politically dangerous.

Proposed new articles

40. The CHAIRMAN said that there were two proposed new articles before the Commission. The first, submitted by Mr. Yepes, was as follows:

> " In the case of conflict between the articles of the present Declaration and the principles laid down in the Charter of the United Nations, the latter shall prevail."

The second, submitted by Sir Benegal Rau, was as follows:

> " Nothing contained in this Declaration shall derogate from the rights and duties of States expressed or implied in the Charter of the United Nations."

41. In his opinion, whichever of those articles was adopted should appear in the preamble rather than in the text of the Declaration.

42. Mr. YEPES would have been prepared to accept Sir Benegal Rau's text and withdraw his own, but he considered that the article should form part of the Declaration itself. The statement to the effect that the principles of the Charter were paramount would be more impressive to the public at large if it were contained in the Declaration than if it were a mere phrase in the preamble.

43. Sir Benegal RAU remarked that more importance was usually attached to the body of any legislative text than to what was contained in a preamble.

44. Mr. BRIERLY, supported by Mr. Córdova, observed that in international practice a preamble was considered to be just as much part of an instrument as any of its articles. In any event there was no possibility of conflict between the Declaration and the Charter. The Commission had had the Charter continually in mind when drafting the Declaration.

45. Mr. KERNO (Assistant Secretary-General) pointed out that, although according to the International Court of Justice and the San Francisco Conference, a preamble had the same binding force as any article, there was a difference in the eyes of the public. He thought the statement should be contained in the Declaration itself.

The Commission decided, by 8 votes to 4, not to include such an article in the Declaration itself.

46. Mr. HSU suggested that article 13 (*b*) should be slightly modified. [6] As it was now a separate article no longer connected with menaces to international peace and order, there was no longer an objection to the addition of the words " without distinction as to race, sex, language or religion ". Secondly, Mr. Hsu proposed the substitution of the term " all persons under its jurisdiction " for " its population ".

The first proposal was adopted by 9 votes to 2.

The second proposal was adopted by 10 votes to 1.

Preamble
(As proposed by the Sub-Committee on the draft Declaration) [7]

47. Mr. YEPES appreciated that in drafting the preamble the Sub-Committee had recognized the existence of a universal juridical community made up of all the peoples of the world. The statement that " the community of States is universal and participation in its constitutional organization should be. . . obligatory " was a juridical and moral truth. Universality was, or should be, the principle of the United Nations. It was essential to state in the Declaration that the Commission's efforts had been in the direction of a universal community of all States under the aegis of the United Nations. The time should not be far off when all the States in the world would be Members. In the four years that had elapsed since the Charter had been signed by forty nine States, ten new Members had been added. Approximately twenty States, however, remained outside the organization. Only when they had been admitted could the organization be said to have achieved the aim of its founders.

48. Hence it was right that the Declaration should proclaim the existence of that universal community without which one of the essential bases of world peace would be lacking. By saying that participation in the Organization should be universal and obligatory, the General Assembly would be expressing the hope that no State would remain outside the United Nations. That was the ideal to aim at. At the time of the signature of the Charter it had not been possible to make the membership of all States obligatory, but the statement in Article 4 that membership was open to all peace-loving States implicitly affirmed the œcumenical character of the organization. Furthermore, there was no article in the Charter authorizing Member States to withdraw. Member-

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[6] See A/CN.4/SR.20, para. 93.

[7] See A/CN.4/SR.19, footnote 2.

ship might thus be considered as permanent and obligatory for those who already belonged to the Organization.

49. In view of the above it was natural and logical that the preamble should express the aspiration towards universality and the obligatory nature of the institution, which was the foundation of the whole edifice. He was therefore unable to agree to the omission of paragraph 3 of the Sub-Committee's draft preamble, as in the draft submitted by the Chairman. With reference to paragraphs 4 and 5 of the Sub-Committee's draft, he felt that they stated an incomplete thesis. " The maintenance of international peace and security " could not in itself constitute the principal aim of the international community. Peace and security must be conditioned by justice—peace at any price was not true peace. A phrase should be added to the paragraphs in question to the effect that peace should be in conformity with the principles of justice—a conception which was to be found in Articles 1 (1) and 2 (3) of the Charter. He recalled that at San Francisco, the Latin-American republics and other small nations had had to wage a veritable battle for the acceptance of that principle. It had not formed part of the original drafts drawn up the great Powers at Dumbarton Oaks.

50. Too much was said on the subject of force and power politics. The United Nations was looking to the International Law Commission for an ideal, not only legal but also moral. Mere legal formulas would not have the power to draw the peoples of the world together under the banner of the Charter.

51. He proposed the following amendments to the preamble:

1. The deletion of the word " the " from the title, which should read simply: " Declaration on Rights and Duties of States "; or use of a specifying adjective, such as " the basic rights ";

2. In the first paragraph, the addition of the word " all " between " Whereas " and " the ";

3. The retention of paragraph 3 of the Sub-Committee's text with reference to the universal and obligatory character of the community of States;

4. The addition of the word " justice " in paragraph 4 before " international peace and security ";

5. The insertion in paragraph 5 of the words " and justice " after " law " in the first line, and of the word " order ", before " peace " in the second line.

52. He also proposed the addition of a new paragraph expressly mentioning Article 103 of the Charter, in order to emphasize the Commission's decision to remain within the framework of the United Nations Charter. That paragraph read as follows:

" Having in mind that in conformity with Article 103 of the United Nations Charter, the obligations under the Charter shall prevail over all obligations contracted by the States Members under any other international agreement."

53. Mr. SPIROPOULOS was unable to regard the preamble as an appropriate introduction to the Declaration. The ideas it contained were admirable, but in his view it could equally well be a preamble to a text on a different subject, except for the fifth paragraph. He analysed the preamble paragraph by paragraph.

Paragraph 1: the organization of the community of States had nothing to do with the Declaration.

Paragraph 2 was a very good text, but it had no connexion with the rights and duties of States.

Paragraph 3 also had no connexion with the rights and duties of States. It merely expressed a hope that the community of States would become universal.

Paragraph 4: the establishment of the organs and procedures of the United Nations was irrelevant.

Paragraph 5: while the idea contained in that paragraph was perhaps not expressed in the best possible way, nevertheless it did have some bearing on the Declaration and could be used as a preamble to it.

54. In drafting a new text he had endeavoured to find and express, so to speak, the *leit-motiv* of the Declaration. He proposed the following wording:

" *Whereas* the States of the world form a community governed by rules of law;

" *Whereas* the historical events of our century have given birth to new principles of international law (which constitute a landmark in the evolution of the international rules of conduct);

" *Whereas* these principles, consecrated by the Charter of the United Nations, constitute the common law of nations of today;

" *Whereas* it is of importance to set forth in a Declaration on rights and duties of States the basic principles of modern international law;

" *Whereas* it is in the interest of the maintenance of international peace and security and the reign of justice that all Governments observe these principles in good faith in international intercourse;

" *The General Assembly* (subject to the provisions of the Charter of the United Nations) adopts. . . "

The Commission unanimously agreed to Mr. Yepes' proposal to delete the word " the " from the title.

55. The CHAIRMAN felt much sympathy for Mr. Spiropoulos' proposal with regard to paragraph 1. He asked the Commission to consider

the substance and to leave the drafting until later.

56. Mr. AMADO also supported Mr. Spiropoulos' proposal.

57. Mr. ALFARO would not object to Mr. Spiropoulos' text being used as a basis of discussion, on the understanding that the Sub-Committee's draft and those submitted by the Chairman and Mr. Yepes should be considered at the same time.

58. Mr. SCELLE pointed out that there were great differences of drafting between the various texts submitted. While accepting many of the fundamental ideas contained in the Sub-Committee's text, Mr. Spiropoulos had rejected the reference to the technical organization of the United Nations, but he accepted the view that the new international law was that of the United Nations.

59. In reply to a question by the CHAIRMAN, Mr. SPIROPOULOS agreed to alter his proposed paragraph 1 to read ". . . governed by international law."

60. Mr. ALFARO would be prepared to accept Mr. Spiropoulos' proposed text amended to read: " Whereas the States of the world form a community governed by law."

61. Mr. SANDSTROM noted that the Sub-Committee text of the preamble, explaining the *raison d'être* of the community of States and its need for a Declaration on the rights of duties of States, differed from Mr. Spiropoulos' proposal, which referred to new principles of international law as the reason for the drafting of the Declaration. In Mr. Sandström's view, the latter text seemed to exaggerate the volume of new principles of international law.

62. The CHAIRMAN thought that it might be unwise to leave out the Sub-Committee's references to the need for organization and to the organization actually effected. He also suggested inclusion of the phrase he had proposed to the effect that the United Nations had established a new international order which most non-member States were also willing to accept.

63. Mr. CORDOVA saw no connexion between the idea of the existence of the community of States and the drafting of a Declaration on the rights and duties of States. Moreover, a number of provisions of the Charter might be amended in the future, as there was a need of constant change; so it would be inadvisable to establish too close a connexion between the international order under the United Nations Charter and the Declaration.

64. Mr. SCELLE remarked that Mr. Spiropoulos' text stressed the innovations in international law, of which, in Mr. Scelle's view, the idea of international organization in order to make international law effective was the most important. While there had been no possibility of enforcement under classic international law, new international law could be enforced by organs created for that purpose, thus making possible the eventual establishment of a supranational authority. That was also the idea contained in article 16 of the Declaration which would live forever, and which the world was striving to implement.

65. He accordingly agreed that the principle of organization should be stressed as also, the right of States to exercise their competence subject to the supreme authority of the international organization. He would therefore accept Mr. Spiropoulos' text provided it included the principle of organization set forth in the Sub-Committee's text.

66. Mr. ALFARO pointed out that the ideas mentioned by Mr. Scelle were contained in paragraphs 2 and 4 of the Sub-Committee's text. He thought that the Commission might retain the first part of the Sub-Committee's draft of paragraph 1 and substitute Mr. Spiropoulos' text for the second part.

67. Mr. KORETSKY thought that it would greatly facilitate the discussions if proposals were submitted twenty-four hours in advance. He was prepared, however, to consider Mr. Spiropoulos' text if the Commission so desired.

68. As regards Mr. Scelle's remarks, concerning the first paragraph of the preamble, they referred to matters not directly mentioned in Mr. Spiropoulos' text. The Commission's task was not to discuss theoretical concepts divorced from reality, but to work out a declaration which could be accepted by Governments. A community of States governed by law would only be possible if there were an organization or super-State over them. No Government, however, would submit to such authority. The United Nations, in accordance with Article 1, paragraph 4 of the Charter, was but a centre for harmonizing the actions of nations; under Article 2, paragraph 7, it was prohibited from intervening in domestic matters of States; and Article 13 clearly showed that it did not have legislative functions.

69. Mr. Koretsky therefore felt that it would be contrary to historical realism to think of a super-State which would destroy the very principle of the United Nations. International law would die, if the sovereignty of States were abolished.

70. Sir Benegal RAU thought that, while the Declaration applied to States in general, some of which were not Members of the United Nations, it should be made clear that it had been drawn up within the framework of the Charter. The second paragraph of the Sub-Committee's draft, as appropriately amended by the Chairman, met that purpose and should therefore be retained. In view of the fact, however, that paragraph 1 of Mr. Spiropoulos' draft did not seem to form a good introduction to the second paragraph of the Sub-Committee's text, he suggested that

something from the Sub-Committee's text should be added to it.

71. The CHAIRMAN, taking up Mr. Alfaro's proposal to delete the second part of the first paragraph of the Sub-Committee's text and to substitute Mr. Spiropoulos' draft for it, suggested that the words " and governed by law " might be inserted after the word " community ", and that the rest of the Sub-Committee's paragraph, which provided the necessary transition to the second paragraph of the Sub-Committee's text, should be retained.

72. Mr. SANDSTROM was against the phrase " governed by law " in view of the existing deficiencies in international law and its enforcement. The United Nations had been set up to remedy those deficiencies.

73. Mr. SPIROPOULOS, in reply to the objections raised to his proposal, said that the phrase " governed by law " was merely intended as a much-needed reference to international law. If another wording was found, he would be prepared to support it. The purpose of the United Nations was to maintain peace, and reference to that Organization was not sufficient in a preamble to a declaration setting forth principles of international law. He therefore felt that the phrase " governed by law " or some similar expression should be adopted.

74. In reply to Sir Benegal Rau's objection, he pointed out that in his proposal the second paragraph was consequential on the first, whereas the first paragraph of the Sub-Committee's text was not relevant to the Declaration.

75. The CHAIRMAN thought that the irrelevant words " protection and advancement of the common interests of their peoples " in the first paragraph of the Sub-Committee's draft should be deleted. Noting that the great weakness of international law in the past had been the lack of international organization, he suggested that the words " and the efficacy of that law depends upon the adequate organization of the community of States " should be added after the words " governed by law " so that the text would read: " Whereas the States of the world form a community governed by law, and the efficacy of that law depends upon adequate organization of the community of States; "

76. Mr. SPIROUPOULOS agreed with the Chairman's suggestion.

There being no objection, the Chairman's proposal for the first paragraph was tentatively adopted.

77. The CHAIRMAN then turned to the second paragraph of the Sub-Committee's draft, which, he thought, might be shortened by deleting the words " are organized as a legally constituted community and . . ." In general he preferred the Sub-Committee's text, with his own amendment, which appropriately stressed the willingness of most countries to accept the new international order, to Mr. Spiropoulos' draft dealing with new principles of international law.

78. Mr. SPIROPOULOS pointed out that not all of the new international law was created by the United Nations, citing as an example the Briand-Kellogg Pact. The Second World War had brought forth another set of rules of international law as, for instance, the principles of the Nürnberg trials. All of those principles, which were embodied in the Declaration and on which the United Nations was built, constituted the common international law of the time, independently of the willingness of other States to accept that order.

79. Mr. KORETSKY, speaking on the second paragraph of Mr. Spiropoulos' proposal, questioned the appropriateness of the expression " new principles of international law " in view of the basic principles of international law mentioned in the Declaration, some of which, such as the principle of non-intervention, had originated at the beginning of the nineteenth century. As Lenin stated it " we do not reject democratic slogans. Rather it is we who put into practice more fully, more consistently and more resolutely whatever is democratic in them. " The Declaration contained no principle that could be called " new "; no provision was made for the effective implementation for such principles as disarmament, for example.

80. The expression " new principles of international law " implied a super-State according to Mr. Scelle and Mr. Spiropoulos, while the peoples of the world wanted reference to their sovereignty and independence. The democratic heritage was the basis of international law, but the super-State was the ideal of those who wanted to dominate other peoples.

81. Mr. ALFARO was opposed to the seemingly controversial and ambiguous text of the second paragraph of Mr. Spiropoulos' draft. While it was true that historical events gave rise to new principles, the existing order of international law consisted of both old and new concepts. Moreover, while the phrase " consecrated by the Charter of the United Nations " in the third paragraph of Mr. Spiroupoulos' text seemed to refer to new principles only, it was well known that the Charter embodied both new and old principles of international law, such as the abolition of war and the sovereign equality of States.

82. With reference to the fourth paragraph of Mr. Spiropoulos' draft, he wished to know the exact meaning of the expression " modern international law ". The purpose of the Declaration was to harmonize the old and the new principles of international law. In view of those considerations, he thought that the Chairman's proposal for the second paragraph was more desirable and less controversial than Mr. Spiropoulos' text.

83. Mr. CORDOVA agreed with Mr. Spiropoulos

as regards the need of relationship between the preamble and the text of the Declaration. However, neither the second paragraph of the Sub-Committee's text, nor that of Mr. Spiropoulos, showed any necessity of drawing up a Declaration on the rights and duties of States.

84. Mr. SPIROPOULOS believed that there must have been some misunderstanding with regard to the intention of his proposal. The word " modern " in the fourth paragraph of his draft did not imply new international law exclusively, but covered all existing principles of international law, international law as it was at that time. As regards the second paragraph of his text, the existence of new principles which should be codified could not be denied.

85. His only purpose in drafting his proposal had been to establish a much-needed connexion between the body of the Declaration and its preamble. He would be prepared to support any other proposal to that effect which might be deemed preferable.

The meeting rose at p.m.

22nd MEETING

Tuesday, 17 May 1949, at 3 p.m.

CONTENTS

Chairman: Mr. Manley O. HUDSON.

Rapporteur: Mr. Gilberto AMADO.

Present:

Members: Mr. Ricardo ALFARO, Mr. JAMES L. BRIERLY, Mr. Roberto CÓRDOVA, Mr. J. P. A. FRANÇOIS, Mr. Shuhsi HSU, Mr. Vladimir KORETSKY, Sir Benegal N. RAU, Mr. A. E. F. SANDSTRÖM, Mr. Georges SCELLE, Mr. Jean SPIROPOULOS, Mr. Jesús María YEPES.

Secretariat: Mr. KERNO, Assistant Secretary-General in charge of the Legal Department; Mr. LIANG, Director, Division for the Development and Codification of International Law, Secretary to the Commission.

Draft Declaration on the Rights and Duties of States (*continued*)

SECOND READING (concluded)

Preamble (continued)

1. Resuming consideration of the preamble to the draft Declaration, the CHAIRMAN presented the following draft, in which he had endeavoured to combine the essential points contained in the two drafts submitted by the Sub-Committee and by Mr. Spiropoulos respectively:

" *Whereas* the States of the world form a community which is governed by international law;

" *Whereas* the progressive development of international law requires effective organization of the community of States;

" *Whereas* a great majority of the States of the world have established a new international order under the Charter of the United Nations, and most of the other States of the world have expressed their willingness to accept this new order;

" *Whereas* the primary purposes of the United Nations are to maintain international peace and security and to bring about the settlement of disputes by peaceful means and in conformity with the principles of justice and international law;

" *Whereas* the reign of law is essential to the realization of these purposes;

" *Whereas* it is desirable to formulate certain basic rights and duties of States in the light of modern international law;

" *Having in mind . . .*"

2. He explained that the first two paragraphs represented the first paragraph of the Sub-Committee's draft, adapted to the language used by Mr. Spiropoulos, and that the third paragraph reflected the idea contained in the second paragraph of the Sub-Committee's draft. [1]

3. Mr. YEPES, while approving the substance of the first paragraph, suggested that the sentence might be lightened by the omission of the words " which is ".

It was so decided.

4. The CHAIRMAN put the first paragraph as amended to the vote.

The first paragraph was adopted by 12 votes to none.

5. Turning to the second paragraph of the preamble, Mr. YEPES suggested that the expression " requires effective organization . . ." implied either that the United Nations was not the organization referred to or, if it was, that it was not effective.

6. The CHAIRMAN suggested that the following text might meet that objection:

" *Whereas* a great many of the States of the world have established an effective organization, which is the United Nations."

7. Mr. SANDSTROM preferred the Chairman's previous draft, and suggested that Mr. Yepes'

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[1] See A/CN.4/SR.19, footnote 2.

objection was not valid, since the reference in the second paragraph to the organization of the community of States was to the abstract idea, and would be followed by the concrete reference in the next paragraph.

The second paragraph was adopted by 8 votes to none.

8. Mr. YEPES stated that he had abstained as he considered the paragraph to lack clarity.

9. The CHAIRMAN explained that the last phrase of the third paragraph of his draft preamble was based on the fact that all the States of the world who were not yet Members of the United Nations had, with two exceptions, applied for membership.

10. Mr. KERNO (Assistant Secretary-General) noted that rule 123 of the rules of procedure of the General Assembly provided that an application for membership of the United Nations must be accompanied by a declaration, made in a formal instrument, that the applicant State accepted the obligations contained in the Charter. The word " expressed " might therefore be changed to " declared ".

It was so decided.

11. Mr. ALFARO suggested that the concept of an organization should be reflected in the third paragraph, since that paragraph was intended to lead on from the second. If, however, the Commission decided not to use the word " organize " or " organization " in the third paragraph, then it might be advisable to amend the second paragraph to accord with it.

12. In response to a suggestion by the Chairman, he proposed that the phrase " have established a new international order " should be amended to " have organized a community ".

13. Mr. BRIERLY proposed a combination of the two suggestions, namely: " have organized themselves in a new international order. . . "

14. Mr. KORETSKY pointed out that the expression " new order " had an unfortunate connotation after the experience of recent years.

15. Mr. BRIERLY thought that there could be no objection to the expression " new international order ", and suggested that the word "new" should be omitted from the second reference to that order.

It was so decided.

16. Mr. YEPES considered that the meaning would be clearer if the second and third paragraphs were combined.

17. The CHAIRMAN did not favour that suggestion, particularly because he considered it would weaken the force of the third paragraph. He put to the vote the third paragraph of the preamble in the following form:

" *Whereas* a great majority of the States of the world have established a new international order under the Charter of the United Nations, and most of the other States of the world have declared their willingness to accept this order; "

The third paragraph, as above, was adopted by 11 votes to none.

18. The CHAIRMAN observed that the text which had just been adopted showed that the great majority of the States, responding to the necessity for effective organization, had established the United Nations. He asked whether the objection which Mr. Alfaro had raised earlier had thus been met.

19. Sir Benegal RAU suggested that that objection would be completely met if the word " accordingly " were inserted before " established."

It was so decided.

20. The CHAIRMAN pointed out that nearly every term in the fourth paragraph of his draft preamble had been taken from paragraph 1 of Article 1 of the Charter. By emphasizing the international law aspect, it was designed to lead up to the emphatic tone of the fifth paragraph.

21. Mr. KERNO (Assistant Secretary-General) said that there had been considerable discussion when the Charter had been drawn up on the question of the Purposes of the United Nations, and that those purposes had been finally embodied in four paragraphs, none of which could be regarded as containing separately the primary purposes.

22. He drew the attention of the Commission to the fact that the discussion at San Francisco had shown that the adjustment and the settlement of international disputes had been regarded as of equal importance. [2] The Commission might, therefore, wish to include both words.

23. The CHAIRMAN accepted Mr. Kerno's first suggestion, to the effect that " the primary purposes " should be replaced by " a primary purpose ", but did not accept his second suggestion.

24. Mr. ALFARO thought that the phrase concerning the settlement of disputes by peaceful means might be omitted, since the idea was contained in the first part of the same paragraph. In the paragraph of the Charter the peaceful settlement of disputes was just one of the means to maintain international peace and security.

25. Mr. SANDSTROM pressed for the inclusion of that phrase as leading up to the proclamation of the rights and duties of States, and because he considered it desirable that the paragraph should contain a reference to international law.

26. The CHAIRMAN suggested that an earlier text he had prepared for the fourth paragraph, including the present fifth paragraph, should be adopted, since it would not be open to the objections that had been raised to his current proposal.

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[2] See Report of Sub-committee I/1/A of the San Francisco Conference, U.N.C.I.O. Doc. 723, I/1/A/9, 1 June 1945, Vol. 6, pp. 702-703.

The text was the following:

" *Whereas* a primary purpose of the United Nations is to maintain international peace and security and the reign of law is essential to the realization of this purpose; "

27. Mr. SCELLE supported that proposal.

28. Mr. YEPES proposed that the words " and justice " should be inserted after the phrase " and the reign of law ". He added that the word " justice " was included in the Charter.

29. The CHAIRMAN and Mr. ALFARO observed that that would turn the phrase into a purpose, instead of a means to attain the objective of the maintenance of international peace and security.

30. Mr. KERNO (Assistant Secretary-General) recalled that the smaller nations had been anxious to include the term " in conformity with the principles of justice and international law " in the original draft of Article 1, paragraph 1, immediately after the words " maintain international peace and security. ", but had been overruled. [3] The text proposed by the Chairman was more in conformity with what had been attained at the San Francisco Conference.

31. The CHAIRMAN asked the Commission to vote on the inclusion of the words " and justice " after the phrase "and the reign of law. "

It was decided, by 6 votes to 3, that those words should be included.

32. The CHAIRMAN put the fourth paragraph, as amended, to the vote.

The fourth paragraph, as amended, was adopted by 11 votes to none.

33. Mr. YEPES wondered whether the Commission intended to include in the preamble the third paragraph of the draft preamble submitted at the previous meeting by Mr. Spiropoulos, namely:

" *Whereas* these principles consecrated by the Charter of the United Nations constitute the common law of nations of today; "

34. In his opinion the fact that the Principles of the United Nations were part of the common law of nations should be included in the preamble, if not in the declaration itself.

35. Mr. KORETSKY suggested that there was no practical difference between the meaning of the expression " the common law of nations " and " general international law. "

36. The CHAIRMAN objected that the Commission could not properly make the statement contained in the paragraph under discussion.

37. Mr. BRIERLY endorsed that view. In his opinion it would be an incorrect statement, since the Charter of the United Nations did not constitute all the common law of nations.

38. At the request of Mr. YEPES, Mr. KERNO said that, in his opinion, the third paragraph already contained the idea that the Charter of the United Nations was a fundamental part of international law, and there seemed to be no need to repeat it.

39. The CHAIRMAN put to the vote the proposal that the idea that the Charter was a foundation of international law should be included in the preamble, over and above the indication in the third paragraph.

The proposal was rejected by 7 votes to 4.

40. The CHAIRMAN opened the discussion on the sixth paragraph of his draft preamble, which, owing to the merging of the fourth and fifth paragraphs, had now become the fifth. He was in favour of the term " certain basic rights " as the Declaration would not be exhaustive and he had adopted the term "modern international law" from Mr. Spiropoulos' draft.

41. Mr. Sandström had suggested to him that the phrase " in the light of modern international law " should be replaced by the phrase " in their mutual relations under the new order.". He himself, however, objected to the expression " the new order."

42. Mr. FRANÇOIS said that that expression could hardly be misinterpreted, since it obviously referred to the Charter of the United Nations, but he preferred the wording proposed by the Chairman.

43. The CHAIRMAN added that the preamble could not properly refer to the mutual relations under the Charter of *all* States.

44. Mr. AMADO referred again to the third paragraph of Mr. Spiropoulos' preamble, which had previously been quoted, and suggested that the phrase " consecrated by the Charter of the United Nations " should be taken out of that draft and included in the paragraph under discussion.

45. The CHAIRMAN said that if the phrase " and in accordance with the principles consecrated by the Charter " were added to the fifth paragraph as he had drafted it, the principles referred to would be the various principles declared throughout the Charter, not only in Article 1. Furthermore, he considered that the word " consecrated " had a connotation which made it unsuitable for use in that text. He would prefer the word " contained. "

46. Mr. ALFARO considered that " modern international law " was too vague a concept. He thought the Commission should find a text which would indicate the blending of customary international law with the new order established by the United Nations through its Charter, the Universal Declaration of Human Rights, etc. In

[3] San Francisco Conference, Committee I/1, 9th meeting (1 June 1945), U.N.C.I.O. doc. 742, I/1/23(1), Vol. 6, p. 319.

his opinion, Mr. Sandström's proposal did express that blending.

47. Mr. YEPES supported that view.

48. The CHAIRMAN put to the vote the paragraph as it would read with Mr. Sandström's amendment and with the addition of the word " international " before " order " suggested by Mr. Brierly:

" *Whereas* it is desirable to formulate certain basic rights and duties of States in their mutual relations under the new international order."

That proposal was adopted by 6 votes to 4.

The vote was considered not to indicate a sufficient preponderance of view.

49. The CHAIRMAN suggested the expression " in the light of modern developments of international law. "

That wording was adopted by 10 votes to none.

50. Mr. YEPES pointed out that on the preceding day five members had sponsored the following paragraph:

" *Whereas* the community of States is universal and participation in its constitutional organization should also be universal and obligatory ".

51. The CHAIRMAN did not consider that phrase to be correct, if it referred to the United Nations, for the organization was not yet universal and participation was not compulsory. The paragraph would not therefore lead up to the Declaration and was irrelevant.

52. Mr. SCELLE considered that the wish contained in the paragraph might find expression in the preamble.

53. Mr. CORDOVA felt that the General Assembly might interpret the paragraph as a criticism of the Charter. Moreover, by adopting it the Commission would be exceeding its terms of reference, which did not include expressing a political opinion on the future course of the United Nations. The Charter neither made membership compulsory nor admission automatic.

54. Mr. SCELLE agreed that if the paragraph might be so construed by the General Assembly, it would certainly be more prudent not to adopt it.

55. Mr. YEPES said he would not press his proposal.

56. The CHAIRMAN asked the Commission to consider the next paragraph of the preamble as drafted by the Sub-Committee, which read:

" Having in mind the principle that rights and duties are correlative and the right of one State implies the duty of other States to respect it. "

57. He himself proposed the following alternative wording:

" Having in mind that, rights and duties being correlative, the right of a State here formulated implies the corresponding duty of other States and the duty of a State here formulated implies the corresponding right of other States."

58. Mr. Yepes had proposed:

" Having in mind that, rights and duties being correlative, the right and duty of a State here formulated implies the corresponding duty or right of other States. "

59. Mr. FRANÇOIS preferred the wording of the Chairman, but objected to the phrase " rights and duties being correlative ", pointing out that that was not always true, particularly in the laws of war.

The Commission decided to delete the words " rights and duties being correlative."

60. After a short discussion, in which Mr. ALFARO defended the inclusion of the paragraph on the ground that the common people needed to be reminded of the fact that rights implied corresponding duties, and conversely, and in which the CHAIRMAN, Mr. SPIROPOULOS, Mr. CORDOVA and Mr. AMADO observed that they considered the paragraph unnecessary, the CHAIRMAN asked the members of the Commission to vote on the retention of the substance of the proposed paragraph.

The Commission decided, by 9 votes to 2, not to retain it.

61. Mr. YEPES explained his vote in favour of its retention and pointed out that several times during the discussion of the articles it had been proposed that an indication of the correlative rights and duties for each duty or right laid down in the Declaration should be included, and that on each occasion the proposal had been set aside on the ground that the preamble would contain a provision to that effect.

62. Mr. SCELLE wished to explain why he had voted against Mr. Yepes' proposal. From a legal standpoint the question which divided the Commission could be stated as follows: when a Government performed a legitimate act, it created a legal situation with which no one could interfere; that was the definition of a right. Other Governments were obliged to respect that situation, but a correlative duty was not necessarily involved; in the majority of cases the obligation was a passive one. He did not press for the inclusion of that idea in the Declaration; he had merely wished to explain why he could not vote for the proposed article.

63. The CHAIRMAN asked the Commission to consider the final paragraph of the preamble: " The General Assembly of the United Nations adopts and proclaims the following (Declarations . . .)".

64. He would prefer to say: " The General Assembly of the United Nations adopts and proclaims, subject to the provisions of the Charter of the

United Nations, this (Declaration. . .) ". The same wording had been proposed by Mr. Yepes.

65. Mr. CORDOVA thought that the phrase " subject to the provisions etc." might risk being interpreted wrongly as meaning that the exercise of the rights and compliance with the duties set forth in the Declaration might conflict with the Charter. He referred in particular to the provisions concerning intervention.

66. Mr. SPIROPOULOS agreed with Mr. Córdova He did not think that the phrase " subject to the provisions of the Charter " should appear in the Declaration. Firstly, the Declaration was also intended to apply to non-member States. Secondly, the phrase seemed to imply that some of the Declaration might be in contradiction with the Charter; thirdly, the point was adequately covered by Article 103 of the Charter.

67. Mr. SANDSTROM objected to that phrase. In his opinion the important point was not that the articles of the Declaration might be contrary to provisions of the Charter, as great care had been taken to avoid that, but that obligations under the Charter would prevail over duties under the Declaration: for example, enforcement action decided on by the Security Council could not be regarded as a violation of the duty to refrain from intervention in the affairs of another State.

68. Mr. BRIERLY was also opposed to the clause. If the General Assembly adopted such a Declaration, it could assume that the world would understand that it did not act contrary to the Charter.

69. Mr. ALFARO was likewise opposed to the inclusion of the phrase in the paragraph under consideration, but thought the Commission might reconsider the possibility of including it in the preceding paragraph, and wording it " in harmony with the provisions of the Charter ", as the present wording seemed to presuppose the possibility of conflict with the Charter.

70. Sir Benegal RAU defended the clause and considered that the Declaration should state somewhere that the Commission regarded the provisions of the Charter as part of the general international law of the modern world.

71. Mr. YEPES pointed out that at the previous meeting the proposals of Sir Benegal Rau and himself to have an article in the body of the Declaration of similar content to the previous clause, had been defeated, it having been considered preferable for it to figure in the preamble.

72. The CHAIRMAN withdrew his proposal, and asked the Commission to vote on the paragraph beginning " Having in mind. . . " in the Sub-Committee's draft, subject to the substitution of " this " for " the following ". [4]

The paragraph was adopted by 12 votes to none.

73. The CHAIRMAN announced that the Commission had concluded its second reading of the draft Declaration, and proposed that it should be referred to the same Sub-Committee [5] that had previously worked on it, for examination with a view to consistency of subject matter and style, and also with regard to the arrangement of the articles, with which he was not entirely satisfied. The Commission would then proceed to a third reading.

At Mr. BRIERLY's suggestion, the Commission requested the Chairman to participate in the work of the Sub-Committee.

74. In reply to a question by Mr. KORETSKY, the CHAIRMAN stated that he hoped the Commission would be able to adopt a final text at the current session. It would be, however, for the Commission to decide what procedure it wished to adopt after completing the third reading of the draft.

75. Mr. KORETSKY did not think it would be possible to complete the work during the current session. After studying the Sub-Committee's text, members should be given time for reflection and should then re-examine the draft at the following session. The terms of reference of the Sub-Committee were not to reconsider the substance of the draft, and it should therefore be possible for the Commission to decide immediately what procedure it would follow.

76. Mr. SPIROPOULOS emphasized that the Sub-Committee should confine itself strictly to drafting and should introduce no modifications of substance.

77. Mr. KORETSKY welcomed the idea of referring the text to a sub-committee for drafting revisions, although he did not share the Chairman's view that the Commission should adopt the final form at the third reading for presentation to the forthcoming session of the General Assembly. It was clear from the summary records and press-releases of the Commission's meetings that the various articles had only been tentatively adopted and required further consideration.

78. He had previously criticized certain shortcomings in the Panamanian draft, which had not been met in the present draft. His principal objections to it were, firstly, that it did not embody such fundamental principles of the United Nations as sovereign equality of its Members and the right of self-determination of peoples, and secondly that it did not defend States against interference, in matters falling essentially within their domestic jurisdiction, by international organizations or groups of States. The Commission had completely overlooked the rights of individual States. The purpose of the community of States

[4] See *supra* paras. 56 and 63.

[5] Set up at the 16th meeting. See A/CN.4/SR.16, para. 114.

was to safeguard the rights of individual States. He had been surprised to see that those who on other occasions had championed the rights of the individual as against society should so strongly support the collective principle when it came to rights of States, and raise the question of a super-State which, in his view, would lead to the disintegration of individual States.

79. In the third place, the draft did not set forth the very important duty of States to take measures for the maintenance of international peace and security, the prohibition of the atomic weapon and for a general reduction of armaments and armed forces. Although the preamble mentioned maintenance of peace and security as one of the primary purposes of the United Nations, it did not provide for measures for implementation. The draft further did not proclaim the duty of States not to join aggressive blocs such as the North Atlantic Pact and the Western Union, which, while pretending to safeguard international peace and security, were actually military alliances.

80. His fourth objection was that the draft ignored the important duty of States to eradicate the last vestiges of fascism and to prevent its possible rebirth.

81. In the fifth place, it did not establish the duty of a State to ensure full equality among its citizens without distinction as to race or nationality, as well as to fight against any racial, national or religious prejudice among its people, and to prevent the propagation of hatred.

82. Lastly, it did not point out the important duty of States to safeguard fundamental human rights and freedoms, in particular the right to work and to protection against unemployment, by adopting measures to provide useful employment for all. The results of the Commission's work showed that his remarks had not been taken into consideration.

83. In certain respects, attempts had been made to improve the Panamanian draft. The United Nations had received " recognition ", although in a half-hearted way as if there were some reluctance to strengthen its activities. He noted, in that connexion, that the proposal for a clause stating that the articles of the Declaration were valid subject to the provisions of the Charter had been rejected, while the Charter provisions on individual and collective self-defence had been distorted in the draft.

84. The new draft, especially article 16, went even further than the Panamanian text in negating the sovereignty of States. The " doctrine of the super-State " was being used by those who were striving to attain world domination. Instead of supporting the principles of sovereignty, self-determination, independence, true equality of States, and liberation of States from dependence upon other States, they were trying to prevent any action designed to free the peoples from exploitation and oppression.

85. With reference to the remark by one of the Commission's members that the concept of the super-State was " revolutionary ", Mr. Koretsky pointed out that it was " counter-revolutionary " inasmuch as it was designed to bring about the absolute enslavement of peoples. It showed a reactionary spirit. No one who loved his country, but only those who were striving to acquire strength from outside in order to suppress their own people, would think of such a doctrine.

86. Mr. Koretsky fully recognized international law, violations of which had brought untold suffering to millions of his people, but he wished to point out that international law, which had been born of the struggle for national sovereignty, for liberation from the tyranny of another State, could only exist so long as there were sovereign States whose relations it governed.

87. With regard to the question of transmitting the draft Declaration in its present form to the following session of the General Assembly, Mr. Koretsky noted that many of its articles had been adopted by a scant majority, with many abstentions and only after repeated voting. He considered that the draft required further consideration and modification. By referring the matter immediately to the General Assembly, the Commission would merely be transmitting a number of controversial questions which it had not yet been able to solve. It would be worse to present an unfinished document than to be accused of delay.

88. The vital questions under consideration could not be decided by show of hands alone, but should be settled by the force of argument. In view of the necessity of obtaining the views of Governments and scientific institutes of international law on the present text, which differed substantially from the Panamanian draft, he proposed that its final adoption should be postponed until the Commission's following session.

89. The CHAIRMAN stated that the question before the Commission was whether the draft Declaration should be referred to the Sub-Committee for drafting revision, with a view to a third reading in the Commission.

90. Mr. SCELLE felt that before a vote on that matter could be taken, the Commission must know the Sub-Committee's terms of reference, as well as the purpose of the third reading. The Commission had repeatedly considered and voted on the different articles of the Declaration, and its work was threatening to become purely academic if no final decision was adopted. He therefore considered that if the Commission decided to refer the draft to the Sub-Committee it should

do so for the exclusive purpose of polishing the text, the substance of which must remain unchanged.

91. Contrary to Mr. Koretsky, Mr. Scelle considered that the draft should be presented to the fourth session of the General Assembly. He was therefore in favour of finishing the work on the draft Declaration and then proceeding to another subject.

92. The CHAIRMAN thought that the Sub-Committee might also be instructed to check the versions of the Declaration in the other working languages.

93. Mr. ALFARO agreed with Mr. Scelle that it was the Commission's duty to finish the Declaration at its current session. The Commission would appear ridiculous in the eyes of the world if, after all its lengthy deliberations, it decided to reconsider the text at its following session. He therefore supported the Chairman's proposal.

94. In reply to a question by Mr. CORDOVA, the CHAIRMAN stated that the Sub-Committee's terms of reference would be to polish the text of the draft Declaration and to check the versions of it in the other working languages, for the Commission's consideration at the third reading. The Sub-Committee would be free to seek the assistance of other members of the Commission.

95. Mr. SPIROPOULOS reserved the right to speak on the Declaration as a whole at the third reading.

96. The CHAIRMAN put to the vote the question of referring the draft to the Sub-Committee.

The Commission decided by 11 votes to 1 to refer the draft to the Sub-Committee.

97. After a brief discussion of procedure, Mr. CORDOVA proposed that the Commission should finish its work on the Declaration before proceeding to other items on its agenda.

Mr. Cordova's proposal was adopted by 8 votes to 2.

98. Mr. HSU, referring to Mr. Koretsky's criticism of the draft Declaration, suggested that the latter submit a number of concrete proposals on the text for the Commission's consideration.

99. Mr. ALFARO asked for clarification of the meaning of the words " modern developments of international law ". The word " modern " was a concept of time, and it was not clear when that modern development had begun, nor which instruments of international law belonged to the period of modern development.

The meeting rose at 6 p.m.

23rd MEETING

Thursday, 19 May 1949, at 3 p.m.

CONTENTS

Chairman: Mr. Manley O. HUDSON.

Rapporteur: Mr. Gilberto AMADO.

Present:

Members: Mr. Ricardo J. ALFARO, Mr. James L. BRIERLY, Mr. Roberto CÓRDOVA, Mr. J. P. A. FRANÇOIS, Mr. Shuhsi HSU, Mr. Vladimir M. KORETSKY, Mr. A. E. F. SANDSTRÖM, Mr. Georges SCELLE, Mr. Jean SPIROPOULOS, Mr. Jesús María YEPES.

Secretariat: Mr. LIANG, Director, Division for the Development and Codification of International Law; Secretary to the Commission.

Draft Declaration on the Rights and Duties of States (*continued*)

THIRD READING

1. The CHAIRMAN opened the third reading of the draft Declaration on Rights and Duties of States, based on the revised text submitted by the Sub-Committee. [1] That document contained

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[1] " *Whereas* the States of the world form a community governed by international law;

" *Whereas* the progressive development of international law requires effective organization of the community of States;

" *Whereas* a great majority of the States of the world have accordingly established a new international order under the Charter of the United Nations, and most of the other States of the world have declared their [willingness to accept] *desire to live within* this order;

" *Whereas* a primary purpose of the United Nations is to maintain international peace and security, and the reign of law and justice is essential to the realization of this purpose; *and*

" *Whereas* it is *therefore* desirable to formulate

various minor changes suggested by the Sub-Committee, upon which the Commission would be required to decide.

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certain basic rights and duties of States in the light of [modern] *new* developments of international law *and in harmony with the Charter of the United Nations*:

THE GENERAL ASSEMBLY of the United Nations adopts and proclaims this DECLARATION ON RIGHTS AND DUTIES OF STATES

" *Article 1*

" Every State has the right to preserve its existence.

" *Article 2*

" Every State has the right to have its existence recognized by other States.

" *Article 3*

" Every State has the right to independence and hence to exercise freely, without [being subject to] dictation by any other State, all its legal powers, including the choice of its own form of government.

" *Article 4* [6]

" Every State has the right to exercise jurisdiction over its territory and over all persons and things therein, subject to the [privileges and] immunities recognized by international law.

" *Article 5* [4]

" Every State has the duty to refrain from intervention in the internal or external affairs of any other State.

" *Article 6* [5]

" Every State has the right to equality in law with every other State.

" *Article 7* [14]

" Every State has the duty to treat [all] *the* persons under its jurisdiction with respect for human rights and fundamental freedoms for all without distinction as to race, sex, language or religion.

" *Article 8* [13]

" Every State has the duty to ensure that conditions prevailing [within] *in* its territory do not menace international peace and order.

" *Article 9* [15]

" Every State has the duty to refrain from fomenting civil strife in the territory of another State, and to prevent the organization within its territory of activities calculated to foment such civil strife.

" *Article 10* [7]

" Every State has the duty to settle its disputes with other States by peaceful means in such a manner that international peace and security, and justice, are not endangered.

" *Article 11* [8]

" Every State has the duty to refrain from [waging] *resorting to* war as an instrument of national policy, and to refrain from [resorting to any] *the* threat or use of force, [*either*] against the territorial integrity or political independence of another State, or in any other manner inconsistent with international law and order.

" *Article 12* [9]

" Every State has the duty to refrain from giving assistance to any State which is acting in violation of article 8, or against which the United Nations is taking preventive or enforcement action.

" *Article 13* [10]

" Every State has the duty to refrain from recognizing any territorial acquisition [made] by another State acting in violation of Article 8.

" *Article 14* [11]

" Every State has the right of individual or collective self-defence against armed attack.

" *Article 15* [12]

" Every State has the duty to carry out in good faith its obligations arising from treaties and other sources of international law, and it may not invoke limitations contained in its own constitution or its laws as an excuse for failure to perform this duty.

" *Article 16*

" Every State has the duty to conduct its relations with other States in accordance with international law and with the principle that the sovereignty of each State is subject to the supremacy of international law.

2. Mr. SPIROPOULOS stated that the revised text still contained a number of points with which he could not agree and to which he had objected during previous discussions. He would not repeat his objections, but would indicate that he could not support the revised draft by abstaining from voting on the parts of the preamble and the articles in question.

Preamble

3. The CHAIRMAN read the preamble, and opened discussion on the first paragraph.

There being no objection, the first paragraph was adopted by 10 votes to none, with 1 abstention.

4. The CHAIRMAN asked for comments on the second paragraph.

5. Mr. HSU suggested that the word " requires " was too strong, and might be replaced by the expression " calls for."

6. Mr. YEPES asked whether the word " an " should not be inserted before " effective organization ".

7. The CHAIRMAN explained that the change suggested by Mr. HSU would affect the meaning only very slightly, and expressed the personal view that the stronger word was preferable. In reply to Mr. Yepes, he said that the English text would not be improved by the addition of the indefinite article.

The second paragraph was adopted, without amendment, by 9 votes to 1, with 1 abstention.

8. The CHAIRMAN read the third paragraph and said that the Sub-Committee, bearing in mind the fact that nearly all non-member States of the United Nations had applied for membership, had concluded that the words " their willingness to accept " should be replaced by the more emphatic expression: " their desire to live within ".

9. In reply to a question from Mr. CORDOVA, the CHAIRMAN pointed out that the word " accept " in Article 4 of the Charter referred to the obligations contained in the Charter, whereas the phrase under discussion referred more largely to the willingness or desire of States to live within the new international order, a desire of which they had given proof by applying for membership.

10. In reply a question by Mr. FRANÇOIS, Mr. BRIERLY expressed the view that a State could be said to " desire to live . . .", since if it existed it must live.

11. After some discussion, the CHAIRMAN put to the vote the substitution of the words " desire to live within " for " willingness to accept ".

The substitution was approved by 6 votes to 3, with 2 abstentions.

12. Mr. SPIROPOULOS suggested that the word " accordingly " in the same paragraph carried the implication that the new international order under the Charter of the United Nations had been established with the sole purpose of achieving the progressive development of international law.

13. The CHAIRMAN explained that the word " accordingly " meant that the new international order had been established in accordance with the idea expressed in the preceding paragraph, but not that that idea was the only reason for establishing that order.

14. Mr. CORDOVA said that he had accepted the word " accordingly " because it carried the meaning that the States of the world were establishing an effective organization under the Charter of the United Nations.

15. Mr. LIANG (Secretary to the Commission) supported the view of Mr. Spiropoulos. The French text, even more than the English, might give rise to the restrictive interpretation.

16. Mr. YEPES proposed that the word " accordingly " should be omitted.

The proposal was rejected by 7 votes to 3, with none abstention.

17. The CHAIRMAN put the third paragraph as amended to the vote.

The third paragraph was adopted by 9 votes to none, with one abstention.

18. The CHAIRMAN read the fourth paragraph, and asked if there was any objection to adding the word " and " to the end of that paragraph, as recommended by the Sub-Committee. There being no objection and no comments, he put the paragraph to the vote.

The fourth paragraph, as amended, was adopted by 9 votes to none, with one abstention.

19. The CHAIRMAN read the fifth paragraph, and indicated three amendments suggested by the Sub-Committee. He asked whether there was any objection to the insertion of the word " therefore " before " desirable ", or to the substitution of " new " for " modern ".

There being no objection, those amendments were adopted.

20. The CHAIRMAN said that the Sub-Committee had proposed that the words " and in harmony with the Charter of the United Nations " should be added to the end of the paragraph. A phrase had been included in earlier drafts of the next paragraph to the effect that the Declaration had been drawn up subject to the provisions of the Charter. That phrase had been deleted at the previous meeting. The Sub-Committee had adopted the phrase " and in harmony with the Charter of the United Nations " at the suggestion of Mr. Alfaro.

21. Mr. LIANG (Secretary to the Committee), speaking on behalf of Dr. Kerno, (Assistant Secretary-General), proposed that the words " in particular " or " particularly " should be inserted at the beginning of the Sub-Committee's proposed amendment, to emphasize that the Charter itself was a new development of international law, not something apart from it.

The proposal was rejected by 6 votes to 2, with 3 abstentions.

22. Mr. SPIROPOULOS considered that the expression proposed by the Sub-Committee would mean that certain basic rights were to be formulated in harnony with the Charter, which he held to be meaningless. Certain principles contained in the Charter could be codified, but the word " harmonize " implied that a compromise had been reached, and that either one or both of the things being harmonized had had something taken away from it to achieve the harmony.

23. In reply, Mr. ALFARO explained that the phrase meant that in the formulation of certain basic rights and duties, the Charter had been taken into consideration and that nothing had been declared which was at variance with its provisions.

24. The CHAIRMAN added that " in harmony with " meant " in the spirit of ". He put to the vote the inclusion of the phrase proposed by the Sub-Committee.

The phrase was adopted by 9 votes to 1, with 1 abstention.

25. Mr. SPIROPOULOS wondered whether the word " certain " should not be omitted. Other authorities had formulated draft declarations on rights and duties of States in a number of articles ranging from 6 to 100 without using that word. The limitation in the word " basic " was enough.

If the Commission considered that it had codified all the basic rights and duties, it could and should omit the word " certain ".

26. Mr. BRIERLY agreed that he, at least, had not consciously agreed to the omission of any basic right or duty, and that the word " certain " might be omitted.

27. Mr. ALFARO supported that view; if any of the basic rights or duties had, in fact, been omitted, then they should be inserted.

28. Mr. CORDOVA also agreed with Mr. Spiropoulos. If the Commission submitted such an admittedly limitative text to the General Assembly, it might well be instructed by it to finish what it had undertaken and codify the remaining rights and duties.

29. Mr. YEPES held the contrary view: e.g. the vital *jus communicationis* had not been embodied in the Declaration and it could not be regarded as exhaustive.

30. Mr. SCELLE endorsed Mr. Yepes' argument, and added that many other rights, such as the right of diplomatic representation, had not been included.

31. Mr. FRANÇOIS expressed the same view, observing that several subjects had been dealt with as they had been retained for codification.

32. Mr. SPIROPOULOS pointed out that the question turned upon the meaning and application of the word " basic ". No list of the rights and duties of States had ever claimed to be exhaustive or final, but for each draft the essential and fundamental rights had been selected for codification. It was therefore for the Commission to decide whether it had omitted any right or duty which it considered to be fundamental, and if so, to insert it. In any case the word " certain " was not appropriate.

33. Mr. SANDSTROM proposed the insertion of the phrase " as a standard of conduct " between the words " formulate " and " certain ", which phrase had been proposed at a previous meeting on the example of the Universal Declaration of Human Rights.

The proposal was adopted by 9 votes to 1, with 1 abstention.

34. The CHAIRMAN put to the vote the fifth paragraph as amended.

The fifth paragraph, as amended, was adopted by 9 votes to 1, with 1 abstention.

The last phrase of the preamble with the title was adopted, without change, by 9 votes to none, with 2 abstentions.

Article 1

35. The CHAIRMAN considered that article 1 should be deleted. He did not feel that it served any useful purpose.

36. Mr. SPIROPOULOS proposed to replace the words " preserve its existence " by " exist ". He considered that the right to preserve its existence was merely a derivative right.

Mr. Spiropoulos' proposal was rejected by 4 votes to 3.

37. Mr. YEPES proposed to insert the words " to exist and " between " the right " and " to preserve its existence."

The proposal was adopted by 5 votes to 1.

The CHAIRMAN put article 1 as amended to the vote.

The result of the vote was a tie, 5 members voting in favour and 5 against. The article was therefore reserved for reconsideration after the return of absent members. [2]

Article 2

38. The CHAIRMAN considered article 2 less necessary since article 1 had been retained. Moreover he considered the use of the term " right to have its existence recognized " to be dangerous, as recognition was too complicated a subject matter.

Article 2 was also reserved. [3]

Article 3

39. The CHAIRMAN stated that the Sub-Committee proposed to delete the words " being subject to " between " without " and " dictation ", on the ground that they were superfluous.

There being no objection, the proposal was adopted.

40. Mr. SPIROPOULOS disliked the whole article. Not only was it clumsily worded, but its substance was covered by article 5, which dealt with intervention. He proposed deleting everything after the word " independence ".

The proposal was rejected by 9 votes to 1.

Article 3 as amended was adopted by 9 votes to none.

41. The CHAIRMAN pointed out that the Sub-Committee had changed the order of the remaining articles into what it considered to be a more logical sequence. He suggested discussing them in the order in which they appeared in document A/CN.4/W.8 and deferring a final decision on the order.

Article 4 [6]

42. The CHAIRMAN stated that the Sub-Committee had proposed the deletion of the words " privileges and " as unnecessary and out of place.

43. Mr. YEPES opposed the deletion on the ground that " privileges and immunities " was the accepted phrase.

The proposal to delete the words " privileges and " was adopted by 7 votes to 2.

Article 4 as amended was adopted by 9 votes to 1.

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[2] See A/CN.4/SR.24, paras. 10-23.

[3] *Ibid.*, paras. 24-50.

44. Mr. SPIROPOULOS stated that he had voted against the article because he felt it did not express what should have been expressed—that a State had exclusive jursidiction over its territory, as no other State had the right to exercise jurisdiction therein.

Article 5 [4]

Article 5 was adopted by 10 votes to none.

Article 6 [5]

Article 6 was adopted by 10 notes to none.

Article 7 [14]

45. The CHAIRMAN stated that the Sub-Committee proposed to replace the word " all " by " the " between " treat " and " persons ", in order not to have the word " all " twice in one sentence. The change was merely one of drafting.

46. Mr. BRIERLY suggested retaining the word " all " in the first line and deleting " for all " after " fundamental freedoms " in the second line.

Mr. Brierly's suggestion was adopted by 7 votes to none.

47. Mr. YEPES proposed the addition of the word " the " before " human rights and fundamental freedoms ", to express that all human rights must be respected.

48. The CHAIRMAN pointed out that that would be inconsistent with the Charter, which always spoke of respect for human rights and fundamental freedoms. Moreover, those rights and freedoms had never been defined.

49. Mr. ALFARO said that there had been much confusion with regard to the article in question. It had originally been inspired by Principle 2 of " International Law of the Future ", which stated that every nation had a duty to treat its own population in a way which " will not shock the conscience of mankind ". [4] That had been changed, at the suggestion of Sir Benegal Rau, to a direct reference to human rights. Article 55 c of the Charter spoke of human rights and fundamental freedoms for all, but the Commission had replaced " population " by " persons under its jurisdiction " and thereby changed the structure of the phrase. Article 7 of the Declaration now dealt with the rights and freedoms of those persons and the suppression of the words " for all " was therefore logical. He suggested saying: " Every State has the duty to treat all persons under its jurisdiction with respect for their human rights and fundamental freedoms ".

50. Mr. YEPES withdrew his proposal in favour of Mr. Alfaro's.

51. Mr. CORDOVA asked whether Mr. Alfaro's proposal would not restrict the duty of the State to respecting the human rights and fundamental freedoms only of the persons under its jurisdiction.

52. Mr. ALFARO agreed that that was so; the Declaration could not say that State A was bound to treat persons under its jurisdiction with respect for the human rights and fundamental freedoms prevailing for persons under the jurisdiction of State B.

53. The CHAIRMAN asked the members to reconsider the last phrase of article 7—" without distinction as to race, sex, language or religion ". The text of that article had previously been combined with article 8 to form what was then article 13, and the phrase in question had not been included. The article had subsequently been divided into two and thereupon the Commission had tentatively decided to add the words in question.

54. These words appeared four times in the Charter. The first time was in Article 1, paragraph 3, which gave as one of the purposes of the United Nations " to achieve international co-operation in. . . promoting and encouraging respect for human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion ". No duty was imposed upon any Member of the United Nations by that text.

55. Article 13. 1 b merely empowered the General Assembly to " initiate studies and make recommendations for the purpose of. . . assisting in the realization of human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion ". It did not impose a duty upon any Member of the United Nations.

56. Article 55 c laid down that the United Nations should " promote. . . universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion ". No duty was thereby imposed upon any Member of the United Nations.

57. Article 76 c provided that " the basic objectives of the Trusteeship system. . . shall be. . . to encourage respect for human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion. . . " It could hardly be claimed that the article either imposed a specific duty upon any Member of the United Nations.

58. Article 62.2 (which did not contain the words " without distinction as to race, sex, language or religion ") merely empowered the Economic and Social Council to " make recommendations for the purpose of promoting respect for, and observance of, human rights and fundamental freedoms for all ". Once more, no duty was imposed on any Member of the United Nations.

59. The conclusion he drew was that Member States had not, by signing the Charter, assumed a legal obligation to treat persons under their jurisdiction with respect for human rights and

[4] See A/CN.4/2, p. 161.

fundamental freedoms without distinction as to race, sex, language or religion. They had merely agreed to promote international co-operation to that end.

60. Article 7 of the Declaration went beyond the Charter in attempting to lay down a legal duty for Member States, and much beyond anything so far known in existing international law in attempting to lay down a legal duty for both Member and non-member States. Moreover, the term " human rights and fundamental freedoms " was not defined, either in the Charter or in the Universal Declaration of Human Rights.

61. He considered that it would be a mistake for the Commission to use the phrase " without distinction as to race, sex, language, or religion " in connexion with a legal duty. Such a distinction was made in many countries, both Members and non-members of the United Nations. In Switzerland, for instance, the vote had not been extended to women. The Declaration could not impose on Switzerland the duty of granting them the franchise, and if it were to contain such a provision that country, as well as many others, would simply refuse to comply.

62. He therefore proposed that the phrase should be omitted. He had made the proposal at that time since he considered that it bore upon the proposal made by Mr. Alfaro and Mr. Yepes that the word " their " should be inserted. If they agreed, he asked that his proposal should be examined first.

63. Mr. ALFARO and Mr. YEPES agreed to the Chairman's proposal being considered before theirs.

64. Mr. SANDSTROM felt that the Chairman's arguments did not apply only to the phrase to which he had referred; they meant that the whole article as drafted went too far.

65. The CHAIRMAN could not accept that extension of his argument.

66. Mr. BRIERLY agreed with the Chairman. Furthermore, even without the phrase in question the article as drafted would mark a revolutionary change in international law, since it brought into the domain of international law a matter which had hitherto been one of purely domestic jurisdiction—the treatment by a State of its own nationals. He felt, however, that there was some reason for saying that that change had in fact taken place. There were the Nürnberg principles, and there was the implication in the Charter that respect for human rights within a State was an important element in securing peaceful and friendly relations with other States. It could well be argued that international law today did impose a duty on States to respect the human rights of their own nationals. He accepted the article as far as the word " freedoms " and if the General Assembly should consider that went too far, it could strike out the article.

67. To say, however, that no distinction could be made on any of the four grounds as they stood was another matter altogether. That went far beyond anything in the Charter or in the rules of general international law outside the Charter. He felt that it went beyond anything that present-day world opinion would be prepared to accept. Probably more than half the Members of the United Nations made a distinction between the sexes, and if the Declaration were to state that they were violating the Charter by so doing, it would not be taken seriously and the members of the Commission would be considered with some reason as academically-minded doctrinaires.

68. Mr. CORDOVA on the other hand thought that the article should be drafted in such a way as to state that human rights and fundamental freedoms should be granted to all persons within a State, without distinction as to race, sex, language or religion. He disagreed with the argument that the last phrase should be omitted because some States did make such a distinction. The instances that had been quoted concerned political rights, but those were not fundamental human rights.

69. The Declaration recognized the necessity of respecting the principle that in order that there should be friendly relations between nations States should never make distinctions between individuals on the ground of race, sex, language or religion. It was for the Commission to determine whether that was a principle of international law and whether it could be imposed on States as a duty. In his view the whole of the Charter gave reason to think that it was more than a mere principle.

70. Mr. KORETSKY stated that the Chairman's proposal substantially altered the provision on fundamental human rights as adopted by the Commission after lengthy deliberation. One of the defects of the earlier texts had been the lack of reference to human rights; to delete the phrase " without distinction as to race, sex, language, or religion " would be to nullify what little improvement had been made in the present draft. Moreover, such action would be interpreted as a limitation of human rights and as an attempt to legalize or ignore the existing injustice in the world. Having stressed new developments in international law in the preamble of the Declaration, how could the Commission now delete a clause dealing with fundamental human rights the protection of which constituted one of the newest principles in international law?

71. Replying to some arguments advanced by the Chairman, he pointed out that a Universal Declaration on Human Rights was already in existence, and that the present Declaration was not intended to limit the human rights to the ones mentioned therein, but its purpose was to lead to the recognition and protection of funda-

mental human rights by all States which in turn would strengthen peaceful and friendly international relations. Moreover, the Commission was drafting a declaration whose importance would lie primarily in its great moral significance.

72. As regards Mr. Brierly's view that the Commission might be accused of being doctrinarian, he thought that such an accusation might be justified in respect of article 16, but not in the present case.

73. The Chairman had mentioned Switzerland as an example of a country where women enjoyed no political rights; however, other examples of fundamental human rights which needed to be protected might be found in the South of the Chairman's own country. By avoiding reference to those rights, the Commission would give rise to the impression that it was loath to speak out against racial and other forms of discrimination.

74. It had also been stated that a reference to human rights in the present declaration would be in violation of the Charter which purportedly never spoke of the protection of human rights as a duty of States. Such a view seemed strange coming from those who had not been concerned over such glaring violations of the Charter as the Western Union and the Atlantic Treaty.

75. Mr. Koretsky stated that in any case the words " all " in the first line of article 7, and the phrase " without distinction as to race, sex, language, or religion " should be maintained. Inclusion of such a concept had been termed " revolutionary "; in Mr. Koretsky's view, deletion would be " counter-revolutionary ".

76. Mr. SCELLE pointed out that the question whether or not fundamental human rights were positive rights had been previously debated on a constitutional level. He disagreed with the Chairman's view that the Charter did not impose any positive obligations in the matter. While it did not establish specific obligations or specific rights, in Article 55, for instance, certain real obligations were implied, though vaguely expressed. The Charter provision that Members of the United Nations should *promote* respect for human rights constituted an obligation, although not a very strict one.

77. The obligation was also incumbent upon States which were not Members of the United Nations. Article 38, paragraph 1, c of the Statute of the International Court of Justice stated that the Court, in deciding international disputes, should apply the general principles of law recognized by civilized nations. Those principles, he felt, must be sought in the Constitutions of the different civilized States, namely States which respected fundamental human rights.

78. As regards the Chairman's reference to Switzerland as a country in which women did not have the right to vote, Mr. Scelle thought that a clear distinction should be drawn between political rights and the fundamental human rights. Until recent years women had not had the right to vote in such civilized countries as France and England in which the fundamental human rights had yet been fully respected and recognized constitutionally. Mr. Scelle therefore felt that recognition of fundamental human rights constituted a true legal obligation under positive law. In France a number of authorities on international law even felt that respect for human rights not only belonged to positive and constitutional law but even to supra-constitutional law, since without such respect there could be no constitution and no civilization.

79. He therefore agreed with Mr. Córdova and Mr. Koretsky that the article should be retained in its present form, inasmuch as it dealt not with political, but with fundamental human rights. Public opinion would receive a bad impression of the Commission's work if the latter were to delete or weaken the provisions on human rights.

80. Mr. HSU stated that he would vote against the Chairman's proposal. The Commission was justified in including such an article in its declaration in the light of the provisions of the Charter and the Universal Declaration on Human Rights.

81. Pointing out that it was pershaps a borderline case, Mr. Hsu appealed to the Commission to take a courageous and progressive stand, especially as it had already been very conservative on the other questions in the Declaration. The article must not be weakened; moreover, the Declaration would be submitted to the General Assembly which would surely amend the article if it considered it too far-reaching.

82. Mr. SANDSTROM, quoting from the General Assembly resolution on the Universal Declaration of Human Rights 217 (III), pointed out that it did not impose the obligation to respect human rights, but used the expressions: " common standard of achievement " and " to promote respect for these rights ". He therefore doubted whether respect for human rights could be considered a duty in international law. In any case, however, if article 7 were retained, nothing would be gained by deleting the phrase " distinction as to race, sex, language, or religion ".

83. Mr. ALFARO said that the Commission was bound to take into account one of the new developments in international law which was the fact that the individual had become the subject of international law. The question was no longer a matter of interest to jurists only, but had become a principle established in the Charter of the United Nations in which promotion of human rights was mentioned several times. Moreover, the United Nations had adopted a Universal Declaration of Human Rights. In view of those facts it was no longer a debatable question and the Commission was obliged to state, as a principle of international law, that every State had the duty to treat all

persons under its jurisdiction with respect for human rights. The ultimate source of all international law was the will and conscience of civilized nations. Quoting from the first, third and last paragraphs of the preamble to the Universal Declaration of Human Rights, Mr. Alfaro pointed out that when fifty-eight nations stated that human rights must be protected, their view could not be ignored.

84. Recalling his earlier remarks, he stated that he agreed to the omission of the last phrase because, as in two instances in the Charter, its meaning was implied in the words " respect for human rights and fundamental freedoms ". Those were the only inherent human rights with which the Commission had to deal; other rights not mentioned in the Charter were of no concern to it.

85. Before adopting the Universal Declaration of Human Rights the General Assembly on two occasions had dealt with the question of fundamental human rights—in the case of Franco Spain and that of the treatment of Indians in the Union of South Africa. When objection had been raised that those were matters falling within the domestic jurisdiction of the countries concerned, the majority of the General Assembly expressed the view that the question of human rights belonged to the domain of international law. In view of those considerations, he felt that article 7 must be maintained, although he would not object to the deletion of the last phrase.

86. Mr. KORETSKY thought that members of the Commission should refrain from using the expression " civilized countries ", even if article 38 of the Statute of the International Court of Justice used it. That expression dated back to the colonial era with its concept of the " white man's burden ".

87. The CHAIRMAN agreed with Mr. Koretsky that the words " civilized countries " should not be used.

88. Mr. CORDOVA pointed out that in most of the documents of the United Nations the words " fundamental human rights " were accompanied by the qualifying Charter phrase " without distinction as to race, sex, language, or religion ". It was a matter of great historical importance, and consequently the last phrase of article 7 should be maintained.

89. Mr. HSU suggested that, in view of the importance of the question, the Commission should postpone action on the Chairman's proposal until a later meeting when the two now absent members would be present.

After some discussion, the Commission decided that the matter should be put to the vote with the understanding that if no clear majority decision was reached, another vote on it would be taken at a later time.

The Chairman's proposal to delete the last line of article 7 was rejected by 4 votes to 6.

90. Mr. YEPES proposed that another vote should be taken on the proposal at a subsequent meeting. [5]

Mr. Yepes' proposal was adopted by 7 votes to 1.

Article 8 [13]

91. The CHAIRMAN pointed out that the Sub-Committee had proposed that the word " within " in the first line of that article should be changed to " in ".

In the absence of objection, the proposed change was adopted.

92. The CHAIRMAN then put the article as amended to the vote.

Article 8 as amended was adopted by 9 votes to none.

Article 9 [15]

93. No change having been proposed in that article, the CHAIRMAN put it to the vote.

Article 9 was adopted by 9 votes to none.

Article 10 [7]

94. No change having been proposed in that article, the CHAIRMAN put it immediately to the vote.

Article 10 was adopted by 10 votes to none.

Article 11 [8]

95. The CHAIRMAN drew attention to the Sub-Committee's suggestion that the word " waging " in the first line should be changed to " resorting ", in view of the fact that a war was waged only after it had begun. In reply to a remark by Mr. Koretsky, he pointed out that the word " waging " had caused considerable difficulty at the Nürnberg trial.

96. The Sub-Committee proposed the deletion of the words " resorting to any " in the second line. A third change proposed by the Sub-Committee was the deletion of the word " the " before the word " threat " in the third line of the article. And finally, the Sub-Committee had proposed the deletion of the word " either " in the third line. He was personally in favour of retaining that word which served to clarify the meaning of the text.

In the absence of objection, the four drafting changes proposed by the Sub-Committee were adopted.

97. Mr. YEPES proposed the addition of the words " and justice " at the end the article with a view to bringing it into conformity with Article 2, paragraph 3 of the Charter.

98. The CHAIRMAN, pointing out that the

[5] A/CN.4/SR.24, para. 51.

addition of that word would weaken the text as the use of force was always inconsistent with justice, put Mr. Yepes' proposal to the vote.

Mr. Yepes' proposal was rejected by no votes to 4.

99. The CHAIRMAN then put article 11, as amended, to the vote.

Article 11, as amended, was adopted by 9 votes to none.

The meeting rose at 6 p.m.

24th MEETING

Friday, 20 May 1949, at 10.15 a.m.

CONTENTS

Chairman: Mr. Manley O. HUDSON.

Rapporteur: Mr. Gilberto AMADO.

Present:

Members: Mr. Ricardo ALFARO, Mr. James L. BRIERLY, Mr. Roberto CÓRDOVA, Mr. J. P. A. FRANÇOIS, Mr. Shuhsi HSU, Mr. Vladimir KORETSKY, Sir Benegal N. RAU, Mr. A. E. F. SANDSTRÖM, Mr. Georges SCELLE, Mr. Jean SPIROPOULOS, Mr. Jesús María YEPES.

Secretariat: Mr. KERNO, Assistant Secretary-General in charge of the Legal Department; Mr. LIANG, Director, Division for the Development and Codification of International Law, Secretary to the Commission.

Draft Declaration on the Rights and Duties of States (A/CN.4/2) (*continued*)

THIRD READING (continued)

Article 12 [9]

1. The CHAIRMAN said that no changes had been suggested by the Drafting Committee (See A/CN.4/SR.23, footnote 1) to the English text previously approved by the Commission. As former article 8 had become article 11 of the draft Declaration, the reference to that article in article12 should therefore be corrected.

Article 12 as amended was adopted by 9 votes.

Article 13 [10]

2. The CHAIRMAN said that the Drafting Committee suggested the deletion of the word " made " from the English text. As in the case of article 12, article 13 should be amended by changing " article 8 " into " article 11 ".

Article 13 as amended was adopted by 13 votes.

Article 14 [11]

3. The CHAIRMAN said that no changes to article 14 were suggested by the Committee.

Article 14 was adopted by 9 votes.

Article 15 [12]

4. The CHAIRMAN said that no changes to the English text of article 15 were suggested by the Committee. He suggested that the word " own " which preceded the word " constitution " in the English text, should be deleted.

That proposal was adopted.

5. Mr. ALFARO thought that the word " limitations " in the English text should be replaced by " provisions ". The Spanish word *disposiciones* meant not only limitations, but also any provisions contrary to the obligations dealt with in that article.

6. Mr. BRIERLY supported that proposal.

Mr. Alfaro's proposal was adopted by 6 votes.

7. Mr. SANDSTROM then suggested that the word " contained " in the English text be deleted, as it became redundant.

That proposal was adopted.

8. The CHAIRMAN put to the vote article 15 in the following wording:

" Every State has the duty to carry out in good faith its obligations arising from treaties and other sources of international law, and it may not invoke provisions contained in its own constitution or its laws as an excuse for failure to perform this duty. "

Article 15 was adopted by 11 votes.

Article 16

9. The CHAIRMAN said that no changes to the English text of article 16 were suggested by the Drafting Committee.

Article 16 was adopted by 10 votes to 1.

Article 1

10. The CHAIRMAN reminded the Commission that it had deferred its decision on article 1 of

the Declaration which, as amended by Mr. Yepes and adopted at the previous meeting, [1] read as follows:

" Every State has the right to exist and to preserve its existence."

11. Sir Benegal RAU said that, in principle, he was against article 1 and article 2 of the draft Declaration which were closely connected. He would, however, be prepared, if necessary, to accept the wording proposed by the Drafting Committee for article 1. He could not agree to the existing text.

12. Mr. ALFARO pointed out that, by proclaiming that every State had the right to exist, the Commission would be reaffirming the principle of the right of peoples to self-determination. Communities which had constituted themselves as States obviously had the right to exist. He was in favour of the wording proposed by Mr. Yepes.

13. Sir Benegal RAU said that if the words " every State has the right to exist " meant that any community which claimed to be a State had the right to exist as a State, he would formally oppose the adoption of article 1 in the form suggested by Mr. Yepes; if, on the contrary, those words meant that every existing State had the right to exist, it would be merely stating a truism.

14. The CHAIRMAN thought that it could only apply to communities which had actually become States. He did not agree with Mr. Alfaro's interpretation of the right set forth in article 1.

15. Mr. ALFARO explained that the article merely " reaffirmed " the right of peoples to self-determination, and that the communities he had spoken of were those which had availed themselves of that right and had become States. In such cases they undoubtedly had both the right to exist and to preserve their existence. The State, like the individual, had the right to exist from the moment of birth.

16. In reply to a question by Mr. HSU, he admitted that there would be no danger in deleting article 1 of the Declaration, but feared that that might have an unfortunate psychological effect on the peoples of the world.

17. Sir Benegal RAU, supported by the CHAIRMAN, unreservedly approved the principle of the right of peoples to self-determination, but distinctly disagreed with the interpretation according to which any community could claim statehood by unilateral action. He feared that that was how article 1 would be interpreted.

18. Mr. ALFARO, supported by Mr. CORDOVA and Mr. SCELLE, thought that such an interpretation was impossible, as article 1 said " every State " and not " every community ".

19. Mr. YEPES explained that, in submitting his wording, he had had in mind actually existing States. If the Commission thought that form of words ambiguous, the words " to exist and " should be deleted and the previously adopted wording used.

20. Mr. KORETSKY stressed the question's political aspect. The principle of a State's right to exist had been put forward to offset the fascist conception that one State had the right to make others disappear. It would be good to reaffirm that principle in the Declaration which the Commission was drafting.

21. The CHAIRMAN put to the vote Mr. Yepes' proposal to delete the words " to exist and " in article 1.

Mr. Yepes' proposal was not adopted, 5 votes being cast in favour and 5 against.

22. The CHAIRMAN then put to the vote article 1 in the following wording: " Every State has the right to existence and to preserve its existence ".

There was an equal vote, 6 being cast in favour and 6 against.

23. The CHAIRMAN asked the Commission to vote on the interpretation to be given to the last vote.

It was decided by 6 votes to 5, with 1 abstention, to consider adopted article 1 in its last wording. [2]

Article 2

24. The CHAIRMAN recalled that the Commission had reserved its decision with regard to article 2 of the draft Declaration.[3] He pointed out that his objections to the article which set forth, as it were, the duty of States to recognize the right to existence proclaimed in article 1, had been strengthened in view of the decision of the Commission to retain article 1 in the draft Declaration.

25. Sir Benegal RAU observed that he had always objected to the inclusion of article 2 in the draft Declaration. He felt that the provisions of article 2 were all the less necessary since article 1 had been adopted.

26. Mr. SCELLE pointed out that, as in the case of article 1, the State referred to was one which had a legal existence. Since it was incumbent upon other States to recognize that existence, it should be clearly stated that it was the right of every State to have its existence recognized by other States.

27. The CHAIRMAN observed that in stating such a right to the advantage of the State, the Declaration would imply that other States had the

[1] A/CN.4/SR.23, para. 37.

[2] See A/CN.4/SR.25, para. 4.

[3] A/CN.4/SR.23, para. 38.

corresponding duty to recognize its existence. Mr. Alfaro had clearly specified that the recognition mentioned in article 2 was not aimed at the positive act of recognition, but at the corresponding duty arising out of the right referred to in article 1. It did not appear necessary, therefore, to set forth that duty as a separate right, namely, the right of the State to recognition of its existence.

28. Mr. ALFARO drew the attention of members of the Commission to the comments of the United Kingdom Government (A/CN.4/2, p. 53). According to that Government, it was the duty of States to recognize as a State a community fulfilling the conditions of statehood and it was also their duty not to recognize as a State a community which did not fulfil those conditions. The United Kingdom Government had agreed that the recognition or non-recognition of States was a matter of legal duty and not of policy, Recognition or non-recognition of a State would therefore depend upon whether or not the other States were convinced that the State seeking recognition of its existence fulfilled the conditions of statehood.

29. The CHAIRMAN and Mr. BRIERLY observed that the comments quoted by Mr. Alfaro dealt with the matter of recognition of States, whereas article 2 referred to the recognition of the existence of a State. Mr Brierly added that in its comment on article 1 (A/CN.4/2, p. 50) the United Kingdom Government had pointed out that it was necessary, in the Declaration on the Rights and Duties of States, to define a State. Mr. Brierly felt that since the Commission had decided not to include in the Declaration a definition of the State, article 2 was out of place in the Declaration.

30. Mr. SCELLE supported the views expressed by Mr. Alfaro. It was incumbent upon States, in all good faith, to recognize communities effectively constituted as States, but they could not be compelled to recognized as a State any political entity claiming statehood unless they were convinced that it fulfilled the conditions of statehood.

31. Mr. Scelle shared the view of Mr. Brierly that recognition of the existence of a State was declarative and not attributive. It did not grant existence to a recognized State, but merely took note of it. Mr. Scelle felt that it would have been preferable to include in the Declaration on the Rights and Duties of States a definition of the State. He was fully aware of the difficulties such a definition would entail and that it would not be easy to reach an agreement; he considered, nevertheless, that article 2 should be retained even in the absence of such a definition in the draft Declaration.

32. The CHAIRMAN asked Mr. Scelle whether, in his opinion, it would be incumbent upon a State, under the provisions of article 2, to declare its stand on the question whether or not a political entity claiming statehood fulfilled the necessary conditions of statehood. Personally, he felt that there was no such obligation.

33. Mr. CORDOVA observed that article 2 might deal with tacit recognition of the effects of the existence of the State. Even without entering into the question whether or not a political entity fulfilled the necessary conditions of statehood, it was clearly incumbent upon the other States to recognize the very fact of the existence of that political entity. The question might arise in the case of warships or other assets belonging to a community claiming statehood yet not recognized by all the other States.

34. Mr. SCELLE pointed out that recognition of a State implied recognition of the competence of the rulers of that State to engage in certain activities. It stood to reason that the competence of rulers of States differed from that of rulers of political entities which were not States, such as insurgents. International law had no means other than recognition whereby to distinguish between States and political entities which were not States. Real international anarchy would be the result if the idea of recognition were cast aside. Personally, he would prefer collective recognition to separate recognition by each State, but as long as there existed no super-State organization able to determine whether or not a political entity constituted a State, it would be up to each State itself to decide on the matter.

35. Mr. Scelle observed, in conclusion, that the duty of States to recognize other States was one way of bringing some order into so disorderly a group as existing international society.

36. Mr. CORDOVA understood Mr. Scelle to mean that the recognition of a State and the recognition of a Government were identical. However, even if the Government of the State was not recognized, it was impossible not to recognize the existence of the State itself. If, for instance, a Spanish warship entered Mexican territorial waters, Mexico could not refuse to grant it the status of a ship flying the Spanish flag, even if it did not recognize the current Spanish Government.

37. The CHAIRMAN stated that it was precisely that interpretation of article 2 which should be avoided. He was therefore against the adoption of the article, which might give rise to a prolonged debate in the General Assembly.

38. Sir Benegal RAU asked Mr. Alfaro if, in his opinion, article 2 gave a community calling itself a State the right of recognition in each of the four following cases:

(1) When it was not yet recognized by any other State;

(2) When it was recognized by a single State;

(3) When it was recognized by the minority of the community of States;

(4) When it was recognized by the majority of the community of States.

39. Mr. ALFARO replied in the negative to the first three questions. With regard to the fourth, he stated that the fact that a community was recognized as a State by the majority of States, was a factor in favour of its recognition by the minority of the community of States. Every State had nevertheless the right, in the exercise of its sovereignty, of refusing to recognize a State which, in its opinion, did not fulfil the conditions of statehood.

40. Sir Benegal RAU pointed out that, in those conditions, article 2 merely stated a truism, and was equivalent to saying that only a community calling itself a State, and universally recognized as a State, was entitled to have its existence recognized.

41. Mr. SPIROPOULOS considered that article 2, as it was drafted, lent itself to several different interpretations. Nevertheless that should not prevent its being retained. It was known that the question of recognition was not definitely settled in positive international law, and there was no objection to letting each State interpret that article in its fashion.

42. Mr. ALFARO stressed that recognition could be express or tacit. It happened that States which refused to recognize a State expressly, were led, nevertheless, to recognize it tacitly. Such was the case of the Arab States, which had to recognize the vote taken with regard to the State of Israel in the United Nations and, consequently the existence of that State, although they refused to recognize Israel expressly as a State.

43. The CHAIRMAN pointed out that the Arab States were Members of the United Nations, of which one of the principles was that of obligatory collective recognition. Would non-member States, such as Switzerland or Portugal, be obliged to recognize the State of Israel in the same way?

44. Mr. ALFARO stated that those States were obliged to recognize it, if they considered that the State of Israel fulfilled all the conditions of statehood.

45. Mr. SCELLE proposed drafting article 2 thus:

" Each State has the duty of recognizing, in good faith, the existence of other States ".

46. On the suggestion of Mr. FRANÇOIS, Mr. SCELLE accepted the deletion of the words " in good faith ".

47. The CHAIRMAN put Mr. Scelle's proposal to the vote.

That proposal was rejected by 5 votes to 4.

48. Mr. CORDOVA pointed out that it was not desirable to retain article 2, the purport of which would be difficult to explain to the General Assembly.

49. The CHAIRMAN put to the vote the original text of article 2 (A/CN.4/W.8).

There were 6 votes in favour and 6 against.

50. After a short discussion, the Commission decided by a large majority to defer the final vote on article 2 until the return of Mr. Amado, (Rapporteur) who was prevented by business elsewhere from attending the meeting.[4]

Article 7 [5]

51. On the proposal of the CHAIRMAN, the Commission decided also to defer the question of the deletion of the words " without distinction as to race, sex, language or religion ", until Mr. Amado's return.

Preamble

52. The CHAIRMAN wondered whether the words " as a standard of conduct " which had been inserted after the word " formulate " in the fifth recital were in keeping with the nature of the Declaration.[6] It was his opinion that the insertion of those words would weaken the preamble which in its first four recitals stated positive rules as did the body of the Declaration which set forth rights to be claimed and duties to be fulfilled, for example, article 11. In his opinion the Declaration should set rules of conduct and not a standard of conduct. The latter expression would remove the obligatory character of the Declaration and would tend to limit its scope. He therefore proposed deletion of the words " as a standard of conduct ".

53. Mr. FRANÇOIS stressed that the General Assembly had no legislative powers and could not in any case adopt a binding Declaration. The Declaration would have only moral force. The insertion of those words was therefore unnecessary since the Declaration merely proclaimed an ideal of conduct.

54. Mr. YEPES concurred in the view of the Chairman that the Declaration should set forth positive rules and not merely define the ideal to be pursued.

55. Mr. HSU also shared the view of the Chairman and felt that those words should be deleted. He therefore proposed that the fifth recital should be reconsidered.

56. Mr. CORDOVA, after recalling that those words had been inserted because of difficulties which has arisen in connexion with the expression " certain basic rights and duties ", admitted that the Declaration should not merely indicate a standard of conduct but should set forth juridical

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[4] See A/CN.4/SR.25, para. 3.

[5] See A/CN.4/SR.23, para 90.

[6] *Ibid.*, para. 33.

rules. He therefore proposed that the words " as a standard of conduct " should be replaced by the words " as legal rules of conduct ".

57. Mr. SANDSTROM supported that proposal.

58. Mr. SCELLE was also of the opinion that the Declaration should set forth legal rules and not merely define a standard of conduct. It should be specified that the Declaration on the Rights and Duties of States was in the field of positive law.

59. Mr. ALFARO favoured the proposal to delete the words " as a standard of conduct ". During the voting of the preceding day he had considered that expression as an equivalent of the " rules of conduct " since he was under the impression that the English word " standard " corresponded to the Spanish word *norma* which meant " rule ".

60. The CHAIRMAN put to the vote the proposal to delete the words " as a standard of conduct ".

The Commission decided by 10 votes to delete those words.

61. Turning to the proposal of Mr. CORDOVA to insert the words " as legal rules of conduct ", the CHAIRMAN stated that that expression would not be completely accurate because, while a duty might be considered as a rule of conduct, a right could not be so considered. Thus it could not be said that the " right to independence " was a rule of conduct.

62. Mr. SPIROPOULOS recalled that the expression " as a standard of conduct " had been inserted because of difficulties which had arisen in connexion with the words " certain basic rights ". Since the Commission had decided to delete the words " as a standard of conduct " there was no reason for substituting other words.

63. Mr. BRIERLY did not consider it necessary to change the original text of that recital, but, if absolute precision was sought, the word " legal " might, if necessary, be added before the word " duties ".

The Commission decided to retain the original text of the fifth recital as drawn up by the Drafting Committee.

Order of articles

64. The CHAIRMAN, supported by Mr. SANDSTROM, proposed that the Commission should agree to retain the articles in the order proposed by the Drafting Committee.

It was so decided.

65. The CHAIRMAN stated that the vote on the Declaration as a whole would have to be deferred until the Commission had reached a decision on articles 2 and 7. H3 proposed that two or three French and Spanish language experts should meet to draft the French and Spanish texts of the Declaration as amended.[7]

It was so decided.

PROCEDURE TO BE FOLLOWED AFTER THE ADOPTION OF THE DRAFT DECLARATION

66. The CHAIRMAN asked the members of the Commission to reach a decision on the procedure to be followed after the adoption of the draft Declaration.

67. He recalled that the Panamanian draft had been distributed to Members of the United Nations immediately after the first part of the first session of the General Assembly (A/CN.4/2, p. 20). Governments therefore had had ample time to study it before the second part of that session during which the Assembly, in resolution 38 (I) had requested the Secretary-General to transmit immediately to all Members of the United Nations and to national and international bodies concerned, the text of the Panamanian draft (*ibid.*, p. 23). Thereafter, both the Commission for the Progressive Development of International Law and its Codification in its report (A/CN.4/2, p. 27) and the General Assembly in resolution 178 (II) (*ibid.*, p. 33) had stated that only a limited number of comments and observations had been received. Accordingly, the Secretary-General had been requested to call to the attention of States the importance of submitting comments and observations as soon as possible. Only seventeen Governments and a few non-governmental organizations had replied to those repeated requests. It should be noted in that connexion that most of the comments from Governments had been helpful in the work of the Commission.

68. That brief review of past events proved that, even before instructing the Commission to draft the text, the General Assembly had already consulted Governments and organizations on the draft Declaration on Rights and Duties of States. It therefore seemed that the Commission had been seized of the question in a somewhat unusual way. It could also be considered that that question was not linked to progressive development covered by article 16 of the Statute of the Commission or to the codification of international law covered by article 18. Accordingly there was no reason to apply to it articles 16 and 17 or article 21 which provided for consultation by the Commission with Governments.

69. The General Assembly had instructed the Commission to draw up a draft declaration. It could therefore be held that, once that draft had been adopted by the Commission, it could be submitted directly to the General Assembly which would take appropriate action, particularly consultation with Governments and organizations if such action was deemed useful. By following that procedure, the Commission would give the Assembly tangible proof of the work it had accomplished during its first session.

[7] See A/CN.4/SR.29, paras. 1-11.

70. Mr. SPIROPOULOS concurred in the views of the Chairman. The case under consideration was of a kind which was not covered by any provision of the Commission's Statute. In fact the Governments, which had been approached on several occasions, had had sufficient time to submit their comments concerning the draft Declaration. It was regrettable that all had not done so, but it could not be said that the formality concerning consultation had not been observed. All that remained to be done, therefore, was to transmit the draft to the General Assembly.

71. The draft was not perfect, but, despite Mr. Koretsky's opinion, it did not seem that it could be further improved by the Commission, which had devoted so much time and thought to it. It was therefore useless to reopen the discussion of the draft at the following session. Moreover, it was not a final text. It was possible that the General Assembly would adopt it without amending it, but it was also possible that the Assembly might treat the draft as a mere working paper concerning which it would wish to consult the Governments. Nothing therefore prevented the Commission's following the proposal of the Chairman that the draft should be transmitted to the General Assembly without further formality.

72. Mr. KORETSKY, without reconsidering the serious imperfections of the draft Declaration, which he did not consider to be in a proper condition to be presented to the General Assembly, confined himself to discussing the question of procedure raised by the Chairman, namely, the question whether the draft, if it were adopted by the majority of the Commission, could be submitted directly to the General Assembly, or whether the Commission must observe certain formalities in advance.

73. Mr. Koretsky could not come to the conclusion reached by the Chairman that the question did not fall within any of the categories provided for in the Statute of the Commission. The Statute, which had been granted at the same time as its terms of reference, must be observed unless quite exceptional circumstances and special reasons intervened; that was not so in the case under discussion.

74. Doubtless there might be some question as to whether the draft concerned the progressive development or the codification of international law, although its preamble clearly referred to a new orientation and to the progressive development of international law; such a controversy would have only academic interest because, in either case, the same result would be attained.

75. If the matter were classified under the heading of progressive development, sub-paragraph (*g*) of article 16 provided that the draft should be issued as a working-paper of the Commission together with the replies to the questionnaire mentioned in sub-paragraph (*c*), and that the Secretariat should give it all the necessary publicity. In addition, in accordance with sub-paragraph (*h*) of the same article, the Commission should invite Governments to submit their remarks on the document within a reasonable time. Lastly, under sub-paragraph (*i*), the Commission must appoint a Rapporteur and a group of members to prepare the final text on which it, in turn, should come to a decision. Only then was the draft to be submitted to the General Assembly through the Secretary-General.

76. If, on the contrary, the question related to codification, article 21, which was applicable in the matter, provided for approximately the same procedure concerning publication, publicity and consultation. The Statute therefore gave the Commission a choice between two procedures; it should choose one or the other, for it could not put forward any serious reason for deviating from the provisions of its rules of procedure.

77. It had been stated that Governments had already been consulted. Mr. Koretsky pointed out, on the one hand, that it had been a question of the Panamanian draft, which the Commission had reworded to such an extent that it had almost become a new text and, on the other hand, that too few Governments had replied to the requests for consultation, doubtless because they did not know at that time what would be the fate of the draft. No doubt could remain in their minds: the International Law Commission had been set up and it had prepared a draft Declaration which would soon be submitted to the General Assembly. In those circumstances, they would not fail to be interested in the new draft, concerning which they would wish to submit their commentaries and remarks. It was therefore imperative to consult them, firstly, in order that the General Assembly might know the opinion of the various Governments, when the draft was submitted to it, and might come to a decision with full knowledge of the facts in the case; secondly, because, if the Commission failed to hold such a consultation the Governments and the General Assembly itself would be justified in reproaching it for having acted in violation of its Statute, which expressly set forth the steps to be taken before a draft was to be sent to the Assembly.

78. The importance of those publicity measures had already been pointed out to the Committee on the Progressive Development of International Law and its Codification. It must not be forgotten that the work of the existing Commission must be carried out under the supervision of world opinion, for its results directly concerned all mankind. The Press and specialized publications had not at least so far made news items of that work. It was therefore imperative not to neglect any publicity measures. Moreover, the progressive development and codification of international law must be effected in close co-operation with

Governments. Mr. Koretsky asked the Commission not to create a precedent inconsistent with the two-fold principle of supervision and co-operation. As for the Commission's prestige, it would be protected, since the publication of the draft would show the extent of the work which the Commission had accomplished.

79. The CHAIRMAN remarked that, in regard to the progressive development of international law, under sub-paragraphs (*b*) and (*c*) of article 16, the Commission must first establish a plan of work and send a questionnaire on the topics included therein to the Governments. The fact that that formality had not been observed, and that no member had suggested it, seemed to indicate that the Commission had not considered the draft Declaration as falling within the scope of article 16.

80. Again, the request for documents provided for in article 19, paragraph 2, in regard to codification, had not been addressed to the Governments either, doubtless because the Commission had thought that that was a special case and that the stage concerning application of that article had already been passed.

81. The Chairman pointed out that the procedure concerning direct transmission of drafts would not in any way prevent the General Assembly from consulting Governments, if it deemed it advisable. The latter would have received the text of the draft from the Secretariat before the opening of the session; they could therefore submit detailed comments during the discussion in the Assembly. If it decided to wait until they had submitted their comments, it would then be in a position either to take an immediate decision or to refer the draft to the Commission in order that the latter might reconsider it in the light of those comments. In any case, the General Assembly's freedom of action would in no way be hampered by the proposed procedure.

82. Mr. ALFARO supported the suggestion of the Chairman and pointed out that the draft Declaration constituted an exceptional case, which did not fall within the scope of progressive development or codification as they were defined in article 15 of the Statute. Moreover, it could be concluded from the juxtaposition of General Assembly resolutions 175 (II), 177 (II) and 260 (III) that three special questions were involved which were outside the field of the progressive development and codification of international law and with which it was the Commission's duty to deal.

83. Sir Benegal RAU asked if article 1 of its Statute did not strictly limit the competence of the Commission to the progressive development of international law and its codification.

84. Mr. HSU supported the Chairman's proposal. The draft declaration was a special question, to which the procedure of the Statute did not apply. However, if that treatment of the matter were insisted upon, it must be concluded, since it was principally a question of codification and considering the circumstances in which it had been submitted to the Commission, that the draft was at the stage mentioned in article 22, in other words suitable for transmission to the General Assembly. If the Assembly was not satisfied with the procedure followed, it could, in accordance with article 23, paragraph 2, always refer the draft back to the Commission for reconsideration. In any case, nothing prevented the transmission of the draft, as soon as it was adopted, to the General Assembly without further formality.

The meeting rose at 1 p.m.

25th MEETING

Monday, 23 May 1949, at 3 p.m.

CONTENTS

Chairman: Mr. Manley O. HUDSON.

Rapporteur: Mr. Gilberto AMADO.

Present:

Members: Mr. Ricardo J. ALFARO, Mr. James L. BRIERLY, Mr. Roberto CÓRDOVA, Mr. J. P. A. FRANÇOIS, Mr. Shuhsi HSU, Mr. Vladimir M. KORETSKY, Sir Benegal RAU, Mr. A. E. F. SANDSTRÖM, Mr. Georges SCELLE, Mr. Jean SPIROPOULOS, Mr. Jesús María YEPES.

Secretariat: Mr. KERNO, Assistant Secretary-General in charge of the Legal Department; Mr. LIANG, Director of the Division for the development and codification of international law, Secretary to the Commission.

Draft Declaration on the Rights and Duties of States (*continued*)

THIRD READING (concluded)

Article 2

1. The CHAIRMAN recalled that at the preceding meeting, after a lengthy discussion on article 2, the Commission had decided to postpone the final vote on that article in order to permit the Rapporteur, Mr. Amado, who was absent at the time, to take part in the voting. [1] The Chairman gave a brief summary of the arguments that had been advanced for and against the retention of that article.

2. Sir Benegal RAU repeated the comments he had made at the preceding meeting.

3. The CHAIRMAN invited the Commission to vote on article 2.

The Commission decided to delete article 2 of the draft declaration, by 7 votes to 5.

Article 1

4. After sounding the views of the Commission, the CHAIRMAN decided to put to the vote once more article 1, which it had been decided to retain in the draft declaration by an equal vote taken at the previous meeting.[2] A new vote would give the Rapporteur, Mr. Amado, an opportunity to express his views on the retention of that article.

The Commission decided to delete article 1 of the draft declaration by 7 votes to 5.

Article 7

5. The CHAIRMAN pointed out that the Commission had reserved its decision on the proposal to delete the words " without distinction as to race, sex, language or religion " at the end of article 7.[3]

6. It had been emphasized as an argument for the deletion of those words that, whenever the question of respect for human rights appeared in the Charter, it was as an aim to be achieved (Articles 1. 3, 13. lb, 55 c, 62.2 and 76 c). The conclusion had been drawn that the Charter did not in any way impose on the Members of the United Nations a legal obligation to respect human rights and fundamental freedoms, and it had been pointed out that neither did existing international law impose any such obligation on non-member States.

7. Mr. SANDSTROM recalled that he had raised certain objections to the wording of article 7, and proposed a return to the formula appearing in article 21 of the Panamanian draft,[4] though with certain slight changes. Article 7 might be worded as follows: " It is the duty of every State to treat the persons under its jurisdiction in a manner which does not violate the dictates of humanity and justice, or offend the conscience of mankind."

8. In his opinion, the Commission would be going much too far if it enunciated as a legal obligation what the Charter of the United Nations and the Universal Declaration of Human Rights deemed an ideal to be achieved or a purpose to be realized. Moreover, it would be well to avoid the expression " human rights and fundamental freedoms " which led to confusion on account of the fact that some people considered that the human rights and fundamental freedoms involved in the Charter were not the same as those enunciated in the Universal Declaration of Human Rights. For himself, he thought it was difficult to maintain that the human rights mentioned in the Charter were different from those in the Declaration, and he therefore preferred the formula he had proposed, which corresponded to the current stage of development of international law.

9. Mr. ALFARO was very flattered by Mr. Sandström's proposal to return to the original text of the Panamanian draft; He was anxious to explain that in reproducing, in his draft. the formula of principle 2 of " The International Law of the Future: Postulates, Principles and Proposals ",[5] he had in fact had in mind the human rights referred to in the Charter. That was why he had agreed with pleasure to replace that formula by the current text, proposed by Sir Benegal Rau, which mentioned human rights expressly.

10. Without wishing to make any formal opposition to the inclusion in article 7 of the text proposed by Mr. Sandström also, he was afraid that it would be out of place, at the current stage of the Commission's work, to delete the direct reference to human rights. Such a deletion would risk being wrongly interpreted by public opinion.

11. Mr. YEPES was in favour of the text prepared by the Drafting Committee. The expression " human rights and fundamental freedoms " had acquired a precise meaning: public opinion might be shocked to see the Commission avoid reproducing the formulae of the Charter.

12. The CHAIRMAN remarked that the meaning of the expression " human rights and fundamental freedoms " was far from being precise, in view of the fact that, in his opinion, the Universal Declaration of Human Rights recently adopted by the General Assembly was not designed to define the human rights mentioned in the Charter.

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[1] A/CN.4/SR.24, para. 50.

[2] *Ibid.*, para. 23.

[3] *Ibid.*, para. 51.

[4] See A/CN.4/2, p. 38.

[5] *Ibid.*, p. 161.

13. He put to the vote the proposal to delete the words " without distinction as to race, sex, language or religion ".

The Commission decided to retain those words, by 7 votes to 5.

14. The CHAIRMAN then put Mr. Sandström's proposal to the vote.

The proposal was rejected by 7 votes to 5.

Article 7, in the form proposed by the Drafting Committee (A/CN.4/W.8) was adopted by 7 votes to 4.

Additional article relating to the jus communicationis *proposed by Mr. Yepes*

15. Mr. YEPES said that the *jus communicationis* was one of the principal rights of States and constituted the very foundation of international law. He thought it would be advisable to add to the draft declaration an article devoted to that right, which might be worded to read: " Every State has the *jus communicationis*, in the sense that it has the right to enter into trade relations with all other States, to maintain with them diplomatic, consular and other relations and to conclude with them treaties and conventions."

16. Mr. SPIROPOULOS said that there was no provision in international law for *jus communicationis* and that States were under no obligation to enter into diplomatic or commercial relations with other States.

17. Mr. FRANÇOIS, supported by Mr. BRIERLY, was opposed to the inclusion in the draft declaration of an article such as that proposed by Mr. Yepes, as the *jus communicationis* was a right which did not exist in international law and was a very vague conception.

18. Mr. SCELLE supported Mr. Yepes and added that relations between States were the basis of international law and that if the *jus communicationis* did not exist no international law would be possible.

19. The CHAIRMAN thought that Mr. Yepes' proposal should have been submitted at an earlier stage in the Commission's work.

20. Mr. YEPES explained that he was not formally suggesting the adoption of his text: he had merely wished to draw the Commission's attention, before the adoption of the draft declaration as a whole, to the desirability of including in that draft an article on *jus communicationis*.

Adoption of the draft declaration as a whole

21. Mr. YEPES proposed placing article 9, on the duty of States to refrain from fomenting civil strife in the territory of other States, after article 5, on the duty of non-intervention.

It was so decided.

22. The CHAIRMAN put to the vote the English text of the draft declaration as a whole.

The English text of the draft declaration was adopted by 11 votes to 2.[6]

23. Mr. KORETSKY explained that he had voted against the draft declaration as it contained many defects to which he had already previously referred. The final text was even less satisfactory than the original text proposed by Panama.

24. The CHAIRMAN said he had voted against the draft declaration because the provisions of former article 7 (new article 6) went beyond the Charter and the current stage of development of international law.

25. Mr. SPIROPOULOS explained that he had voted for the draft declaration as it appeared satisfactory as a whole, although, in his opinion some articles should not have been included, while others were not entirely acceptable.

26. Mr. ALFARO had voted for the draft declaration as the Commission had succeeded, in a general way, in finding satisfactory wording for the most important articles. He regretted, however, that the Commission should have decided to delete the three fundamental articles on the existence of the State which, logically, should have been placed at the beginning of the Declaration on the Rights and Duties of States. The draft just adopted by the Commission was composed of fourteen articles, whereas the Panamanian draft consisted of twenty-four. It should not, however, be assumed that ten of the articles of the Panamanian draft had been deleted; certain articles had been incorporated in the preamble to the Declaration, while others had been combined into a single article. The essential points of the Panamanian draft were, as a whole, retained in the text adopted by the Commission.

27. Mr. BRIERLY was in favour of the draft declaration which he thought satisfactory as a whole. He entirely disapproved of the provisions of former article 7 (new article 6) which went beyond those of the Charter and existing international law, but no member of the Commission could expect all his wishes to prevail over those of the majority.

28. Mr. SCELLE said he had voted for the draft declaration not because he believed that the concept of the rights and duties of States was a real legal concept, but because he felt that the extent of the legal powers of the Governments of States should be defined in one form or another.

Procedure to be followed after the adoption of the draft declaration (continued)

29. Mr. SANDSTROM agreed that the drafting of a declaration on the rights and duties of States was a special task which had been entrusted to the

[6] See A/CN.4/SR.29, paras. 1-11 for discussion of the French and Spanish texts; see also A/CN.4/SR. 30, paras. 1-21 for a proposed additional article.

Commission by the General Assembly and for which the Commission should lay down its own procedure. In his opinion, the draft which had been adopted should be referred to the General Assembly, which would decide what effect should be given to it.

30. Sir Benegal RAU pointed out that under article 1 of its Statute, it was the Commission's duty to promote the development of international law and its codification. The procedure to be followed was laid down in article 16 or article 21 of the Statute, according as the task entrusted to the Commission fell within the field of the progressive development of international law or that of the codification of international law. It had, however, to be admitted that the preparation of a draft declaration on the rights and duties of States was a special task which did not derive either from the progressive development of international law or from its codification and that, therefore, the provisions of articles 16 and 21 did not apply in the case in point.

31. In submitting to the General Assembly the draft declaration it had just adopted, the Commission should make it clear that it had felt that the General Assembly had entrusted it with a special task and for that reason it had not followed the procedure laid down in articles 16 and 21 of the Statute.

32. Mr. KORETSKY said that it was very easy to side-step the provisions of the Statute, and to evade the obligation to conform to them by alleging that a special task had been imposed on the Commission.

33. When the General Assembly decided to set up the International Law Commission, it might well have been thought that the members of that Commission, as jurists, would provide all other United Nations bodies with an example of how legal obligations should be respected. However, after having been invited by the General Assembly, to exercise its functions in accordance with its Statute (resolution 174 (II)), the Commission, which had been instructed by the General Assembly to prepare a draft declaration on the rights and duties of States (resolution 178 (II)) appeared inclined to disregard those provisions. Indeed, it seemed disposed to submit directly to the General Assembly the draft declaration it had adopted without first asking the various Governments, as the Statute required, to submit their comments on that draft. It thus appeared to wish to ignore the views of Governments and public opinion.

34. Mr. Hudson had sought to show that the preparation of the draft Declaration on the Rights and Duties of States did not fall within the scope of the progressive development of international law or the codification of that law and that therefore the provisions of the Statute were not applicable in the case under consideration. Mr. Koretsky did not see how the Commission could have been entrusted with a task which did not come within the framework of the Statute which necessarily governed all its work. In his opinion, it was inappropriate to make an absolute distinction between the progressive development of international law and its codification. In that connexion, he pointed out that article 15 of the Statute specified that the distinction between progressive development and codification was made "for convenience". Certain work might relate exclusively to the progressive development or to the codification of international law; other work might relate to both at the same time. That seemed to him to be the case of the draft declaration which the Commission had been instructed to prepare.

35. It had been said that the General Assembly had already consulted the Governments and organizations concerned before instructing the Commission to prepare the draft declaration. Mr. Koretsky pointed out that the terms of resolution 178 (II) revealed that the General Assembly had noted that very few comments and observations on the Panamanian draft had been received by the United Nations and that it felt that the attention of Member States should be drawn to the desirability of submitting their comments and observations without delay. It could therefore not be said that the General Assembly had consulted Member States before instructing the Commission to prepare a draft declaration; what it had done was to request the Secretary-General again to invite Member States to submit their comments to the United Nations without delay and at the same time to instruct the International Law Commission to prepare the draft declaration. The General Assembly had not studied the Panamanian draft and had not approved it before sending it to the Commission for use as a basis of discussion.

36. Moreover, no Member State had submitted comments on the draft which the Commission had just adopted; the few comments which had been received related to the Panamanian draft. It was nevertheless essential to consult Governments on the draft which had been prepared by the Commission before sending that draft to the General Assembly.

37. It had been held that Governments would have an opportunity to explain their views verbally at the General Assembly. It must, however, be remembered that the Assembly was a body which generally had an extremely heavy agenda. Arrangements should therefore be made to ensure that the draft declaration would be submitted to the Assembly only after the various Governments had been consulted and after consideration had been given to the comments that they might present in connexion with the draft prepared by the Commission. The draft which the Commission had just adopted might possibly have impor-

tant gaps: consultation with Governments and public opinion would make it possible to fill those gaps.

38. The Statute of the Commission provided for no exception to the two procedures which it defined. In its resolution 178 (II), the General Assembly had not authorized the Commission to depart from those procedures. Consequently, in accordance with articles 16 and 21 of the Statute, the Commission was required to request the Secretary-General to issue the draft declaration as a Commission document and to request Governments to submit their comments on that document within a reasonable time.

39. The fact that the Commission had not drawn up a plan of work and that it had not circulated a questionnaire to Governments in no way empowered it to refuse to follow the other steps in the procedure established in articles 16 and 21. The Commission had not drawn up a plan of work because that plan had already been determined by the General Assembly; it had not circulated a questionnaire to Governments because principles of international law relating to general questions were involved and because Governments had already received the Panamanian draft which was to serve as the basis of discussion. It was none the less true that, once the Commission had decided by 11 votes to 2 that the draft which it had prepared was satisfactory, it should, in accordance with articles 16 and 21, have the Secretary-General publish it as a Commission document and invite Governments to submit their comments on the draft within a reasonable time. If such an invitation was not extended to Governments and if the Commission decided to send the draft directly to the General Assembly, the Secretary-General could refuse to transmit it and decide to send it back to the Commission with an indication that the normal procedure had not been followed.

40. Mr. SPIROPOULOS observed that Mr. Koretsky seemed to think that the Commission could only be entrusted with work concerning the progressive development of international law or work connected with the codification of that law, and that consequently it must always apply the procedure laid down in article 16 of the Statute or that stated in article 21. In his opinion, that was not the case. The Commission's principal task was obviously to promote the progressive development of international law and its codification, and the Statute laid down precise rules for the procedure to be followed in connexion with work in those two fields. The General Assembly, however, always had the right to ask the Commission, as in the case of the Declaration on the Rights and Duties of States, to carry out certain work not provided for under the Statute. For such work, the Commission was free to apply the procedure of article 16 or that of article 21, but it was not obliged to do so.

41. Mr. Spiropoulos remarked that the preparation of a declaration on the rights and duties of States was not the only example of special work entrusted to the Commission. For example, the study of the question of the establishment of an international judicial organ for the trial of persons accused of genocide or other crimes, entrusted to the Commission by resolution 260 B (III) was another.

42. Mr. Koretsky had said that Governments had been able to express their views on the Panama draft, but that they had not had an opportunity to submit their observations on the draft the Commission had just adopted. It should not, however, be forgotten that, according to the Statute, the final text prepared by the Commission in accordance with article 16 (i), and on the basis of the comments of Governments, did not need to be submitted to the latter so that they might present new observations: only the original draft had to be sent to them. In the case in point, the Panama draft might be considered as the original draft declaration; that draft had been submitted to various Governments, and it might be said that essentially the provisions of article 16 had been applied.

43. He thought that, as the Commission had considered the draft declaration to be satisfactory, it should refer it directly to the General Assembly.

44. Mr. KERNO (Assistant Secretary-General) explained the Secretariat's point of view. He recalled that Sir Benegal Rau had rightly defined the problem as being a matter of deciding whether the Commission should always act in accordance with its Statute or whether in certain particular cases it could depart from it. It was a question of the interpretation of the Commission's terms of reference; in accordance with United Nations custom, the body concerned itself gave the interpretation, and the General Assembly in the last resort decided whether that interpretation was correct.

45. In the case under discussion, the Commission might consider that it was carrying out a normal task, in which event it should apply the provisions of its Statute, in particular those of articles 16 and 21. It might equally well decide that the drafting of the draft declaration was a special task given it by the General Assembly, which had no relation either to the progressive development of international law or to its codification; in that case, the Commission could conclude that the provisions of its Statute were not relevant. It should be noted that, in the case in point, the Commission could not invoke article 23 of the Statute; it should limit itself to presenting its report and the draft declaration, without making recommendations.

46. Mr. Kerno then called special attention to the last sub-paragraph of resolution 174 (II) establishing the International Law Commission,

in which it was said that the Commission " shall be constituted and shall exercise its functions in accordance with the provisions of its Statute ". The Commission must decide whether the provisions of resolution 174 (II) enabled it to act outside its Statute, even in the event of a case referred to it by a special decision of the Assembly.

47. He remarked that the Secretary-General could not pass judgment on the Commission's decision; he would limit himself to transmitting the draft declaration to the General Assembly or to Governments, according to the Commission's instructions. Only the General Assembly was entitled to judge whether the Commission had acted in accordance with its terms of reference or not.

48. Mr. ALFARO recalled that Sir Benegal Rau and Mr. Spiropoulos had invoked article 2 of the Statute to show that the preparation of the draft declaration was a special task outside the terms of reference conferred on the Commission by resolution 174 (II). Article 15 of the Statute confirmed that interpretation, for the preparation of the draft declaration could not be included among the definitions given there. The provision of resolution 174 (II), cited by Mr. Kerno, could not therefore be taken into consideration in the case in point.

49. Mr. Alfaro said Mr. Koretsky was asking that the draft should be referred to Governments so that they might present their comments. That had already been done in accordance with resolution 38 (I) of 11 December 1946, when the initial draft had been sent to all Member States. The extent to which the Governments had shown their interest was known to the members of the Commission: only seventeen States had sent their comments; the USSR was among the numerous States which had failed to reply. There were no grounds for hoping that the newly adopted draft would call forth more numerous replies, for it would come up against the customary inertia of administrations when they had before them questions that were not urgent.

50. If the newly adopted draft were sent directly to the General Assembly, it would be examined by the Sixth Committee; all Member States would be able to present their point of view with full knowledge of the facts, as the text of the draft would have been communicated to them by the Secretary-General before the opening of the General Assembly. If, as a result of that examination, the draft proved to be unsatisfactory, the General Assembly would take what decision it thought fit.

51. Mr. Alfaro thought that by transmitting the new draft to the General Assembly the Commission would have faithfully respected the provisions of resolution 178 (II) of 21 November 1947, thanks moreover to the collaboration of the Secretary-General, who had faithfully carried out the duty entrusted to him by that resolution. It was he who had indeed drawn the attention of Governments to the desirability of their comments and observations being sent in without delay; he had also provided very full documentation, which had enabled the Commission to reach rapid and satisfactory results.

52. He pointed out that Mr. Koretsky had voted against the draft because he did not consider it satisfactory. It might be wondered why Mr. Koretsky had not thought fit to present, in the course of the various readings, amendments to the articles of which he did not approve. The Commission had utilized all the data at its disposal; it would have welcomed new elements enabling it to improve its draft.

53. Mr. Alfaro concluded by pointing out that the initial draft had been communicated to Member States after the first session of the General Assembly; there were therefore no grounds for beginning the same procedure again, for to do so was to run the risk of never reaching a definite result. The Commission had acted in accordance with resolution 178 (II); it only remained for it to give an account of its work to the General Assembly.

54. The CHAIRMAN put to the vote the proposal to submit the draft declaration to the General Assembly, through the good offices of the Secretary-General.

The Chairman's proposal was adopted by 12 votes to 1.

55. Mr. KORETSKY said he had voted against the proposal for he felt that it violated the provisions of resolution 174 (II), and in particular its last paragraph. Furthermore, it violated the Statute of the Commission.

56. The decision just taken illustrated the desire of the large majority of the Commission to escape the control of public opinion and to avoid any close co-operation with the Governments of Member States. That tendency had become apparent from the very beginning of the session; it showed that the Commission wished to become an independent organ through which certain Governments would be able to impose their views on all the States. He pointed out that on the whole the Secretary-General's memorandum contained only views from the American Continent. Moreover, the observations of the seventeen States mentioned by Mr. Alfaro dealt with the initial plan submitted by Panama and not with the draft declaration drawn up by the Commission itself.

57. The CHAIRMAN said that the Commission should bring the French and Spanish versions into harmony with the adopted English text: the question would be examined at a later meeting. He asked the Rapporteur to let the Commission have, as soon as possible, the part of his report relating to the draft Declaration on the Rights

and Duties of States. He expressed his satisfaction with the work already done by the Commission.

Formulation of the Principles recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal (A/CN.4/5) (*resumed*)

GENERAL DISCUSSION (resumed)

58. The CHAIRMAN asked the Commission to begin the task entrusted to it by the General Assembly under resolutions 177 (II) of 21 November 1947;[7] under that resolution, the Commission was asked to formulate the principles of international law recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal.

59. The Sub-Committee [8] entrusted with the formulation of the Nürnberg principles had drawn up a draft [9] which would serve as a basis for the Commission's work.

60. Mr. SPIROPOULOS presented the Sub-Committee's draft. He pointed out that it followed closely the provisions of articles 6, 7 and 8 of the Charter of the International Military Tribunal. Indeed, paragraphs a, b and c of article 6 of the Charter defined crimes against peace, war crimes, and crimes against humanity; the Sub-Committee had adopted those definitions without any modification; articles 7 and 8 of the Charter had also been adopted for the draft with mere drafting changes.

61. He pointed out that the Sub-Committee had examined the text proposed by Mr. Alfaro which defined eighteen principles. Some of them were identical with those contained in the Sub-Committee's draft, while others concerned questions of procedure which the Sub-Committee had decided not to include in its draft at present.

62. The CHAIRMAN said that the General Assembly resolution 177 (II) directed the Commission to formulate the principles of international law; the aim of the second paragraph of article 6 of the Charter of the International Military Tribunal, however, was to define the crimes within the Tribunal's jurisdiction and not crimes which constituted violations of the principles of international law. Consequently, it could be asked whether the Sub-Committee had sufficiently realized the essential distinction between crimes within the Tribunal's jurisdiction and crimes under international law when it had textually reproduced the definitions of article 6 of the Tribunal's Charter.

63. He believed that paragraphs 6, 7 and 8 of the draft proposed by the Sub-Committee set forth principles of international law recognized by the Charter of the International Military Tribunal. On the other hand, he felt that paragraph 1 could not be regarded as setting forth a principle of international law. He drew attention to resolution 95 (I) of 11 December 1946, in which the General Assembly confirmed the principles of international law recognized by the Charter of the Nürnberg Tribunal and in the judgment of the Tribunal.

64. Mr. SPIROPOULOS stated that the Sub-Committee was quite aware of the difference between crimes coming within the competence of the International Military Tribunal and crimes under international law. The Sub-Committee had taken into account the fact that the judgment qualified as international crimes certain crimes which the Statute only defined as crimes coming within the competence of the International Military Tribunal.

65. Mr. SANDSTROM drew attention to paragraph 5 of the Sub-Committee's draft relating to crimes against humanity. The proposed definition was not general enough as it seemed to restrict those crimes to acts committed in certain circumstances; that was due to the fact that the

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[7] The general discussion opened at the 17th meeting. See A/CN.4/SR.17, para. 1,

[8] *Ibid.*, para. 58.

[9] Principles of international law recognized in the Charter of the Nürnberg Tribunal and in the judgment of the Tribunal:

1. A violation of international law may constitute an international crime even if no legal instrument characterizes it as such.

2. The categories of international crimes recognized by the Charter and the Judgment of the Tribunal are crimes against peace, war crimes and crimes against humanity.

3. The following acts constitute crimes against peace, namely:

(*a*) The planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances;

(*b*) Any participation in a common plan or conspiracy for the accomplishment of any of the acts mentioned under (*a*).

4. The following acts constitute war crimes, namely: violations of the laws or customs of war.

5. The following acts constitute crimes against humanity, namely: murder, extermination, enslavement, deportation and other inhuman acts done against the civilian population before or during a war, or persecution on political, racial or religious grounds, where such acts are done or such persecution is conducted in execution of or in connexion with any crime against peace or any war crime, notwithstanding that the municipal law applicable may not have been violated.

6. Any individual author of or accomplice in an international crime is responsible under international law and liable to punishment, whether or not his offence is punishable under municipal law.

7. The official position of an individual as Head of State or responsible official does not free him from responsibility or mitigate punishment.

8. The fact that an individual acts pursuant to order of this Government or of a superior does not free him from responsibility. It may, however, be considered in mitigation of punishment, if justice so requires.

Commission had felt obliged to use the phrasing of article 6 paragraph (*c*) of the Statute of the International Military Tribunal. He hoped that the Commission would modify that drafting in the course of its work.

66. Mr. KORETSKY thought that if the Commission was going to examine the draft paragraph by paragraph it would be preferable to examine paragraph 1 last as it would be easier to draft that paragraph after all the other principles had been formulated.

67. The CHAIRMAN pointed out that a general discussion seemed absolutely essential: if the Commission had to formulate the principles of international law, it was not bound by the provisions of article 6 of the Statute of the International Military Tribunal.

68. Mr. ALFARO agreed with the President that paragraph 1 of the Sub-Committee's draft should be thoroughly discussed. He also thought that the Commission should clarify the meaning of the phrase " principles. . . recognized ". It was necessary to decide whether it referred to new principles established by the Tribunal or to principles which had already been in existence. In his opinion the Commission had to formulate certain principles of international law relating to individual penal responsibility on the basis of the Statute and the judgment of the International Military Tribunal.

69. The CHAIRMAN thought that since the Statute and judgment recognized that it was a question of principles of international law, it was immaterial whether or not those principles had existed before the Tribunal was established. The Tribunal had considered that certain violations of international law fell within its competence, but it was questionable whether it had thereby laid down a principle of international law.

70. He pointed out that the judgment spoke of international crimes but that the Statute never used that expression. The wording of General Assembly resolution 95 (I) gave the Commission no help as it did not specify what principles of international law had been recognized by the Tribunal and confirmed by the General Assembly.

71. Mr. SPIROPOULOS thought that Mr. Alfaro had raised an interesting question; but he pointed out that there was no difficulty, as the Tribunal had considered that the principles stated in article 6 of the Statute were principles of international law which had existed before the Tribunal's Statute had been adopted.

72. In support of Mr. Spiropoulos, Mr. SANDSTROM quoted certain passages from the judgment published by the United States Government [10] which stated that the Statute expressed the international law existing at the time the Tribunal was established and that it was therefore a contribution to international law.

73. Mr. BRIERLY suggested that the Commission should begin by examining paragraphs 6, 7 and 8 of the Sub-Commission's draft which stated respectively the principle of individual penal responsibility, the principle that the official position of an individual did not free him from responsibility and the principle that the fact that an individual acted on superior orders did not free him from responsibility. The Commission might then examine paragraphs 2, 3, 4 and 5 in which crimes against peace, war crimes and crimes against humanity were defined.

74. Mr. SPIROPOULOS supported that proposal.

Mr. Brierly's proposal was adopted.

Paragraph 6 of the draft proposed by the Sub-Committee

75. The CHAIRMAN invited the Commission to examine paragraph 6 of the draft proposed by the Sub-Committee.

76. Mr. BRIERLY proposed the following text as an alternative to the Sub-Committee's draft:

> " Any person who commits or is an accomplice in the commission of an international crime is responsible under international law and liable to be punished therefor."

77. Mr. KORETSKY proposed the following variant in place of the Sub-Committee's draft:

> " Any person committing acts which constitute crimes under international law is responsible for such acts, subject to the existence of appropriate international agreements, whether or not the acts committed constitute crimes under the domestic law of the country on whose territory they had been perpetrated."

78. Mr. ALFARO supported the text proposed by Mr. Brierly. He thought, however, that it was necessary to specify the exact meaning of the expressions " international crime " or " crime under international law " used in the paragraph. Indeed, the Commission was not dealing at present with international crimes such as genocide, piracy, white slave traffic or traffic in narcotic drugs, as it had to confine itself to examining the crimes defined in the Charter of the International Military Tribunal, namely crimes against peace, war crimes and crimes against humanity.

79. The CHAIRMAN pointed out that the Conventions relating to crimes mentioned by Mr. Alfaro, to wit, piracy, white slave traffic and traffic in narcotic drugs, never described them as international crimes.

80. Mr. CORDOVA said that under the domestic legislation of many countries the crimes mentioned by Mr. Alfaro were regarded as international crimes in view of their nature: The signatories to

[10] " Nazi Conspiracy and Aggression—Opinion and Judgment—Office of United States Chief of Counsel for Prosecution of Axis Criminality— United States Government Printing Office—Washington: 1947. "

the Conventions relating to those crimes were under the obligation to punish them whatever the place of their commission. He supported Mr. Alfaro's proposal to specify the exact meaning of the expression " international crimes " used in paragraph 6.

81. Mr. AMADO said that the crimes mentioned by Mr. Alfaro could be described as international crimes only because punishment thereof had been organized on an international scale. He did not agree with the text submitted by Mr. Brierly. The Tribunal had laid down that any violation of international law might constitute an international crime even if no legal instrument characterized it as such, provided, however, that the great majority of States had made it clear that they intended to regard the act in question as criminal. It would apparently be necessary to bring the provisions of paragraph 6 into harmony with the aforesaid opinion of the Tribunal.

82. Mr. SPIROPOULOS wished to point out that the principle laid down in paragraph 6 did not apply solely to crimes defined by the Charter of the International Military Tribunal but to all international crimes.

83. He made it clear that the principles recognized in the judgment of the Tribunal applied to all international crimes and not only to crimes defined in the Charter. He quoted an extract from the said judgment published by the United States Government in connexion with the Nürnberg trial[11] stating that crimes under international law were committed by individuals and not by abstract entities. Respect for the provisions of international law could therefore be enforced by punishing the individuals perpetrating those crimes.

84. The CHAIRMAN said that the text quoted by Mr. Spiropoulos seemed to exclude crimes committed by States. That was an important question: the Commission should decide whether it wished to limit itself to a study of crimes committed by individuals.

The meeting rose at 6 p.m.

[11] *Ibid.*

26th MEETING

Tuesday, 24 May 1949, at 3 p.m.

CONTENTS

Chairman: Mr. Manley O. HUDSON.
Rapporteur: Mr. Gilberto AMADO.

Present:

Members: Mr. Ricardo J. ALFARO, Mr. James L. BRIERLY, Mr. ROBERTO CÓRDOVA, Mr. J. P. A. FRANÇOIS, Mr. Shuhsi HSU, Mr. Vladimir M. KORETSKY, Mr. A. E. F. SANDSTRÖM, Mr. Georges SCELLE, Mr. Jean SPIROPOULOS, Mr. Jesús María YEPES.

Secretariat: Mr. KERNO, Assistant Secretary-General in charge of the Legal Department; Mr. LIANG, Director of the Division for the Development and Codification of International Law, Secretary to the Commission.

Formulation of the Principles recognized in the Nürnberg Tribunal and in the Judgment of the Tribunal (*continued*)

PARAGRAPH 6 OF THE DRAFT PROPOSED BY THE SUB-COMMITTEE (continued)

1. The CHAIRMAN invited the Commission to continue the discussion of paragraph 6 of the draft submitted by the Sub-Commission (See A/CN.4/SR.25, footnote 9) together with the amendments proposed thereto by Mr. Brierly and Mr. Koretsky.[1] He observed that the phrase " liable to punishment ", which appeared in the Sub-Commission's draft as well as in Mr. Brierly's amendment, raised the question of who would inflict the punishment.

2. The Chairman wondered, furthermore, whether paragraph 6 stated a general principle of international law actually recognized by the Charter and the judgment of Nürnberg. By the terms of article 6 of the Charter, the Tribunal was competent " to try and punish persons who, acting in the interests of the European Axis countries . . ."

3. It followed that the crimes enumerated later must have been committed by persons acting in the interests of the Axis. Even had this definition been absent, nowhere in the Charter were there to be found provisions according to which accused persons would have to answer for crimes against international law. The records of the London Conference responsible for the drawing up of the Charter did not make clear whether, in the opinion of its authors, article 6 of the Charter laid down a general principle of international law

[1] See A/CN.4/SR.25, paras. 76-77.

applicable to all. Although it was true that the Tribunal had interpreted that article very widely, the competence conferred upon it by the Charter was limited to crimes committed only by persons acting in the interest of the Axis powers.

4. Mr. BRIERLY declared that such an interpretation would not leave standing a single one of the principles of the Charter and judgment of Nürnberg. It was obvious that the General Assembly, in laying upon the Commission the duty of formulating the principles recognized at Nürnberg, had interpreted article 6 of the Charter much more widely.

5. Mr. CORDOVA considered that article 6 of the Charter could be divided into two parts. The first dealt with the competence of the Tribunal, which was limited to crimes committed by persons acting in the interests of the Axis Powers; the second laid down general principles of international law in the light of which the judgment had been rendered. The task of the Commission was limited to formulating those principles without dealing with the limited competence of the Tribunal.

6. Mr. SANDSTROM also stated that the Nürnberg Charter was founded on the principle of the existence of crimes which were punishable under international law. The report of Judge Jackson, dated 6 June 1945, made that point sufficiently clear.[2]

7. The CHAIRMAN observed that the matter involved was a concept which appeared in the report of one of the negotiators of the agreement concerning the creation of the Tribunal, a concept which was not reflected in the verbatim reports of the Conference.

8. Mr. SANDSTROM emphasized that generally speaking the Conference had mainly discussed procedural questions.

9. Mr. SPIROPOULOS shared the opinion expressed by the preceding speakers to the effect that the Commission's mission was to formulate the general principles which had been evolved at Nürnberg. According to the Chairman's interpretation, the persons condemned at Nürnberg had not been condemned by virtue of a principle of international law but because they belonged to the Axis powers. It was common knowledge that the counsel for the defence had definitely pleaded the absence of any previously established principle enunciating individual responsibility. But it was the task of the Commission to sift out that principle from the Charter and the judgment of the Nürnberg Tribunal and to proclaim it in the form of a warning to possible future aggressors.

10. Mr. Spiropoulos quoted in that connexion a statement by President Truman to the effect that the setting up of " a code of international criminal law to deal with all who wage aggressive war . . . deserves to be studied and weighed by the best legal minds the world over . . ." (A/CN. 4/5, p. 11 and 12).

11. Mr. AMADO declared that the great principle which flowed from the Charter and the judgment was precisely that of individual responsibility. If that were not the case, Goering and the other accused would have been able to take shelter behind the responsibility of the German State. But the Nürnberg Charter had not been concerned with the responsibility of the German State as such but solely with that of the individual. That was a new concept, for up to then the individual had not been considered as capable of being guilty of an international crime.

12. Mr. Amado pointed out that other so-called international crimes such as piracy and the white slave traffic had an international character only because their suppression had been organized on an international basis, but they were not international crimes in the strict sense of the term. Mr. Amado found it difficult to believe that the principle enunciated in the Nürnberg Charter was to be applied only to criminals of the Axis Powers.

13. Mr. SCELLE recalled that according to the terms of General Assembly resolution 177 (II), the Commission was called upon to formulate the principles recognized by the Charter and judgment of Nürnberg. That implied that, in the opinion of the General Assembly itself, the Charter and judgment had not created but had confirmed principles already existent in positive international law or still in the process of development. Both had to be formulated by the Commission, which had to go even farther. Actually, the principle of individual responsibility was only the application of a more general principle to which Sir Hartley Shawcross had alluded and which was enunciated in the " reasons adduced " of the judgment, namely that the individual was subject to international law. In his indictment, Sir Hartley Shawcross had pointed out that that principle had already existed in international law and had been recognized by all States. It was therefore appropriate likewise to formulate that very general principle in view of the fact that the principle of individual responsibility was only its application.

14. Mr. Scelle thought that the Commission should give a very broad interpretation to General Assembly resolution 177 (II) and to the Charter and judgment so as to be able to sift out the great principles which constituted their base.

15. Mr. KORETSKY felt that the Commission should not involve itself in a discussion of general principles, but should keep either to article 6 of the Nürnberg Charter or to the amendment which

[2] Department of State Publication 3080, Washington, 1949.

he himself had presented. In his opinion, the amendment of Mr. Brierly should be dismissed, as it raised questions of principle of a general nature.

16. The CHAIRMAN stated that it was not advisable at that stage to limit the debate in any way.

17. Contrary to the view held by Mr. Koretsky, Mr. SPIROPOULOS thought it was definitely on article 6 of the Charter that the discussion turned for the whole problem was to ascertain whether that article enunciated a general principle or whether it had in view provisions applicable only to individual persons belonging to the Axis Powers. Now, the Commission's task was not to codify the Nürnberg law in a restrictive sense, but to formulate the general principles that flowed from it and that were of a nature to be applied in the future. If that were not the case, then the principles which were being formulated would lead to the conclusion that any person belonging to the Axis would be punished if he committed an international crime—all of which was of no interest whatever since the Axis Powers no longer existed.

18. Mr. YEPES shared the opinion of those who favoured a broad interpretation of article 6 of the Charter. That article was divided into two parts. The first part was connected with the competence of the Tribunal to judge certain specific persons. The Commission did not need to take that part into account. The second part laid down principles of substance, of a permanent character, applicable not only to persons belonging to the Axis Powers but to any person who committed the international crimes listed in paragraphs (*a*), (*b*) and (*c*) of article 6. It was doubtless the second part of the article which the General Assembly had in mind when it had entrusted the Commission with the formulation of the principles of Nürnberg. That was, therefore, the task of the Commission.

19. The CHAIRMAN invited the Commission to voice opinion on the texts before it: paragraph 6 of the draft of the Sub-Commission and the amendments to that paragraph proposed by Mr. Brierly and Mr. Koretsky.

20. Mr. ALFARO felt that the amendment of Mr. Brierly, which set out the principle of individual penal responsibility in international law, was sufficiently important to be the object of a separate article. The provision in the second part of paragraph 6 of the draft of the Sub-Commission could constitute a second article.

21. Furthermore, Mr. Alfaro proposed the addition of the words " as hereinafter defined " after the word " crime " in Mr. Brierly's amendment.

22. Mr. BRIERLY accepted that addition.

23. Mr. SANDSTROM was opposed to the addition of those words because the enumeration of crimes contained in article 6 of the Charter was not complete.

24. The CHAIRMAN proposed to amalgamate as follows the first part of Mr. Koretsky's amendment with Mr. Brierly's amendment, leaving the question of complicity for later examination.[3]

> " Any person who commits any of the following acts is guilty of a crime under international law and is liable to punishment."

25. Mr. SPIROPOULOS felt that it was advisable to enunciate the general principle in a first article and to declare in the following article that " The Charter and the judgment of Nürnberg considers as crimes the following acts. . . " That was the method which had been followed in the drafting of the Convention on Genocide. Moreover, he would like the first article to read " Any person who commits an act which constitutes a crime under international law is responsible therefor and liable to punishment."

26. Mr. ALFARO shared the opinion of Mr. Spiropoulos.

27. Mr. SCELLE supported the formula proposed by the Chairman. He pointed out however that a crime could be perpetrated either by " commission " or by " omission ". Thus, a military commander who did not prevent a massacre, although he was in a position to do so, or Governments which permitted the perpetration of the crime of genocide would be guilty of a crime of omission.

28. To make allowance for that idea, he proposed a modification of the Chairman's formula in the following manner:

> " Any person who commits an act or who is guilty of an omission which constitutes a crime under international law is responsible for that act or for that omission and liable to be punished."

29. Mr. CORDOVA declared himself in favour of the new wording proposed for Mr. Brierly's amendment, because it had the advantage of specifying the crimes involved. If the article was drafted in too general terms the question would arise in the future of knowing what the acts were which constituted crimes under international law. Acts which at the present time were not considered crimes under international law might well be considered as such later on and the whole question of the principle of *nullum crimen sine lege* would come up again.

30. Mr. SANDSTROM replied that there would be but little risk of that in view of the fact that the Commission was called upon to prepare a draft code of crimes against the peace and security of humanity which would contain a list and definition of such crimes.

31. Mr. SPIROPOULOS thought that the new text proposed by Mr. Brierly, which included

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[3] See A/CN.4/SR.28, paras. 62-64.

Mr. Alfaro's amendment, restricted the general scope of the article.

32. Mr. BRIERLY said that the Commission had to codify only the principles recognized in the Charter and judgment of Nürnberg and not principles of more general application. The same comment also applied to Mr. Scelle's amendment.

33. Mr. SCELLE agreed that crimes of omission had not been recognized by the Charter. But that document did set forth certain fundamental principles which had been applied in the judgment. The first and most important of those principles was the following: that rulers could commit international crimes and be held responsible for them. That principle had not been definitely established before Nürnberg.

34. The Commission was called upon to lay down the general principles of an international penal code, of which the primary principle, established at Nürnberg, was that a ruler was not justified by his quality as a ruler and could not shelter behind the State. A ruler could be guilty of a crime, because only he could " will " a crime; the State could not. The actions of rulers could be described as criminal, not only by virtue of international agreements, as was stated in Mr. Koretsky's amendment, but by virtue of other sources of law, such as custom and legal practice. As a result, any action which disturbed international public order was a crime under international law.

35. Mr. Scelle thought that the article under discussion was of a purely abstract nature and should constitute, as it were, an introduction to all the other Nürnberg principles. It was also necessary to state that crimes of omission could be perpetrated, regardless of whether or not such crimes had actually been punished by the Nürnberg Tribunal.

36. The CHAIRMAN expressed surprise at the wide interpretation which Mr. Scelle gave to the Commission's terms of reference as set out in General Assembly resolution 177 (II).

37. Mr. FRANÇOIS was also surprised by such a wide interpretation of the Commission's terms of reference. The General Assembly resolution had directed the Commission to formulate only the principles recognized by the Charter and judgment of the Nürnberg Tribunal, and no more. Crimes of omission had not been mentioned either in that Charter or in the judgment.

38. Mr. SCELLE quoted the letter from President Truman, dated 12 November 1946, in which the latter had said that the cause of peace would be served if the United Nations could draw up a code of international crimes. Mr. Scelle stated that the Commission should try to find in the Charter and the judgment not only the immediate principles, but the foundations on which those principles rested.

39. He reiterated the statement that the cardinal principle was that an individual could commit an international crime. That principle was a new one in international law. Some fifty years ago rulers had been able to make war when they wished, provided only that they observed the formalities. The right to make war was a discretionary power, arising out of the sovereignty of the State. Since that time, the Covenant of the League of Nations, the Kellogg Pact and the Charter of the United Nations had marked different stages in a long evolutionary process which had ultimately been defined by the Charter and judgment of Nürnberg. War was currently regarded as a crime for which the responsibility lay not with the State, but with the rulers who prepared for war or declared it. That was a vital principle which should be enunciated and recorded once and for all. It was impossible, therefore, to interpret the Charter and judgment of Nürnberg restrictively, as Mr. Brierly and Mr. François apparently wished.

40. Mr. KORETSKY stated that Mr. Scelle's concepts could not be included even in an international penal code, with which, in any case, the Commission would have to deal only at a later date. The details which Mr. Scelle had discussed, such as crimes of omission or commission, came under the domestic law of States.

41. Mr. Koretsky recalled that his amendment contained the words: " subject to the existence of appropriate international agreements ". The first point to decide was whether the Commission was considering only the crimes listed in paragraphs 3, 4 and 5 of the Sub-Committee's draft, or other crimes which might, at some time, be committed. If only the crimes included in paragraphs 3, 4 and 5 were considered, no doubt arose, since the appropriate international agreement already existed. If, however, the possibility of other crimes was considered, it was necessary to see that those crimes were defined as such by international agreements; only in that way was it possible to respect the principle of sovereignty, which States were not yet ready to waive. He therefore asked the Chairman to give a ruling on the question whether the Commission was to consider only the crimes enumerated in paragraphs 3, 4 and 5 of the Sub-Committee's draft, or crimes of a different kind which might possibly be committed.

42. If the phrase " subject to the existence of appropriate international agreements " were maintained, the provision in the Charter itself namely: " whether or not in violation of the domestic law of the country where perpetrated " should also be maintained, for in cases which were covered by an international agreement, an act could be considered as criminal, regardless of all provisions to the contrary in the domestic law of the country where it was perpetrated.

43. Furthermore, Mr. Koretsky considered that all mention of punishment should be omitted from paragraph 6, which should be limited only to the question of responsibility.

44. The CHAIRMAN observed that, as a result of the discussion which had just taken place, the proposal of Mr. Brierly had undergone some modification. Its author agreed in particular to eliminate the clause: " and is liable to punishment ". Furthermore, Mr. Scelle had suggested that crime by omission should be mentioned after the positive act constituting the crime.

45. Mr. SANDSTROM was in favour of maintaining the phrase " and is liable to punishment " because, without such a specification, there would be no modification of what sort of responsibility was involved: for example, it might be a purely moral or pecuniary responsibility. Accordingly, it was advisable to indicate with precision that the responsibility incurred by the author of the crime was of a penal nature.

46. Mr. SPIROPOULOS thought that the observation made by Mr. Sandström was not without value. Indeed, besides penal responsibility, there did exist civil responsibility, and it was best to specify to which of the two the article alluded. Mr. Spiropoulos was therefore of the opinion that the paragraph should include the two ideas of responsibility and punishment. A somewhat similar duality existed in the first article of the Convention on Genocide which spoke both of prevention and punishment. Moreover, the judgment of the Nürnberg Tribunal expressly emphasized the importance of the idea of punishment in the following terms:

> " Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced " (A/CN.4/5, p. 41).

47. The CHAIRMAN put to the vote the proposal of Mr. Brierly, the revised text of which read: " Any person who commits an act which constitutes a crime under international law is responsible therefor ".

The text was provisionally retained by 11 votes.

48. The CHAIRMAN put to the vote Mr. Scelle's proposal to add the phrase " or is guilty of omission " after the word " act ".

The suggestion was rejected by 7 votes to 2.

49. The CHAIRMAN invited the Commission to decide on the addition at the end of the text of the words " and is liable to punishment " in accordance with the proposal of Mr. Sandström.

50. Mr. KORETSKY noted that if mention were made of punishment in the text, it would necessarily have to be indicated by whom and in what manner the punishment should be applied. That is what was done in the Moscow Declaration in the following passage:

> " (Those responsible) will be sent back to the countries in which their abominable deeds were done in order that they may be judged and punished according to the laws of these liberated countries and of the free governments which will be created therein " (A/CN.4/5, p. 87).

51. If, then, the purpose of the paragraph under discussion was simply to enunciate a general principle, it should not include any mention of punishment. Moreover, there could be no doubt whatever concerning the nature of the responsibility incurred: since crimes were involved, there could be no question but of penal responsibility. The idea of responsibility was therefore sufficient in itself, and it was the only thing that could be mentioned in a text of a general character, since it was independent of the provisions of internal law as specified at the end of the proposal of Mr. Koretsky.

52. The CHAIRMAN put to the vote the suggestion of Mr. Sandström to add the words: " and is liable to punishment ".

The addition was approved by 10 votes to 2.

53. The CHAIRMAN asked the Commission to decide for or against the inclusion, after the text that had been retained, of the following clause of Mr. Koretsky's proposal: " subject to the existence of appropriate international agreements."

54. Mr. KORETSKY declared that he was asking for the insertion of that reservation in the paragraph, only if it was supposed to enunciate a principle applicable to all crimes of international law, whatever they might be. On the other hand, it would not be necessary if the text was supposed to cover only the crimes enumerated in paragraphs 2, 3, 4 and 5 of the draft of the Sub-Committee, crimes which had already been made the object of an international agreement. It was of the highest importance to resolve that essential question.

55. Mr. SPIROPOULOS noted that it was precisely because the paragraph aimed at enunciating the very broad principle of the responsibility of authors of international crimes that it could not be limited by a reservation restricting its application to cases where international agreements existed.

56. Mr. CORDOVA feared that such a reservation might be a source of serious inconvenience, if it should happen in the future that international agreements did not recognize certain crimes as being crimes under international law.

57. Mr. YEPES was of the opinion that the insertion of the reservation would weaken the principle laid down by the paragraph to the point of uselessness.

58. Mr. SANDSTROM wanted to know who would conclude the international agreements to which the reservation of Mr. Koretsky referred.

Were they agreements that might possibly be reached by the victors in a war?

59. Mr. SCELLE thought that the reservation proposed by Mr. Koretsky was contrary to the judgment of the Nürnberg Tribunal which had declared that the acts judged by it constituted crimes by virtue of principles which existed previously to the Nürnberg Charter, and not by virtue of international agreements.

60. Mr. KORETSKY specified that his proposed reservation was intended to bring out the connexion between international and domestic law, to which reference was made in the latter part of his text. As a matter of fact, the reservation could not be taken out of the text. He recalled that the retention of that reservation in the paragraph depended, in his opinion, on the extent of the scope of the application of the principle enunciated.

61. The CHAIRMAN asked the Commission to decide whether it wanted to add to the retained text the phrase: " subject to the existence of appropriate international agreements ".

The Commission decided against the inclusion of that phrase by a large majority.

62. The CHAIRMAN invited the Commission to consider whether there was any need to add to the wording retained either the last sentence of the Sub-Committee's draft: " whether or not his offence is punishable under municipal law " or the last part of the proposal submitted by Mr. Koretsky: " whether or not the acts committed constitute crimes under the domestic law of the country on whose territory they had been perpetrated ". That was an important point, for in many countries international law was not incorporated into domestic law. Mr. Koretsky's wording was preferable, in the opinion of the Chairman, since it mentioned specifically what domestic law was being referred to.

63. Mr. SPIROPOULOS favoured the wording of the Sub-Committee of which the scope was not limited to any given territory. He recalled that the major war criminals had been punished regardless of the countries in which their crimes had been perpetrated.

64. Mr. ALFARO held the view that a decision should be reached first as to whether the question was to be dealt with in paragraph 6 of the Sub-Committee's draft, or isolated from that article to form a separate principle.

65. Mr. Scelle had proposed that the principle of individual responsibility in international law, rightly considered by him to be the essential principle, should come at the head of the draft. Then would come the list of international crimes. Only then, in Mr. Alfaro's opinion, could there be laid down the principle of the primacy of international law over domestic law, which was the question under discussion and one which raised a vast and complex problem calling for a special debate.

66. Mr. SANDSTROM favoured the wording submitted by the Sub-Committee which did not contemplate any specific domestic law. In the Nürnberg Charter itself, in fact, all ideas of the geographical localization of crimes placed under the jurisdiction of the tribunal had been dismissed.

67. The CHAIRMAN invited the Commission to take a decision concerning the addition of the last part of Mr. Koretsky's proposal.

Mr. Koretsky's text was rejected by 9 votes to 3.

The Commission decided by 4 votes to 1 not to retain in the text of paragraph 6 the words " whether or not his offence is punishable under municipal law ".

68. Mr. SANDSTROM felt that it would be difficult to formulate separately the idea contained in the words in question.

69. Mr. AMADO stated that for that very reason he had voted in favour of the retention of those words in the text of paragraph 6.

70. Mr. SCELLE held the view that a separate wording should be found to express that idea.

71. Mr. CORDOVA said that the provisional draft submitted for paragraph 6 did not appear to him to be satisfactory. It had to be clearly understood, in future, that international crimes would involve only those crimes previously defined as such. Yet the words " an act constituting a crime under international law " provided no safeguard in that respect. It was clearly not necessary that the crime should be defined in an international agreement, as Mr. Koretsky would have wished, and it was for that reason that Mr. Córdova had voted against that reservation. He felt, however, that the question should be specified clearly in another paragraph.

Additional paragraph proposed by Mr. Córdova

72. Mr. CORDOVA proposed the adoption of the following paragraph to be inserted after paragraph 6:

> " All persons committing any of the acts above referred to shall be responsible under international law, whether or not such acts are punishable under municipal law."

73. Mr. SPIROPOULOS pointed out that the idea contained in that new proposal was the same as the concept set forth in the last part of paragraph 6 of the Sub-Committee's draft. The Sub-Committee had thought that the idea was not a principle in the strict sense of the word, and it had therefore preferred to insert it after the paragraph proclaiming the general principle of the responsibility of the individual in international crimes.

74. Mr. KORETSKY approved the insertion

of that concept in a separate paragraph, but he thought that the paragraph should adopt the terminology used in the latter part of article 6, paragraph (*c*) of the Charter of the Nürnberg Tribunal reading as follows: " whether or not in violation of the domestic law of the country, where perpetrated". That text accurately reflected the aim of Mr. Koretsky's draft of paragraph 6: the only differences to be found were due to its double translation into Russian and then into English.

75. The CHAIRMAN pointed out that the phrase quoted by Mr. Koretsky only applied to crimes against humanity, referred to in article 6, paragraph (*c*) and not to crimes against peace or war crimes.

76. Mr. SANDSTROM thought the reason for that was to be found in the fact that at the time when the Charter was drawn up, crimes against peace and war crimes had already been recognized as international crimes, while a doubt might have existed in that respect with regard to crimes against humanity.

77. Instead of the Charter's wording, Mr. ALFARO preferred the Sub-Committee's text which was the same as the version contained in Mr. Córdova's new proposal. The latter text was more inclusive than the other, as it included not only the law of the criminal's country of origin and the law of the country which should enforce the penalty, but the domestic law of the country where the crime had been perpetrated as well. Such at least was Mr. Alfaro's interpretation, in consideration of which he favoured the Sub-Committee's text.

78. Mr. AMADO was also of the opinion that the text should cover all national legislations and not only the domestic law of the country in which the crime had been perpetrated.

79. Mr. SCELLE also favoured the Sub-Committee's text which he thought much better than that of the Charter. He proposed however the addition of the word " whatsoever " at the end of Mr. Córdova's proposal. According to Mr. Scelle, Mr. Koretsky's text seemed to refer to the principle of territoriality in criminal matters, which constituted the most important obstacle to the development of international penal law. He recalled that the question of the establishment of an international penal tribunal was included in the Commission's agenda (A/CN.4/3): in formulating the Nürnberg principles it was therefore preferable for the Commission at all costs to avoid giving the impression that it was reluctant to consider that the development of international penal law should lead to the creation of an international judicial organ.

80. Mr. KORETSKY objected that no intervention could be permitted in affairs essentially within the domestic jurisdiction of the State. One of its primary functions was precisely the trial and punishment of criminals, functions which it had a right to exercise with full sovereignty. The problem which arose was to ascertain how the authors of international crimes would be punished. To that question the Moscow Declaration had given an unequivocal reply when it had specified that criminals would be tried in the country where their crimes had been committed and in conformity with the laws of that country. The phrase included towards the end of article 6, paragraph (*c*) of the Nürnberg Charter: " whether or not in violation of the domestic law of the country where perpetrated " was only the sequel to that passage of the Moscow Declaration. That historic aspect of the question should not be neglected any more than should the importance of the rule laid down at Moscow to ensure efficacious punishment. In fact, what the criminals had dreaded above all was to be tried in the countries in which they had committed their crimes. That was why they had done all in their power to avoid falling into the hands of the authorities of the USSR and of the other popular democracies and to flee to other countries. Therefore Mr. Koretsky was surprised that certain members of the Commission seemed to wish to deviate on that point from the text of the Charter, as any such deviation would tend considerably to restrict the scope of a principle which the Commission had been given the task of formulating exactly as it had been recognized in the Charter and judgment of the Nürnberg Tribunal.

81. Mr. SANDSTROM pointed out that in his argument, which was based entirely on territorial penal jurisdiction, Mr. Koretsky had not taken account of the third paragraph of the recital of the Agreement for the establishment of an international military tribunal, which specifically said that the Moscow Declaration " was stated to be without prejudice to the case of major criminals whose offences have no particular geographical location and who will be punished by the joint decision of the Governments of the Allies;" (A/CN.4/5, p. 89).

82. Mr. BRIERLY suggested that the word " domestic " should replace the word " municipal " in the English text of Mr. Córdova's proposal.

83. Mr. CORDOVA accepted that suggestion, and also the addition of the word " whatsoever " proposed by Mr. Scelle.

84. The CHAIRMAN put to the vote the supplementary paragraph proposed by Mr. Córdova as amended.

The paragraph as amended was provisionally retained by 8 votes to 1.

PARAGRAPH 7

85. The CHAIRMAN pointed out that paragraph 7 closely followed the wording of article 7 of the Nürnberg Charter. [4]

86. He put to the vote the first part of the paragraph up to and including the word " responsibility ".

The first part of paragraph 7 was provisionally retained by 10 votes to none.

87. The CHAIRMAN put to the vote the final portion of the paragraph: " or mitigate punishment."

88. Mr. BRIERLY agreed that the wording should be retained since it merely reproduced an idea contained in article 7 of the Nürnberg Charter; in principle, however, there was no reason why the official position of accused persons could not be taken into consideration as grounds for the mitigation of punishment.

89. The CHAIRMAN put to the vote the end of paragraph 7.

The end of paragraph 7 was provisionally retained by 8 votes to 1.

PARAGRAPH 8

90. The CHAIRMAN requested the Commission to decide seriatim on the two sentences of paragraph 8 the text of which was very close to that of the corresponding article of the Nürnberg Charter. [5]

The first sentence of paragraph 8 was provisionally retained by 11 votes.

The second sentence of paragraph 8 was provisionally retained by 10 votes.

PARAGRAPH 2

91. The CHAIRMAN doubted the usefulness of including paragraph 2 in the list of principles as international crimes were enumerated in the succeeding paragraph. [6]

92. Mr. ALFARO, who shared that view, proposed that the following text should be substituted for paragraphs 2, 3, 4, and 5 of the draft:

" The following acts shall constitute crimes punishable under the preceding article:

" (*a*) Crimes against peace;

" (*b*) War crimes;

" (*c*) Crimes against humanity."

93. Each of the sub-paragraphs, (*a*), (*b*), and (*c*), would be followed by the clauses of the Charter which specifically defined the corresponding kind of crime.

94. The proposed paragraph would necessarily be inserted after the statement of the general principle enunciated in paragraph 6, as provisionally retained, and would therefore appear before Mr. Córdova's additional paragraph.

95. The CHAIRMAN thought that the simplest course would be to delete paragraph 2 and recast paragraphs 3, 4, and 5 as a single paragraph.

96. Mr. AMADO favoured the retention of paragraph 2, which was intended to list the crimes recognized by the Charter and judgment of the Nürnberg Tribunal as international in scope.

97. Mr. YEPES held that the proper procedure would be to set forth international crimes in general in an initial paragraph, and to list them specifically in one or more succeeding paragraphs.

98. Mr. SCELLE shared the point of view of Mr. Amado and Mr. Yepes that it was best to follow the plan adopted by all penal codes according to which offences were first grouped in categories and then named specifically.

99. Mr. SANDSTROM preferred Mr. Alfaro's proposal to the Sub-Committee's formulation. It seemed difficult, indeed, to put crimes against humanity, defined in so specific a way, into a general paragraph enunciating the various categories of international crimes.

100. Mr. SPIROPOULOS emphasized the justness of Mr. Sandström's observation. The restrictions included in the definition of crimes against humanity made the specific mention of that category in a paragraph debatable, to say the least. In the Sub-Committee, Mr. Spiropoulos had suggested leaving out the paragraph concerned, but he had given way, in the end, to the arguments of those who wished to include it.

101. The CHAIRMAN felt that the discussion ought not to be limited to paragraph 2; it should cover paragraphs 3, 4, and 5, which formed a logical whole with it.

The meeting rose at 6 p.m.

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[4] See text in A/CN.4/SR.25, footnote 9.

[5] *Ibid.*

[6] *Ibid.*

27th MEETING

Wednesday, 25 May 1949, at 3 p.m.

CONTENTS

Chairman: Mr. Manley O. HUDSON.

Rapporteur: Mr. Gilberto AMADO.

Present:

Members: Mr. Ricardo J. ALFARO, Mr. James L. BRIERLY, Mr. Roberto CÓRDOVA, Mr. J. P. A. FRANÇOIS, Mr. Shuhsi HSU, Mr. Vladimir M. KORETSKY, Sir Benegal RAU, Mr. A. E. F. SANDSTRÖM, Mr. Georges SCELLE, Mr. Jean SPIROPOULOS, Mr. Jesús María YEPES.

Secretariat: Mr. KERNO, Assistant Secretary-General in charge of the Legal Department; Mr. LIANG, Director of the Division for the Development and Codification of International Law, Secretary to the Commission.

Formulation of the Principles recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal (*continued*)

COMMUNICATION FROM THE ASSOCIATION OF YUGOSLAV JURISTS

1. The CHAIRMAN informed the members of the Commission that the Secretariat had received, through the intermediary of the Yugoslav Permanent Delegation, a communication from the Association of Yugoslav Jurists. That communication dealt with the sentence imposed on the German Field-Marshal List by the Military Tribunal of the American zone of occupation in Germany.

2. He had carefully studied the document. The protest it contained did not seem to be relevant to the Commission's agenda and, furthermore, the Commission did not appear to be competent to give an opinion on the sentences imposed by a military tribunal in Germany. Nevertheless, he pointed out that the Yugoslav jurists had drawn attention to the statement of the Military Tribunal of the American occupation zone in Germany to the effect that the German occupation of Yugoslavia had been carried out in accordance with the provisions of article 42 of The Hague Convention of 1907 respecting the Laws and Customs of War on Land. (The Chairman remarked that in fact the reference had been to article 42 of the Statute annexed to that Convention). The text of the judgment of the Military Tribunal had not been attached to the communication, which was at the disposal of any member of the Commission who wished to examine it.

3. The Chairman felt that although it could not be considered by the Commission, the communication from the Yugoslav jurists seemed to prove that, in order to accomplish the task with which it had been entrusted by the General Assembly, the Commission might take into account other judgments than that passed by the International Military Tribunal of Nürnberg.

DRAFT PROPOSED BY THE SUB-COMMITTEE

Sub-paragraph 3 (a)

4. The CHAIRMAN recalled that paragraphs 6, 7 and 8 of the draft proposed by the Sub-Committee had been adopted provisionally with the various amendments accepted by the Commission.[1] The final text of those paragraphs would only be adopted after a second reading.

5. He asked the Commission to examine paragraph 3 of the Sub-Committee's draft. That paragraph was a faithful reproduction of article 6 (*a*) of the Charter of the International Military Tribunal.

6. He proposed that the Commission should first of all examine sub-paragraph (*a*) of paragraph 3, which read:

> " The following acts constitute crimes against peace, namely: (*a*) the planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances."

7. The Chairman wondered if those responsible for drawing up the Charter had envisaged politicians alone as possible authors of those crimes, or politicians and military men acting in conjunction. The expression " waging of a war " also needed clarification. Obviously once war had been declared, the private soldier took part in the waging of war. It was equally evident that he could not do otherwise than obey orders. It could therefore be assumed that the authors of the Charter had not intended to consider soldiers as guilty of crimes against peace.

8. While military chiefs were responsible for the " waging of a war ", it was to be wondered to what degree they were responsible for " the planning, preparation or initiation " of that war. In fact, it seemed that the role played by military general staffs was purely technical and consisted simply of carrying out orders.

9. The Chairman wondered whether it would be opportune or possible to define the meaning of " a war of aggression ". He recalled that several proposals defining the meaning of a war of aggression had been submitted to the authors of the Charter of the United Nations both at the Preparatory Conference in London and at the San Francisco Conference, but none of those definitions had finally been accepted.

10. He thought the Commission should define what was meant by the expression " a war in violation of international treaties, agreements or assurances ". The Nürnberg Tribunal had had to deal with certain international instruments which had been enumerated in the indictment. A study of those instruments showed that they

[1] At the previous meeting.

could not justify the expression " in violation of international treaties, agreements or assurances ".

11. Mr. SPIROPOULOS replied to the various points raised by the Chairman. The International Military Tribunal had reached the conclusion, in its Judgment, that only persons with sufficient influence could be pronounced guilty of crimes against peace, consisting in the planning, preparation, initiation or waging of a war of aggression. That conception therefore automatically excluded private soldiers and minor leaders.

12. Neither the Charter, nor the Judgment of the International Military Tribunal had given a definition of the term " war of aggression ". The Tribunal had limited itself to stating in certain cases that it had been a war of aggression without explaining on what basis it had reached that conclusion. That was why the Sub-Committee had not tried to lay down any principle giving a definition of a war of aggression.

13. With regard to the expression " a war in violation of international treaties, agreements or assurances ", the Sub-Committee had simply reproduced, word for word, the text of article 6 (*a*) of the Charter, without attempting to decide which of the international instruments listed in the Judgment of the Tribunal had been violated.

14. Mr. Spiropoulos recalled that paragraph 3 of the Sub-Committee's draft simply gave the definition of crimes against peace as it had been established by the Charter of the International Military Tribunal. That definition had been given in technical terms and the Sub-Committee had not considered itself competent to alter them.

15. Mr. SANDSTROM pointed out that the International Military Tribunal had listed in its indictment the international instruments to which he had referred with the sole aim of showing that waging a war was an international crime. The Tribunal had concluded, in its Judgment, that certain of the accused had been guilty of waging a war of aggression; it had not specified that it was a war in violation of any particular treaty.

16. The CHAIRMAN drew attention in that connexion to the explanations to be found on page 46 of the Judgment published by the United States Government. [2]

17. Mr. BRIERLY wondered whether it would be advisable to alter the wording of paragraph 3 of the Sub-Committee's draft. He thought it would be better to keep it as it was, since it was a faithful reproduction of article 6 (*a*) of the Charter of the International Military Tribunal, which the Commission was not empowered to alter. He pointed out, further, that the Judgment neither corrected nor clarified the terms used in the Charter.

18. The CHAIRMAN mentioned that he had had occasion to talk to several leaders of the armed services who had expressed anxiety concerning the text of article 6 (*a*) of the Charter. They feared that in certain circumstances they might be accused of having waged a war of aggression, since no definition had been given for that expression.

19. Mr. CORDOVA thought the Commission would be perfectly within its competence in giving an interpretation on the basis of the conclusions of the International Military Tribunal. The Judgment drew a distinction according to whether the military leaders were or were not acquainted with the plans of Hitler and his associates. Some of the generals who had been accused had not been condemned by the Tribunal, for the sole reason that they had not been in the confidence of their superiors.

20. Mr. SPIROPOULOS proposed that the word " namely " should be deleted from the English text since it served no useful purpose and had not been included in the text prepared by the Sub-Committee. He pointed out that paragraph 3 was a definition of international crimes. The way in which the Tribunal had interpreted that definition could not constitute a principle of law. It seemed obvious that only those persons possessing the necessary influence should be considered guilty of planning, preparing, initiating or waging a war of aggression; nevertheless that restriction could not be considered as a principle of international law.

21. Mr. CORDOVA thought that, if a definition were given, it would be advisable to specify the extent to which the principle could be applied. That was what the Tribunal had done in its Judgment. Consequently, he thought it would be advisable to clarify the definition given in paragraph 3 (*a*) by stating that those who committed the acts listed should occupy a position of responsibility.

22. The CHAIRMAN drew attention to the remarks in the Judgment with regard to Admiral Doenitz. [3] It had been recognized that Doenitz had exercised purely tactical functions during the preparation and initiation of the war and that he had not been present at the conferences when the plans for waging a war of aggression had been announced. Consequently Doenitz had not been pronounced guilty on the count of crimes against peace.

23. Mr. SANDSTROM thought that the case of Doenitz might influence the Commission to adopt an amendment such as the one proposed by Mr. Córdova.

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[2] " Nazi Conspiracy and Aggression—Opinion and Judgment— Office of US Chief of Counsel for Prosecution of Axis Criminality— " US Government Printing Office—Washington, 1947.

[3] *Ibid*, p. 137.

24. Mr. SPIROPOULOS recalled that the Commission's task was to formulate the principles of international law, and not to lay down as principles all the considerations that the Tribunal had had to take into account in order to pronounce its Judgment. He did not think that any general principle could be formulated out of the cases of Admiral Doenitz or some of the other accused.

25. Mr. KERNO (Assistant Secretary-General) wished to explain what the General Assembly seemed to expect of the Commission. He had taken part in the discussions which had led to the adoption by the General Assembly of resolution 95 (I) and of resolution 177 (II), and had had the impression that the Assembly considered the principles of Nürnberg as constituting a progress in international law that should not be lost and that it wished the expression of those principles to be improved, if possible, by a new formulation given by the Commission. Consequently, the Commission was not strictly bound by all the terms of the Charter or the Judgment of the International Military Tribunal.

26. The CHAIRMAN thought that Mr. Kerno's interpretation of the General Assembly's resolutions was too broad. The terms of those resolutions had led the Commission to believe that it should respect the provisions of the Charter and the Judgment of the International Military Tribunal.

27. Mr. SCELLE supported the interpretation given by Mr. Kerno, which was identical with the one which he had had occasion to give himself. He thought that the Commission should decide which interpretation should be adopted, the President's or that given by Mr. Kerno.

28. Mr. CORDOVA shared Mr. Kerno's views. The Commission must not be bound solely by the Charter; it must take into account the way in which the Charter had been interpreted by the Tribunal in its judgment.

29. Mr. AMADO also thought that Mr. Kerno's interpretation was correct. The General Assembly had entrusted the Commission with a technical task, but, in order to carry it out, it must work analytically and constructively and not confine itself to mere slavish copying.

30. Mr. SANDSTROM did not think it was necessary for the principles to be stated explicitly in the Charter or the Judgment: it was sufficient that they should be implied by the provisions of those two instruments. That was why the Charter and the Judgment must be taken into account together. Where the Judgment differed from the Charter, it was necessary to discover whether the Tribunal had adopted two different principles or whether it had interpreted some principle of the Charter in a particular sense. The Tribunal had analysed certain of the concepts submitted to it: it was difficult to say whether that analysis had led to different principles.

31. Mr. SPIROPOULOS concurred in principle with Mr. Sandström and Mr. Córdova. It was not necessary for the principles to be stated explicitly in the Charter or the Judgment. He pointed out that in its interpretation of article 8 of its Charter, the Tribunal had reached a completely different conclusion from that adopted by the Commission when the latter had provisionally accepted paragraph 8 of the Sub-Committee's draft. In that connexion, he quoted an extract from the Judgment published by the Government of the United States of America [4] where it was stated, on the one hand, that the provisions of article 8 were in conformity with the law of all nations and, on the other, that the true test, according to the criminal law of most nations, was, not the existence of an order but whether a " moral choice " was possible. In accepting paragraph 8 of the Sub-Committee's draft, the Commission had formulated the general principle, without stating the principle of the moral choice.

32. He thought that the Commission could not bear in mind all the interpretations given by the Tribunal when formulating principles of international law.

33. The CHAIRMAN remarked that the Tribunal seemed to have gone rather far when it stated that the provisions of article 8 were in conformity with the law of all nations and said that the concept of the " moral choice " was admitted, in varying degrees, in the criminal law of most countries.

34. Mr. CORDOVA was convinced that the Commission could not define crimes against peace as proposed by the Sub-Committee; it must define them in exact terms. The Commission must adopt the interpretation which the International Military Tribunal had placed on the definitions proposed by the Charter, i.e., that a person was responsible when he had a moral choice. The question was very important and would probably imply a revision of the text with regard to the principle of responsibility.

35. Sir Benegal RAU observed that the crimes as understood by the Tribunal were rather different from the definition given in the Charter: the Tribunal had decided that to be guilty, a person responsible for the organization or preparation of a war must know that it was a war of aggression. It was that distinction which had led the Tribunal to declare Admiral Doenitz not guilty of the planning, preparation or initiation of a war.

36. The CHAIRMAN thought it was difficult to draw conclusions from the considerations which had enabled the Tribunal to declare Admiral Doenitz not guilty of certain crimes.

37. Sir Benegal RAU made it clear that Admiral

[4] *Ibid.*, p. 53.

Doenitz had, in fact, been found guilty of waging a war of aggression, because, after a certain date, he had been perfectly aware of the true situation.

38. The CHAIRMAN thought it was very difficult to decide in advance whether a war was one of aggression or a war authorized by the right to self-defence.

39. Mr. AMADO drew attention to the Judgment's provisions regarding Bormann: he had not been found guilty of crimes against peace because it had not been proved that he was aware of Hitler's plans.

40. Mr. HSU thought that the text proposed by the Sub-Committee was not enough to constitute the formulation of principles of international law. The Commission should settle the question whether it could modify the terms of article 6 (*a*) of the Nürnberg Charter, so as to explain more precisely the principles it contained.

41. Mr. SPIROPOULOS pointed out that in order to apply the definitions given in the Charter, the Tribunal had been obliged to seek out and establish certain criteria; but in so doing it had not formulated any principles. It would be a mistake to try now to transform those criteria into principles of international law, because they could be modified according to the cases in which they were applied.

42. Mr. YEPES drew attention to the fact it was not always possible to compare the Charter and the Judgment. The scope of the Charter was wider than that of the Judgment. He recalled that resolution 177 (II) of the General Assembly called for the formulation of the principles recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal; it must therefore be decided whether a principle was to be found both in the Charter and the Judgment; if not, it would doubtless not be advisable to formulate it.

43. Mr. KORETSKY thought that Mr. Yepes' interpretation was incorrect; it must be understood that it was a question of principles recognized by the Charter or by the Judgment and not of principles recognized by both instruments. Moreover, it did not seem that the Tribunal had departed greatly from the Charter on which its terms of reference were based: the Tribunal had no doubt adopted certain criteria in applying the principles of the Charter, but it had not enunciated new or different principles.

44. The question whether the military men who had taken part in the waging of the war had had a " moral choice ", or had been obliged strictly to obey the orders of their superiors, was irrelevant. It was impossible to establish general principles for the degree of responsibility of criminals and the mitigating circumstances. In that connexion, it must be remembered that the Commission had already adopted paragraph 8 of the Sub-Committee's draft: [5] the decision taken in that respect could not be reversed. Moreover, he did not think military leaders could be absolved of responsibility, unless the principal culprits were to be acquitted. It was difficult to conceive of military leaders awaiting the orders of politicians in order to plan or prepare for a war. The United Nations was urging general disarmament, precisely because the whole world recognized that armed forces were in themselves a danger to peace. When a war was declared, military leaders were at least as responsible as politicians, if not more so.

45. He recalled that the Nürnberg Charter had been drawn up at a time in history when all mankind appreciated the cruelty of war and it had been realized that military leaders could not be absolved of their responsibilities. Without wishing to prejudice the activities of military leaders at the present time, they must not be relieved of their responsibilities for the future. The anti-war spirit in forming the Nürnberg Charter must be retained. In consequence, he was in favour of maintaining the whole of paragraph 3 of the text proposed by the Sub-Committee.

46. Mr. SANDSTROM shared Mr. Córdova's views, but stressed the difficulty of expressing those views in the text of the definition. The Nürnberg Tribunal had taken into account the special circumstances in each case: it had not judged on the basis of well-defined principles, so that more principles were expressed in a negative than in a positive form in the Judgment.

47. Mr. CORDOVA proposed the addition, at the end of sub-paragraph 3 (*a*) of the Sub-Committee's draft, of the words: " when such acts are committed by persons occupying influential positions." It must be borne in mind that even the prosecution had taken action only against persons who had played an effective part in the adoption of decisions which had resulted in one of the acts constituting crimes against peace.

48. Mr. SANDSTROM pointed out that a person could occupy an influential position without in consequence having any effective influence on his Government's decision to declare war.

49. Mr. KORETSKY thought that the amendment proposed by Mr. Córdova was inconsistent with the provisions of paragraph 8 of the Sub-Committee's draft.

50. The CHAIRMAN saw no inconsistency: a principle could be stated and cases of application of that principle provided for.

51. Mr. AMADO concurred in the remarks of Mr. Koretsky and Mr. Spiropoulos. He pointed out that it would be the tribunal's duty to establish the degree of responsibility of defendants.

52. Sir Benegal RAU thought that the definition

[5] See A/CN.4/SR.26, para. 90.

of crimes against peace should be altered so as to indicate that the element of intention was necessary.

53. Mr. FRANÇOIS remarked that, as far as planning and preparation for war were concerned, it was obvious that persons who participated therein always occupied influential positions.

54. The CHAIRMAN added that the element of intention was understood in the planning, preparation, initiation or waging of war. It might be asked, however, if a lieutenant training his platoon was planning or preparing for a war.

55. Mr. ALFARO pointed out that the case of such a lieutenant would be governed by the principles set forth in paragraph 8 of the Sub-Committee's draft. The degree of participation in the decision to commit one of the crimes against peace must be determined by the court judging that crime. The court should also decide whether or not the war in question constituted a war of aggression or a war in violation of international treaties, assurances or agreements. It must not be forgotten that not war in general, but war of aggression, had been outlawed. It was admitted that war might be waged in self-defence.

56. The Commission should formulate a general definition of crimes against peace, leaving to the courts the task of interpreting that definition in each separate case. As far as he was concerned, he was in favour of sub-paragraph 3 (*a*) as drafted by the Sub-Committee.

57. Mr. SPIROPOULOS agreed with Mr. Alfaro. The courts which might be called upon to judge crimes against peace would choose certain criteria to enable them to apply the definition formulated by the Commission to the cases which were submitted to them. It was a question of defining a certain category of crimes: the Charter of the Nürnberg Tribunal furnished a definition of those crimes; the Commission could not arbitrarily alter that definition.

58. The CHAIRMAN put Mr. Córdova's amendment to the vote.

The amendment was rejected by 9 votes to 2.

59. In reply to a question by the CHAIRMAN, Sir Benegal RAU stated that he had given up the idea of proposing an amendment to the text submitted by the Sub-Commission.

60. The CHAIRMAN consulted the Commission on the question whether it was advisable to define war of aggression according to the formulation of the principles recognized by the Charter and the Judgment of the Nürnberg Tribunal. He pointed out that war of aggression was defined neither in the Charter of the Nürnberg Tribunal nor in the Judgment of that Tribunal.

61. Mr. FRANÇOIS was of the opinion that, since neither the Charter and the Judgment defined war of aggression, it was not for the Commission to formulate such a definition.

62. Mr. KORETSKY shared the opinion of Mr. François. The definition of war of aggression seemed premature to him at the stage the Commission's work had reached.

63. The CHAIRMAN put to the vote the provisional adoption of sub-paragraph 3 (*a*) of the draft submitted by the Sub-Committee.

Sub-paragraph 3 (a) *was provisionally adopted by 10 votes to 1*

Sub-paragraph 3 (b)

64. The CHAIRMAN requested the Commission to take a decision on sub-paragraph 3 (*b*) of the draft proposed by the Sub-Committee. [6] He pointed out that the Secretariat had devoted pages 50 to 55 of the memorandum (A/CN.4/5) to that paragraph.

Sub-paragraph 3 (b) *of the Sub-Committee's draft was provisionally adopted by 10 votes.*

Paragraph 4

65. The CHAIRMAN requested the Commission to take a decision on paragraph 4 of the draft proposed by the Sub-Committee. [7] He recalled that that paragraph was taken from article 6, paragraph (*b*), of the Charter of the Nürnberg Tribunal and that Mr. Koretsky had proposed the addition of the following sentence to the text:

> " In particular such crimes as murder, ill-treatment, deportation to slavery or driving away of civilian populations, murder and ill-treatment of prisoners of war, murder of hostages, plunder of public or private property, destruction of property not justified by military necessity, devastation of towns and villages, etc . . ."

66. Mr. BRIERLY asked Mr. Koretsky if the slight differences between the text which he had proposed and the provisions of article 6, paragraph (*b*) of the Charter were intentional or if they resulted from the translation from Russian.

67. Mr. KORETSKY pointed out that the meaning of his amendment was exactly the same as that of the provisions of article 6, paragraph (*b*), of the Charter. If the text which he had proposed differed somewhat from that of the Charter, it was because he had wished to simplify article 6, paragraph (*b*), and to mention only the most important crimes committed during the last war.

68. The CHAIRMAN recalled that, after quite a long debate, the Commission had decided to retain, for the time being, the right of war as a topic for codification. It seemed necessary, however, to state precisely what was meant by the right of war. As Mr. François had pointed

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[6] See text in A/CN.4/SR.25, footnote 9.

[7] *Ibid.*

out, The Hague Conventions of 1899 and 1907, which governed war, had been superseded. The Judgment of the Nürnberg Tribunal however contained numerous references to those Conventions, to the Naval Treaty of 1930, and to the Protocol of 1936 in regard to submarine warfare. In the cases of Admiral Doenitz and Admiral Raeder, the Tribunal had not judged them guilty of violation of the two above-mentioned instruments, as the latter had not been respected by either side.

69. In 1920 the Committee of Jurists entrusted with the drafting of the Statute of the Permanent Court of International Justice had stressed the need to call an international conference to revise the laws of war. In view of the evolution in modern war technique, such a revision would seem even more necessary now than in 1920.

70. Mr. ALFARO was under the impression that, since war was thenceforth outlawed, or in other words, constituted a crime, the Commission had decided that there could be no question of codifying the law of war and had rejected Mr. François' proposal to that effect. In those circumstances no reference could well be made to the laws of war in defining war crimes. In regard to the customs of war, it should be made clear that those customs were not those of any particular country but of civilized nations. The words " violations of the laws or customs of war " should therefore be replaced by an expression such as " violations of principles, rules and practices which tend to diminish the horrors of war ". In any case the enumeration contained in Article 6 (*b*) of the Charter should be included in paragraph 4 of the Sub-Committee's draft.

71. Mr. SPIROPOULOS thought it unnecessary to enumerate the various war crimes in defining those crimes, seeing that the expression " war crimes " had a very precise meaning in the Charter of the Nürnberg Tribunal. Moreover the deletion of that enumeration would enable the Commission to present to the General Assembly a definition of war crimes which would be something more than a mere copy of Article 6 (*b*) of the Charter.

72. In reply to Mr. Alfaro's remarks, he said that " laws and customs of war " was a technical term accepted by all nations as meaning all rules relating to war. The rules annexed to The Hague Convention of 1907 were entitled " The Laws and Customs of War ". It would seem unwise to use another form of words.

73. Mr. KORETSKY was in favour of enumerating war crimes. The fact that the Commission had decided, for political reasons, not to codify the law of war immediately was not sufficient reason to omit an enumeration of war crimes from the paragraph dealing with those crimes. The Commission had been anxious to avoid any imputation that it was, so to speak, making legal preparations for a new war; but the terrible crimes committed by the fascists during the last world war, by methods until then unknown, should be solemnly condemned and quoted as an example in the definition of war crimes.

74. The fact that war was considered a crime was no good reason for refraining from enumerating the various war crimes when defining them. If it were, an enumeration of crimes against peace and against humanity should also have been omitted from the paragraph of the Sub-Committee's report which concerned those two classes of crimes. Public opinion might rightly ask why the Commission had found it necessary to enumerate crimes against peace and crimes against humanity but not war crimes; it could even accuse the Commission of a certain degree of negligence.

75. Mr. ALFARO feared that the expression " customs of war " was somewhat ambiguous. The laws and customs of war were obviously not those of any one country: they could only be those admitted in international law. He agreed with Mr. Spiropoulos that the expression " laws and customs of war " was a technical term used in a number of international instruments, in particular in the rules annexed to the Hague Convention of 1907. It should therefore be retained, and an explanation of the principal war crimes committed to date should be given after the definition proposed by the Sub-Commission.

76. He had suggested certain amendments to article 6 (*b*) of the Charter of the Nürnberg Tribunal because, on the one hand, war crimes should not be limited to those committed against the civilian population of occupied territories and, on the other hand, because the devastation of towns and villages should not be justified by alleged military requirements; only certain types of destruction could be justified by such requirements. That was why he had deleted, in his amendment, the reservation contained in the last seven words of article 6 (*b*) of the Charter.

77. The CHAIRMAN said that the Secretary of the Commission had reminded him that the Charter of the International Military Tribunal of Tokyo had defined war crimes as follows: " Conventional war crimes, namely violations of the laws or customs of war ". No enumeration followed that definition.

78. Mr. FRANÇOIS thought that war crimes should be enumerated in the definition of those crimes, since at least some examples of violations of the laws and customs of war should be given. He particularly pressed for the inclusion among those examples of the execution of hostages, the prohibition of which had once given rise to a controversy in international law. The Charter of the Nürnberg Tribunal had, for the first time, solemnly proclaimed that the execution of hostages constituted a war crime; it should be repeated

in drafting the principles recognized by the Charter and Judgment of the Nürnberg Tribunal.

79. The Commission's decision with regard to the codification of the law of war in no way prevented it from dealing with war crimes. The Commission should mention the principal war crimes after their definition, and as fully as possible. Article 6 (*b*) of the Nürnberg Charter should therefore be included word for word.

80. Mr. AMADO agreed with that view.

81. Mr. HSU supported Mr. François' proposal. He disagreed with Mr. Alfaro's proposal to replace " laws and customs of war " by another expression, as that might lead to misunderstanding. The Commission could, if it thought necessary, reverse its decision not to codify the law of war. Reality must be faced; merely to outlaw war would not prevent new wars. There should be regulations for defensive wars as much as for wars of aggression.

82. Mr. CORDOVA concurred in Mr. Hsu's remarks and drew attention to the fact that wars of self-defence had not been outlawed; it was necessary, therefore, to regulate them. Without limiting war crimes to those mentioned, the enumeration should include the principal crimes committed in the course of recent wars, with the purpose of bringing such crimes to the attention of future generations so as to prevent their being committed again.

83. Mr. BRIERLY agreed that it was absolutely necessary to retain the enumeration of crimes in article 6 (*b*) of the Nürnberg Charter in the definition of war crimes.

84. The execution of hostages had not been forbidden by the Hague Conventions, since no one at that time had deemed it possible that any nation would commit so barbarous an act. Experience had shown otherwise; specific mention of that crime in the definition of war crimes would, therefore, be of undoubted use. For the sake of uniformity, moreover, it would be well to add the list which appeared in article 6 (*b*) of the Charter to paragraph 4 of the Sub-Committee's draft, as had already been done in the case of paragraphs 3 and 5.

85. Concerning Mr. Koretsky's proposal to delete the words " not justified by military necessity " after " devastation ", and to insert the word " wanton " before " destruction ", Mr. Brierly admitted that the words in question might leave the way open to abuse, but he nevertheless opposed any change in article 6 (*b*) of the Charter. It must be admitted that in certain cases devastation might be necessary in time of war. Mr. Koretsky's fears, however, seemed baseless; it was not for a possible defendant to justify himself by pleading military necessity, but rather for the tribunal to decide whether the necessity had been such as to warrant the devastation in question.

86. Mr. ALFARO was glad to note that the Commission felt that, although war had been outlawed, it was possible to regulate war crimes. His fears on the subject had been dispelled. He therefore withdrew his amendment and declared himself to be in favour of the text of article 6 (*b*) of the Charter.

87. Mr. AMADO also stated that he was in favour of the enumeration of war crimes, as given in article 6 (*b*) of the Charter.

88. Mr. SPIROPOULOS observed that the majority of the Commission wished to enumerate war crimes in defining them. As a matter of fact, the two other members of the Sub-Committee had held the same opinion, and he had been obliged to accede to their view. This enumeration had been left out of the text submitted to the Commission by mistake. He had not made the point clear earlier because he had thought that a general discussion of the point would be valuable.

89. The CHAIRMAN put to the vote the principle of including an enumeration of war crimes in the definition of those crimes.

The principle was adopted by 10 votes.

90. The CHAIRMAN put to the vote Mr. Koretsky's amendment, replacing the words " Such violations shall include, but not be limited to " by the words " in particular ".

The amendment was rejected by 7 votes to 3.

91. The CHAIRMAN put to the vote Mr. Koretsky's amendment, replacing the words " or for any other purpose " by the words " or driving away ", and deleting the words " in occupied territory ".

The amendment was rejected by 8 votes to 2.

92. The CHAIRMAN put to the vote Mr. Koretsky's amendment, deleting the words " or persons on the seas ".

The amendment was not accepted.

93. The CHAIRMAN put to the vote Mr. Koretsky's amendment, replacing the words " wanton destruction of cities, towns, or villages, or devastation not justified by military necessity " by the words " destruction of property not justified by military necessity, devastation of towns and villages, etc. "

The amendment was rejected by 9 votes to 1.

94. The CHAIRMAN put to the vote the text of article 6 (*b*) of the Charter, which, if adopted, would become paragraph 4 of the draft formulation of the principles recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal.

The text was adopted by 10 votes.

The meeting rose at 5 p.m.

28th MEETING

Thursday, 26 May 1949, at 3 p.m.

CONTENTS

Chairman: Mr. Manley O. HUDSON.
Rapporteur: Mr. Gilberto AMADO.

Present:

Members: Mr. Ricardo J. ALFARO, Mr. James L. BRIERLY, Mr. R. CÓRDOVA, Mr. J. P. A. FRANÇOIS, Mr. Shuhsi HSU, Mr. Vladimir M. KORETSKY, Sir Benegal RAU, Mr. A. E. F. SANDSTRÖM, Mr. Georges SCELLE, Mr. Jean SPIROPOULOS, Mr. Jesús María YEPES.

Secretariat: Mr. KERNO, Assistant Secretary-General in charge of the Legal Department; Mr. LIANG, Director of the Division for the Development and Codification of International Law, Secretary to the Commission.

Formulation of the Principles recognized in the Charter of the Nürnberg Tribunal and Judgment of the Tribunal (*continued*)

PARAGRAPH 5 OF THE SUB-COMMITTEE'S DRAFT

1. The CHAIRMAN opened discussion on paragraph 5 of the Sub-Committee's draft.[1] He drew attention to the amendments the Sub-Committee had made to article 6 (*c*) of the Charter of the Tribunal. The word " any " in " any civilian population " had been replaced by the word " the ". The word " persecutions " had been changed from the plural to the singular. The words " where such acts are done or such persecutions are conducted " were not included in the English text of the Charter, whereas they did figure in the French text *(lorsque ces actes ou persécutions sont commis)*. Finally, the last clause of article 6 (*c*) (in the English text) of the Charter had been altered to read: " notwithstanding that the municipal law applicable may not have been violated ".

2. Mr. SPIROPOULOS said that some of those alterations, such as putting the word " persecutions " in the singular, were doubtless due to typing errors and had not been intended by the Sub-Committee.

3. Mr. SANDSTROM explained that the Sub-Committee had thought it necessary to replace the word " any " in " any civilian population " by the word " the ", since it was laying down a general rule. The word " any " had been correct in the Charter because that document had dealt with crimes committed against the populations of various countries.

4. The CHAIRMAN thought that the expression " a population " would be more appropriate.

The amendment proposed by the Chairman was accepted.

The word " persecution " was put back into the plural.

5. The CHAIRMAN asked the members of the Sub-Committee to explain the reasons for the addition of the phrase " where such acts are done or such persecution is conducted " to the English text.

6. Mr. SANDSTROM said that that amendment was intended to clarify the meaning in the same way as the change in punctuation introduced by the Berlin Protocol of 1945: it was to show that the last part of the paragraph referred to the paragraph as a whole and not only to the word " persecutions ".

The addition proposed by the Sub-Committee was retained.

7. The CHAIRMAN asked the Commission's opinion on the retention of the words " against peace or any war crime ".

8. Mr. SANDSTROM said that, under article 6 (*c*) of the Nürnberg Charter, " acts committed. . . in connexion with any crime within the jurisdiction of the Tribunal ", namely crimes against peace, war crimes or crimes committed in connexion with war, were crimes against humanity. The Sub-Committee had retained that idea but had expressed it in a more general way.

9. Replying to the Chairman, he explained that the massacre of a civilian population had, in principle, been considered as a crime against humanity only if it had been committed in an occupied territory, since it had then been a crime committed in connexion with war. The same crime committed in Germany had not been considered as a crime against humanity, as defined in the Charter.

The Commission decided to retain the words " against peace or any war crime ".

10. The CHAIRMAN pointed out that the substance of the phrase " notwithstanding that the municipal law applicable may not have been violated " was contained in paragraph 6 of the

[1] See text in A/CN.4/SR.25, footnote 9.

Sub-Committee's draft. He therefore proposed the deletion of that phrase.

The Commission decided to delete those words from paragraph 5.

11. The CHAIRMAN opened discussion on the words " before or during a war ". In that connexion, he said that the word " la " in the French text should be replaced by the word " une ", because it was no longer a question of the Second World War but of possible future wars. He wondered how the phrase would be interpreted in the case of a crime of preparing war, if that war never actually broke out.

12. Mr. AMADO thought that that would be a question of proof and that it would be for the judge to decide in each individual case whether a particular crime had been committed before a war.

13. Mr. BRIERLY said that those words had only been included in the Nürnberg Charter because that document had been concerned with a particular war. They would not serve any useful purpose in a formulation of a general nature, since their restrictive effect had already been achieved by the phrase " in connexion with any crime against peace or any war crime ".

14. The CHAIRMAN added that that expression was all the more necessary in that the Tribunal had refused to punish crimes against humanity committed *before* the war.

15. Mr. SANDSTROM explained that the Tribunal had refused to punish crimes against humanity committed before the war if they had not been committed in connexion with crimes against peace or war crimes. The Tribunal had thus stressed the idea of connexion and not the idea of time.

16. Mr. KORETSKY did not agree that the words " before or during the war ", which appeared in the Nürnberg Charter itself, should be omitted. He recalled that the Convention on Genocide provided for the punishment of crimes committed both in time of peace and in time of war. The Commission could therefore not exclude the idea of crimes against humanity committed *before* a war, the more so in view of the fact that certain neo-fascist circles, which were preparing for another war, would be tempted to repeat the crimes committed by the fascist Powers.

17. If the words were omitted it would imply that the Commission condoned crimes against humanity which were committed before a war; such crimes were nevertheless crimes against peace and security.

18. Mr. SANDSTROM remarked that the omission of the words would not affect the scope of the paragraph in any way; it would in any event apply to all crimes, at whatever stage they might have been committed.

19. Mr. AMADO endorsed the view expressed by Mr. Koretsky. He pointed out that there was a definite example of the application of that provision of the Charter in the case of Streicher (A/CN.4/5, p. 69). From the judgment given on his case it was clear that the Tribunal had taken into account his persecution of the Jews before the war. Mr. Amado pointed out, further, that the crime of conspiracy to wage war could be committed only before a war.

20. Mr. ALFARO wondered, in the first place, exactly what was meant by the word " war ". Did it mean a state of open hostility, or a state of war in the technical sense, namely, without hostilities necessarily breaking out? In his view, moreover, it was not only crimes committed before and during a war that should be punished, but also those committed *after* a war. The latter category of crimes should therefore be covered in the formula.

21. The CHAIRMAN said that it would be difficult to take up the idea of crimes against humanity committed after a war, since the Nürnberg Charter dealt only with crimes against humanity committed in connexion with crimes against peace or war-crimes.

22. Mr. KORETSKY did not agree with Mr. Sandström that the deletion of the words in question would not affect the scope of the paragraph. Had the phrase not appeared in the Charter, it might perhaps have been possible to omit it. Since, however, it was there, its deletion would imply that the Commission intended to amend the text of article 6 (*c*) of the Charter in a limitative sense. With regard to Mr. Alfaro's suggestion, he thought that the question of crimes against humanity committed after a war might be dealt with in a separate study.

23. Mr. CORDOVA stated that, unfortunate though it might be, the Commission was bound by the limited terms of reference granted by the General Assembly. It was therefore required to follow carefully the provisions of the Nürnberg Charter and to maintain the words " before or during the war."

24. The last paragraph on page 68 of the Secretariat memorandum (A/CN.4/5) contained the following statement: " The acts may have been committed . . . 'before or during the war' but, obviously, their connexion with crimes against peace or with war crimes will be more difficult to prove if the acts have taken place before the war." Crimes committed before a war should be punished, the only limiting factor being the necessity to establish the connexion, which was, of course, more difficult to prove in the case of crimes committed before a war.

25. Although the Commission's terms of reference did not allow it to consider the question of crimes committed after a war, it would be well to draw the attention of the General Assembly to that point in the report.

26. Mr. SCELLE averred that General Assembly resolution 177 (II) could not be interpreted in such a restrictive sense. The Commission was not called upon to analyse the Charter and the Judgment of the Nürnberg Tribunal, but to establish the principles of international law upon which those documents were based. A crime under international law was always a crime, at whatever time it had been committed, before, during or after a war. The competence of the Nürnberg Tribunal had doubtless been limited by the Charter to crimes against humanity committed in connexion with the war, but the Commission was required to define the principles of international law of a permanent character upon which the Charter and Judgment were based. How, then, could it be maintained that the nature of a criminal act could change according to whether it were committed before, during or after a war?

27. He repeated that it was for the Commission to state the relevant general principles of international law, without adhering too closely to the letter of the Charter and the Judgment.

28. The CHAIRMAN said that, in those conditions, a murder, in whatever circumstances it was committed, would be a crime under international law.

29. Mr. SCELLE replied that all crimes were not necessarily crimes under international law but that a crime under international law, such as genocide, was always a crime under international law, regardless of when it was committed and independent of any question of war.

30. Mr. BRIERLY thought that if the words " before or during a war " were maintained, the field of application of paragraph 5 would be limited. It was a fact that crimes against humanity could be committed during the preparation for a war which might never break out.

31. Mr. SANDSTROM wondered whether crimes known as crimes against humanity which were committed, not in occupied territory—for then they would be confused with war crimes—but on the territory of the State which committed them, could be considered as crimes under international law.

32. He drew attention to certain passages on pages 48, 82, 83 and 84 of the Judgment, [2] in which there was no evidence that the Tribunal had considered crimes against humanity as crimes under positive international law at the time of the Charter and Judgment; it had considered them as such only by reason of their connexion with crimes against peace or war crimes, which were crimes under international law by virtue of earlier Conventions. He reminded the Commission that that opinion was shared by Mr. Donnedieu de Vabres and by Sir Hartley Shawcross.

33. The reason, therefore, why the Charter considered those crimes as crimes under international law was, first, because they had been committed in occupied territory and secondly, because of their connexion with crimes that came within the Tribunal's competence. The Charter had been intended to enable the Tribunal to pass sentence on all the aspects of a single criminal act in one and the same verdict.

34. He therefore considered that it was very doubtful whether crimes against humanity as such could properly be considered as crimes under positive international law at the time of the Charter and Judgment of the Nürnberg Tribunal. There had, of course, been a certain development in international law since that time, by reason of the Convention on Genocide.

35. Mr. SPIROPOULOS also considered it a difficult question to decide. The Tribunal had stated that:

> " To constitute crimes against humanity, the acts relied on before the outbreak of war must have been in execution of, or in connexion with, any crime within the jurisdiction of the Tribunal. The Tribunal is of the opinion that revolting and horrible as many of these crimes were, it has not been satisfactorily proved that they were done in execution of, or in connexion with, any such crime. The Tribunal therefore cannot make a general declaration that the acts before 1939 were crimes against humanity within the meaning of the Charter." (page 84 of the Judgment and page 67 of document A/CN.4/5.

36. It followed that, with the exception of crimes against persons deported to Germany, the Tribunal had considered only crimes against humanity committed in occupied territory and that by reason of their obvious connexion with war crimes. For them, to constitute crimes against humanity however, it had had to be proved that the crimes committed in Germany itself had been committed in connexion with the war.

37. Mr. SANDSTROM emphasized that the important point arising from page 84 of the Judgment was that the Tribunal had not considered crimes against humanity as crimes under international law at the time the Nürnberg Charter was drawn up.

38. Mr. AMADO drew attention to a passage in Mr. Donnedieu de Vabres' memorandum, submitted to the Committee on the Progressive Development of International Law and its Codification (A/AC.10/29, pp. 5 and 6), in which Mr. Donnedieu de Vabres stated his opinion that a codification committee should not be bound by the restrictive interpretation placed on the Nürnberg Charter by the Tribunal.

[2] " Nazi Conspiracy and Aggression—Opinion and Judgment. " Office of United States Chief of Counsel for Prosecution of Axis Criminality—United States Government Printing Office, Washington.

39. That passage reads as follows:

" The assiduity which the International Military Tribunal appears to have displayed in order to restrict, if it did not exclude, the indictment of crimes against humanity, is explained by the fact that this was a completely new indictment and that some at any rate of the members of the Tribunal considered themselves bound by the principle of the legality of crimes and penalties. It is evident that the legislator and consequently also the Codification Committee would not have doubts of this kind. The idea of punishing the Governments of peoples who violate the natural law goes back to Grotius and Vattel. Action 'on behalf of humanity' has long been a commonplace of international practice. It is in line with modern evolution, characterized by the United Nations, that instead of the political character which it has borne up to the present, this action should now assume a judicial and punitive character. There should therefore be no question of excluding indictments for crimes against humanity."

40. He also quoted the following passage from the same memorandum (p. 4):

" Having enumerated the acts which constitute a crime against humanity, the Charter (article 6 (*c*)) adds the following:
'. . . in execution of or in connexion with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.'

" Thus crimes against humanity are not directly within the competence of the International Military Tribunal. They are only submitted to it by virtue of being connected with other acts: crimes against peace or war crimes."

41. Mr. SCELLE pointed out that the Tribunal had never stated that crimes against humanity were not crimes under international law. It had simply said that it was not " competent " to pass judgment on such crimes if they had not been committed in connexion with the war.

42. Mr. SPIROPOULOS said that crimes against humanity could not even yet be considered as crimes under international law, since the Convention on Genocide had not been ratified. Hence, when the Nürnberg Judgment was formulated there had been no principle or provision qualifying those crimes as crimes under international law. For that reason the Charter and the Judgment should be interpreted in a very restrictive way.

43. Sir Benegal RAU pointed out that the discussion seemed to be straying from the point. The Commission had to give its opinion on the retention of the words " before or during a war ", but the discussion seemed to be turning on the retention of the phrase: " where such acts are done or such persecution is conducted in execution of or in connexion with any crime against peace or any war crime ". If that phrase were retained there would be no need to retain the words " before or during a war ".

44. The CHAIRMAN stated that Mr. Sandström and Mr. Spiropoulos appeared to be advocating nothing less than the deletion of paragraph 5.

45. Mr. SCELLE wished to state in all solemnity that if the Commission deleted that paragraph it would constitute a backward step in international law rather than progress. It would then become necessary to abandon the time-honoured theory of intervention on behalf of humanity, in the name of which the United States had intervened in the Kichinev affair in Romania. He would never accept such a renunciation of the doctrine of intervention on behalf of humanity which had for so long formed an integral part of international law.

46. Mr. CORDOVA recalled that he had never been in favour of the restrictive interpretation of the Commission's terms of reference. Since such an interpretation had been adopted, however, the Commission must confine itself to the formulation of only those principles which had been laid down in the Nürnberg Charter and Judgment and must not go beyond them. Consequently, although everyone agreed in principle that crimes against humanity were always crimes under international law, that could not be stated in the present formulation. He considered it regrettable, however, that the General Assembly had seen fit to restrict the Commission's terms of reference in that way.

47. Mr. ALFARO stated that he would vote for the deletion of the words " before or during a war ", since that deletion would extend the scope of paragraph 5.

48. The CHAIRMAN put to the vote the deletion of the words " before or during a war ".

The Commission decided by 6 votes to 2, to delete those words.

49. The CHAIRMAN suggested that the word " inhuman " in the English text should be replaced by the word " inhumane ".

It was so decided.

50. The CHAIRMAN put to the vote the text of paragraph 5 as follows:

" The following acts constitute crimes against humanity, namely: murder, extermination, enslavement, deportation and other inhumane acts done against the civilian population, or persecution on political, racial or religious grounds, where such acts are done or such persecution is conducted in execution of or in connexion with any crime against peace or any war crime."

The above text of paragraph 5 was provisionally retained, by 9 votes to 1.

Paragraph 1 of the draft proposed by the Sub-Committee

51. The CHAIRMAN opened the discussion on paragraph 1 of the draft proposed by the Sub-Committee, pointing out that its contents had been drawn from the section of the Judgment relating to aggressive war (A/CN.4/5, p. 47). [3] In his opinion the statement that any violation of international law could constitute an international crime, even if no legal instrument characterized it as such, might be dangerous, as it was of too broad a scope.

52. Mr. SANDSTROM pointed out that the paragraph had been intended to serve as an introduction to the principles formulated subsequently in the draft. In view of the new arrangement of the paragraphs envisaged by the Commission, it was no longer necessary.

53. After a consultation with the members of the Sub-Committee, the CHAIRMAN announced that the latter would withdraw paragraph 1.

Paragraph 1 was therefore deleted.

Criminal Organizations

54. The CHAIRMAN noted that the Sub-Committee's draft contained no reference to the declaration made by the Nürnberg Tribunal of the criminal character of certain groups or organizations, in pursuance of articles 9, 10 and 11 of the Nürnberg Charter.

55. Mr. SPIROPOULOS explained that the Sub-Committee had studied the question after Mr. Alfaro had presented a draft formulation of approximately 16 paragraphs, which had contained, among other things, proposals regarding membership of criminal organizations, the prescribing of a maximum penalty and rights of defence. The Sub-Committee had had very little time in which to study the draft and had been unable to find in it anything which appeared at first glance to be in accordance with its concept of the principles of international law.

56. After having studied the Tribunal's interpretation of articles 9, 10 and 11 of the Nürnberg Charter, the Sub-Committee had not felt that their provisions contained a true principle. The proclamation of the criminal character of certain German groups or organizations had had no consequences of a penal nature: it had exerted no influence save on the application of that test to certain members of those groups or organizations in subsequent trials. In no instance had the accused been condemned solely because of his membership in a group or organization which had been declared criminal. In short, the only concept to retain from those articles would be that of complicity.

57. The CHAIRMAN pointed out that after the declaration of the criminal character of certain groups or organizations, some of their members had been brought before other courts: there would thus be some basis for maintaining that those declarations had produced results of a penal nature.

58. Mr. SANDSTROM stressed the fact that the articles in question had been interpreted in a very restrictive manner in the Judgment. No organization had been declared criminal as a whole; it was only groups within those organizations, composed of persons who had taken an important part in their activities who had been aware of their criminal objectives, that had been declared criminal. Hence the Sub-Committee had not thought that a principle could be derived from those provisions of the Charter. The most that could be deduced was a broader concept of complicity than that which was admitted by national codes of law.

59. Mr. ALFARO did not think that the question of criminal organizations could be omitted from a statement of principles. Articles 9, 10 and 11 of the Nürnberg Charter stated that groups or organizations could be declared criminal, that membership in those groups or organizations could be cause for prosecution and that the penalty imposed under that count was different from that incurred for crimes committed directly by a member of the organization. In addition to the crimes referred to in article 6, the Charter had therefore defined a special crime, namely participation in criminal organizations. That crime should therefore be included in the list retained by the Commission.

60. Mr. BRIERLY did not think that a principle of international law could be derived from those articles of the Charter which particularly concerned the case of Nazi Germany and groups such as the S.S. and the S.A. For that reason he could not support Mr. Alfaro's suggestion.

61. The CHAIRMAN requested the Commission to decide whether it wished provisionally to retain the principle that membership in a criminal group or organization would in itself constitute a crime.

Mr. Alfaro's proposal was rejected by 6 votes to 2.

Complicity

62. Mr. SANDSTROM thought that the idea of complicity which had been eliminated from paragraph 6 of the Sub-Committee's draft should be

[3] See text in A/CN.4/SR.25, footnote 9.

reintroduced in some form in the text of the principles retained by the Commission. [4]

63. Mr. BRIERLY was also of the opinion that that idea should be restored in the formulation, since it appeared in the Nürnberg Charter.

64. The CHAIRMAN thought that the matter could be considered by the new Sub-Committee which would be responsible for the final drafting of the texts provisionally retained by the Commission.

It was so decided.

Conspiracy

65. Mr. BRIERLY asked if the Sub-Committee had intentionally omitted any separate reference in its draft to the conspiracy referred to at the end of article 6 of the Nürnberg Charter.

66. Mr. SANDSTROM replied that the Tribunal itself had considered that the idea of conspiracy could be applied only to crimes against peace. The Sub-Committee had accordingly referred to it only in sub-paragraph (*b*) of paragraph 3 of its draft.

67. Mr. BRIERLY proposed that that sub-paragraph should be separated and that the principle it embodied should be expressed separately, so that it would not apply exclusively to crimes against peace.

68. The CHAIRMAN proposed that the redrafting of that principle should be left to the sub-committee which was to be set up.

It was so decided.

Establishment of maximum sentence

69. Mr. ALFARO drew the attention of the Commission to article 27 of the Nürnberg Charter, which referred to the sentences which could be imposed on criminals. No equivalent of that article was to be found in the text retained by the Commission, yet that article reaffirmed the principle *nullum crimen, nulla poena sine lege.* The Commission should consider, therefore, whether it was not advisable to establish at least the maximum sentence for criminals in the formulation of the principles.

70. Mr. SANDSTROM pointed out that paragraph 2 of the text provisionally retained by the Commission covered the principle *nullum crimen sine lege.* It was only the sentences that the Commission had not envisaged.

71. The CHAIRMAN found it difficult to recognize that article 27 of the Charter contained a principle of international law. That undoubtedly explained why no proposal had been made in that connexion.

Right of self defence

72. Mr. ALFARO considered that the right of self defence although connected with procedure, constituted a principle of international law which moreover had already been affirmed by the Universal Declaration of Human Rights. The right of self defence was covered by article 16 of the Nürnberg Charter, which had been applied during the Nürnberg trial. The Commission should therefore consider whether that article should be included in the formulation of the Nürnberg principles.

73. The CHAIRMAN did not see what principles could be drawn from article 16 of the Charter.

74 Mr. SANDSTROM recalled that the Sub-Committee had considered that there was no need to formulate the rules of procedure contained in the Charter.

75. Mr. SCELLE considered that the right of self defence was certainly a principle of international law which had been recognized in the Charter and the Judgment and which at the same time constituted one of the general principles of law recognized by civilized nations, referred to in paragraph 1 (*c*) of article 38 of the Statute of the International Court of Justice. He therefore proposed that the following statement should be inserted in the Nürnberg principles: " Any accused person has the right of self defence ".

76. Mr. ALFARO proposed the following text: " Any person accused of one of the crimes defined above has the right to conduct his own defence or to have the assistance of counsel. He may present any evidence and may ask direct questions of all witnesses called by the prosecution ".

77. Mr. YEPES thought there was no need to indicate how the accused could defend himself. He preferred the more general text of Mr. Scelle.

78. Mr. KORETSKY pointed out that the Commission was once again faced with suggestions which would broaden the scope of the well defined task assigned to it. The essential purpose of the Nürnberg Charter and Judgment had been to ensure the punishment and the prevention of atrocious crimes which had shocked the conscience of mankind. All the principles of Nürnberg were therefore linked to that idea of responsibility and suppression. It was not logical, therefore that concern for the protection of the accused should appear in the formulation of those principles. That was an entirely different question involving human rights; if the right of self defence was not adequately guaranteed in the Universal Declaration, it was still possible to ensure its protection in the draft international covenant which was being drawn up. In any case, that question had no immediate connexion with the definition of international crimes. The Charter dealt with the matter only in connexion with the procedure to be followed by the Tribunal. While, therefore,

[4] See A/CN.4/SR.26, para. 24.

he in no way objected to the principle of the protection of the right of self defence, he considered that that right could not be included in the list of principles of Nürnberg.

79. Mr. SPIROPOULOS pointed out that the guarantee of the right of self defence before an international penal tribunal could not have existed as a principle before the establishment of the Nürnberg Charter, since the Nürnberg Tribunal had been the first international jurisdiction of that kind. It could not therefore be said that the principle had been recognized in the Charter or the Judgment.

80. With reference to the argument which Mr. Scelle had drawn from article 38 of the Statute of the International Court of Justice, it should be pointed out that the general principles of law mentioned in that article were principles of municipal law. The meaning of that paragraph was that the Court should, when necessary, apply the general principles of municipal law in the settlement of international disputes. It could not therefore be held that there was a principle of international law in that matter, which, moreover, came under penal procedure.

81. Mr. SCELLE objected that article 38 in no way stipulated that it applied only to principles of municipal law: that adjective did not appear in the text. It could therefore be held that the Statute of the Court referred in that paragraph to the principles of international law as well as to the principles of municipal law. That was perfectly logical, since any principle of international law had its origin in custom, which was actually a repetition by States of acts covered by their municipal law. Before becoming a principle of international law, therefore, any principle was first a general principle of municipal law and at both stages of its development it could be applied by the Court in international matters.

82. With regard to the inclusion of the right of self defence among the rules of procedure, Mr. Scelle could not accept that position at all. In that connexion he recalled that the reason the Dreyfus affair had shocked France to such an extent was that one of the documents presented by the prosecution had not been communicated to the accused. The French people had not been wrong on that point: it had considered that something more than a procedural irregularity was involved; it had seen in that fact a violation of a fundamental principle of justice.

83. Mr. CORDOVA thought that any discussion on the nature of the right of self defence was only of a purely academic interest. Since the right of the defendant to defend himself was written in the Nürnberg Charter, the Commission could also include it among the principles which it was formulating. In that case, it might be asked what could be thought of the provisions of the Nürnberg Charter which restricted the right of self defence, in particular article 3, which ruled out any possibility of objecting to the judges. Was it not necessary to consider them as a limitation by the Charter of a principle of international law which that Charter its lf recognized?

84. Mr. BRIERLY was of the opinion that Mr. Alfaro's proposal was altogether too detailed and contained rules which were not included in the general conception of the right of self defence: cross-examination of witnesses for the prosecution by the defence, for example, took place only in countries of Anglo-Saxon law. It was therefore preferable to adopt a more general formula which would simply ensure that defendants were to have a just trial.

85. Mr. FRANÇOIS shared the opinion of Mr. Brierly and explained that the right of the defendant to question witnesses for the prosecution directly was unknown in the legislation of the Netherlands, for example.

86. Mr. YEPES would vote in favour of the two proposals, because he wanted one or the other of them to be retained; his preference, however, was for Mr. Scelle's text.

87. The CHAIRMAN put the two proposals to the vote.

Mr. Alfaro's proposal was rejected by 4 votes to 1.

The Commission decided, by 6 votes to 2, to retain provisionally the following text proposed by Mr. Scelle: " Every defendant shall have the right to defend himself."

Draft formulation submitted by Mr. Scelle

88. Mr. SCELLE asked the Chairman to submit to the Commission an alternative draft of the formulation of the Nürnberg principles, of which he was the author, and which reads as follows:

" The principles of international law recognized in the Charter of the Nürnberg Tribunal and in the judgment of the Tribunal are as follows:

" 1. The individual is subject to international law, including international penal law.

" 2. The office of head of State, ruler or civil servant, does not confer any immunity in penal matters nor mitigate responsibility.

" 3. This subjective criminal responsibility of heads of States, rulers and agents is distinct from the objective responsibility of the State, which may become a subsidiary issue.

" 4. International law, including international penal law, has precedence over municipal law. It follows that rulers and agents of State are directly responsible for their international crimes and offences whether or not these are offences under the domestic penal law of their

countries. Consequently, any person who commits a crime against international law, either of commission or of omission, is responsible therefor and liable to punishment.

" 5. Superior orders do not constitute a complete defence, but only a mitigating circumstance when justice so requires.

" 6. A court of international jurisdiction appears particularly suitable to try international crimes and offences, especially those committed by heads of State, rulers or high civil servants.

" 7. In the present state of international law such a court is not necessarily bound by the principle that offences and penalties are not retroactive; this presupposes the preparation and drafting of an international penal code.

" 8. In conformity with the Nürnberg Charter and Judgment the following are already now international crimes:

" Crimes against peace;

" War crimes;

" Crimes against humanity.

" 9. Crimes against peace are: ".

89. In his opinion, the work accomplished so far comprised nothing but an analysis of the Nürnberg Charter and Judgment and, in addition, of the principal international crimes. The Commission had not yet defined any of the fundamental principles of international law which had existed at the time of the drafting of the Nürnberg Charter and Judgment, and which had been recognized by the Charter and applied by the Tribunal. The terms of reference of the Commission were precisely that.

90. The first of those fundamental principles, invoked by the Public Prosecutor and recognized in the Judgment, stated that the individual was subject to international law, including international penal law. It was in accordance with that principle that individuals could be punished: it should therefore appear at the head of the list.

91. The next step was to establish the fact that the old theory according to which any act performed on behalf of the State exempted rulers or officials from individual responsibility has been discarded. It was recognized that the office of head of the State, ruler or civil servant did not confer any immunity in penal matters nor mitigate responsibility. The Commission had admittedly drawn certain deductions from that principle, but it had not expressed it as did his draft.

92. Apart from that subjective responsibility of rulers, there was an objective responsibility of the State, which might become a subsidiary issue. It would certainly be necessary to specify later the nature of that responsibility, but whether it was penal, civil or pecuniary, its existence could not be denied. It therefore constituted a principle of international law which was contradicted by neither the Charter nor the Judgment of the Nürnberg Tribunal, which had not had to deal with it.

93. The fourth principle was that of the precedence of international law over municipal law. It was an obvious principle that the Commission had expressed in the draft Declaration on the Rights and Duties of States and which was the basis of the Charter and Judgment of the Nürnberg Tribunal. From that principle the Commission had drawn the conclusion that the individual was responsible for his crimes under international law, whether those crimes were or were not punishable under municipal law; it had not, however, formulated the principle itself.

94. The Commission had formulated none of the essential principles which were the subject of the first four paragraphs of his draft; it had merely drawn conclusions from some of them. It was imperative that those principles should be defined, the more so since the Commission was to be asked to prepare a code of crimes against international peace and security, of which those principles should constitute the preamble.

95. If the Commission intended to limit itself to the mere task of analysis which it had so far performed, Mr. Scelle could not take part in work which in no way answered the true purpose which the Commission was to fulfil. He had therefore presented his draft formulation, which could be put into final form by the sub-committee whose duty it would be to prepare the final draft.

96. The CHAIRMAN thought that, in view of the importance of the question raised by Mr. Scelle, the Commission should express its opinion of the new draft before referring it to a sub-committee.

97. Mr. FRANÇOIS disagreed entirely with Mr. Scelle's views on the scope of the Commission's terms of reference: its task consisted only in formulating the principles contained in the Nürnberg Charter and Judgment. It was indeed regrettable that the task was so restricted and the Commission might indicate, when it submitted to the General Assembly the result of the work which had been assigned to it, that the principles thus formulated did not represent its own conception of the principles of existing international law; it was, however, the prerogative of the General Assembly to request, if it deemed fit, that the Commission should not formulate the Nürnberg principles once again, but those of positive international law, as the Commission understood them.

98. Mr. YEPES thought that Mr. Scelle's draft, a great part of which he approved, deserved a very thorough study in the Commission, which should certainly not confine itself merely to transcribing the Nürnberg texts.

99. Mr. SPIROPOULOS noted that the various paragraphs of Mr. Scelle's draft set forth or less

the same principles as the Sub-Committee's draft, but in a different form. The first principle was only of theoretical interest. It could be implicitly admitted, without being formulated: that had been the procedure at the time of the codification of the laws of war. The second principle was none other than that contained in paragraph 7 of the Sub-Committee's draft, which had the advantage of reproducing very closely the terms of the Charter of the Nürnberg Tribunal. A great part of the idea contained in paragraph 3 of the alternative draft was also contained in the Sub-Committee's draft. The first part of paragraph 4 was a sort of axiom, which there was no need to formulate. The remainder of the paragraph found its counterpart in the Sub-Committee's draft. Paragraph 5, which dealt with the influence of superior orders on responsibility, corresponded to paragraph 8 of the Sub-Committee's draft, which reproduced article 9 of the Nürnberg Charter almost word for word. As for paragraphs 6 and 7, which dealt with international jurisdiction, the ideas which they contained were not recognized in either the Nürnberg Charter or Judgment.

100. On the whole, therefore, Mr. Scelle's draft differed very little from the Sub-Committee's draft, except that it deviated from the terminology adopted by the Nürnberg Charter to which the Sub-Committee had wished to remain faithful. As, however, the new draft presented the formulation of the Nürnberg principles in a new guise, a discussion of it could not fail to be useful for the planning of the Commission's work.

101. Mr. FRANÇOIS urged the Commission to determine first of all the nature and limits of the task which had been entrusted to it by the General Assembly. In his opinion, that task could consist only in the formulation of the principles which were contained in the Charter and Judgment. It was for that reason that he had voted in favour of paragraphs of the draft which he himself had not favoured, simply and solely because the rules which they set forth appeared also in the Charter and Judgment.

102. Mr. KORETSKY, while not finding Mr. Scelle's draft at all satisfactory, thought that the Commission should study it carefully.

The meeting rose at 5.50 p.m.

29th MEETING

Friday, 27 May 1949, at 10.30 a.m.

CONTENTS

Chairman: Mr. Manley O. HUDSON.

Rapporteur: Mr. Gilberto AMADO.

Present:

Members: Mr. James L. BRIERLY, Mr. Roberto CÓRDOVA, Mr. J. P. A. FRANÇOIS, Mr. Shuhsi HSU, Mr. Vladimir M. KORETSKY, Sir Benegal RAU, Mr. A. E. F. SANDSTRÖM, Professor Georges SCELLE, Mr. Jean SPIROPOULOS, Mr. Jesús María YEPES.

Secretariat: Mr. KERNO, Assistant Secretary-General in charge of the Legal Department; Mr. LIANG, Director of the Division for the development and codification of international law, Secretary to the Commission.

Draft Declaration on the Rights and Duties of States (*resumed*)

CONCORDANCE OF TEXTS IN THE THREE WORKING LANGUAGES

1. The CHAIRMAN said that the Commission had to adopt the French and Spanish texts of the draft declaration which should correspond with the English text already adopted. [1]

1. FRENCH TEXT

2. Mr. FRANÇOIS pointed out that the heading of the French text *(Projet de déclaration sur les droits et devoirs des États)* was not identical to that of the English text; it seemed to indicate that the draft declaration related to all the rights and duties of States which was not the case.

3. Professor SCELLE thought it would be difficult to modify the French text; furthermore, he thought the expression *sur les droits et devoirs* meant that all the rights and duties had not been envisaged.

4. Mr. YEPES wondered if, in the second paragraph of the preamble, the word *efficace* in French had the same meaning as the word "effective" in the English text. In the third clause, the French text used the expression *sous l'égide de la charte* whereas the English text said "under the Charter". In his opinion, the French term did not correspond to reality as the new international

[1] At the 25th meeting. See A/CN.4/SR.25, para. 22.

order had been created by the Charter and not simply under its aegis.

5. Mr. AMADO pointed out that in the third paragraph, the last part of the sentence in the French text was not identical with the corresponding part in the English text. The expression *leur désir d'y conformer leur activité* did not seem to be an exact translation of " their desire to live within this order ". Mr. Amado thought that it would be preferable to adopt an expression such as *le désir de conformer leur existence à cet ordre.*

6. Mr. FRANÇOIS wondered whether, in article 1, the term *pression* was equivalent to the English expression " dictation ".

7. The CHAIRMAN pointed out that that question had been discussed at length and the conclusion had been reached that the two words had practically the same meaning.

8. Mr. BRIERLY thought that in article 4 the expression *guerre civile* did not correspond exactly to the term " civil strife ".

9. Mr. YEPES felt that the Commission might use the same term as that employed in the Havana Convention of 1928, namely, " civil strife " and *lutte civile.*

10. The CHAIRMAN asked Professor Scelle to take the remarks of the Commission's members into consideration in order to modify the French text of the draft declaration where necessary.

2. *Spanish text*

11. Mr. CORDOVA proposed that the term *guerras civiles* in article 4 should be replaced by *luchas civiles* which corresponded better to the French expression *lutte civile* and the English term " civil strife ".

It was thus decided.

Formulation of the Principles recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal (*concluded*)

DRAFT SUBMITTED BY PROFESSOR SCELLE (continued)

12. The CHAIRMAN reopened the discussion on Professor Scelle's proposal (A/CN.4/SR.28, para. 88). He thought the Commission should first of all decide whether that proposal should be examined in detail, that is, paragraph by paragraph.

13. Mr. SANDSTROM shared in the opinion expressed by Mr. Spiropoulos at the previous meeting that nearly all the opinions put forward by Professor Scelle could be found in another form in the text which had been provisionally adopted by the Commission. The essential difference between the two texts was one of wording; Professor Scelle was proposing that the draft should be more academic and couched in abstract terms, whereas the Commission, following the example of the Sub-Commission, had adopted a more concrete and realistic draft.

14. Should it be necessary to choose between the two texts, Mr. Sandström would vote for the text which had been provisionally adopted by the Commission, but he wondered whether such a choice was necessary. Everything depended on how the Commission wished to submit the formulation in question to the General Assembly: it could either merely draw up a list of principles or else also attach comments to that list indicating the source of the principles stated. Should the Commission adopt the second alternative, it would no doubt find it useful to take over some elements from Professor Scelle's proposal; for instance, paragraph 7 explained why some of the principles adopted in the Charter of the Nürnberg Tribunal were not altogether satisfactory from the point of view of international law: that conclusion should be set forth when the Commission formulated the principles and not when it prepared the draft code mentioned in item 3 (*b*) of the Agenda.

15. The Commission need not, therefore, examine Professor Scelle's proposal paragraph by paragraph; it could merely incorporate certain elements of that proposal which would usefully complete the draft adopted by the Commission.

16. Mr. HSU agreed with Mr. Sandström that the essential difference between the text provisionally adopted by the Commission and Professor Scelle's proposal lay in the manner of approaching the problem. If the Commission felt that Professor Scelle's academic approach was preferable to the practical approach of the Sub-Commission, his proposal should be examined paragraph by paragraph. Mr. Hsu, for his part, thought that the Commission should examine Professor Scelle's proposal in detail.

17. Mr. SPIROPOULOS inferred from Mr. Sandström's statement that Professor Scelle's proposal could serve as a basis for the report which the Commission would submit to the General Assembly in connexion with the formulation of the Nürnberg principles. The ideas contained in Professor Scelle's text would constitute an excellent introduction to the Commission's report.

18. Mr. SANDSTROM made it clear that if the Commission decided against submitting a mere list of principles, it could adopt certain ideas from Mr. Scelle's proposal and use them in its final formulation of principles.

19. The CHAIRMAN reminded members that the Commission would not be able to complete the discussion on item 3 (*a*) and (*b*) of its agenda during the first session; that item would have to be included again in the agenda of the second session, the more so as an inter-governmental conference was now being held at Geneva to revise the Geneva Convention: it would be in the inter-

est of the Commission to acquaint itself with the report of that conference before drafting the final formulation of the principles of Nürnberg. Consequently it would be enough for the time being to decide what drafts the Commission wished to examine at its second session. The text drawn up on the basis of the Sub-Commission's draft had been adopted only provisionally; the Commission should decide therefore whether it wished to retain—also provisionally—the proposal of Professor Scelle. If so, the text already adopted by the Commission and Professor Scelle's text would be entrusted to a drafting committee, whose task it would be to combine the two drafts and to prepare a working paper for the Commission to study at its second session.

20. Mr. LIANG (Secretary to the Commission) pointed out that the General Assembly did not seem to have requested a formulation of the principles of Nürnberg as a separate task. That was clear from the first resolution the General Assembly had adopted on that subject: resolution 95 (I) directed the Commission to treat as a matter of primary importance plans for the formulation, in the context of a general codification of offences against the peace and security of mankind, or of an International Criminal Code, of the principles recognized in the Charter of the Nürnberg Tribunal and in the judgment of the Tribunal. No doubt resolution 177 (II) had drawn a distinction between the formulation of the principles and the preparation of a draft code merely for the purpose of clarity. It would, seem, therefore, that the formulation of the principles should be carried out in relation with the preparation of a draft code. If the Commission regarded the formulation of principles as an independent task, it could hardly be said to be fully discharging its duty to the General Assembly if it merely reproduced the provisions of the Nürnberg Charter.

21. He felt that a comparative study of the two resolutions of the General Assembly showed that the latter had not envisaged the Commission's task as being solely to reproduce the Nürnberg principles. Had it done so, it would not have called on the services of the International Law Commission. He believed that the draft provisionally adopted by the Commission could not be regarded as exhausting the subject; some of the principles set forth by Professor Scelle should certainly be considered.

22. Mr. KORETSKY thought that before proceeding to the examination of Professor Scelle's proposal paragraph by paragraph, the Commission should decide what its attitude must be towards that proposal as a whole. Mr. Liang had pointed out that the General Assembly had entrusted the Commission with two tasks, which could not be viewed independently. That was true, but it should not be forgotten that the main task was to formulate the principles of Nürnberg: that would make it possible to prepare the draft code, since the principles which would be formulated were decisive and would form the basis of the code.

23. Mr. Koretsky believed that the Commission had remained within its terms of reference as far as the formulation of the principles of Nürnberg was concerned. Subject to drafting changes, that formulation could be submitted to the General Assembly, according to the procedure provided by the Statute of the Commission. He associated himself with those members of the Commission who had had occasion to remark that Professor Scelle was an eminent jurist, whose ideas had always been of undeniable interest. It seemed, however, that in the present case Professor Scelle had tried above all to put forward certain ideas which he had defended throughout his career, but which were out of place in the formulation of the principles of Nürnberg.

24. Professor Scelle's proposal contained principles which could be classified in two categories: principles identical with those already adopted by the Commission, and new principles. As far as the first category was concerned, Professor Scelle's proposal consisted simply in replacing the terms of the Statute of the Nürnberg Tribunal by a general text: that was the purport of paragraphs 2 and 3. The criticism that could be made of those paragraphs was that it might seem to public opinion that the change in drafting was designed to change the actual meaning of the principles enunciated. To avoid such an interpretation, it was preferable to abide by the text of the Nürnberg Charter.

25. The new principles enunciated by Professor Scelle formed the subject of paragraphs 1 and 4 of his proposal. Mr. Koretsky felt that it could not be affirmed that " the individual is subject to international law, including international penal law ". That conclusion could not be drawn automatically from the fact that certain criminals had been judged and condemned by an international tribunal created, not on the basis of international law, but because the four Powers represented on it had assumed sovereignty over the territory of the State of which the criminals were nationals. The idea that the individual was subject to international law was not generally accepted; there could not therefore be any question of proclaiming it as a principle. According to the large majority of legal theories, the State alone was subject to international law.

26. It did not seem possible to say that " international law, including international penal law, has precedence over municipal law ". It was true that the idea was expressed in the provisions of article 14 of the draft declaration on the rights and duties of States which the Commission had just adopted, but Mr. Koretsky maintained that the precedence of international law over national

law had never been recognized and the Charter of the Nürnberg Tribunal was no argument in favour of that concept. It was the precedence of national law—in other words, national sovereignty—which enabled nations to govern themselves as they wished: the concept upheld by Professor Scelle would never be accepted by the majority of States. As regards the question of an " international jurisdiction ", it should not be forgotten that the General Assembly had asked for a study to be made of that matter: the decision which would be taken should not, therefore, be prejudged.

27. In conclusion, Mr. Koretsky said that Professor Scelle's proposal should not be retained by the Commission for the following reasons: either it was only a transposition of the Charter of the Nürnberg Tribunal, or it set forth concepts which were not generally accepted. It need not therefore be examined paragraph by paragraph.

28. Professor SCELLE did not wish to reply in detail to the criticisms of his proposal made by Mr. Koretsky, as he felt that the preliminary question to be settled before a decision was taken on the proposal was how the Commission interpreted the terms of reference given to it by the General Assembly. According to resolution 177 (II), the Commission should (*a*) formulate the principles of international law recognized in the Charter of the Nürnberg Tribunal and in the judgment of the Tribunal, and (*b*) prepare a draft code of offences against the peace and security of mankind, i.e., undertake the codification of international penal law. For that reason, in submitting his draft to the Commission, Professor Scelle had first of all expressed the general principles forming the basis of the Charter and the judgment of the Nürnberg Tribunal and then set forth the main elements for codification contained in those two texts.

29. The Chairman had remarked that it would be impossible, at the present session, to conclude the work entrusted to the Commission under resolution 177 (II). The Commission should, however, decide immediately whether, in formulating the principles recognized by the Charter and the judgment of Nürnberg, it should simply define those principles, or whether it should examine the manner in which the Tribunal had applied them.

30. Mr. SANDSTROM proposed that the Commission should examine Professor Scelle's proposal paragraph by paragraph, and decide whether it wished to incorporate some of the ideas contained therein in the draft submitted by the Sub-Commission.

31. Mr. BRIERLY supported that proposal. He thought that some of the ideas expressed in Professor Scelle's proposal already appeared in certain paragraphs of the Sub-Commission's draft provisionally adopted by the Commission, while others had no place in the formulation of principles recognized by the Charter and the judgment of the Nürnberg Tribunal. He thought, however, that the Commission would gain time if it took a decision on each of those ideas and, if, in the event that it should decide to retain some of them, it instructed the Sub-Commission to incorporate them in the provisionally adopted text.

The Commission decided by 7 votes to 2 to examine Professor Scelle's proposal pragraph by paragraph.

Paragraph 1

32. Mr. BRIERLY remarked that the idea expressed in that paragraph was contained in the paragraph 1 provisionally adopted by the Commission. He added that, in its present form, paragraph 1 of Professor Scelle's proposal did not, properly speaking, set forth a principle of international law.

33. Mr. SPIROPOULOS supported Mr. Brierly's remarks. Apart from the fact that the principle contained in paragraph 1 of Professor Scelle's draft was not a principle of international law, it should be noted that it had been recognized neither by the Charter nor by the judgment of the Nürnberg Tribunal. Quoting from the judgment, Mr. Spiropoulos said it would seem that the Tribunal had considered that the provisions of international law were applicable to individuals, in other words, that an individual was responsible at international law, but it could not be said that he was subject to international law.

34. Sir Benegal RAU said that by rejecting the theory that international law was concerned only with the actions of sovereign States and did not provide for the punishment of guilty persons, as well as the theory that where the act charged was an act of State, those who carried it out were not personally responsible, but were protected by the doctrine of the sovereignty of the State, [2] the Nürnberg Tribunal would appear to support Professor Scelle's view.

35. Professor SCELLE said that, strictly speaking, the Charter and judgment of the Nürnberg Tribunal did not contain principles of international law; but in view of the General Assembly resolution 177 (II), the Commission should consider whether it should restrict itself to defining the principles laid down in the Charter, or whether it should go further and analyse the judgment to find out what principles had been applied by the Tribunal and in what manner.

36. It would not be quite true to say that the substance of paragraph 1 of his draft was contained in the paragraph 1 which the Commission had

[2] " Nazi Conspiracy and Aggression—Opinion and Judgment ". Office of the United States Chief of Council for Prosecution of Axis Criminals—United States Government Printing Office—Washington 1947, p. 52.

provisionally adopted. Paragraph 1 of his draft laid down a principle while the paragraph provisionally adopted stated a consequence of that principle. It was essential, therefore, to know what exactly was the task of the Commission. He urged that, instead of immediately taking a vote on each of the paragraphs of his draft, the Chairman should first ask the Commission to state how it interpreted its task.

37. Mr. FRANÇOIS thought the question to decide was whether the Commission should restrict itself to formulating the principles recognized by the Charter and the Judgment of the Nürnberg Tribunal, or whether it should go further and examine and state its views on the general principles underlying the Charter and Judgment.

38. Mr. SPIROPOULOS found the question quite simple. The Commission's task was very clearly defined in paragraph (*a*) of the General Assembly resolution 177 (II): it had merely to formulate the principles of international law recognized in the Charter of the Nürnberg Tribunal and in the Judgment of that Tribunal. Professor Scelle's document dealt with the matter too academically.

39. Mr. BRIERLY agreed with Mr. Spiropoulos.

40. Mr. KORETSKY thought it would be useless to consult the Commission on Mr. François' and Professor Scelle's question. The Commission's terms of reference were perfectly clear and no distinction could be made between the principles recognized by the Charter and Judgment of the Nürnberg Tribunal and the principles underlying those two documents. The only question which the Commission was called upon to answer was whether it accepted certain of the ideas contained in Professor Scelle's draft.

41. The CHAIRMAN asked the Commission whether it wished to vote on the question put by Mr. François and Professor Scelle.

The Commission decided by 5 votes to 3 to take a vote on the question put by Mr. François and Professor Scelle.

42. Mr. KORETSKY suggested that the wording of the proposal should be amended to read: " The Commission's task was to formulate " instead of " The Commission's task was limited to formulating ".

Mr. Koretsky's amendment was rejected by 3 votes to one, with one abstention.

43. The CHAIRMAN having invited the Commission to vote on the question put by Mr. François and Professor Scelle, stated that there was an equal vote. In the circumstances he decided to abide by the earlier decision to examine Professor Scelle's draft paragraph by paragraph, and he called on the Commission to proceed with the examination of paragraph 1 of the draft.

44. Mr. AMADO said that the paragraph 1 which the Commission had provisionally adopted set forth the broadest general principle which could be admitted in the matter. The responsibility of the individual was recognized in international law. It was impossible to go even further and state that the individual was subject to international law.

45. Mr. YEPES thought that the paragraph 1 provisionally adopted by the Commission had been drafted on a purely empirical and pragmatic basis, whereas Professor Scelle's approach to his paragraph had been academic. The Commission should formulate general principles. Since the conclusion contained in the text provisionally adopted by the Commission was an empirical one and, Professor Scelle's text clearly stated the principle upon which that conclusion was based, the two texts might perhaps be combined into a single one comprising both the principle and the practical consequence of that principle.

The first paragraph of Professor Scelle's proposal was rejected by 6 votes to 4.

46. Mr. SANDSTROM said that he had voted against that paragraph as he thought the principle could be mentioned in the comment accompanying the draft.

Paragraph 2

47. The CHAIRMAN said that that paragraph corresponded to paragraph 3 of the text provisionally adopted by the Commission, according to which the official position of a head of State, or responsible civil servant, did not confer any immunity in penal matters nor mitigate responsibility.

Paragraph 2 was rejected by 6 votes to 2.

Paragraph 3

48. The CHAIRMAN said that paragraph 3 did not correspond to any of the paragraphs provisionally adopted by the Commission.

49. Mr. SPIROPOULOS added that that principle had not been envisaged either in the Charter or in the Judgment of the Nürnberg Tribunal.

50. Mr. CORDOVA thought that the paragraph went too far. The Charter and Judgment of the Nürnberg Tribunal had admitted, besides the responsibility of the State, the subsidiary responsibility of the individual. That had been a new departure. But it could not be said that the responsibility of the State was subsidiary to the responsibility of the individual.

51. Mr. BRIERLY was in agreement with the preceding speakers and in addition failed to see what meaning was to be attached to the word " objective ".

Paragraph 3 was rejected by 6 votes to one.

Paragraph 4

52. Sir Benegal RAU drew the attention of the members of the Commission to a passage in the

Judgment of the Nürnberg Tribunal [3] which contained an idea corresponding to that expressed in the first sentence of paragraph 4.

53. Mr. BRIERLY failed to see what the first sentence of paragraph 4 would add to paragraphs 2 and 3 of the text the Commission had already provisionally adopted. The second sentence of the text proposed by Professor Scelle did not introduce any new element either. On the other hand, the third sentence raised the question of omission, which had not been dealt with in either the Charter or the Judgment.

54. Mr. SPIROPOULOS agreed with Mr. Brierly.

55. Mr. KORETSKY agreed with the preceding speakers with regard to the first sentence of the text proposed by Professor Scelle. The notion of the precedence of international law over municipal law was even less acceptable in the penal field. He wondered what international significance the judicial functions exercised by an international military tribunal would have.

56. He drew the attention of the members of the Commission to the opinion expressed in the Judgment of the Nürnberg Tribunal: the establishment of the Charter had affirmed the sovereign legislative rights of the States to which the German State had surrendered, thereby losing its own sovereignty, i.e., the laws of the four Great Powers, and not international law. Each of those Powers had been able to prosecute war crimes in its own country and in its zone of occupied Germany.

57. It must not be forgotten that international law was exercised and applied by each State and that it could not exist independently of States. Consequently, there was no point in invoking the false and abstract notion of the prededence of international law over municipal law. In its historical wisdom, British law affirmed that international law was a part of internal law and thus rejected the theory of the precedence of international law. In any conflict, the principle whereby a special law departed from the general law was applied. Generally speaking, it was obvious that each State itself applied international law so that municipal law was the supreme law. Regarding the rest of paragraph 4, he proposed to retain the text already provisionally adopted by the Commission.

58. Professor SCELLE noted that the Commission had decided not to formulate the principles underlying the Nürnberg Charter and Judgment. It was impossible for him to withdraw his proposal at that stage, but he continued to believe that the Commission was not doing what the Assembly had invited it to do; as a result, he dissociated himself entirely from the fate of the subsequent articles of his proposal.

Paragraph 4 was rejected by 6 votes to one.

[3] *Ibid.*, p. 53.

59. Sir Benegal RAU said that he had abstained from voting. If the wording had been the same as in the Judgment, he would have voted for that paragraph.

Paragraph 5

60. The CHAIRMAN recalled that paragraph 5 corresponded to paragraph 8 of the text provisionally adopted by the Commission, whereby the fact that an individual had acted pursuant to an order of his government or of a superior did not free him from responsibility; it could however be considered in mitigation of punishment, if justice so required.

Paragraph 5 was rejected by 6 votes to none.

Paragraph 6

61. The CHAIRMAN recalled that paragraph 6 was related to the question on the Commission's agenda regarding the establishment of a court of international jurisdiction.

Paragraph 6 was rejected.

Paragraph 7

62. The CHAIRMAN noted that paragraph 7 presupposed the preparation and drafting of an international penal code.

Paragraph 7 was rejected.

Paragraph 8

Paragraph 8 was rejected.

63. Mr. YEPES proposed that the following sentence should be added to paragraph 4 of the text adopted by the Commission: " Consequently, individuals have international duties which transcend the national obligations of obedience imposed on them by a given State ".

64. Sir Benegal RAU proposed the following formula, which was closer to the text of the Judgment of the Nürnberg Tribunal: " Consequently, individuals have international duties which transcend the national obligations of obedience imposed on them by the laws of their own States "; that formula would precede the paragraph 2 provisionally adopted by the Commission.

65. Mr. KORETSKY was opposed to the insertion of that text. It was one of the grounds of the Judgment of the Nürnberg Tribunal which was perfectly justifiable in its context. But if it was taken out of its context and given an abstract and general bearing, it would become one of the principles at the basis of a system of world government. Thus, without adding anything to what the Commission had already decided, they would be going very far beyond the opinion of the judges of the Nürnberg tribunal. The adoption of such

a text would signify that the Commission wished to subject individuals to an abstract rule.

66. Mr. SPIROPOULOS agreed with Mr. Koretsky. The idea reformulated by Sir Benegal Rau was not clearly expressed in the Charter of the Nürnberg tribunal and was not a principle of international law.

67. Mr. BRIERLY thought that the text proposed by Sir Benegal Rau would express the idea contained in paragraph 2 of the text adopted by the Commission more clearly. He would vote in favour of its adoption.

The text proposed by Sir Benegal Rau was not adopted, 4 votes being cast in favour and 4 against.

68. The CHAIRMAN proposed to refer the texts of the provisionally adopted paragraphs to the Sub-Committee.

It was so decided.

69. Mr. SPIROPOULOS said that while he had voted against Professor Scelle's proposal, he thought that most of the ideas expressed in it should be summarized in the introduction.

Preparation of a Draft Code of Offences against the Peace and Security of Mankind

70. Mr. KORETSKY proposed that the consideration of that question should be postponed to the Commission's next session and that, in the meantime, the Secretariat should prepare the working documents.

71. Mr. SPIROPOULOS thought it would be better to devote one meeting of the Commission at the most to a general discussion of that topic and then to appoint a Rapporteur to draft the working documents which would be submitted to the Commission at its next session.

72. Mr. CORDOVA and Mr. AMADO supported Mr. Spiropoulos' suggestion.

Mr. Spiropoulos' proposal was adopted by 10 votes to 1.

The meeting rose at 1 p.m.

30th MEETING

Tuesday, 31 May 1949, at 3 p.m.

CONTENTS

Chairman: Mr. Manley O. HUDSON.

Rapporteur: Mr. Gilberto AMADO.

Present:

Members: Mr. Ricardo J. ALFARO, Mr. James L. BRIERLY, Mr. Roberto CÓRDOVA, Mr. J. P. A. FRANÇOIS, Mr. Shuhsi HSU, Mr. Vladimir M. KORETSKY, Sir Benegal N. RAU, Mr. A. E. F. SANDSTRÖM, Mr. Georges SCELLE, Mr. Jean SPIROPOULOS, Mr. Jesús María YEPES.

Secretariat: Mr. KERNO, Assistant Secretary-General in charge of the Legal Department; Mr LIANG, Director of the Division for the development and codification of International Law, Secretary to the Commission.

Draft Declaration on the Rights and Duties of States *(resumed and concluded)*

PROPOSED NEW ARTICLE FOR INSERTION IN THE DRAFT DECLARATION

1. The CHAIRMAN announced that Mr. Hsu had that day submitted to the Commission the text of a new article to be inserted in the draft Declaration on Rights and Duties of States. The Commission had already completed its discussion of the draft declaration and had adopted a text for submission to the General Assembly. He considered, therefore, that Mr. Hsu's text had been submitted too late for discussion, and felt that members of the Commission would agree with that ruling.

2. Mr. HSU appealed against the ruling of the Chairman, and said that the Commission should not for purely procedural reasons refuse to take up any question which in its opinion was essential for the Declaration on Rights and Duties of States.

3. Mr. KORETSKY agreed with the Chairman's ruling, but not with the reason given for that decision, namely that Mr. Hsu had submitted his proposal too late. He felt that that proposal was linked with the problem of the codification of the laws of war which the Commission had decided not to study, and was therefore out of order.

4. Mr. YEPES, although not opposed to the ruling of the chair, considered that the decision made was too severe.

5. Mr. CORDOVA could not support Mr. Hsu's proposal, but felt that he should be given an opportunity to defend his text.

6. The CHAIRMAN, referring to rule 102 of the rules of procedure of the General Assembly,

put to the vote Mr. Hsu's appeal against the ruling of the chair.

The Chairman's ruling was overruled by 5 votes to 3.

7. Mr. HSU then submitted the text of the proposed new article he wanted to see inserted in the draft Declaration on Rights and Duties of States. It read:

> " Every State has the duty, in the event of resort to self-defence or the carrying out of an enforcement action on behalf of the United Nations, to follow the dictates of humanity in treating enemy individuals and to refrain from attacks directed at enemy civilian population."

8. Mr. Hsu said that his text embodied an accepted principle of international law, and in view of what was taking place in the world that principle should be reaffirmed. In the article submitted to the Commission, general principles only were laid down and no question was raised of distinction between combatants and non-combatants or between the zone of military operations and open country, nor had any attempt been made to outlaw any method or weapon of warfare.

9. Although certain members of the Commission felt that all cases of the violation of the laws of war were covered by the Nürnberg principles, he considered that there were many cases of violation which were not covered by those principles. In that connexion, he mentioned submarine warfare and the aerial bombardment of civilians. Recent wars had shown that the laws of war had not been observed.

10. Quoting from the book which he had written —" A New Digest of Japanese War Conduct "— Mr. Hsu pointed out that the Japanese shot down fleeing refugees, killed prisoners of war, plundered and burned enemy cities, especially the wealthier sections, and generally indulged in looting, rape and murder. When they occupied a country, they tried to make the inhabitants forswear allegiance to their own country. They did not hesitate to use poison gas or to devastate the countryside; they carried out aerial bombardment of non-combatants, and sunk fishing vessels and passenger-carrying trading junks.

11. Similar happenings had taken place in Europe and should not be allowed to continue. It was therefore incumbent upon jurists to study international law and, although many attempts had been made and no results had been achieved, to draw up laws of war. Some Governments had attempted to carry out that work but had failed. He pointed out, however, that if the Commission agreed with his proposal and submitted a text to the General Assembly, the matter would be brought before fifty-nine States.

12. Mr. SCELLE considered that Mr. Hsu's proposal was interesting but incomplete. The principles he had enunciated should apply also in the case of revolts. Even though an insurrection might be illegal, any necessary international police action taken in connexion with that insurrection should follow the dictates of humanity. He suggested, therefore, that the words " or in case of insurrection " should be added to the article proposed by Mr. Hsu. Such an article would improve the draft Declaration on Rights and Duties of States, and he therefore supported Mr. Hsu's proposal.

13. Mr. SANDSTROM agreed with Mr. Hsu's proposal, but felt that the text of the article he had suggested could not be considered until it had been redrafted. It was the duty of all States, whether carrying on a defensive war or not, to follow the dictates of humanity.

14. Mr. CORDOVA considered that the Commission had done more than Mr. Hsu now suggested that it should do, when it had formulated the principles of international law recognized in the Charter of the Nürnberg Tribunal. In his opinion that text was out of place in the draft Declaration on Rights and Duties of States.

15. Mr. FRANÇOIS could not support Mr. Hsu's proposal, as he felt that if the Commission decided to study the laws of war—and the discussion of the Nürnberg principles had shown that to be desirable and even necessary—it should do so completely and systematically. The proposal referred to only one aspect of the laws of war, the complex problem of the treatment of non-combatants. In his text, Mr. Hsu referred to the " dictates of humanity ", but should not States also follow the dictates of law? He considered, therefore, that the text of the proposed article should be redrafted to make it acceptable.

16. Mr. ALFARO supported Mr. Hsu's proposal in principle, but felt that the wording at the end of the suggested new article beginning with " to follow the dictates of humanity etc. " was dangerous. Modern warfare was total warfare, and any military operations might affect the civilian population of a country. He would support the article provided it was more generally worded, and stated clearly that it was the duty of every State, in carrying out military operations, to conform to practices which would tend to diminish the horrors of war.

17. Sir Benegal RAU supported Mr. Hsu's proposal as far as it went, but considered that the proposed article should not be inserted in the draft Declaration on Rights and Duties of States. The Commission had already formulated the principles of international law recognized in the Charter of the Nürnberg Tribunal and in doing so had outlawed aggressive warfare. The whole field of what remained of the laws of war would be covered when the Commission came to deal with that matter.

18. Mr. YEPES supported Mr. Hsu's proposed new article with the amendment suggested by

Mr. Scelle, but agreed with Mr. Alfaro that the article should be redrafted. He pointed out that Dr. Jessup, in his book " The Modern Law of Nations ", had stated that through the abusive use of the right of veto a state of war might arise between certain countries, and had suggested that rules should be laid down to deal with such a situation. He had also suggested that certain principles of neutrality should be reconsidered to see whether they were still applicable.

19. The CHAIRMAN presumed that rules dealing with the situation mentioned by Dr. Jessup would no doubt be laid down in due course, but did not feel that the International Law Commission should deal with that question. The organs of the United Nations deciding on enforcement action would consider itself competent to make such rules.

20. Replying to Mr. SPIROPOULOS, Mr. SANDSTRÖM said that a draft Convention in connexion with the treatment of non-combatants had been submitted to the Diplomatic Conference for the Establishment of International Conventions for the Protection of War Victims, which was in session in Geneva.

21. The CHAIRMAN put to the vote Mr. Hsu's proposal that a new article, worded as Mr. Hsu had suggested, should be inserted in the draft Declaration on the Rights and Duties of States.

The proposal was rejected by 5 votes to 4.

Preparation of a Draft Code of Offences against the Peace and Security of Mankind (A/CN.4/5) (*concluded*)

22. The CHAIRMAN said that the Secretariat had not submitted to the Commission any documents relating to the preparation of a draft code of offences against the peace and security of mankind. He pointed out that the United States member of the Nürnberg Tribunal had recommended in his report to the President of the United States of America on 9 November 1946 that " the United Nations as a whole should reaffirm the principles of the Nürnberg Charter in the context of a general codification of offences against the peace and security of mankind ", (A/CN.4/5, p. 11), and that under General Assembly resolution 177 (II) the Commission had been directed 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.

23. Mr. SPIROPOULOS said the Commission would first have to decide whether the matter to be discussed was a question of codification or of the progressive development of international law, or whether it could be considered as a specific mandate of the Commission as had been decided with respect to the draft Declaration on Rights and Duties of States. In the latter case, the Commission would be completely free to discuss the matter as it wished, but if it decided that it was a question of codification or of progressive development of international law, then the provisions of article 16, or article 19 and the following articles, of the Statute of the International Law Commission would have to be strictly followed. In his opinion, the preparation of a draft code of offences against the peace and security of mankind was clearly a question of the progressive development of international law.

24. The CHAIRMAN said that the formulation of a draft code of offences against the peace and security of mankind was definitely a matter coming under the progressive development of international law, and therefore the procedure laid down in article 16 of the Commission's Statute should be followed.

25. Mr. KORETSKY felt that, in any case, the Commission should follow the provisions laid down in article 16 of its Statute and protested once again against the attitude that if the Commission considered a matter to be referred to it as a specific question, it did not need to apply the provisions of its Statute.

26. Mr. YEPES considered that the provisions of article 16 of the Statute of the Commission did not apply to the question under discussion. The Commission had been instructed by the General Assembly to examine and formulate principles recognized in the Nürnberg Charter, and to prepare a draft code of offences against the peace and security of mankind. That was definitely not a matter of codification or of the progressive development of international law. It was a separate question altogether.

27. Mr. SPIROPOULOS said that the questions covered by items 3 (*a*) and (*b*) of the agenda were separate matters, and the formulation of the principles recognized in the Charter of the Nürnberg Tribunal and in the judgment of the Tribunal did not come under the codification or under the progressive development of international law, but should be treated as a special question. As he had already said, however, item 3 (*b*) came under the progressive development of international law.

28. Mr. SANDSTRÖM, supported by Mr. ALFARO and Mr. AMADO, agreed with Mr. Spiropoulos' statement.

29. Mr. CORDOVA felt that the procedure laid down in article 16 of the Statute should be followed. The Commission had been instructed to prepare a draft code of offences against the peace and security of mankind indicating 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. He agreed, therefore, with Mr. Spiropoulos that it was a question of the progressive development of international law, and questionnaires should be circu-

lated to Governments inviting them to supply data and information relevant to the matter.

30. Mr. KORETSKY noted some confusion with regard to the exact nature of the Commission's task. In reply to Mr. Spiropoulos and other members of the Commission who liked to classify questions according to categories, Mr. Koretsky recalled the view which had been expressed at the beginning of the Commission's session that codification included elements of progressive development of international law, and vice versa. Indeed, both questions were closely linked together and could not be separated and any matter which pertained neither to the progressive development of international law nor to its codification, was clearly outside the Commission's terms of reference.

31. Mr. Spiropoulos' statement that the codification of the Nürnberg principles might be regarded as a specific question was utterly unacceptable. Such an attitude would destroy the Statute of the Commission. Codification of international law and its progressive development proceeded simultaneously. The principles recognized at Nürnberg had definitely become international law; thus a *lex specialis* had become *lex generalis* and fell within the Commission's field of work.

32. The question had been raised whether the preparation of a draft code of offences against the peace and security of mankind came under the Statute of the Commission. Two questions arose in that connexion: was the Commission endeavouring to codify offences against international law, or did it merely want to assist States in the adoption of national laws to punish such crimes? The fight against crimes fell within the domestic jurisdiction of States; consequently standardization of punishment of offences against peace and security would not come either under the progressive development of international law, or under its codification, but would constitute a retrogressive step inasmuch as the Commission would be interfering in matters falling within the domestic jurisdiction of States.

33. The fight against crime and the establishment of a code of penal law was the basic function of each Government, and interference in such matters by an international organ would constitute a violation of the sovereign rights of States. Consequently Mr. Koretsky felt that the time had not yet come for the Commission to deal with the draft code of offences against peace and security of mankind, a matter which was outside its competence.

34. The CHAIRMAN agreed with some of Mr. Koretsky's remarks. He had hoped, however, that the discussion might bring out some ideas as to what acts might be included in the code of offences against peace and security of mankind. The Commission should keep in mind that its function was not a political one, but that it was dealing with a topic requiring an extension of the law. So far, except for the Nürnberg principles, there were few established offences against peace and security. While not certain how far the International Law Commission could go in the matter, he hoped that the discussion would go beyond procedural matters and elicit some ideas as to what the code might contain.

36. Mr. SPIROPOULOS felt that after the discussion of substance had been completed, the Commission should revert to the procedural question with a view to deciding, in accordance with article 16 of the Statute, what the Rapporteur, if appointed, should be asked to do. Mr. Spiropoulos said that the Commission must find out what was, or ought to be, considered a crime against peace and security. There might perhaps be other offences against the peace and security of mankind in addition to those established in the Nürnberg Charter. He quoted extensively, in that connexion, from Professor Vespasian V. Pella's " Plan for a World Criminal Code . . ." (Chapter I, pp. 69 to 71) listing a number of act which could be considered crimes of war. The list included such crimes as " supporting, on his own territory, of armed gangs having invaded another State's territory or refusing, in spite of the invaded State's claim, to take all measures in his power, on his own territory, to deprive the said gangs of all aid and support ", which were not included in the Nürnberg prnciples, and might be incorporated in the code of offences against peace and security. The code should further mention " use of methods of extermination, enslavement or persecution of certain civilian populations, whether in peace or war, and consisting in actions directed against life, bodily integrity, health or liberty, on racial, political or religious grounds ". Then genocide.

37. The code might also list acts of " non-punishment of crimes prepared on the territory of a State, and directed against the independence and territorial integrity of another State ". He pointed out, in that connexion, that Article 1, paragraph 4 of the United Nations Charter contained a provision concerning the territorial integrity of States and that violation of that provision might also be considered a crime against peace. Paragraph 4 of Professor Pella's list, which read " The fact of a State allowing, helping or supporting on its territory individuals or organizations which prepare crimes against another State, i.e.: (*a*) criminal attempts against the life or liberty of either foreign chiefs of State or members of the Government, of official or political assemblies, or judicial authorities of a foreign State; (*b*) criminal attempts against public buildings, railways, ships, aircraft and other means of communication with an international character or belonging to a foreign State; (*c*) association for the accomplishment of any of the foregoing

offences referred to the security of mankind and might consequently be included in the code of offences. The crime of counterfeiting of coins and bills, and any other disloyal action committed or tolerated by one State, to undermine other States by weakening their credit could also be considered for inclusion in the code ".

38. Not all the acts enumerated in Professor Pella's book need be included in the code, while other crimes, which were not listed, should be included; in any case, however, Professor Pella's list would form a good working basis in view of the fact that it contained acts which could be considered crimes against peace and security of mankind.

39. Mr. AMADO stated that in order to draft a code of offences against the peace and security of mankind, the Commission must first determine what crimes fell into that category. The problem of offences against the peace and security of mankind overlapped with a number of other international offences and crimes, such as piracy and white slave traffic which came within the field of international repression and the crimes included in the Nürnberg Charter and judgment.

40. Consequently a plan of work would be necessary to clarify all those questions. The Commission should collect the necessary material for drafting a code of offences against peace and security of mankind. Mr. Spiropoulos had suggested Professor Pella's book as a working basis. There were also other sources which might be used.

41. Mr. Amado therefore suggested that in accordance with article 16 of the Statute, the Commission should appoint a Rapporteur who, with the aid of all the documentation which the Secretariat could furnish, would prepare a working paper. Thereupon a plan of work could be made.

42. Mr. BRIERLY agreed with Mr. Amado's remarks. The Commission would be unable to undertake any serious work until it had a working paper before it. He therefore agreed that a Rapporteur should be appointed to formulate a plan of work, in the light of Mr. Spiropoulos' suggestions, for the Commission's following session.

43. Mr. SANDSTROM agreed with Mr. Brierly that the Rapporteur should consider what crimes could be considered offences under international law. The question had already been examined by noted criminologists and groups of experts. Moreover, violations of certain provisions of the draft Declaration on the Rights and Duties of States might also be considered offences against the peace and security of mankind, and there were other judgments, in addition to that of the Nürnberg trial, which could be relevant to the question.

44. Mr. YEPES agreed with Mr. Spiropoulos' enumeration of acts which might be included in the draft code of offences against the peace and security of mankind. He referred, in that connexion, to the definition of aggression as formulated by Colombia at the Pan-American Conference of 1936 in Buenos Aires. He drew attention to the fact that the principle of international law whereby no State could tolerate on its territory plots against another State, had also been considered at the International Conference on the Prevention and Repression of Terrorism held in Geneva in 1937 and which had drafted a Convention on the subject.

45. Mr. SPIROPOULOS proposed that, in accordance with article 16 (*c*) of the Statute, the Commission should send out, not a questionnaire, but a simple question asking the views of Governments as to what acts should be included in the draft code of offences against the peace and security of mankind. With reference to article 16 (*e*), he suggested that at the same time the Commission might consult scientific institutions and individual experts, asking them to prepare a working document on the matter.

46. Furthermore, a Rapporteur should be appointed at the present session to prepare for the Commission's next session, a report based on the replies which might have been received from the Governments as well as the views submitted by experts.

47. Mr. BRIERLY supported the proposal, although he pointed out that the question could not be sent out to Governments until a plan of work had been formulated, unless it was worded very simply and generally.

48. Mr. KORETSKY thought that the first question to be sent to Governments should be phrased in the following terms: " Shall the code include any offences, and if so, of what nature? " He explained that Governments must first consider whether a code was necessary as that question had already raised much controversy in the General Assembly. The Commission should also ask the Governments whether their national legislation included any legal offences of that nature; Poland, for example, and the USSR had already adopted certain laws in that respect.

49. The CHAIRMAN observed that the Commission could not question the need for a code of offences which it had been instructed to prepare by the General Assembly.

50. In reply to a question by Mr. Koretsky, he explained that the Commission had as yet taken no action with regard to the place of the Nürnberg principles in the code referred to in the resolution of the General Assembly (177 (II)).

51. In view of the fact, however, that the General Assembly resolution established a close connexion between the Nürnberg principles and the question of the preparation of a draft code of offences against the peace and security of mankind, the Commission should not separate them in its instructions to the Rapporteur.

52. Mr. KORETSKY felt that in no circumstances should the two tasks be confused. In instructing the Commission to prepare a draft code, the General Assembly had merely wished the latter to consider what place should be accorded therein to the principles of international law recognized in the Charter of the Nürnberg Tribunal and in the Tribunal's judgment.

53. The question of the formulation of the Nürnberg principles would not present much difficulty, but the preparation of the draft code was a controversial matter which might delay the work considerably. He therefore proposed that different procedure should be followed in respect of each of the two questions which should be considered separately and on which the Rapporteur should present separate reports.

54. The CHAIRMAN agreed that the Rapporteur should be asked to prepare two separate reports on paragraphs (*a*) and (*b*) of the General Assembly resolution 177 (II), as well a plan of work with regard to paragraph (*b*) for consideration at the Commission's next session. He put that proposal to the vote.

The proposal was adopted by 11 votes.

55. The CHAIRMAN then turned to the question whether the Commission should consult the views of Governments on the acts to be included in the code and ask them what offences against the peace and security of mankind were defined in their national legislation.

56. Mr. BRIERLY and Mr. AMADO supported that proposal.

57. Mr. ALFARO suggested that Governments should be asked which crimes besides those listed in the Charter of the Nürnberg Tribunal should be included in the code of offences.

58. Mr. KORETSKY felt that the question should be so formulated as to permit Governments, which felt that the code of offences should include only the principles of the Charter of the Nürnberg Tribunal and in the Tribunal's judgment, to express their views.

59. He also stated that while in favour of asking the Rapporteur to prepare a report in respect of the question in paragraph (*a*) of the General Assembly resolution 177 (II), he was against the preparation of a draft code of offences against the peace and security of mankind and therefore also against a questionnaire on that item.

60. The CHAIRMAN thought that the question, as formulated, would permit Governments to state their views on the matter, even if that should be negative.

61. Mr. KORETSKY pointed out that the General Assembly's instructions had not been to prepare a code including offences against the peace and security of mankind other than those listed in the Charter of the Nürnberg Tribunal. Consequently the question to be sent out to Governments should not deal with other principles besides those mentioned. He therefore proposed that Governments should not be asked which offences should be included in the code and what relevant provisions had been adopted in their national legislations.

62. The CHAIRMAN put to the vote Mr. Alfaro's proposal that the words " apart from the principles of international law recognized in the Charter of the Nürnberg Tribunal and in the judgment of the Tribunal " should be inserted in the question to be sent out to Governments.

Mr. Alfaro's proposal was adopted by 6 votes to 1.

63. The CHAIRMAN then put to the vote the proposal to ask Governments what offences apart from the principles of international law recognized in the Charter of the Nürnberg Tribunal and in the judgment of the Tribunal should be included in the code of offences against the peace and security of mankind, and whether such offences were included in their national legislations.

The proposal was adopted by 10 votes to none.

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 (A/CN.4/7)

64. The CHAIRMAN read out General Assembly resolution 260 B (III) asking 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 would be conferred upon that organ by international conventions. He thought that unless there was serious difference of opinion on the matter, the Commission might prepare a report on that question at its current session. The Commission had not been asked to present a plan for the establishment of an international judicial organ although its attention had been drawn to the possibility of establishing a Criminal Chamber of the International Court of Justice.

65. Mr. KORETSKY thought that it would be premature to consider the question before having completed the formulation of the principles of international law recognized in the Charter of the Nürnberg Tribunal and in the judgment of the Tribunal.

66. Mr. AMADO believed that the question was of no particular urgency in view of the fact that the Convention on the Prevention and Punishment of the Crime of Genocide to which it related had not yet been ratified by any Government. Furthermore, the other crimes with which the judicial organ should deal had not yet been codified. In view of those circumstances

Mr. Amado suggested that the matter should be postponed until the next session.

67. Mr. BRIERLY supported the views put forward by Mr. Amado and Mr. Koretsky.

68. The CHAIRMAN thought that the consensus of opinion was that the matter should be postponed until the next session.

69. Mr. YEPES did not agree with the preceding speakers. While the matter was of no particular urgency, the Commission had been instructed by the General Assembly to consider the desirability of establishing an international judicial organ. The Commission should comply with that request without entering into details. He proposed that the question should be decided in principle at the current session.

70. Mr. SCELLE agreed with Mr. Yepes. He pointed out, in that connexion, that institutes of international law always studied such questions years in advance. Consequently, in view of the fact that the matter was difficult and its study would require much time, and in view of the fact that it had been referred to the Commission by the General Assembly, he felt that the Commission should follow the usual procedure by appointing a rapporteur to work out a plan of study of that question, and to prepare a questionnaire to be circulated to Governments.

71. Mr. SPIROPOULOS thought that both points of view were acceptable. While certain members were right in believing that the Commission could not take any final action as long as it did not know what crimes would be listed in the code of offences, it appeared from the first paragraph of the General Assembly resolution that the primary purpose of the establishment of an international judicial organ would be to try persons charged with crimes of genocide under the Convention which, it was true, had not yet been ratified. The trial of " other crimes " mentioned in the third paragraph of the resolution seemed to be of secondary importance. The Commission could instruct the rapporteur to study the matter, in co-operation with the Secretariat, and to present a working paper for its next session.

72. Mr. AMADO, recalling the discussion of the question in the Sixth Committee of the General Assembly, stated that while he fully respected the lofty motives of that proposal, the fact remained that the international judicial organ would only be able to judge crimes of genocide after the Convention had been ratified, and to judge other offences after they had been codified and after the appropriate conventions had been signed and ratified. Until then no action would be possible. He therefore maintained his proposal to postpone the item.

73. Mr. SCELLE took issue with Mr. Amado's view. The primordial issue was whether national justice could be counted upon to prosecute international crimes, or whether an international jurisdiction was necessary in that regard. He had definite views on that subject which he reserved until a later occasion. He had not opposed the Commission's decision to inquire of Governments whether any provision had been made in their national legislations in respect of offences against the peace and security of mankind, although in his view, violation of international law was a violation of the international public order and not of the national public order.

74. In the present case, however, the Commission was dealing with the question of crimes which might be committed by Governments and should therefore be tried by Governments. The General Assembly had stated its position on the matter in adopting resolution 260 B (III). It had wanted the international criminal jurisdiction to be already established when the crime which it would have to adjudicate, would be determined. It was not a question of principle, but a purely practical one. The Commission was a scientific body to which the time-consuming study of a scientific question had been referred. He therefore maintained his proposal.

75. Mr. SPIROPOULOS thought that it was a special question in no way related to the progressive development of international law or its codification, to which the provisions of article 16 of the Statute consequently did not apply. The rapporteur should be asked to deal with the question merely from a theoretical point of view.

76. Mr. ALFARO disagreed with the proposals to postpone the study of the matter. The Commission must deal in principle with the question which had been referred to it by General Assembly resolution 260 B (III).

77. In reply to the view that the Commission could not envisage the creation of an international judicial organ until the crimes with which the latter should deal had been defined and codified, he pointed out that the Convention had defined all aspects of genocide, while offences against the peace and security of mankind had already been established in the Charter of the Nürnberg Tribunal. He therefore supported Mr. Scelle's view that a rapporteur should be appointed to prepare a report on that question for the Commission's next session.

78. Mr. CORDOVA agreed with Mr. Scelle that a rapporteur should be appointed, but shared Mr. Spiropoulos' view that a questionnaire would be unnecessary.

79. The CHAIRMAN noted that the General Assembly had simply asked the Commission to study the question. No special report would be necessary, and the Commission could state the results of its study in its general report to the General Assembly.

80. Mr. SCELLE did not insist on the matter

of a questionnaire, but insisted that a rapporteur should be appointed.

81. Mr. SANDSTROM supported Mr. Scelle's proposal.

82. The CHAIRMAN drew the Commission's attention to the Secretary-General's Memorandum: a Historical Survey of the Question of International Criminal Jurisdiction (A/CN.4/7) which might later be useful in the consideration of that question. He put to the vote the question whether the Commission should decide on the matter at the present meeting.

The Commission decided by 10 votes in favour to take a decision on the matter at its present meeting.

83. The CHAIRMAN then put to the vote the proposal by Mr. Amado and Mr. Koretsky that the matter should be postponed until the following session.

The proposal was rejected by 9 votes to 4.

84. The CHAIRMAN called for a vote on Mr. Scelle's proposal that a rapporteur should be appointed to study the question and present a report thereon to the following session of the Commission.

The proposal was adopted by 8 votes to 4.

85. The CHAIRMAN declared the discussion on the matter closed.

The meeting rose at 6 p.m,

31st MEETING

Wednesday, 1 June 1949, at 3 p.m.

CONTENTS

Chairman: Mr. Manley O. HUDSON.

Rapporteur: Mr. Gilberto AMADO.

Present:

Members: Mr. Ricardo ALFARO, Mr. James L. BRIERLY, Mr. Roberto CÓRDOVA, Mr. J. P. A. FRANÇOIS, Mr. Shuhsi HSU, Mr. Vladimir M. KORETSKY, Sir Benegal N. RAU, Mr. A. E. F. SANDSTRÖM, Mr. Georges SCELLE, Mr. Jean SPIROPOULOS, Mr. Jesús María YEPES.

Secretariat: Mr. KERNO, Assistant Secretary-General in charge of the Legal Department; Mr. LIANG, Director, Division for the Development and Codification of International Law, Secretary to the Commission.

Draft Report to the General Assembly on the Work of the First Session (Chapters I and II)

1. The CHAIRMAN requested the Commission to consider chapters I and II of the draft report to the General Assembly on the work of the first session. [1]

GENERAL OBSERVATIONS

2. Mr. AMADO (Rapporteur) stated that he had attempted to prepare a sober, precise and clear text which would accurately reflect the discussions which had taken place in the Commission. He realized that some gaps would undoubtedly be found and that certain deletions might have to be made. The comments of the Commission would prove most helpful in that respect.

3. He wished to point out that he had given special attention to reporting the discussion on the Commission's competence as outlined in article 18, sub-paragraph 2, of the Statute. He hoped that the report would meet with the Commission's approval and that it would be considered as an objective presentation of the Commission's opinion.

CHAPTER I. INTRODUCTION

Paragraph 1: Establishment and membership of the Commission

4. Mr. ALFARO thought that the listing of countries, as it stood, might seem to indicate that the members were representatives of those countries. He therefore suggested that the names of the members should be followed by the word " of " and then the name of the corresponding country.

5. The CHAIRMAN pointed out that the word " nationality " could be inserted at the head of the column of countries and the adjective of nationality could then be listed in the column instead of the name of the country.

6. Mr. KORETSKY preferred the draft presented by the Rapporteur. He saw no reason not to indicate the fact that a member was a citizen of a particular country. In order to satisfy Mr.

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[1] The text of the draft report has not been reproduced in the present publication. In order to follow the discussion of the draft report, see text of the Report. Parts of the draft report which differ from the Report have been included in footnotes to the summary records.

Alfaro's objection, however, there might be some mention of the fact that members had been elected in accordance with the provisions of the Commission's Statute.

7. The CHAIRMAN pointed out that paragraph 1, sub-paragraph 2, stated that the General Assembly had elected the members " in accordance with the provisions of the Statute of the Commission ".

8. Mr. LIANG (Secretary to the Commission) stated that the Legal Department had consulted the Yearbook of the International Court of Justice in which, after the names of the judges, there was a column giving their nationality. While he thought that the procedure followed by the Rapporteur was perfectly clear, the Commission could, if it wished, adopt the form used by the International Court.

9. The CHAIRMAN put to the vote the proposal to insert the word " nationality " over the column listing the countries of which the members were nationals.

The proposal was adopted by 9 votes.

Paragraph 2: Place and duration of the first session

There were no comments on paragraph 2.

Paragraph 3: Election of officers

There were no comments on paragraph 3.

Paragraph 4: Secretariat

Paragraph 5: Rules of procedure

There were no comments on paragraph 5.

Paragraph 6: Adoption of the agenda

There were no comments on paragraph 6.

Paragraph 7: Programme of work

10. Mr. KORETSKY suggested that the report should stress the fact that decisions of the General Assembly had been given priority in the Commission's discussions. Accordingly, since items 5 and 6 had not hitherto been dealt with, he proposed that the first sentence should be inserted after sentence 2 in order to stress the work that the Commission had done. He thought it was unfortunate that the report declared codification to be the main function of the International Law Commission, for in his view the most important task of that body was to carry out the instructions of the General Assembly.

Mr. Koretsky's proposal to invert the order of the first two sentences of paragraph 7 was adopted by 4 votes to none.

11. The CHAIRMAN pointed out that in accordance with that decision the Rapporteur would have to make certain drafting changes in the text of paragraph 7. In consideration of a comment by Mr. Córdova, the Chairman requested the Rapporteur to re-word the phrase " the Commission was anxious ".

Paragraph 8: Preparatory work by the Secretariat

There were no comments on paragraph 8.

CHAPTER II. SURVEY OF INTERNATIONAL LAW AND SELECTION OF TOPICS FOR CODIFICATION; POWERS OF THE COMMISSION WITH RESPECT TO THE SELECTION OF TOPICS

Paragraph 9

There were no comments on paragraph 9.

Paragraphs 10 and 11

12. Mr. KORETSKY felt that paragraphs 10 and 11 raised an extremely significant issue, which had occupied a considerable amount of the Commission's time. While the drafting of paragraphs 10 and 11 in the Rapporteur's report was not incorrect, he felt the issue had been over-simplified. Acute differences, both political and theoretical, had arisen among members of the Commission on that question. Nevertheless, the opposing views were not adequately expressed in the report, although more satisfactory treatment of the issue appeared in the summary records. He therefore suggested that those paragraphs should be developed in more detail; he would be willing to assist the Rapporteur in drafting a statement of his own position.

13. The CHAIRMAN agreed that those paragraphs could be amplified. He pointed out, however, that the function of a report was different from that of a summary record, in that the former should include only matters of interest to the General Assembly. His personal view on those paragraphs had been that they explained the issue in too great detail.

14. Mr. AMADO (Rapporteur) pointed out that it would be unwise to attempt to include individual opinions throughout the report. In the case in question, however, he thought the Commission would be justified if it decided to present the opinions of the various members, since it was a matter of great importance.

15. Mr. KORETSKY did not wish to have his individual point of view incorporated in the report but he did wish emphasis to be placed on the fact that the differences of opinion among members of the Commission were of a fundamental nature. The discussion had, in fact, resolved into a struggle between those favouring the autonomy of the Commission and those favouring its dependence upon the parent body.

16. Mr. CORDOVA did not consider Mr. Koretsky's statement of the main issue correct. Although some members had touched on the question whether the Commission was dependent or not on the General Assembly, the matter had not been discussed. He thought that the Rapporteur's report was clear on the issue, which in his opinion was summed up accurately in paragraph 12 of the report.

17. Mr. SCELLE proposed that the Commission should vote whether it was satisfied with paragraphs 10 and 11 as they stood, or whether it desired those paragraphs to be amplified.

18. Sir Benegal RAU proposed that the phrase " unless otherwise directed by the General Assembly " should be inserted at the end of the first sentence of paragraph 11.

19. Mr. KORETSKY stated that his objections would be partially satisfied if that amendment were adopted.

Sir Benegal Rau's amendment was adopted by 10 votes to none.

20. Mr. BRIERLY thought that individual representatives should be allowed to revise any formulation of their opinions to be included in the report.

21. Mr. SCELLE supported that view. Since it was agreed to revise paragraphs 10 and 11 to satisfy Mr. Koretsky's objections, Mr. Scelle withdrew his proposal of a vote.

22. Mr. BRIERLY thought that the last sentence of paragraph 11 was misleading regarding the stage at which the Commission would make recommendations.

23. The CHAIRMAN requested Mr. Brierly to present his suggestion for revision of that sentence to the Rapporteur. In his opinion it was sufficient for the individual views of members to be included in the summary records.

24. Mr. SCELLE pointed out that if member's requests to include specific points of view in the report were not complied with, it would mean that the Commission would be forced to present a report with no reservations whatsoever.

25. The CHAIRMAN observed that the members could explain in the report their final vote on it.

26. Mr. SPIROPOULOS stated that under the procedure which had been followed in the Sixth Committee of the General Assembly during its last session, if a Member wished for an expression of his opinion to be included in the report, the Committee decided whether that request should be granted.

27. Mr. KORETSKY pointed out that he would agree with the Chairman in cases where the report reflected the views of the Commission as a whole, but whenever the opinions of certain members were outlined in the report they would have to be given in the proper detail, and each member could request a correction or amplification.

28. The CHAIRMAN agreed with that point of view.

Paragraph 12

29. The CHAIRMAN suggested that the phrase " by 10 votes to 3 " in the last sentence should be deleted, and that a similar procedure might be followed throughout the report.

30. Mr. KORETSKY suggested that " a majority " might be inserted at the beginning of the sentence.

31. Mr. SCELLE could not support the Chairman's proposal, because the report of the exact number of votes helped materially to define the tenor of the Commission's discussions, giving a truer picture of the decisions it reached.

Paragraph 13: Survey of international law

32. Mr. KORETSKY objected to the last sentence of that paragraph. There was a difference of opinion as to the merits of the memorandum to which it referred. He felt it was unnecessary to praise such documents. If, however, the Commission insisted on including favourable remarks with regard to the memorandum, it should be indicated that that was the opinion of some members of the Commission and not of the Commission as a whole.

33. Mr. AMADO (Rapporteur) did not feel that Mr. Koretsky's criticism of the sentence was entirely justified but he was willing to accept the decision of the Commission in the matter.

34. The CHAIRMAN agreed that the sentence was not essential to the paragraph.

35. Mr. CORDOVA could not agree to the deletion of the sentence, since the document in question had formed the basis of the Commission's discussions and he thought that some reference should be made to it. He suggested that Mr. Koretsky's objections might be answered if the following phrase were included: " in the opinion of a majority of the Commission ".

36. Mr. LIANG (Secretary to the Commission) stated that the sentence did not make propaganda either for or against the memorandum. It merely contained an objective statement of the document's contents, but the Secretariat had no strong views regarding its retention. He hoped, however, that should the Commission decide to delete the sentence, that decision would not be interpreted to indicate either censure or approval of the memorandum in question.

37. Mr. ALFARO favoured retaining the substance of the sentence and even wanted to word it more in conformity with truth and justice. A discussion on the memorandum had taken place in the Commission and the paragraph reflected the opinion of the majority. In order to satisfy Mr. Koretsky's objections, however, he would

suggest that the sentence should be amended to read as follows:

"The majority of the Commission found that this memorandum surveys the field of international law of peace and enumerates in a comprehensive and satisfactory way topics in that field."

38. Mr. KORETSKY thought it was unnecessary to appraise documents which had been submitted to the Commission by the Secretariat. He could understand the Secretariat's attitude in the matter but at the same time he considered that it was for the Commission and not for the Secretariat to say whether or not comments and criticisms of the Secretariat's work were just or unjust. If there was any misunderstanding of that fact, it should be made quite clear to the persons concerned.

39. The CHAIRMAN did not feel it would be wise to limit the freedom of the representatives of the Secretariat to express their opinions.

Mr. Koretsky's proposal to delete the last sentence of paragraph 13 was rejected by 8 votes to one.

40. The CHAIRMAN thought it would be better either to insert Mr. Alfaro's amendment, or to delete the rest of the sentence after the phrase "international law of peace".

41. Mr. ALFARO thought that since the Commission had decided that the memorandum was comprehensive and satisfactory, the report should include a statement to that effect and he would maintain his amendment.

Mr. Alfaro's amendment was adopted by 5 votes to 4.

Paragraph 14: The question of a general plan of codification

There were no comments on paragraph 14.

Paragraph 15: Topics of international law considered by the Commission

42. Mr. BRIERLY pointed out that sub-paragraph 1 should read "subjects of international law" and that sub-paragraph 3 should read "the law of States". [2]

43. Mr. KORETSKY thought it was unnecessary to include paragraph 15 in the report: it merely listed the twenty-five topics and included yet another reference to the memorandum submitted by the Secretary-General, which he thought completely superfluous. He saw no reason for listing the twenty-five topics the Commission had reviewed if the Commission intended to list in paragraph 16 of the report the fourteen topics it had eventually decided to recommend for codification. A comparison of the two paragraphs would lead an intelligent reader to inquire why some topics had been rejected and why others had been retained. Moreover, he did not feel that paragraph 15 was relevant to the General Assembly's consideration of the Commission's report.

44. The CHAIRMAN thought that Mr. Koretsky had raised several valid points. An inclusion of both lists would undoubtedly give rise to the question why the Commission had decided to select fourteen specific topics and to omit eleven others. Those paragraphs would undoubtedly invite criticism, especially from those who had no means of knowing why the Commission had acted as it did.

45. Mr. AMADO (Rapporteur) explained that he had included paragraph 15 because the Commission had selected its topics on the basis of that list. He felt that the paragraph merely reflected the Commission's actions. In view of the arguments which had been advanced by Mr. Koretsky, however, he would not object to the deletion of paragraph 15.

46. Mr. CORDOVA felt that it was important to retain paragraph 15, which reflected much of the work which had been accomplished by the Commission. It would not be difficult, should the Commission so desire, to insert a short explanation of the reasons for which it had selected the topics appearing in paragraph 16 and rejected the others.

47. Mr. YEPES thought that paragraph 15 was a simple statement of fact, which should be included in the report, especially since a review of the summary records would show that the Commission had considered twenty-five topics for codification. The paragraph reflected the results of several days' work by the Commission.

48. Mr. ALFARO thought that paragraph 15 served a useful purpose, particularly as it would invite constructive criticism. It would also provide a helpful basis for comparison for the General Assembly, which might decide to instruct the Commission to make up subjects other than those mentioned in paragraph 16, in the light of its consideration of the topics listed in paragraph 15.

49. Sir Benegal RAU wondered whether paragraph 15 could be considered out of place in the report, since General Assembly resolution 175 (II) specifically instructed the Secretariat to prepare the study referred to in paragraph 15.

50. Mr. BRIERLY did not feel particularly strongly on the question but thought it wiser to delete paragraph 15, since it would invite the question why some topics had been rejected. If the paragraph were included, some explanation of the Commission's action should be made, and that in turn would be difficult, in view of the fact that there had been no one reason but many

[2] In lieu of "subject of international law" and "the law of the States."

individual reasons which had decided members to exclude certain topics.

51. Mr. SANDSTROM did not feel that it would be difficult to explain why certain topics had been omitted but thought that a phrase to the effect that the Commission had viewed and selected a provisional list for the first stage of the codification work could be inserted.

52. Mr. SCELLE thought it might be advisable to indicate the reasons for the Commission's actions. He agreed with Mr. Sandström that it would not be difficult to include a short explanation, especially since the report also included a statement of how priority had been granted to topics 5, 10 and 14 of paragraph 16.

53. Mr. KORETSKY could not agree to placing the memorandum submitted by the Secretary-General on the same level as the Panamanian draft Declaration on Rights and Duties of States, which had really been an essential document for the Commission's work. The Commission could have compiled the list of topics without the aid of the memorandum and there was no need to give the impression that the Commission had been unduly dependent upon the Secretariat. He agreed with Mr. Scelle that the emphasis should be on paragraph 16 and the succeeding paragraphs of the report, and for that reason he did not think that paragraph 15 should be included.

54. Paragraph 16 could be limited to a list of the fourteen topics which had been selected and some mention of the fact could be made that they had been chosen out of a possible twenty-five. The report might also state that the Commission expected to make recommendations on three specific topics. He would point out, however, that the General Assembly was not interested in processes of ratiocination but in results, namely paragraph 16, together with an explanation of the reasons for granting priority to three specific topics.

55. The CHAIRMAN pointed out that if paragraph 15 were deleted the introduction to paragraph 16 would have to be expanded. It might be possible to state in the introduction to paragraph 16 that the Commission had considered twenty-five topics and had excluded certain of those topics for general reasons. That statement could then be followed by a summary of the criteria used by the Commission in making its selection.

56. Mr. HSU preferred to retain paragraph 15 because the list of topics contained therein would be of great assistance to the various delegations when the report was considered by the General Assembly. He did not feel that the fact that the inclusion of paragraph 15 might invite criticism should be a valid reason for deleting it; his view was quite the contrary.

The proposal to delete paragraph 15 was rejected by 8 votes to 4.

Paragraph 16: Topics of international law provisionally selected by the Commission

57. The CHAIRMAN requested the Rapporteur to expand the introduction to paragraph 16, which the latter agreed to do.

58. Mr. YEPES suggested that item 1 should be amended to correspond with the parallel item 5 in paragraph 15, by the addition of the words " and Governments ".

That suggestion was adopted.

59. Mr. YEPES thought that since statelessness was the main issue discussed in connexion with item 7 and since that item appeared in paragraph 15 under item 16 with the inclusion of the words " including statelessness ", item 7 should be amended accordingly.

That suggestion was adopted by 8 votes to one.

60. Mr. YEPES pointed out that items 11 and 12 were worded too briefly and should be redrafted to correspond with the phraseology used in items 21 and 22 in paragraph 15.

That suggestion was adopted by 10 votes to none.

Paragraph 17

61. The CHAIRMAN asked the Rapporteur to consider a suggestion made by Mr. Yepes that another expression should be found for the verb in the phrase " the Commission desires to emphasize ". [3]

62. Mr. SCELLE was not clear regarding the full implications of the last sentence of paragraph17. It seemed merely to express the Commission's good intentions.

63. Mr. AMADO (Rapporteur) agreed that it could be deleted. [4]

It was so decided.

Paragraph 18: The Laws of War [5]

64. Mr. HSU thought paragraph 18 was unnecessary. It did not reflect very well the views expressed and he preferred that it should be deleted.

65. The CHAIRMAN supported that proposal. It was unnecessary to include paragraph 18,

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[3] Later changed to " It was understood ".

[4] That sentence, read as follows: " The Commission would, in the course of time, endeavour to make detailed studies of each of these topics."

[5] Paragraph 18 read as follows:

" 18. The Commission considered whether the laws of war should be selected as a topic for codification, and decided in the negative. It was suggested that the horrors of the Second World War were fresh in the memory of the peoples of the world and that if the Commission took up the subject of the laws of war, its action might have an unfortunate psychological effect upon world opinion."

since a comparison of the list of topics included in paragraphs 15 and 16 would indicate that the Commission had decided to delete the topic " the laws of war ".

66. Mr. AMADO (Rapporteur) supported that suggestion.

67. Mr. FRANÇOIS, on the contrary, considered that the paragraph should be explained in more detail. He felt it was extremely important for the General Assembly to know why the Commission had decided against including the topic of " the laws of war ". He thought that in general the report of the Rapporteur had been extremely well prepared but that in that particular instance it was little too succinct since it gave only one argument brought forward in favour of excluding that topic. Other arguments had been used in support of that point of view, and there had also been a considered expression of opinion in favour of codifying the laws of war.

68. He proposed the insertion of a paragraph to the effect that the Commission had considered whether " the laws of war " should be selected as a topic for codification. It had realized that in view of the principles of international law recognized by the Charter and judgment of the Nürnberg Tribunal, war crimes had been declared crimes under international law. The punishment of those crimes in the event of any future armed conflict, whether in a collective action by the United Nations or in the exercise of the right of self-defence, would require the prior determination of what acts constituted war crimes, and consequently the codification of the laws of war. On the other hand the Commission had realized that it was unable to complete that task without the assistance of a fairly large number of military experts. Furthermore, it had feared that if it took up the subject of the laws of war at the very outset of its work its action might be interpreted to indicate a lack of confidence in the effectiveness of the means at the disposal of the United Nations for the prevention of war. In those circumstances the Commission had decided not to begin the study of that problem.

69. The CHAIRMAN requested the Commission to decide whether it preferred too keep some reference to the debate on the laws of war on the understanding that if such a reference were retained the Rapporteur would redraft the text of paragraph 18, taking into consideration Mr. François' proposal.

70. Mr. KORETSKY thought that the paragraph should be deleted. There was no reason to include a particular reference to the omission of the topic, " the laws of war ", unless an explanation were given for the omission of the other topics. He thought, furthermore, that in the draft presented by Mr. François the text would have a certain political significance. It would be of great assistance to the warmongers who were constantly promoting a new war, because it would give them a legalistic basis for their actions. He did not believe that the members of the International Law Commission would wish to constitute a legal staff committee to the countries which had signed the Atlantic Pact and were preparing a third world war. He therefore felt that paragraph 18 was out of place and that it would lead to a misinterpretation of the Commission's position in that matter.

71. Mr. SCELLE pointed out that if paragraph 18 were omitted there would be no indication of a lengthy discussion which had taken place in the Commission, also in connexion with the Nürnberg principles. On those grounds he felt that paragraph 18 would have to be retained and he agreed with Mr. François that it was necessary to explain the reasons for the Commission's decision to omit the topic " the laws of war ". In that connexion he pointed out that war was no longer lawful, since it had been declared a crime and he therefore thought that in the interests of logic the title " the laws of war " would have to be revised. In his opinion, the rules for the use of force or for the action of an international police unit would have to be codified, because in order to enforce the law it would always be necessary to resort to some form of compulsion.

72. The CHAIRMAN pointed out that if paragraph 18 were retained it would not necessarily have to have a sub-title. The sub-title put it out of focus. It might be stated that all the selected topics related to the law of peace and that the laws of war were related to the Nürnberg principles. In order to establish the proper perspective it might be wise to include the following sentence in paragraph 18: " It will be noted that each of the topics mentioned in paragraph 16 refers to the peacetime relations of States ".

73. Mr. HSU would not press for the deletion of paragraph 18 if an acceptable alternative were adopted by the Commission. If the latter procedure were followed he thought that two paragraphs similar to those drafted on the controversial question of the Commission's competence should be prepared. He was not sure that the brief paragraph composed by Mr. François would fully expose the complex aspects of the question.

74. Mr. KORETSKY was surprised that whereas at the beginning of the discussion the Chairman had supported the proposal to delete paragraph 18, he had just proposed the insertion of a sentence which would imply that, from the moment an aggressor had unleashed his campaign of aggression, he would no longer be bound by international law, as all existing international law was law of peace. The effect of the sentence proposed by the Chairman would be to rule out the possibility of applying international law to the con-

duct of an aggressor. He considered it an extremely dangerous sentence and open to grievous misinterpretation.

75. He did not think it would be advisable to delete only the heading of paragraph 18. To adopt such a subterfuge was not a suitable way for the Commission to act. Paragraph 18 should be deleted, since any other course would amount to the legalization of war.

The proposal to delete paragraph 18 was received 5 votes in favour and 5 against.

76. The CHAIRMAN stated that under the rules of procedure the proposal had been rejected and he requested the Rapporteur to redraft paragraph 18 in the light of the discussions just held.[6]

77. Mr. KORETSKY observed that it had been the general practice of the Commission that when a vote was equally divided, the final decision was postponed until the following meeting. That procedure should be followed or the records and the report should indicate that the vote had been equally divided.

The Chairman's ruling was upheld by 8 votes.

78. Sir Benegal RAU explained that he had abstained in the vote on the deletion of paragraph 18, because he had not known what the alternative was: If the Rapporteur's new paragraph was satisfactory he would vote in favour of it, otherwise he would vote for the deletion of paragraph 18.

79. Mr. SPIROPOULOS regretted that he had not taken part in the vote. He would have voted in favour of retaining paragraph 18, since he felt that such a vital question should be mentioned in the report.

Paragraph 19: Priority of Topics

80. The CHAIRMAN suggested that paragraph 19 should be deleted. It would not be of interest to the General Assembly and the necessary information was contained in paragraph 20.

81. Mr. YEPES stated that the report should reflect the Commission's proceedings; it was impossible to deny a historical fact. The Chairman's criterion was not necessarily that of the General Assembly, which might be interested in everything the Commission had done.

The proposal to delete paragraph 19 was rejected by 8 votes to 4.

Paragraph 20

82. The CHAIRMAN proposed the deletion of the last sentence,[7] as he felt that it was unnecessary for the Commission to state its working time-table.

83. In reply to a question by Mr. KORETSKY, he stated that it was quite clear that the three topics referred to would be given priority and that the question of the Commission's programme after the present session would be contained in a later section of the Commission's report.

The last sentence of paragraph 20 deleted by 7 votes.

Formulation of the Principles recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal *(concluded)*

84. The CHAIRMAN drew attention to the text[8] presented by the Sub-Committee, in accordance with a decision taken at the 29th meeting (A/CN.4/SR.29, para. 68).

85. Mr. YEPES felt that the Sub-Committee's text did not go far enough or draw all the possible principles from the Charter and Judgment; certain conclusions were formulated, but no principles, and the latter had been the task given to the Commission.

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[6] See A/CN.4/SR.37, paras. 19-24.

[7] That sentence read as follows: " It was further decided that these topics would be dealt with as soon as the Commission had finished its consideration of items 2, 3 and 4 of its agenda, namely those questions referred to it by the General Assembly ".

[8] " 1. Any person who commits or is an accomplice in the commission of an act which constitutes a crime under international law is responsible therefor and liable to punishment.

" 2. Such person is responsible under international law whether or not his act is punishable under any domestic law.

" 3. The official position of a person as Head of State or responsible official does not free him from responsibility (or mitigate punishment).

" 4. The fact that a person acts pursuant to order of his Government or of a superior does not free him from responsibility. It may, however, be considered in mitigation of punishment, if justice so requires.

" 5. The following acts constitute crimes under international law:

" (*a*) Crimes against peace: namely:

" (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).

" (*b*) War crimes: namely violations of the laws or customs of war. Such violations shall include, but not be 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 or 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.

" (*c*) Crimes against humanity: namely murder, extermination, enslavement, deportation and other inhumane acts done against a 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.

" 6. Any person accused of a crime under international law has the right of defense."

86. Mr. SPIROPOULOS drew attention to the fact that the Commission had already discussed the principles and that the Sub-Committee had only made certain minor drafting modifications.

87. Mr. YEPES asked why paragraph 1 of the Sub-Committee's original draft had been deleted from the new recommendations without explanation. [9] If it was founded on the Nürnberg Charter and Judgment it should not be omitted, as it was a very important principle.

88. Mr. SPIROPOULOS replied that the Judgment contained that idea but not the Charter. It was included as a real principle of law, however, but merely as one of the Tribunal's considerations.

It was unanimously decided to refer the text presented by the Sub-Committee to the next session and to appoint a Rapporteur on that subject.

Ways and Means for Making the Evidence of Customary International Law more Readily Available (A/CN.4/6)

89. The CHAIRMAN felt that the preparation of a comprehensive collection of all the existing evidence of customary international law suggested in the working paper prepared by the secretariat [10] would take many years and could never be complete.

90. With regard to the Secretariat's second suggestion for a new publication containing a more limited amount of material, various official government publications containing much material

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[9] See A/CN.4/SR.28, para. 53.

[10] That document read as follows:

1. *Possible Methods of Procuring the Publication of More Complete Collections of Evidence of Customary International Law.*

(*a*) *General.* The Commission could consider

(i) The preparation of a comprehensive collection of all the existing evidence of customary international law; or

(ii) A new publication containing a more limited amount of material; or

(iii) The continuation or elaboration of some existing publication or publications.

(*b*) *A comprehensive collection.* Some suggestions as to how an enterprise of this sort might be undertaken are contained in Section 2 of this paper.

(*c*) *Publications of a less comprehensive type.* Publications of this sort might contain either.

(i) Current material only. Cf. the *United Nations Treaty Series.*

(ii) Current material and also material dating from the relatively recent past. Cf. the *United Nations Reports of International Arbitrations.* Such a publication may be divided into

(*a*) Current series; and

(*b*) Earlier series; cf. Moore's *International Adjudications, Ancient and Modern Series,* and the *Annual Digest and Reports of Public International Law Cases, Supplementary Volume.*

(*d*) *Continuation of Existing Publications.* It would be within the scope of Article 24 of its Statute for the Commission to recommend the continuation, and possibly the expansion, of such well-known existing works as the *Annual Digest and Reports of Public International Law Cases,* the *Fontes Juris Gentium* series, the *United Nations Reports of International Arbitrations,* Flournoy and Hudson, *Collection of Nationality Laws,* Morrison, *Collection of Piracy Laws,* Feller and Hudson, *Collection of Diplomatic and Consular Laws,* and Lapradelle and Politis, *Recueil des arbitrages internationaux.*

2. *The Organization of the Preparation of a Systematic and Comprehensive Compilation of Evidence of Customary International Law.*

(*a*) *Possible methods.* The following alternatives, or combinations of them, may be considered:

(i) All or part of the work to be undertaken and carried out by the Secretariat of the United Nations under the direction of the Commission; or

(ii) All or part of the work to be undertaken and carried out under the auspices of Governments; or

(iii) All or part of the work to be undertaken and carried out in existing unofficial scientific institutions in the different countries; or

(iv) All or part of the work to be undertaken and carried out by individual experts, pursuant to a plan laid down by the Commission and under the direction of the Secretariat.

(*b*) *The Secretariat as Central Organ.* In view of the evident need for centralization, there is a strong case to be made out for the entrusting of this task to the Secretariat, under the direction of the Commission. The Secretariat is equipped to provide for the translation of texts into the official and working languages of the United Nations, and for their publication.

The following is an indication as to what the method would involve when applied to different parts of the undertaking:

(i) *Digest of the Practice of States.* In connexion with the preparation of digests of State practice, the Governments would need to furnish relevant materials, which would be edited, translated and published by the Secretariat in accordance with instructions drawn up by the Commission.

(ii) *Collections of International Decisions.* For the making of collections of international decisions, Governments would supply to the Secretariat copies of all past arbitral awards and, possibly, furnish copies of all future awards in the same manner as, in conformity with Article 102 of the Charter, they now furnish copies of treaties.

(iii) *Decisions of National Courts.* In connexion with the collecting of national decisions, the Secretariat would collaborate with individual experts, national scientific institutions or correspondents, and, in the case of some countries, perhaps also with Governments, for the assembling of such decisions.

(iv) *National Legislation.* As respects the collection of national legislation, the Secretariat would collaborate with appropriate correspondents in the different countries, and Government might possibly agree to communicate relevant texts for the future.

(*c*) *Individual Undertakings by Governments.* The co-operation of Governments is clearly essential to the success of any undertaking for which the Secretariat is to be primarily responsible. An alternative would be to place the main responsibility upon Governments, and to limit the function of the Secretariat to the furnishing of such auxiliary services as translation and publication. There might be many advantages in such a scheme, particularly in so far as concerns the preparation of digests of State practice which will involve extensive consultation with national archives. And it is to be noted that not only has at least one Govern-

on the subject were available. He was particularly indebted to the annual volumes published by the Central and South American States, a list of which was contained in document A/CN.4/6 (p. 10 to 12). Some of those " *Memoria* " had been published for a very long time. He also drew attention to a comparable United States Government publication, " Foreign Relations ".

91. Mr. SPIROPOULOS felt that the question was a very complicated one though it had nothing to do with the codification of international law as such and need not necessarily be done by a legal expert. The Secretariat study (A/CN.4/6) was extremely valuable but it would necessitate serious consideration. The Commission could consider the Secretariat working paper paragraph by paragraph or it could appoint a Rapporteur to draw up proposals for the Commission's consideration. He felt that the latter course might be more advisable, since the Commission had not given the subject sufficient thought or preparation to be able to consider its substance.

92. Mr. KORETSKY agreed with Mr. Spiropoulos that the Commission was not in a position to take a decision on that item; the documents involved were too numerous for one individual to study, even in a whole life-time. The Secretariat's study, however, so highly praised by Mr. Spiropoulos, would not enable the Commission to decide the direction in which it should work. He did not wish to indulge in mere criticism of the Secretariat but he felt that it was impossible to follow the Secretariat's suggestions.

93. The data given did not cover all countries, though the study purported to deal with the whole world; with regard to certain countries the information was inadequate or inaccurate; hardly any reference was made to developments in the Arab countries, Sweden or China, which were included under the heading of " Other Countries ". The development of international customary law in the People's Democracies was almost entirely neglected although a great deal of information was available to those who wished to find it; for example, there was a three-volume bibliography on the subject in the Moscow Library. Judging from pages 18 and 19 of the Secretariat's study, however, the author of that document seemed unduly interested in pre-revolutionary Russia but displayed utter ignorance with regard to the situation in the USSR. It was unpardonable that the Secretary-General should sanction such a display of ignorance.

94. The USSR and the other People's Democracies had a substantial contribution to make and were parties to numerous international treaties. Information was available but the Legal Department did not seem to wish to give the International Law Commission objective information; it had made no attempt to find the available documentation but had resorted to the consultation of experts who did not possess the necessary authority, but were ignorant and displayed anti-democratic tendencies. Proof that

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ment, that of the United States, already prepared and published digests of its State practice, but numerous others regularly publish extensive collections of material relevant in this connexion. Mention may be made in particular of the periodical *Boletins* and like publications of the various South American Governments. But the method would not be free from drawbacks unless a minimum of uniformity were assured, for instance by the issue by the Commission of detailed suggestions for compilation.

(*d*) *Division of Labour between Governments and the Secretariat.* Another possibility which clearly exists is a combination of the two methods last treated.

(*e*) *Utilization of National Institutions or Committees.* Governments favourable to the idea of such a comprehensive undertaking as is here suggested but not willing to assume responsibility for the work might be willing to entrust their share thereof to national commissions, which would be either official or unofficial as national practice and tradition would dictate. The creation *de novo* of official national research bodies, for which there are ample precedents, might also be considered. Co-ordination between bodies of this sort might be achieved either by means of instructions issued by the Commission or by the formation of an international co-ordinating committee.

(*f*) *Enlistment of Individual Experts.* The contribution which individual experts can make to such a comprehensive undertaking as in contemplated here is large, but there are clear limits to that contribution. Thus a Government might think it desirable to entrust the compilation of a digest of its State practice to an individual scholar. But, though the earlier United States digests and notably that of Moore, were prepared in that way, it is now generally agreed that the task of digesting the extensive materials in national archives is beyond the power of any one man, although a team directed by a qualified individual may effectively discharge it. In so far as concerns the compilation of digests of international decisions, national decisions, or national legislation, there would appear to be ample scope for individual effort, as such works as Moore's *International Adjudications*, the *Fontes Juris Gentium* collection of the decisions of the German Supreme Court, and Flournoy and Hudson's *Collection of Nationality Laws* sufficiently demonstrate. The employment of individual experts is not, however, an alternative method of carrying out the whole undertaking and presupposes the adoption of one or other of the methods discussed already. Such experts may be entrusted with specific tasks by Governments in the same manner as it has been suggested in the case of national scientific bodies. Likewise their co-operation may be enlisted in connexion with any task entrusted to the Secretariat.

3. *Some Secondary Suggestions.*

Other matters worthy of the attention of the Commission in connexion with Article 24 of its Statute might include:

(i) Possibility of consultation with Governments for the granting of more easy access to national archives.

(ii) Methods of promoting wider distribution of existing collections of evidence of international law, e.g. the ascertainment of the exact contents of existing libraries, the provision of nuclear collections in appropriate places, the provision of phostotatic copies of works now out of print, and the enlistment of the co-operation of Governments and private foundations with a view to the establishment and maintenance of standard libraries of international law in different parts of the world.

information was available from the Soviet countries was to be found in the " Human Rights Year Book "; the Legal Department, however, seemed determined to maintain a conspiracy of silence with regard to the People's Democracies and the USSR.

95. He would be frank: the Secretariat's study was definitely biased in favour of the United States; it was an excellent piece of research work on United States publications by persons who sympathized with the United States viewpoint; events in Asia and Africa were apparently considered unimportant. The document was in fact completely lacking in any sense of proportion. It was intolerable that the Secretariat should bow to the will of an influential Member of the United Nations and assist that Member to impose a hegemony of thought throughout the world. Such a tendency was incompatible with the principle of sovereign equality laid down in Article 2, paragraph 7, of the Charter and was particularly regrettable in the compilation of a document of that type.

96. The study referred to certain papers and praised certain collections such as the United Kingdom " Annual Digest and Reports of the International Law Cases ", which did not deserve that praise. That collection was interesting but it did not contain an objective explanation of customary international law. The editor was clearly undemocratic and had no sympathy with the USSR. Even when quoting the objective decision handed down by such judges as Lord Justices Scrutton and Banks, he had quoted all the arguments against the USSR and none of those in its favour; such editing was designed to condition international lawyers to take decisions against the USSR.

97. Similarly, Mr. Koretsky understood the motives that had inspired the Secretariat in drawing up its study. The author of the document was anti-democratic and anti-Soviet; his eyes were closed to the new aspects of international customary law arising in Eastern Europe and he was happy in his ignorance.

98. Mr. Koretsky recalled that in 1947 he had warned the Secretariat on the dangers of consulting private experts and had been accused of not recognizing the value of specialists; the Secretariat's study fully justified his premonitions. The authorities quoted were authorities on biased opinions alone and it was unfortunate that the Secretariat should subsidize the representatives of countries which sought to dominate the world.

99. With regard to the substance of the question, he felt that at this juncture customary international law was too vague to be important and might moreover be fashioned into a tool to serve certain deplorable tendencies. Custom existed because States were unequal and slavery still prevailed. He quoted the example of mixed courts which had been used to promote colonial infiltration in dependent territories; customary law had also been used by the counter-revolutionaries to impose a foreign yoke on certain countries, such as China, for example, in connexion with which he referred to the system of capitulations and extra-territoriality. He wondered whether Mr. Hsu would agree with such a system. He personally felt that it should be rooted out in the interests of the world-wide liberation of all peoples. The world was now entering a new phase. The Commission should rather study the new documents and treaties which were being drawn up throughout the world; any other procedure would mark a retrogression to the black past.

100. In conclusion, he stated that the Commission should reject the Secretariat's study as unworthy of its attention and should seek real ways and means for making international law more readily available. To that end, the Secretariat should compile a study which did in fact relate to all countries; the Commission would then be in a better position to accomplish its task. That would not be possible at the current session, however; more time and better documents were needed.

101. Mr. YEPES felt that the Secretariat document clearly proved the injustice of Mr. Koretsky's accusations; it was an extremely useful and learned document based on a profound study of customary international law throughout the world. It contained a list of reference documents which the Commission might usefully study and it referred to all available Soviet sources. United States documents were available to everyone and if the USSR documents were not, that was not the Secretariat's fault. He admitted, however, that certain documents such as the *Recueil des Cours de l'Académie de Droit International de la Haye* might usefully have been included. The gaps in the memorandum did not concern the USSR alone and in any case they were not intentional.

102. Mr. SPIROPOULOS reaffirmed his opinion that the document was an extremely good one and added that Mr. Koretsky's criticism seemed unfair. Obviously the study was not complete but it would have been impossible to make it complete at that time; furthermore, the Commission's task was not to obtain a complete list of all publications on international law but to ascertain the best method of compiling an exhaustive documentation on the subject.

103. Since the question was on the Commission's agenda and was referred to in article 24 of its Statute, he felt that the Secretariat working paper might form a useful basis for a general discussion on what documents the Commission required and on how it could set about obtaining them. Furthermore, there should be a Rapporteur's report on the subject.

104. Mr. HSU felt that the Secretariat document spoke for itself and did not need his defence. He

appreciated Mr. Koretsky's motives in referring to extra-territorial consular jurisdiction in China. He pointed out, however, that such jurisdiction was not based on custom but on Treaties, though the provisions of those Treaties had been somewhat expanded.

105. The CHAIRMAN remarked that the Secretariat had been confronted with a very difficult task. Although the document it had produced had certain limitations, he felt that the Secretariat deserved the Commission's congratulations.

The meeting rose at 6.10 p.m.

32nd MEETING

Thursday, 2 June 1949, at 3 p.m.

CONTENTS

Chairman: Mr. Manley O. HUDSON.
Rapporteur: Mr. Gilberto AMADO.

Present:

Members: Mr. Ricardo J. ALFARO, Mr. James L. BRIERLY, Mr. Roberto CÓRDOVA, Mr. J. P. A. FRANÇOIS, Mr. Shuhsi HSU, Mr. Vladimir M. KORETSKY, Sir Benegal RAU, Mr. A. E. F. SANDSTRÖM, Mr. Georges SCELLE, Mr. Jean SPIROPOULOS, Mr. Jesús María YEPES.

Secretariat: Mr. KERNO, Assistant Secretary-General in charge of the Legal Department; Mr. LIANG, Director, Division for the Development and Codification of International Law, Secretary to the Commission.

Ways and Means of Making the Evidence of Customary International Law more Readily Available (A/CN.4/6) (*concluded*)

1. The CHAIRMAN re-opened the discussion of this item.

2. Mr. HSU wished to complete the remarks which he had made at the end of the preceding meeting. He had carefully perused both documents under discussion and had found them as good as could be expected under the circumstances. The work was still at a preliminary stage and could not therefore be complete, but it did not deserve the severe criticism and political accusations levelled against it by Mr. Koretsky.

3. The Secretariat paper had been prepared in a very scientific manner and had listed different methods by which the objective might be reached. Mr. Hsu therefore felt that the most effective method would be to instruct the Secretariat to prepare a systematic and comprehensive compilation of evidence of customary international law; the Secretariat would be the central organ for that work and would seek the co-operation of the governments, organizations and experts.

4. The Commission should base its discussion on the Secretariat working paper, starting with page 2, paragraph 2 (*b*). [1] He pointed out, in that connexion, that the document followed the outline of the Secretary-General's Memorandum containing a survey of compilations and digests of evidence of customary international law (A/CN.4/6). The working paper could thus be discussed paragraph by paragraph in conjunction with the corresponding sections of the survey.

5. The CHAIRMAN considered Mr. Hsu's suggestion useful He agreed that the different paragraphs of the working paper covered certain sections of the survey; thus paragraph 2 (*b*) (i), Digest of the Practice of States, covered part two, I, section B of the survey; paragraph 2 (*b*) (ii), Collections of International Decisions, covered sections D to H of the same part; paragraph 2 (*b*) (iii), Decisions of National Courts, covered sections I and J, and paragraph 2 (*b*) (iv) covered section K. He suggested that the Commission should follow Mr. Hsu's proposal and begin with the discussion of paragraph 2 (*b*) (i).

6. Mr. SCELLE thought that both Mr. Hsu's proposal and the proposal made by Mr. Spiropoulos at the preceding meeting were acceptable. It was a difficult question and its study would require much time. With regard to the survey which had been strongly criticized by Mr. Koretsky, he pointed out that every work was bound to contain some faults. Nevertheless, Mr. Scelle found that he had learned a great deal from the document.

7. Mr. Koretsky's vehement attack had been defeated by its own arguments. While there might be certain gaps in the survey, they were certainly not due to bad faith on the part of the Secretariat. Mr. Scelle also felt that the survey should be completed, but even in its existing form it was the most valuable study on the question extant.

8. Mr. Scelle therefore supported Mr. Spiropoulos' proposal that it should be taken as one of the major subjects for study and that a rapporteur should be appointed to complete the survey and consider how the evidence of customary law, which was as yet the main source of international law, could best be made available. In a sociological sense, international law was yet at an

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[1] See A/CN.4/SR.31, footnote 9.

early stage of development, and customary law was of great importance in that connexion.

9. Even in France, a country of written law, the influence of customary law was daily felt. He pointed out, with reference to conventional law, that treaties as a rule merely record customs in writing. Consequently, in international law customary law was relatively more important than conventional law.

10. Mr. KORETSKY thought that the discussion had shown not only divergent ideological approaches, but also differences in the evaluation of methods. In speaking of the "attacks" against the Secretariat paper, Mr. Scelle had simplified the Commission's task. It was a wrong approach which would ultimately be harmful to its work. Referring to an incident from his own experience, Mr. Koretsky stated that the thoroughness of his criticism was in proportion to his desire to help in any given work. He had not only the right, but the duty to point to any shortcomings in the Secretariat's work, and such criticism should not be taken personally.

11. With regard to Mr. Hsu's statement at the preceding meeting, Mr. Koretsky expressed disappointment at the fact that Mr. Hsu had defended the treaties which had been instrumental in imposing foreign domination on China and from which the latter was now freeing itself.

12. The inadequacy of the survey was due to ignorance of available material and a lack of desire to do further research. The Harvard Library contained many volumes of data on pre-revolutionary Russia as well as on the Union of Soviet Socialist Republics which had not been listed in the survey. The documents relating to the United States of America and the Latin American countries were well publicized and there was no need to concentrate on them. In the case of other countries, however, the material was less well known and the Secretariat had failed to carry out research where it was most needed. In view of those circumstances, his evaluation of the Secretariat's work had been necessarily critical. All facts tended to show that such work should not be entrusted to individual experts who might be guided by personal preferences.

13. Regarding the question of principle raised by Mr. Scelle, Mr. Koretsky noted that a number of members seemed to feel that customary law was the basic source of international law. That view was wrong. A correct study of the evolution of international law would show that customary law was bound by tradition, backward and always lagged behind social development. Conventional law, on the other hand, was progressive; in it were crystallized the new principles of law and thus it served to strengthen the development of international law. There were many new sources of conventional law; the Charter of the United Nations, for instance, which laid down many new principles of international law, was essentially a treaty which had been signed by all peace-loving nations in San Francisco. Consequently treaties, which were the expression of the sovereign will of sovereign States acting jointly, should be considered the principal source of international law and should be studied with a view to extracting the main principles which they embodied, as was being done in the of the principles of the Charter of the Nürnberg Tribunal and of the Tribunal's Judgment.

14. Customary law, however, was backward and belonged to the period of the "white man's burden", the period of the domination by a few powerful States who had disregarded the national sovereignty of weaker States. Mr. Scelle had correctly stressed the need to determine what should be considered a basic source of international law, but his conclusions had been wrong; conventional law, not customary law, was the basic source of international law.

15. The CHAIRMAN, stating his own view on the matter, did not think that it was for the Commission as a whole to judge the documents prepared by the Secretariat. Each member of the Commission had his own views regarding the quality of the work and there was no purpose in trying to arrive at a unanimous agreement on it.

16. In his opinion, the document could not possibly be complete in view of the tremendousness of the task involved. It was essentially a problem of finding persons equipped with technical and linguistic knowledge to carry out the work. The Division of the Legal Department which acted as Secretariat to the Commission, had once included a staff member from the Soviet Union, but he had not been able to complete his part of the work.

17. The Commission must observe article 24 of its Statute. In accordance with that article, the Secretariat had prepared a useful, if not complete, document. Mr. Koretsky's suggestion for a survey of current treaty law was interesting, and the Chairman hoped that such a survey might be carried out in the future. He himself had devoted many years of his life to a careful study of the League of Nations Treaty Series, and at one time had taken steps to ensure its continued publication in the two working languages. His interest in the matter, however, had not prevented him from criticizing it severely on different occasions.

18. Referring to his own experience in the United States, he pointed out that, being convinced that the difficulty of obtaining texts was one of the main obstacles to research work on international law he had carried on an unceasing campaign for the publication of relevant material. As a result of those efforts, the publications of the

State Department of the United States Government had been vastly improved, a series of multipartite international conventions had been published under the title *International Legislation* and the judgments, advisory opinions and orders of the Permanent Court of International Justice from 1922 to 1942 had been brought out in one series entitled *The World Court Reports*.

19. A study of the legislation of all countries on various subjects has been started at Harvard University, and he hoped that that as well as other studies by the Harvard Research might be brought up to date by the United Nations Secretariat.

20. In reply to the objection which had been raised that the survey did not deal with laws in Arab countries, he drew attention to page 61 of the survey containing a reference to Egypt. He recalled, in that connexion, his own experience in trying to collect customary laws pertaining to pearl fishing in the Persian Gulf. As no documents had been published on the matter, it had been necessary to send out research workers to interview pearl fishers on the existing customs in that region. He hoped that the research would further the knowledge of customary international law on the question. While the Secretariat could not be expected to carry out similar research, the incident was typical of the difficulties experienced.

21. In conclusion he suggested, with reference to the last paragraph on page 4 of the working document, that the United Nations might take steps to provide its Members with adequate material on international law as applied to meet current problems, with special reference to the United Nations and international co-operation in general. The material should cover all countries and be translated into the languages of the respective Member States to which it was circulated.

22. Mr. YEPES thanked the Chairman for his statement and suggested that he should be appointed Rapporteur on that subject.

23. Mr. SANDSTROM supported Mr. Spiropoulos' proposal made at the previous meeting that a rapporteur should be appointed, and thought that there was general agreement with Mr. Yepes' proposal.

24. The CHAIRMAN stated that he would be glad to help in the preparation of a report on the subject, but he did not think that, as Chairman, he should be appointed Rapporteur.

25. He then turned to paragraph 2 (*b*) of the working paper. He noted that the material available on paragraph (i), Digest of the Practice of States, was insufficient and should be supplemented. With regard to paragraph (ii), Collections of International Decisions, two excellent volumes of the International Arbitration Awards had been published, but new volumes were needed. In connexion with paragraph (iii), Decisions of National Courts, he said that the Annual Digest of Reports of Public International Law Cases, published in London, was very useful although not complete. With reference to paragraph (iv), National Legislation, he suggested that the Secretariat should publish collections of the national legislations of all countries, classifying them according to subjects.

Paragraph 2 (b) (*i*): *Digest of the practice of States*

26. The CHAIRMAN pointed out that some Governments supplied a great deal of material on certain questions, and experts would have to go over much of it in order to trace the development of particular subjects for simplified presentation in the Digest.

27. Mr. BRIERLY thought that such an undertaking would be impractical. He feared that there would be no response if Governments were asked to supply too extensive a documentation.

28. Mr. SPIROPOULOS suggested that the ministries of foreign affairs of Member Governments might be asked to transmit copies of their diplomatic correspondence.

29. The CHAIRMAN saw some difficulty in that suggestion as Governments would not be willing to supply the relevant documents without the consent of the other Governments involved and not until the issues discussed in the correspondence had been settled. The Commission might, however, request the Governments to prepare digests of their practices, although it was doubtful whether the latter would assume such an expensive and time-consuming function.

30. Mr. CORDOVA noted that the *Memoria* published in Mexico included the main documents pertaining to that country's diplomatic negotiations. The documents, however, were only published ten years after the negotiations had been completed.

31. Mr. SPIROPOULOS, reminding the Commission that it must present a report on the matter to the General Assembly, stated that the Commission should request Governments to prepare collections of documents similar to Moore's Digest.

32. Mr. AMADO suggested that the Chairman, who was an expert on the question, should prepare a working paper on the basis of which the Commission could formulate its instructions to the Rapporteur.

Paragraph 2 (b) (*ii*):
Collection of international decisions

33. The CHAIRMAN noted that a new volume of the *Reports of International Arbitral Awards* [2] had been prepared by the staff of the registry of the International Court of Justice. The material

[2] United Nations publication, Sales Number:1948-V. II.

contained in that volume was relevant, but its editing was defective. He drew attention to the *Grotius Annuaire*, a very useful collection of international decisions which had been published in The Hague.

34. As regards current international decisions, collections were being published. In the case of earlier international decisions, he had suggested to the Registrar of the International Court of Justice that the first series should start with 1920, the second series with 1820, and a third series with the eighteenth century.

35. Mr. BRIERLY asked the Chairman whether he thought the matter in question was adequately taken care of in the publications of the Permanent Court of International Justice, and whether there would be any overlapping of work if another body made a collection of international decisions.

36. The CHAIRMAN said that Mr. Brierly's first question could not be answered until ten years after the publications had been completed. Replying to the second question, he said there would be no overlapping of work if such a collection of decisions covered another period, and pointed out that two extremely useful works already existed, namely the *Recueil des Arbitrages Internationaux* by Lapradelle and Politis, and *the Recueil International des Traités du XX^e Siècle contenant l'ensemble du droit conventionnel entre les Etats et les sentences arbitraires* by Descamps and Renault.

37. The work of making the collection of decisions had been entrusted to the Registry of the International Court of Justice as it had the necessary staff and material to carry out such work.

38. Mr. BRIERLY felt that it would be a waste of time for Governments to supply the United Nations Secretariat with copies of all past arbitral awards in order that it might make a collection of international decisions, as suggested in the working paper of the Secretariat, if the Registry of the International Court of Justice was already doing that work.

39. Mr. SPIROPOULOS agreed that a great deal of work had already been carried out by the International Court of Justice in collating decisions, but felt that the Secretariat of the United Nations should be the central organ in view of the evident need for centralization.

40. Mr. LIANG (Secretary to the Commission) said that the series of publications entitled "Reports of International Arbitral Awards" was being prepared jointly by the Registry of the International Court of Justice and the Legal Department of the Secretariat of the United Nations. The main part of the work was being done at The Hague because of the accessibility of material and for other practical reasons. The work was being paid for out of United Nations funds. While the Reports referred to published awards given in the past, the suggestion made in paragraph 2 (*b*) (ii), of the working paper, referred to the preparation of collections of future arbitral awards. If the Commission decided that such work should be carried out, also by the Registry of the Court, the Secretariat would be glad to transmit to the International Court of Justice, copies of all arbitral awards made in the future which it received from Governments.

41. Replying to Mr. BRIERLY, the CHAIRMAN said that under The Hague Convention on the Pacific Settlement of International Disputes to which more than forty States were parties, signatory States had to forward to the Permanent Court of Arbitration all texts of arbitral awards. The Permanent Court of Arbitration had already published a number of volumes containing such texts.

Paragraph 2 (b):
(iii) Decisions of National Courts

42. The CHAIRMAN said that, as a general rule, national courts applied international law only in so far as it had been incorporated in national law. A collection of decisions was contained in the Annual Digest and Reports of Public International Law Cases, published in London. It would be useful if the Secretariat collaborated with individual experts, national scientific institutions and, in the case of some countries, with Governments, for the assembling of such decisions.

43. Mr. KORETSKY said that if such decisions were compiled and published by the United Nations, care should be taken that the full texts of the decisions of national courts were given. It was important that the Secretariat of the United Nations should do the work of compilation itself and should not co-operate with individual experts, as suggested in the working paper of the Secretariat. In many existing collections the decisions were reported in a mutilated form.

44. The CHAIRMAN agreed that the full texts of decisions of national courts should be published.

Paragraph 2 (b): *(iv) National Legislation*

45. The CHAIRMAN pointed out that in the working paper of the Secretariat it was suggested that Governments might possibly agree to communicate to the Secretariat of the United Nations in the future the relevant texts of national legislation. In most countries national legislation was published, and he presumed the Secretariat could make a collection of such legislation and determine what items were of international interest.

46. Mr. LIANG (Secretary to the Commission) said it was difficult to visualize a complete collection of national legislations as so many subjects were involved. He felt, therefore, that a collection should only be made of national legislations cover-

ing the topics chosen for codification by the Commission.

47. The CHAIRMAN said the Commission had completed a review of paragraphs 2 (*b*) (i), (ii), (iii) and (iv). He felt that the questions covered by paragraphs 2 (*c*), (*d*), (*e*) and (*f*) should be considered later.

Paragraphs 3 (i) and 3 (ii)

48. The CHAIRMAN said that paragraph 3 (i) which referred to the possibility of consultation with Governments for the granting of more easy access to national archives, might be of general interest to the United Nations. He was not sure whether such consultations should be initiated by the Commission or by a resolution of the General Assembly.

49. Mr. KORETSKY felt that the question whether Governments should grant more easy access to national archives was one of domestic jurisdiction. In the Union of Soviet Socialist Republics the archives could be consulted by all scientists. Referring to paragraph 3 (ii) he felt it was not necessary for the Commission to take any action regarding methods of promoting wider distribution of existing collections of evidence of international law.

50. The CHAIRMAN said the question might be drawn to the attention of the United Nations Educational, Scientific and Cultural Organization.

51. Mr. KORETSKY could not agree with the Chairman's suggestion, as UNESCO dealt only with educational problems.

52. The CHAIRMAN proposed that the matter should be referred to the second session of the International Law Commission.

53. Mr. YEPES suggested that the Chairman should prepare a working paper containing his views on the subject of ways and means for making the evidence of customary international law more readily available and that no Rapporteur should be appointed to deal with that question.

54. Mr. AMADO pointed out that, as he had made a similar proposal at a previous meeting, he would support Mr. Yepes' suggestion.

It was decided that no Rapporteur should be appointed to deal with the question of ways and means for making customary international law more readily available, but that a member of the Commission should prepare a working paper on that subject to be submitted to the second session of the International Law Commission.

General Directives Regarding the Commission's Report: Appointment of Rapporteurs

55. Mr. YEPES suggested that before the appointment of Rapporteurs for the three topics chosen by the Commission for codification, there should be a general discussion of those three subjects, namely the Law of Treaties, the Law of Arbitral Procedure, and the Régime of the High Seas, to determine what directives should be given to the Rapporteurs.

56. He suggested that the Commission might wish to choose another subject for codification in case any of the Rapporteurs appointed could not be present at the second session or was prevented from carrying out his work. It would be best for each member of the Commission to choose a subject in which he was interested and submit a paper to the second session, but he admitted that that was not practicable.

57. Listing the problems coming under the Law of Treaties, he said that each one of them was worthy of a special report, and that the Rapporteurs would have great difficulty in making such reports unless they had received directives from the Commission.

58. Referring to the Law of Arbitral Procedure, he considered that the Commission should give the Rapporteur clear directives whether he was to study arbitral procedure of the nineteenth century and the early part of the twentieth; or whether he should concentrate on modern arbitral procedure. He pointed out that at the ninth Pan-American Conference problems relating to the peaceful settlement of disputes had been carefully examined, and it had been decided that The Hague procedure was out of date in view of world legal evolution. That had resulted in a very advanced treaty on the subject.

59. The Régime of the High Seas was a problem on which the repercussions of contemporary events had been very profound. The Rapporteur should be given specific directives regarding the work to be carried out in that connexion. Mr. Yepes stated that revolutionary doctrines had exploded the classic conception of international law as regards the Régime of the High Seas, and referred to a declaration made at the Pan-American Conference of 1939 regarding the security belt of 300 nautical miles established around the western hemisphere. That declaration had already been incorporated in certain treaties of the American Republics. It was to be regretted, however, that it had been omitted from the North Atlantic Treaty.

60. President Truman had made an important declaration regarding the doctrine of the " continental shelf ". That " shelf " comprised a large area of the ocean which, in connexion with the exploitation of the riches of the sea, was to be considered as the exclusive property of the countries bordering it. Similar declarations had been made by the Presidents of Mexico, Chile, Argentina, Costa Rica and other States. In certain countries it had been decided that the " continental shelf " should be 200 nautical miles in radius.

61. An inquiry was being carried out by certain Latin American States regarding the possibility and desirability of concluding a convention between all American States with a view to settling the radius of the security belt which would protect the sovereignty of American States over a portion of the ocean formerly known as the " high seas ", as it was beyond the three-mile limit.

62. The CHAIRMAN agreed with Mr. Yepes' suggestion that there should be a general discussion on the three topics chosen for codification, but felt that only one Rapporteur should be appointed to deal with each topic.

63. Mr. KORETSKY could not agree with Mr. Yepes' proposal. As members of the Commission had already expressed their views on the various topics for codification, he felt that further discussion of those topics would not lead to any directives being given to the Rapporteurs. The latter should merely draw up working papers to be submitted to the second session of the Commission. Their work was not the same as that of Rapporteurs working on subjects which the General Assembly had already assigned to the International Law Commission.

64. Mr. SPIROPOULOS said he had drawn the Commission's attention at a previous meeting to the points which had now been raised by Mr. Yepes, and felt that the matter should be discussed further. The Rapporteurs appointed must be given directives, the Commission must adopt a plan of work in each case, and must decide how Governments should be approached and requested to furnish the texts of laws, decreed, judicial decisions, treaties, diplomatic correspondence and other documents relevant to the topic being studied in accordance with Article 19 of the Statute. The Commission should also decide what form its report to the General Assembly should take in the light of Article 20 of the Statute, and what subjects should be discussed at the second session.

65. Mr. YEPES proposed that the question of the recognition of States and Governments should be added to the list of topics already chosen for codification.

66. Mr. BRIERLY felt it would be impossible to discuss thoroughly even three subjects at the second session, and therefore disagreed with Mr. Yepes' proposal.

67. Mr. SCELLE suggested that at the following meeting the Commission's report to the General Assembly should be discussed. The directives to be given to the Rapporteurs should be considered, but they should not be given strictly determined terms of reference. It might be advisable to appoint a Rapporteur to deal with the problem of the recognition of States and Governments, which was one of the most important current political questions.

68. The CHAIRMAN said that the proposal submitted by Mr. Yepes would be considered at the following meeting. He agreed that the Commission should adopt a plan of work appropriate to each topic to be codified, but, in connexion with the suggestion that a new topic should be added, felt that the Commission should not undertake more work than it could carry out.

The meeting rose at 5.50 p.m.

33rd MEETING

Friday, 3 June 1949, at 10.30 a.m.

CONTENTS

Chairman: Mr. Manley O. HUDSON.
Rapporteur: Mr. Gilberto AMADO.

Present:

Members: Mr. Ricardo J. ALFARO, Mr. James L. BRIERLY, Mr. R. CÓRDOVA, Mr. J. P. A. FRANÇOIS, Mr. Shuhsi HSU, Mr. Vladimir KORETSKY, Sir Benegal RAU, Mr. A. E. F. SANDSTRÖM, Mr. Georges SCELLE, Mr. Jean SPIROPOULOS, Mr. Jesús María YEPES.

Secretariat: Mr. KERNO, Assistant Secretary-General in charge of the Legal Department; Mr. LIANG, Director of the Division for the Development and Codification of International Law, Secretary to the Commission.

Preparation of a Working Document on the Right of Political Asylum

1. The CHAIRMAN recalled that at the preceding meeting [1] Mr. Yepes had suggested that he might prepare for the following session a working paper on the recognition of States and Governments. In view of the importance of the question and the special difficulties connected with it, Mr. Yepes had agreed to give up that subject and to prepare instead a document on a topic of more limited scope, with which he was especially familiar: namely, that of the right of political asylum.

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[1] See A/CN.4/SR.32, para. 65.

2. Mr. KORETSKY thought that the Commission should not increase the number of topics for codification to be studied in the interval between the two sessions. Priority had been granted to three questions, the examination of which would require a great deal of time, and which would probably occupy the whole of the Commission's time at the following session; the Commission might not even be able to complete the study of those priority questions. In those circumstances, it was better for the members of the Commission not to divert their attention and their efforts to other matters, such as the right of political asylum, which the Commission would probably not be able to approach for a considerable time: all efforts should be concentrated on the three priority topics for codification.

3. The CHAIRMAN explained that there was no question of diverting the attention of members from the three topics for codification to which the Commission itself had granted priority. Those problems should have precedence over all others, and the fact that some members were willing to prepare working papers on other issues did not mean that the Commission would have to examine their memoranda at the following session. Those documents would simply be held in reserve for any occasion when, for some reason such as the absence of a rapporteur, for example, the Commission might have the necessary time to consider them. In those circumstances, there was no reason why the Commission should not be glad to receive the voluntary offers of some of its members who wished to make good use of the interval between sessions by studying a topic for codification and preparing a working paper on that point.

4. Mr. SANDSTROM shared the Chairman's opinion that it would be useful to have in reserve, over and above the three topics for codification which had been granted priority, prepared studies on one or two other questions. The Commission could only express its gratitude to members who were willing to undertake that additional task.

5. The CHAIRMAN proposed that the Commission should invite Mr. Yepes to prepare for the following session a working paper on the right of political asylum, on the same conditions as the Chairman had accepted the task of preparing a document on ways and means of making the evidence of customary international law more readily available.

It was so decided.

General Directives on the Drafting of Reports (*concluded*)

6. The CHAIRMAN recalled that the Commission had decided at the previous meeting that the appointment of Rapporteurs to study the three priority topics for codification should be preceded by a short discussion, during which the scope of each topic would be determined; from those discussions the Rapporteurs would be able to obtain directives for the preparation of the subject and drafting of the report. Mr. Yepes had already provided some most valuable guidance in that respect, to which little needed to be added.

7. The first question, that of treaties, embraced various familiar problems which the Rapporteur would naturally consider in the light of the existing documents, including the "Convention on Treaties" adopted in 1928 by the Havana Conference.

8. The question of arbitral procedure, which had been considered for the first time in 1875 by the Institute of International Law, had been amply dealt with in The Hague Conventions of 1899 and 1907 on the Pacific Settlement of International Disputes. Since that time the rules of arbitral procedure had been frequently applied; and the Rapporteur would find abundant practical documentation in the many cases of arbitration. In particular, he might make a thorough study of a question which had already arisen several times, in the case of the Hungarian optants, for example, as also before a Franco-Mexican claims commission and a German-American claims commission: namely, what were the powers of a commission made up of two members representing the two Powers concerned and one arbitrator, after the representative of one of the Powers had withdrawn?

9. The régime of the high seas should be considered more especially in its modern aspect. The Rapporteur should not waste time on the classic questions of *mare liberum* and *mare clausum*. He should, however, make a careful study of the new doctrine of the control of natural submarine resources, known as the "doctrine of the continental shelf". Certain subjects listed in paragraph 70 of the Secretariat's memorandum (A/CN. 4/1/Rev. 1), [2] which came more within the field of private international law, could easily be left out of the report. The topic should clearly be restricted to the régime of the high seas, as the régime of territorial waters was in itself a tremendous question which would have to be considered separately.

10. No useful purpose would be served by giving limitative instructions to the Rapporteurs, who would themselves draw up the list of subjects to be studied under the items entrusted to them.

11. Mr. KORETSKY thought that the Commission should confine itself, for the time being, to specifying that the reports should contain, firstly, an adequately based draft recommendation concerning the choice of topics for codification,

[2] United Nations publication, Sales No.: 1948. V. I. (1).

which should be drawn up in accordance with the terms of paragraph 2 of article 18 of the Statute of the Commission, and secondly, a draft programme of the work envisaged in the first paragraph of article 19, including a list of the questions to be studied by the Commission after the choice of topics had been approved by the General Assembly.

12. Mr. YEPES agreed with the views expressed by the Chairman. He thought, however, that the régime of the high seas should logically be considered at the same time as the régime of territorial waters, as the two subjects were closely linked. It was only on account of the reasons of a practical nature which the Chairman had pointed out that he would not press for the two subjects to be dealt with in one and the same study.

13. Mr. SPIROPOULOS recalled that The Hague Conference of 1930 had dealt with the status of territorial waters without linking the topic to the problem of the régime of the high seas: there was therefore nothing unusual in the suggestion that the two questions should be dealt with separately.

Appointment of Rapporteurs

The following members were unanimously appointed Rapporteurs for the three priority topics for codification:

Mr. BRIERLY, for the question of treaties;

Mr. FRANÇOIS, for the question of the régime of the high seas;

Mr. SCELLE, for the question of arbitral procedure.

Mr. SPIROPOULOS was unanimously appointed Rapporteur for the preparation of a report on the formulation of the principles of international law recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal (General Assembly resolution 177 (II), paragraph (a)) and to draw up a working paper on the preparation of a draft code of offences against the peace and security of mankind (paragraph (b) of the same resolution).

Mr. ALFARO and Mr. SANDSTROM were appointed Rapporteurs for the preparation of a working paper on the question of the desirability and possibility of establishing an international judicial organ for the trial of persons charged with genocide or other crimes over which jurisdiction would be conferred upon that organ by international conventions (General Assembly resolution 260 (III) (B)).

14. Mr. KORETSKY was opposed to the appointment of two Rapporteurs for that question, which was not worthy of special attention. One Rapporteur would be enough for that subject and in his opinion the establishment of the organ in question was neither opportune nor possible.

Application of the Procedure laid down in Article 19, Paragraph 2, of the Statute of the Commission

15. The CHAIRMAN opened the debate by pointing out that the matter of asking Governments to furnish information arose only in regard to the questions of arbitral procedure, the régime of the high seas, and treaties. It could, of course, be asserted that the Commission would not be in a position during the current year to address detailed requests to Governments. It should, however, request such information as soon as possible, since delay must be allowed for. If the Commission were to wait until the following year before submitting its requests, it might not receive the required information until 1951, since Governments would need time to collect the necessary material. The terms of reference of the members of the Commission expired in 1951, however, and the Commission might not have time to study those documents during its final session.

16. Another argument in favour of an immediate decision to that effect was that the Rapporteurs might need the texts of laws, decrees, judicial decisions and treaties on those three questions and that it would be to their advantage to receive them as soon as possible. He had therefore consulted Mr. Spiropoulos, who had a concrete proposal to make on that matter.

17. Mr. SPIROPOULOS suggested that the Commission should adopt the following procedure:

(*a*) To decide at once to request Governments to furnish the information mentioned in paragraph 2 of article 19;

(*b*) To instruct the Rapporteurs to decide, together with the Chairman of the Commission and the Secretary-General, what documents they would require;

(*c*) To instruct the Chairman to address requests, through the Secretary-General, to Governments for information.

18. Mr. KORETSKY opposed that proposal. The Commission should, he said, observe the programme of work laid down by the General Assembly. It should start by choosing the topics which, in its opinion, should be codified. It should then submit to the General Assembly its recommendations on that subject; only after the General Assembly had approved its recommendations could the Commission think of applying the method laid down in article 19, paragraph 2. If the Commission had been mistaken in deciding to meet once a year, it should not correct that error by a violation of its Statute.

19. Apart from that argument of principle, the Commission was not a research institute, free to do as it pleased and to ask Governments for any information it desired. Its programme of work must be sanctioned by the General Assembly

before the Commission could request Member States for information. Moreover, Government officials should not be asked for information on topics the codification of which had not yet been approved by the General Assembly.

20. Finally, the Commission had no right to delegate its powers in that matter to any one of its members, whether it were the Chairman or the Rapporteur. All decisions on the procedure laid down in article 19, paragraph 2, should be taken by the Commission as a whole.

21. For those reasons, he thought that it would be not only premature but also contrary to the Commission's Statute to adopt Mr. Spiropoulos' proposal. It would be useless to address requests to Governments at the existing stage of the work, since the Rapporteurs had been entrusted with the limited task of stating the reasons for the recommendations which the Commission intended to formulate and of drawing up a programme of work. The material which could be found in libraries would amply suffice for that task.

22. The CHAIRMAN reminded Mr. Koretsky that the Commission had already come to a decision [3] on the question of principle and that the point at issue was to define the best method of applying article 19, paragraph 2. The report which the Commission was to submit to the General Assembly indicated that it had decided by 10 votes to 3 that " the Commission was competent to proceed with the work of codification under articles 19 to 23 without awaiting action by the General Assembly on recommendations made by the Commission. . . " [4]

23. Mr. KORETSKY rejoined that the Commission had not yet submitted any recommendations to the General Assembly and that the decision in question could not, therefore, be applied for the moment.

24. The CHAIRMAN said that without formulating precise recommendations the Commission had indicated in its first report what questions it intended to study first. Whether or not its choice was approved by the General Assembly, the appearance of those questions in the report was enough to justify a request to Governments for information.

25. Mr. CORDOVA also thought that the list of topics in the draft report could be considered as a recommendation, and that the Commission was therefore perfectly justified in putting its decision into effect forthwith.

26. Mr. KORETSKY did not agree. It would be a lack of respect to the General Assembly and the Sixth Committee to submit to them a mere list of questions in the report, instead of making a formal recommendation. When a recommendation was submitted, reasons should be given for it; it was precisely that task which had been entrusted to the Rapporteurs. Until that had been done, it was impossible to speak of recommendations.

27. The CHAIRMAN put the following question to the vote:

" In view of the decision taken with regard to paragraph 2 of article 18, could the Commission adopt a procedure such as that proposed by Mr. Spiropoulos for paragraph 2 of article 19? "

By 12 votes to 1, the Commission replied to that question in the affirmative.

28. Mr. HSU stated that he had voted in the affirmative, although he had voted against the interpretation given by the majority of the Commission to paragraph 2 of article 18. In his opinion, that earlier decision bound the Commission with regard to the interpretation of paragraph 2 of article 19.

29. The CHAIRMAN put Mr. Spiropoulos' proposal to the vote.

The proposal was adopted by 9 votes to 1, with 3 abstentions.

30. The CHAIRMAN announced that Mr. Scelle, Mr. François and Mr. Brierly would be instructed to draft specific requests to be addressed to Governments through the Secretary-General.

31. The CHAIRMAN read the text which Mr. Amado, Rapporteur, had suggested for insertion in the Commission's report to the General Assembly.

32. A brief exchange of views followed.

It was decided by 11 votes to 2 to insert that text in the report, subject to certain amendments of detail. [5]

The meeting rose at 1 p.m,

[3] See A/CN.4/4, para. 15.

[4] See *Report of the International Law Commission covering its first session, 12 April—9 June 1949*, para. 12.

[5] *Ibid.*, para. 42.

34th MEETING

Monday, 6 June 1949, at 3 p.m.

CONTENTS

Chairman: Mr. Manley O. HUDSON.

Rapporteur: Mr. Gilberto AMADO.

Present:

Members: Mr. Ricardo J. ALFARO, Mr. James L. BRIERLY, Mr. J. P. A. FRANÇOIS, Mr. Shuhsi HSU, Mr. Vladimir M. KORETSKY, Sir Benegal RAU, Mr. Georges SCELLE, Mr. Jean SPIROPOULOS, Mr. Jesús María YEPES.

Secretariat: Mr. KERNO, Assistant Secretary-General in charge of the Legal Department; Mr. LIANG, Director, Division for the Development and Codification of International Law, Secretary to the Commission.

Draft Report to the General Assembly on the Work of the First Session (*resumed*)

1. The CHAIRMAN suggested to the Commission that it should examine chapter III of the Rapporteur's draft report. [1]

CHAPTER III. DRAFT DECLARATION ON THE RIGHTS AND DUTIES OF STATES

2. Mr. AMADO, speaking as Rapporteur, said that chapter III of the draft report was both comprehensive and concise; he was prepared however to accept any amendments the members of the Commission might think necessary in order to make the report more precise.

3. Chapter III consisted of eight paragraphs: the first recalled the terms of General Assembly resolution 178 (II) which instructed the International Law Commission to prepare a draft declaration on the rights and duties of States; the second paragraph listed the material which had enabled the Commission to draw up the draft declaration; the third explained how the Commission had proceeded with its work, and gave the complete text of the draft declaration which had been adopted; the fourth set out the principles by which the Commission had been guided; the fifth gave a summary of the draft declaration; the sixth a comparison between the Panamanian draft and the one adopted by the Commission; the seventh was devoted to the right of asylum; the eighth and final paragraph summarized the discussions on the procedure to be followed in submitting the draft declaration to the General Assembly; that paragraph also set forth Mr. Koretsky's opinion, which was at variance with the conclusions of the other twelve members of the Commission.

4. The CHAIRMAN proposed that chapter III should be examined paragraph by paragraph.

5. Mr. YEPES thought that the heading of chapter III, in the English text, should be amended to read " Draft Declaration on Rights and Duties of States."

Paragraph 21 [2]

There were no amendments to that paragraph.

Paragraph 22 [3]

6. Mr. KORETSKY thought that paragraph 22 conveyed the impression that the Commission had considered the Secretary-General's memorandum only, and that it had become aware of the Panamanian draft only through that document. That was not the case; it was well known that the Panamanian draft was known long before the publication of the memorandum and that it had been submitted to the General Assembly, as could be seen from resolution 178 (II).

7. The history of the Panamanian draft should, therefore be given in the report: the date on which it was communicated to the General Assembly and of its transmission to the governments of Member States, and replies received from the latter. Other documents and drafts such as the Ecuadorian draft, drafts and statements from legal institutions or jurists, etc., which the General Assembly had instructed the Commission to take into consideration, should be explicitly mentioned also.

8. The Secretary-General's memorandum should be considered only as a most useful reference document, which should not have been mentioned in the report in preference to the original documents to which it referred. It should be pointed out to the General Assembly that the Commission had studied, and taken into consideration, all the official and non-official drafts and documents at its disposal; and to do that all the documents which had served as a basis for the Commission's work should be mentioned in detail, as well as the Panamanian draft, by title, date and registration number.

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[1] See A/CN.4/SR.31, footnote 1. Chapter III of the draft report (paras. 21-28) was later changed to part II of the *Report* (paras. 44-53).

[2] Para. 44 of the *Report*.

[3] Para. 22 read as follows:

Preparation by the Commission of the Draft Declaration

"22. The Commission had before it a memorandum entitled " Preparatory Study concerning a Draft Declaration on the Rights and Duties of States ", submitted by the Secretary-General (A/CN.4/2). This memorandum, after a brief survey of the history of declarations on the rights and duties of States, set out: (*a*) the text of the Declaration on Rights and Duties of States presented by Panama, together with the explanatory note prepared by the Foreign Minister of Panama, Mr. Ricardo J. Alfaro; (*b*) a detailed analysis of United Nations discussions and decisions on the matter; (*c*) comments and observations communicated by Member States on the Panamanian Draft Declaration; and (*d*) the relevant texts of treaties and conventions, resolutions, declarations and projects adopted by inter-governmental bodies, other draft declarations proposed by Governments, declarations by non-governmental organizations and scientific institutions, and statements by jurists and publicists."

9. The CHAIRMAN pointed out that the Secretary-General's memorandum contained all the texts Mr. Koretsky wished to see mentioned separately in the report. The fact that the Commission had studied and used the memorandum showed clearly that it had taken account of: (*a*) the Panamanian draft; (*b*) United Nations discussions and decisions; (*c*) comments of governments of Member States on the Panamanian draft; (*d*) all drafts, treaties or conventions, declarations and statements published by governments, organizations, institutions and jurists. He felt, therefore, that it was unnecessary for paragraph 22 to be amended; that paragraph was absolutely in keeping with the provisions of the last sub-paragraph of resolution 178 (II).

10. Mr. ALFARO thought that paragraph 22 was very comprehensive and that it mentioned all the material considered by the Commission. In order to meet Mr. Koretsky's wishes a sentence could be added to that paragraph to the effect that all the texts mentioned in the Secretary-General's memorandum had been carefully studied by the Commission, which had most carefully considered all the material provided.

11. Mr. AMADO said that paragraph 22 had been drafted in accordance with the provisions of resolution 178 (II), and particularly with the paragraph in which the General Assembly requested the Secretary-General to undertake the necessary preparatory work on the draft declaration on the rights and duties of States, according to the terms of resolution 175 (II). The preparatory work done by the Secretariat had been most useful, as it had considerably facilitated the Commission's work; it was therefore perfectly logical to refer to it in the report. Mr. Koretsky's amendment to paragraph 22 raised no substantial objections; he did not think, however, that there was any need for such an amendment.

12. Mr. KORETSKY remarked that his amendment raised a matter of principle, namely: the rule which should guide the Commission in mentioning the documents on which its work was based. He considered that it was imperative that the commission should mention original documents rather than the surveys which referred to such documents. Out of deference to the authors of the various documents which had served as a basis for the Commission's work, those documents should be specifically mentioned instead of being included in a very vague enumeration.

13. He again requested that paragraph 22 should be amended as he had indicated. The Commission could show its appreciation of the Secretary-General's preparatory work by stating, in a footnote, that his memorandum had greatly facilitated its work.

14. Mr. SPIROPOULOS reminded the Commission that the Secretary-General's memorandum had been presented to it as a working paper, in accordance with the provisions of resolution 178 (II); a special place should, therefore, be given to the memorandum in the report. All the documents contained in the memorandum could also be mentioned, but such an enumeration would probably be very long and of no practical interest. He considered that paragraph 22 needed no amendment, he would not, however, oppose Mr. Koretsky's proposal if the latter thought it absolutely necessary.

15. Mr. YEPES agreed with Mr. Koretsky in principle. The report would gain in authority if it were to mention all the sources which had guided the Commission's work. He suggested that Mr. Koretsky should be entrusted with the redrafting of paragraph 22.

It was so decided. [4]

Paragraph 23

16. The CHAIRMAN read paragraph 23. [5] He thought that it would be well to state that the Commission had adopted the final text of the draft declaration only after the third reading.

That amendment was adopted.

17. Mr. YEPES thought that to quote the complete text of the draft declaration was not enough: there should be an explanation of how each article had been adopted. To do that the preamble and each article should be followed by a commentary summarizing the discussion, listing the principal amendments submitted and giving the result of the voting. Such a history of each article would show with what care the

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[4] See A/CN.4/SR.36, paras. 1-13.

[5] Para. 23 read as follows:

" 23. The Commission examined article by article the Draft submitted by Panama. On the basis of its deliberations, as recorded in its Summary Records,[2] the Commission prepared and adopted by 11 votes to 2 [3] [4] the following Draft Declaration consisting of fourteen articles:

" [2] The expression of the views of the members of the Commission is embodied in the Summary Records of its meetings. Documents A/CN.4/SR.6 to A/CN.4/SR.16 and A/CN.4/SR.19 to A/CN.4/SR.25.

" [3] Document A/CN.4/SR.25.

" [4] After the vote on the Draft Declaration, Mr. Vladimir M. Koretsky and Mr. Manley O. Hudson, who voted against it, made the following statements in explanation of their votes. Mr. Koretsky declared that he voted against the Draft Declaration because its present text was even less satisfactory than the original text proposed by Panama. Certain shortcomings in the Panamanian Draft had not been met in the present Draft (A/CN.4/SR.22, pages 13, 14). Mr. Hudson stated that he voted against the Draft Declaration because the provisions of its article 6 went beyond the Charter of the United Nations and of international law at its present stage of development (A/CN.4/SR.25, pages 3, 6)."

Commission had accomplished the task entrusted to it.

18. He recalled that the draft declaration had been adopted only after three readings, some articles had even been given four or five readings each of which had given rise to very important amendments. It was not sufficient merely to announce the result of the voting on the draft declaration as a whole and explain the votes of the two members of the minority. In the case of each article the serial number of the summary record referring to that article should be indicated so that readers of the report might follow the debates.

19. Mr. SCELLE agreed entirely with Mr. Yepes. The report did not give a true idea of the way in which the various articles had been adopted after three readings; the report did not reflect the different attitudes which had succeeded one another, and the various lines of thought which had been expressed during the discussion. There should be some explanation of why certain articles of the Panamanian draft had been rejected, and others more or less drastically amended. He considered that the report as drafted was of no scientific interest.

20. Mr. AMADO, speaking as Rapporteur, said that he had followed the precedents established by other Commissions in their reports to the General Assembly: up to the present reports had always been brief and had never attempted to reflect the mood of the discussions.

21. He would have liked to give an outline of the very clear ideas expressed by certain members of the Commission, and to analyse the different opinions; he had, however, feared that he would be unable to give a faithful account of the theories and arguments advanced; moreover, it would have made the report disproportionately long.

22. Mr. CORDOVA agreed with Mr. Yepes and Mr. Scelle. The report should reflect the various points of view which had been expressed during the discussions, so that the General Assembly might understand the Commission's final attitude. He felt more particularly that the report should show clearly that each article of the draft declaration had been studied and voted upon separately, and that each vote had resulted in a different majority.

23. Mr. KORETSKY agreed with Mr. Yepes, that the draft declaration should be accompanied by comments explaining to the General Assembly how it had been drawn up. He had expressed his opposition to the Commission's decision to transmit the draft declaration directly to the General Assembly, contenting itself with merely attaching a brief report. The draft report under discussion contained only a few comments, on paragraphs 24, 25 and 26, which were not enough to give a complete picture of the work which had culminated in the draft declaration.

24. He felt that it was unnecessary to indicate all the successive votes on each article, particularly since the results of some of them had been contradictory; a precise commentary following the preamble and each of the articles was, however, indispensable. The purpose of those comments would be to indicate the principles which had guided the Commission and the reasons for the position it had taken in adopting each article, and also to show the changes in the views of the members of the Commission. The General Assembly should be able to understand the conditions under which the draft declaration had been adopted, and how some articles had been rejected, amended or adopted, sometimes under the influence of certain members who had been particularly persistent in defending their views.

25. In his view, some comments would be useful to clarify the exact meaning of all the articles, which was not precisely apparent from the text itself.

26. The CHAIRMAN asked the Commission to decide upon the question whether or not the report should contain a synthetic account and history of the articles in the draft declaration, including even articles which had not been accepted.

The proposal was rejected by 6 votes to 4.

27. Mr. ALFARO explained that he had not supported the proposal, although he approved of its principles, because in the short time remaining to the Commission the Rapporteur would not be able to make the necessary changes in paragraph 23.

28. Mr. KORETSKY drew attention to footnote 4 relating to paragraph 23. He pointed out that the observations which he had made at the twenty-second, twenty-fourth and twenty-fifth meetings had not been correctly interpreted by the Rapporteur. The latter should have reflected the chronological order of the explanations which Mr. Koretsky had made, and should as far as possible, have employed the same terms, which were to be found in the summary records.

29. He expressed his willingness to draft an amendment to footnote 4, based upon the summary records.[6]

30. Mr. YEPES regretted that the Commission had not accepted his proposal that each article of the draft declaration should be followed by a short commentary; he requested that a reference should be made, either immediately after each article or in a footnote to the relevant summary records. [7]

The proposal was accepted by 9 votes to 1.

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[6] See A/CN.4/SR.36, paras. 14-16.

[7] In the draft report, the articles of the draft declaration were not followed by comments as in the *Report*. See *Report*, para. 46.

Paragraph 24 [8]

31. The CHAIRMAN read the paragraph. He proposed a drafting amendment, which would not affect the French text, namely, that the words " it should " preceding each phrase should be amended to " that it should ". He also suggested that the phrase " be applicable to all the States of the world " should be replaced by " envisage all the States of the world ".

32. Mr. KORETSKY thought that the phrase " that it should be applicable only to fully sovereign States " should be deleted. The notion of sovereignty had not been sufficiently studied by the Commission, and it was difficult to say what was meant by " fully sovereign States "; it had even been maintained that, juridically speaking, some Member States were not " fully sovereign ". If that phrase were retained the number of States to which the declaration of rights and duties would apply might be considerably reduced.

33. The phrase: " that it should be applicable to all the States of the world and not only to the Members of the United Nations " showed a praiseworthy desire to give the declaration a universal character. It should be borne in mind, however, that the declaration had been requested by the General Assembly, which had not specified that it should apply to States which were not Members of the United Nations. He considered therefore that the phrase should also be deleted.

34. He proposed the deletion of the word " basic " in the last part of the phrase in order to avoid the implicit exclusion from the scope of the declaration of certain political rights which it was the duty of States to respect, such as the right of women to vote, which some members of the Commission had suggested was not a basic right—a view which he had always opposed.

35. The CHAIRMAN recalled that the Commission had already voted in favour of the two phrases which Mr. Koretsky wished deleted. He pointed out that the word " basic " was included in the last postulate of the preamble to the draft declaration, logically, therefore, it should be maintained in the body of the report.

36. Mr. SCELLE supported the views expressed by the Chairman; he considered that the decision taken by the Commission on the matter should not be reconsidered. If the Commission decided to delete those phrases he would vote against the draft. He even suggested that the expression " all the sovereign States of the world " should replace the words " all the States of the world ", since it would be more logical than the phrase used in the declaration as it stood, particularly in view of the preceding words.

37. Mr. HSU stated that the word " only " in the last phrase should be deleted, since it had been the intention of the Commission to study, if not all the rights and duties of States, at least the greatest possible number. As at present drafted the last phrase did not reflect accurately the spirit which had prevailed at the time the Commission had taken a decision on that point.

38. He also requested that the expression " fully sovereign States " should be replaced by " sovereign States ".

39. Sir Benegal RAU proposed that the last phrase should be replaced by the following: " and that it should formulate certain basic rights and duties of States ".

40. The CHAIRMAN put to the vote paragraph 24, as amended, by the proposals of Mr. Hsu, Sir Benegal Rau, Mr. Scelle and himself.

Paragraph 24, as amended, was adopted by 11 votes to one.

Paragraph 25 [9]

41. The CHAIRMAN read paragraph 25. He suggested that in the first sentence the word " main " should be deleted from the expression " four main rights ". He also proposed that in the last sentence the word " organized " should be inserted before the word " incitement ". He observed that the order in which the rights and duties were set out was not identical with the order followed in the draft declaration; he suggested that the Rapporteur should make the necessary amendments in that respect to paragraph 25.

42. Mr. SCELLE considered that paragraph 25 was of no value since it only summarized the draft declaration. It thus contained no proposal of substance and its deletion would be in accordance with the Commission's decision to submit a very brief report.

Mr. Scelle's proposal was rejected by 5 votes to one.

43. Mr. KORETSKY pointed out that the last phrase of the paragraph should be re-drafted to make it conform to the provisions of the Charter and of article 6 of the draft declaration.

It was so decided.

[8] See *Report*, para. 47.

[9] See *Report*, para. 48.

Paragraph 26 [10]

44. The CHAIRMAN considered that the comparative study in paragraph 26 of the draft declaration prepared by the Commission and the draft submitted by Panama would not be necessary if the Panamanian draft were reproduced in the report. In his opinion, it would be in order for it to be deleted, since the purpose of the report was not to tell the General Assembly what had become of the Panamanian draft, but to submit to it the draft prepared by the Commission. The Chairman therefore considered that no difficulty would be caused by the deletion of that paragraph.

45. Mr. ALFARO objected that, since the Commission had decided not to include in the report commentaries showing the origin and history of each article, because of the lack of time, the least that should be done would be to maintain paragraph 26 which was, in a way, a summary of the Commission's discussions on the Panamanian draft, which had been used as the basis for the final draft. Jurists who read the report, and who wished to go further into the comparative study, would themselves refer to the draft submitted by Panama. With regard to other readers, it would be a good thing for them to see the reasons for which certain parts of the original draft had been rejected and others amended.

46. Mr. AMADO (Rapporteur) expressed the opinion that paragraph 26 was necessary for the guidance of the reader, since it showed clearly the reasons which had motivated the votes in the Commission. Had he been informed that the Commission would prefer a very full report, he would have enumerated the tendencies and trends of opinion which had developed in the course of the debate. He had, in fact, prepared all the material necessary for such a report. After careful consideration, and in agreement with those who had assisted him in his work, however, he had drawn up the report in a very concise form, the principle of which could also be justified; he considered therefore that paragraph 26 should not be re-drafted since, as it stood, it gave the minimum of necessary explanations.

47. Mr. KORETSKY was of the opinion that, assuming it was possible to compare such different texts as the draft prepared by the Commission and the draft submitted by Panama, which were more parallel than convergent, the comparative study should be more exact and more complete than appeared from the actual content of paragraph 26. To cite only one example, it was not true that article 1 of the Panamanian draft had been deleted solely because the right to exist was implied by articles 1 and 12 of the Commission's draft. Reference to the summary records of the twenty-fourth and twenty-fifth meetings (A/CN.4/SR 24 and A/CN.4/SR 25), would show that, although the majority had ultimately adopted the Chairman's suggestion, nevertheless some members of the Commission had very clearly expressed the opposing view. In spite of that fact, the report contained no reflection of the political and juridical arguments which had been adduced in favour of maintaining that right in the final draft.

48. He regretted that the Rapporteur had considered it advisable to adopt an exaggeratedly brief form for the report. A summary in a few laconic paragraphs was hardly a faithful reflection of the work of the Commission, whose discussions had lasted more than six weeks. The importance of the document itself, which was to be submitted

[10] Para. 26 read as follows:

" *Comparison with the Panamanian Draft*

" 26. It will be noted that the Draft Declaration prepared by the Commission retained the substantive provisions of sixteen of the original twenty-four articles of the Draft submitted by Panama.

" Some articles of the Draft submitted by Panama were not retained on the ground that their provisions were substantially covered by other articles of the Draft Declaration prepared by the Commission. Thus, article 1 was omitted because the right of a State to exist and to protect and preserve its existence was implied in the Draft Declaration, particularly in articles 1 and 12 thereof. [1] Similarly, article 9, relating to the respect for the rights of the State by other States, was considered unnecessary because its substance is implied throughout the Draft Declaration, Article 10, dealing with the limitation of the rights of the States, is substantially covered by article 14 of the Draft Declaration. Articles 11 and 12, dealing respectively with the observance of treaties and sanctity of the pledged word, and the discharge of international obligations are combined in a single text in article 13 of the Draft Declaration. Article 24, dealing with the prohibition of pacts incompatible with the discharge of international obligations, is covered also by article 13 of the Draft Declaration.

" Some other articles were not retained on different grounds. Articles 2 and 3 of the Panamanian Draft, dealing with recognition of States, were omitted in view of the controversial nature of the subject-matter, and in view of the decision of the Commission to include the subject of recognition amongst the topics for codification.[2] [3] With regard to article 8, it was decided that the consideration of the question of diplomatic intervention should be postponed until the Commission should proceed to the codification of this subject.[4] Article 14, dealing with the national and international scope of the law of nations, was omitted on the ground that its subjects-matter did not constitute either a right or a duty of States. Article 20, relating to the co-operation in the pursuit of the aims of the community of States, was not thought necessary since the obligations set forth in the Charter already covered that topic. Finally, article 23, concerning equality of opportunity and interdependence in the economic sphere was omitted since it was deemed that this subject-matter did not entirely fall within the scope and purpose of international law.

" [1] Document A/CN.4/SR.25.

" [2] See paragraph 15 (5) of this report.

" [3] Document A/CN.4/SR.25.

" [4] Document A-CN.4/SR.13, page 15. "

to the General Assembly, would have justified a more extensive development of the subject. In any case, paragraph 26 should be completed in the interests of accuracy alone.

49. Mr. CORDOVA considered that the General Assembly would be particularly interested, not so much in the analogical and numerical relationship between the articles of the two drafts, as in the arguments which had been developed in the course of the discussion. Since the Rapporteur had said that he had prepared a statement of those trends of opinion, could he not be asked to submit that material to the Commission, which might use it to expand the report which was unquestionably too brief.

50. Having consulted Mr. AMADO, the CHAIRMAN stated that the Rapporteur would bear in mind as far as possible the remarks which had just been made and would accordingly redraft paragraph 26. [11]

51. Mr. HSU thought that the explanation given in the last sub-paragraph of paragraph 26 was inadequate, since it stated that a given article of the Panamanian draft had been deleted because the Commission had decided to include the subject among the topics for codification. The article had not, in fact, been deleted for that reason; articles relating to other topics reserved for codification had been included in the draft declaration regardless of that fact. The true reason for the deletion had been the impossibility of drawing up a text acceptable to the majority of the Commission and it had, therefore, decided to formulate only certain rights and duties of States, as was in fact stated in paragraph 24, but without any indication of the criteria upon which the choice had been based.

52. Mr. YEPES requested that the word " interposition " should be substituted for the word " intervention " in the sixth line of the English text of the last sub-paragraph of paragraph 26.

53. Mr. FRANÇOIS suggested that the phrase at the end of the same paragraph, namely: " did not entirely fall within the scope and purpose of international law " should be replaced by the words: " did not fall within the mandate of the Commission ".

54. The CHAIRMAN stated that the Rapporteur would make those two changes in the report.

Paragraph 27 [12]

55. The CHAIRMAN considered that paragraph 27 should be deleted, since the proposal to include the right of asylum, with which it dealt, had ultimately been rejected by the Commission. If it were retained, however, a similar paragraph should be included relating to each of the proposals which had been made during the discussion and which had not been accepted by the Commission.

56. Further, the Commission had not put aside the draft article on the right to asylum for the reason mentioned in the paragraph but because a dispute in that connexion which had arisen between Colombia and Peru was to be submitted to the International Court of Justice.

57. Mr. YEPES objected to the deletion of the paragraph. The CHAIRMAN put the question to the vote.

The result of the vote was 4 in favour and 4 against; the paragraph was therefore retained.

58. The CHAIRMAN proposed the deletion of the second sentence of the paragraph reading: " After discussion, the Commission provisionally adopted, by 9 votes to 2, the amended text of the proposed article ". The sentence was of no value since the article in question had not ultimately been adopted.

59. Mr. ALFARO held the view that the statement was necessary, since it reflected the intentions of the Commission by emphasizing the reason for which the right of asylum had eventually been omitted; namely, because it had been retained as a topic for codification and would be the subject of later consideration.

60. Mr. KORETSKY considered that that purely technical reason, the only one mentioned in the report, had not been the true cause for the postponement of the question. The reason had not, in fact, been decisive in other cases; thus, the duty of a State to carry out in good faith its obligations arising from treaties was included in the draft declaration, regardless of the fact that it, too, was linked with a topic which had been reserved for codification. The reason why the Commission had refused to include the right of asylum in the draft had really been because, for political reasons, it had not wished to consider such a difficult problem of great topical interest upon which agreement in the Commission could not be expected in the circumstances. He agreed with the opinion expressed by the Chairman that paragraph 26 was of no value. Since, however, the Commission had decided to retain it, he requested that it should be expanded by the inclusion of the text of the proposed article and the true reasons why that article had been rejected.

61. The CHAIRMAN reiterated the fact that the question of the right of asylum had been adjourned, not only because it had been retained as a topic for codification, but also, and primarily because that right was the subject of a dispute which was about to be submitted to the International Court of Justice. The latter reason should be mentioned in the report, because it was the only one which offered a plausible justification for the change in the Commission's attitude which, after it had decided to include that right in the

[11] See CN.4/SR.36, para. 21.

[12] See *Report*, para. 23.

draft, had preferred subsequently to postpone consideration of the problem. He felt that it would be sufficient to mention the question of the right of asylum in the paragraph of the report which stated that Mr. Yepes would prepare a working paper on that question.

62. Mr. SCELLE pointed out that the study of the question of the right of asylum had been entrusted to Mr. Yepes who had been asked to draft a working document for submission to the Commission at its next session: a later paragraph of the report would mention that decision of the Commission which was contradictory to the reason for adjournment mentioned by the Chairman.

63. Mr. ALFARO was of the opinion that there was nothing to prevent the inclusion in the report of a review of the facts as they actually had occurred. When the Peruvian delegation had informed the Commission that litigation regarding that right was pending, Mr. Yepes, with the approval of the Commission, had withdrawn his proposal because of the controversial nature of the question.

64. Mr. KERNO (Assistant Secretary-General) pointed out that the Commission could mention in the section of the report dealing with the study on the right of asylum to be made by Mr. Yepes, that a proposal, which, however, had eventually been withdrawn, had been submitted that an article on that question should be inserted in the draft declaration on the rights and duties of States.

65. The CHAIRMAN proposed that the Commission should adopt that solution.

It was decided by 9 votes to none to transfer the substance of paragraph 27 to a later chapter of the report. [13]

Paragraph 28 [14]

66. The CHAIRMAN proposed that the word " examined " in the second sentence of paragraph 28, first sub-paragraph should be replaced by the words " was guided by ".

It was so decided.

67. The CHAIRMAN suggested the following amendments in the second sub-paragraph of the paragraph: deletion of the words " to be " in front of the word " noted " in lines 8 and 12 of the English text; the phrase " such as had not taken advantage of this opportunity would be enabled to do so " to be replaced by the words " all Members of the United Nations would have another opportunity to do so ".

It was so decided.

68. Mr. KORETSKY suggested the deletion of the following words which he felt were unnecessary, and which appeared in the first sentence of the second sub-paragraph: " like the study of the question of an international criminal jurisdiction ".

69. The CHAIRMAN put Mr. Koretsky's suggestion to the vote.

It was agreed by 6 votes to 2 delete that phrase.

70. The CHAIRMAN mentioned that in the English text the comma should be placed in front of the word " but ".

71. Mr. BRIERLY pointed out that the deletion of that phrase would necessarily entail the deletion of the last sentence of the first sub-paragraph which also mentioned international criminal jurisdiction.

72. Sir Benegal RAU and Mr. ALFARO did not think that the deletion was obligatory.

73. The CHAIRMAN put to the vote Mr. Brierly's suggestion to delete the last sentence of the first sub-paragraph.

The proposal was not adopted, 5 votes being cast in favour and 5 against. The phrase was therefore retained.

74. The CHAIRMAN suggested that the word " immediately " in the second line of the third sub-paragraph of the English text should be transferred to the third line, after the words " General Assembly ". Furthermore, commas should be placed before and after the phrase " through the Secretary-General. "

It was so decided.

75. The CHAIRMAN asked Mr. Koretsky whether he had any comments to make on the text of the fourth sub-paragraph which summarized his interpretation of the Statute of the Commission on the circulation of drafts to Governments.

76. Mr. KORETSKY would like to make that sub-paragraph more specific by the deletion of the reference to non-governmental organizations which were not mentioned in article 21 of the Statute to which he had referred. For that purpose, he would send the Rapporteur the substance of his intervention on that point as it appeared in the summary record (A/CN.4/SR 25).

77. The CHAIRMAN noted the Rapporteur's agreement to the change requested by Mr. Koretsky and declared the first reading of chapter III of the report closed.

International and National Organizations Concerned with Questions of International Law; Tentative List Prepared by the Secretary-General for the Purpose of Distribution of the Documents of the Commission (A/CN.4/8)

78. The CHAIRMAN submitted to the Commission a list of international and national organizations concerned with questions of international law (A/CN.4/8) prepared by the Secretariat

[13] Transferred to Chapter II under the heading " The topic of the right of asylum ".

[14] See *Report*, para. 53.

in pursuance of article 26, paragraph 2 of the Statute, and taking into account the provisions of paragraph 3. He explained that the list had been compiled solely with a view to the distribution of the Commission's documents by the Secretariat and not for the purposes of the consultation provided for in the first paragraph of that article.

79. Article 26 dealt separately with the power of the Commission to consult with any international or national organizations, official or non-official, and with the distribution of documents to the various organizations in the same categories, the Secretary-General having been requested to compile a list of those organizations after consultation with the Commission. That distinction was made quite clear in paragraph 3 of the article which specifically stated that organizations which had collaborated with the Nazis and Fascists or with Fascist Spain should be excluded both from consultations and from the list.

80. Mr. KORETSKY was, on the contrary, of the opinion that paragraph 2 could not be considered apart from the context of the article, and that the distribution of documents should not be considered until after the Commission had decided which organizations it might wish to consult.

81. The Statute of the Commission constituted a homogeneous whole, from which neither an article nor a paragraph could be extracted and considered outside of the general structure of the article or the Statute. Thus the second paragraph of article 26 was closely linked to the first paragraph, and the sole purpose of the distribution of documents for which it provided was to supply the organizations which the Commission intended to consult with the necessary documentation so that they could submit their opinion with a full knowledge of all the facts. That was the only purpose which the list prepared by the Secretariat could serve. It would enable the organizations with consultative status to receive the documents which might be of interest to them, namely, those relating to subjects of future consultation. In the interests of economy, and in view of the large number of those organizations, it would be advisable for the Secretariat to send to each only the documentation dealing with its particular field. A military legal academy, for example, should receive only the documents relating to the laws of war, the sole point on which it could be consulted.

82. The CHAIRMAN pointed out that it was for the Secretariat to decide which documents should be distributed to a particular organization. The Commission did not need to concern itself with the financial question involved in that distribution. The purpose of the distribution was not, as Mr. Koretsky thought, to provide the necessary documents for a few exceptional consultative organizations which would receive, of course, very complete files on the questions under consideration, but to disseminate throughout the legal world the results of the Commission's work as widely as the budget for that purpose would allow, in order to arouse the interest and support of the principal organizations of jurists in the Commission's work.

83. In that respect it was for the latter to clarify its interpretation of article 26 of the Statute and to say whether the first two paragraphs should or should not be considered separately.

The Commission decided by 10 votes to 1, that those two paragraphs were independent of each other and that they dealt with two different questions: consultation with organizations on the one hand, and distribution of documents on the other.

84. The CHAIRMAN proposed that the Commission should examine the list of organizations which had been prepared by the Secretariat primarily in accordance with the information furnished by Member Governments and by the Government of Switzerland, in reply to the Secretary-General's letter of 30 April 1948, in which he had requested those Governments to obtain for him the names of national and international organizations in their respective territories which were concerned with international law.

85. Mr. KORETSKY regretted that the Secretariat had been satisfied to list the international organizations without supplying specific information on them. As a result the Commission was not in a position to determine whether some of those organizations did not come under the exclusion clause in article 26, paragraph 3 of the Statute, or whether others really had as the primary purpose of their activity the study of international law. The Secretariat was nevertheless in possession of detailed information on each one of those organizations, particularly on those which enjoyed consultative status granted by the Economic and Social Council, since the list prepared for the Council by the Secretary-General was accompanied by basic information in that respect. For that reason Mr. Koretsky would like the representative of the Secretary-General to explain to the Commission whether all that information had been taken when the list under consideration had been prepared and, in particular, whether the organizations which were included therein were free of all ties and had severed all connexions with Franco Spain.

86. Mr. KERNO (Assistant Secretary-General) pointed out first of all that, in compiling its list, the Secretariat had worked on the principle that it should be used only for the distribution of documents and, consequently, it would in no way prejudge the choice of organizations which the Commission might eventually decide to consult, in accordance with article 26, paragraph 1.

87. In the last analysis, the inclusion of an organization on that list would have little effect,

since the latter would not acquire any other right from the fact than that of receiving, officially and free of charge, certain documents of the Commission. Anyone could, however, obtain those documents by buying them at booksellers who were agents for United Nations publications. Inclusion in the list could, therefore, in no case confer consultative status of any kind on the organizations listed therein.

88. For that reason the Secretariat had not thought it vitally necessary to add to the list of organizations detailed information regarding each one of them. But it had studied very carefully the list in question. In particular it had taken into account the list of organizations granted consultative status by the Economic and Social Council (E/C.2/87) and the most recent decisions of the Council. With regard to relations with Franco Spain, it had, for example, excluded from the list the International Bar Association which had only been granted consultative status by the Economic and Social Council subject to the exclusion of its Spanish affiliates and to which the Council had refused that status as such exclusion had not been effected by a certain date. The Secretariat had also used the list submitted by the Secretary-General in 1947 to the Commission on the Progressive Development of International Law and its Codification, which had not formulated any objections with regard to the organizations included in that list. With regard to the International Institute for the Unification of Private Law, the headquarters of which was in Rome, the Secretariat had thought that the close co-operation of that Institute with the Economic Commission for Europe was sufficient proof that it could not be presumed to have collaborated with the Fascists.

89. The Secretariat had thus taken all the necessary precautions and, so far as was possible, had verified all data. If, however, the accuracy of its information were found to be defective on some points, it would take advantage of any comments of members of the Commission to alter the list which had been submitted to them.

90. Part B of the list had been compiled solely from the replies of Governments which, it must be admitted, were not very uniform, certain Governments having supplied a list of most of their universities, others having confined themselves to indicating one or two official institutions. It should be borne in mind, however, that, in principle, the national organizations enumerated in that part of the list were not to receive the Commission's documents unless the Commission itself decided to extend distribution to them. The Secretariat would be glad to receive any additions to the list which members of the Commission might wish to make.

91. The CHAIRMAN suggested that members of the Commission should notify the Assistant Secretary-General directly of any omissions which they would like to see rectified, and of all additions or deletions which they thought should be made, it being understood that the Secretariat as a result, would alter the list without prejudice to any changes which might subsequently be proposed.

The meeting rose at 6 p.m.

35th MEETING

Tuesday, 7 June 1949, at 3 p.m.

CONTENTS

Chairman: Mr. Manley O. HUDSON
Rapporteur: Mr. Gilberto AMADO

Present:

Members: Mr. Ricardo J. ALFARO, Mr. James L. BRIERLY, Mr. CÓRDOVA, Mr. J. P. A. FRANÇOIS, Mr. Shuhsi HSU, Mr. Vladimir M. KORETSKY, Sir Benegal RAU, Mr. Georges SCELLE, Mr. Jean SPIROPOULOS, Mr. Jesús María YEPES.

Secretariat: Mr. KERNO, Assistant Secretary-General in charge of the Legal Department; Mr. LIANG, Director of the Division for the Development and Codification of International Law, Secretary to the Commission.

Draft Report to the General Assembly on the Work of the First Session (A/CN.4/W.10, A/CN.4/W.10/Add.1 and Add.2) (*resumed*)

1. The CHAIRMAN opened the discussion on chapters IV, V and VI of the draft report to the General Assembly.

Chapter IV. Formulation of the Nürnberg principles and preparation of a draft code of offences against the peace and security of mankind

Paragraph 29 [1]

Paragraph 29 was approved without comment.

Paragraph 30 [2]

2. Mr. KORETSKY objected to the tendency to emphasize the Secretariat's contribution to the Commission's work. That was bound to create the impression that the Commission had been able to make progress only because of the Secretariat's help. In his opinion, it would be sufficient to mention in a note at the bottom of the page that the Secretariat had collected the relevant documentation in a memorandum.

3. The CHAIRMAN recalled that the rapporteur of a commission had always a certain freedom of action in the drafting of his report. He asked for Mr. Kerno's opinion in that connexion.

4. Mr. KERNO (Assistant Secretary-General) replied that in practice the General Assembly had shown some uncertainty in that matter. At first the Main Committees had approved the rapporteur's report. Later they had contented themselves with approving the resolutions without commenting on the report itself. The Commission could, of course, follow or alter that practice.

5. Mr. AMADO (Rapporteur) stated that he had only followed the practice pursued up to the present by other bodies, and instanced the report of Mr. Brierly, Rapporteur of the Committee on the methods for encouraging the progressive development of international law and its eventual codification (A/AC.10/51) and that of Mr. Spiropoulos, Rapporteur of the Sixth Committee, at the third session of the General Assembly (A/760).

6. Mr. SPIROPOULOS was surprised at Mr. Koretsky's objections to mention being made of the only working document submitted to the Commission at that session.

7. Mr. KORETSKY said that if the procedure outlined by Mr. Kerno were observed, that would mean giving full discretionary powers to the Rapporteur. While not contesting the usefulness of the work carried out by the Secretariat, Mr. Koretsky pointed out that the Commission had taken the Charter and Judgment of the Nürnberg Tribunal as a basis for its work and not the memorandum submitted by the Secretary-General (A/CN.4/5). It was for that reason that the memorandum should be mentioned only in a note at the bottom of the page. In doing that the Commission would prove to everyone that it had done serious and objective work.

8. Mr. KERNO, Assistant Secretary-General, explained that he had simply pointed out the practice followed by the Main Committees without in any way suggesting the procedure to be followed by the International Law Commission.

9. The CHAIRMAN considered that the paragraph in question was a simple statement of fact. It was obvious that the Commission had taken the Charter and Judgment of the Nürnberg Tribunal as the basis for its work.

10. Mr. AMADO (Rapporteur) also pointed out that the paragraph simply recorded a fact, namely that the Secretary-General had submitted a memorandum in accordance with instructions received. In order to meet Mr. Koretsky's view he suggested that the following phrase should be added at the beginning of the paragraph—"The Commission had before it the Charter and Judgment of the Nürnberg Tribunal."

11. Mr. SCELLE supported that proposal.

12. Mr. SPIROPOULOS could not support the addition which was useless, as that fact was obvious.

13. Mr. AMADO (Rapporteur) did not press his proposal.

14. The CHAIRMAN put to the vote the original text of paragraph 30.

Paragraph 30 was approved by 10 votes.

Paragraph 31 [3]

Paragraph 31 was approved without comment.

Paragraph 32 [4]

15. Mr. YEPES suggested that, in order to submit a complete picture of the Commission's debates to the General Assembly, the alternative proposal submitted by Mr. Scelle in connexion with the formulation of the principles of Nürnberg should appear at the bottom of the page.

16. Mr. AMADO (Rapporteur) pointed out that that would be contrary to practice.

17. Mr. SCELLE left the matter to the Rapporteur. He did not wish to receive special treatment if such an addition was not in accordance with the usual practice.

18. Mr. YEPES said he was requesting that such an addition should be made in the interests of the General Assembly.

19. Mr. CORDOVA pointed out that if Mr. Scelle's text was reproduced it would be necessary to state the reasons why it had been rejected by the Commission.

20. The CHAIRMAN put Mr. Yepes' proposal to the vote.

The proposal was rejected by 4 votes to 1.

Paragraph 32 was approved.

[1] See *Report*, para. 24.

[2] *Ibid.*, para. 25.

[3] *Ibid.*, para. 26.

[4] *Ibid.*, para. 27.

Paragraph 33 [5]

21. Mr. SCELLE felt it would be advisable to mention whether the " revised " proposal referred to had been accepted or not by the Commission. He particularly wished that his vote against that proposal should be mentioned.

22. Mr. AMADO (Rapporteur) said that Mr. Scelle's negative vote would be mentioned.

23. The CHAIRMAN suggested that the word " revised " should be replaced by " further ".

It was so decided.

24. Mr. KORETSKY thought the paragraph should be simplified. All that was necessary was to mention the working paper and to state that after thorough discussion the Commission had decided to defer its decision until its next session.

25. The CHAIRMAN pointed out that paragraph 34 contained the decision taken by the Commission in that matter. In his opinion, paragraph 33 was necessary because it showed that the Commission had already embarked on a thorough study of the question at its current session.

Paragraph 33 was approved with the reservation that Mr. Scelle's vote should be mentioned.

Paragraph 34 [6]

26. Mr. KORETSKY considered that the facts as set out were incorrect. It had been decided to postpone that item of the agenda to the second session so that the question might be studied more thoroughly. That postponement did not mean that the Nürnberg principles would be formulated only after a draft code of offences against the peace and security of mankind had been drawn up. If it had been otherwise, the Commission would have acted in opposition to General Assembly resolution 177 (II), which separated the two questions.

27. The CHAIRMAN said that the paragraph correctly set out the reason why he had supported the deferment of the study of the formulation of the Nürnberg principles. Otherwise, he would have recommended making a more thorough study of the latter question.

He put paragraph 34 to the vote.

Paragraph 34 was approved by 11 votes to one.

Paragraph 35 [7]

Paragraph 35 was approved without comment.

Paragraph 36 [8]

Paragraph 36 was approved without comment.

CHAPTER V. STUDY OF AN INTERNATIONAL CRIMINAL JURISDICTION

Paragraph 37 [9]

Paragraph 37 was approved without comment.

Paragraph 38 [10]

28. Mr. KORETSKY wondered why the memorandum submitted by the Secretary-General (A/CN.4/7) was mentioned, although that document had not even been studied.

29. The CHAIRMAN said that it was a simple statement of fact.

30. Mr. YEPES was in favour of the retention of the paragraph.

31. Mr. SPIROPOULOS suggested that the paragraph should be drafted in the same way as paragraph 30.

It was so decided.

Paragraph 38 as amended was approved.

Paragraph 39 [11]

Paragraph 39 was approved without comment.

CHAPTER VI. WAYS AND MEANS FOR MAKING THE EVIDENCE OF CUSTOMARY INTERNATIONAL LAW MORE READILY AVAILABLE

Paragraph 40 [12]

32. The CHAIRMAN suggested that the drafting of the second sentence should be amended in order to make it agree with the first sentence of paragraph 30.

It was so decided.

33. Mr. KORETSKY stated that the second sentence of that paragraph was wrongly worded as he thought it gave the false impression that resolution 175 (II) instructed the Secretariat to carry out a particular task. As the Commission had decided to mention all documents prepared by the Secretariat, he reserved the right to submit to the Rapporteur, for inclusion in his report, a draft text of the objections which he had already raised against the memorandum (A/CN.4/6) because, of all the memoranda submitted by the Secretariat, that one contained the crudest and most flagrant mistakes.

34. Mr. SCELLE, pointed out that he had not pressed for the inclusion of his counter proposal to the formulation of the Nürnberg principles in the report, and thought no special treatment should be accorded to Mr. Koretsky's observations

[5] *Ibid.*, para. 28.
[6] *Ibid.*, para. 29.
[7] *Ibid.*, para. 30.
[8] *Ibid.*, para. 31.
[9] *Ibid.*, para. 32.
[10] *Ibid.*, para. 33.
[11] *Ibid.*, para. 34.
[12] *Ibid.*, para. 35.

relating to the memorandum by inserting them in the report.

35. Mr. YEPES felt, on the contrary, that Mr. Koretsky's observations regarding the Secretariat memorandum should appear in the report, so that it should be complete. As it stood, the text did not state that the Commission had studied the documents which had been submitted to it.

36. The CHAIRMAN, in order to meet Mr. Koretsky's wishes, proposed that the words " in accordance with resolution 175 (II), dated 21 November 1947, of the General Assembly " should be suppressed. Having said that, he hoped that the Rapporteur would hesitate to insert in his report criticisms of the kind made by Mr. Koretsky. He had himself made a declaration which he had not asked to be inserted in the report.

Paragraph 40 was approved with the preceding amendment and the deletion of the words " in accordance with resolution 175 (II) dated 21 November 1947 of the General Assembly ".

Paragraph 41 [13]

37. Mr. YEPES felt that the paragraph should be recast. As drafted, it gave the impression that the Commission had attached but little importance to the problem of documentation relating to customary international law as compared with that relating to conventional international law. It had, however, devoted two meetings to that question and had listened to an admirable address by its Chairman. In any case, it would be advisable to emphasize the importance attached by the Commission to customary law.

38. Mr. SPIROPOULOS suggested the deletion of the words " brief " and " some " in the first and second lines respectively.

39. The CHAIRMAN proposed that it should be added that the Commission had had a general discussion on the importance of customary international law as compared with conventional international law.

40. Mr. SPIROPOULOS objected that there had not been a general discussion of the matter.

The Commission left the Rapporteur free to make the desired insertion if he wished.

Paragraph 41 was approved, with the deletion of the words " brief " and " some " and the addition proposed by the Chairman.

Paragraph 42 [14]

41. The CHAIRMAN suggested the deletion of the word " suitable " before " paper " and of the sentence " in view of his well-known concern over a period of years with the problem of documentation of international law " after the words " the Chairman of the Commission was invited."

42. Mr. KORETSKY supported that deletion. The Chairman was an eminent judge and jurist who hardly needed that type of praise, particularly when stress was laid on his competence in questions of documentation.

43. Mr. YEPES urged that the sentence should be retained.

44. Mr. AMADO (Rapporteur) agreed with the deletion of the words " of documentation ". The rest was a mere statement of fact which should be retained.

45. The CHAIRMAN put to the vote the deletion of the sentence " in view of his well-known concern over a period of many years with the problem of documentation on international law."

It was decided to delete the sentence by 8 votes to 3.

Paragraph 42, thus amended and with the deletion of the word " suitable ", was approved.

CHAPTER II. SURVEY OF INTERNATIONAL LAW AND SELECTION OF TOPICS FOR CODIFICATION: ADDITIONAL PARAGRAPHS

46. The CHAIRMAN opened the discussion on the additional paragraphs proposed by the Rapporteur.

First additional paragraph

47. The text of the paragraph was as follows:

" *Election of Rapporteurs*

" The foregoing three topics were entrusted to three rapporteurs elected by the Commission, each of whom was to prepare a draft on one of these topics, for submission to the Commission at its second session. The rapporteurs were:

" (1) Law of Treaties: Mr. James L. Brierly, Rapporteur;

" (2) Régime of the high seas: Mr. J. P. A. François, Rapporteur;

" (3) Arbitral procedure: Mr. Georges Scelle, Rapporteur."

48. At the suggestion of Mr. SPIROPOULOS, the word " draft " was replaced by " working paper ", in order to bring the paragraph into line with paragraph 36.

49. At the suggestion of Mr. BRIERLY, the word " Rapporteur " each time it appeared after a Rapporteur's name, was deleted.

50. It was also decided to insert the words " elected by the Commission " after the word " Rapporteurs " in the fourth line. Finally, the word " were " was replaced by " are ".

The first additional paragraph, as amended, was approved.

[13] *Ibid.*, para. 36.

[14] *Ibid.*, para. 37.

Second additional paragraph

51. The text of the second paragraph was as follows :

" *Request to Governments for data*

" Pursuant to the provisions of article 19, paragraph 2, of its Statute, the Commission decided that a request should be addressed to Governments to furnish the texts of laws, decrees, judicial decisions, treaties, diplomatic correspondence and other documents relevant to the foregoing three topics. The rapporteurs were requested to prepare, in consultation with the Chairman of the Commission and the Secretary-General, the terms of the request which would be sent to the Governments in the name of the Commission through the Secretary-General. "

52. Mr. KORETSKY recalled that he has voted against the proposal to consult Governments ; he wished his objections to be recorded in a footnote. He reserved the right to submit to the Rapporteur the text to be used.

The second additional paragraph was approved, with the reservation made by Mr. Koretsky.

Third additional paragraph

53. The text of the paragraph was as follows :

" *The Topic of the Right of Asylum*

" During the discussion on the draft Declaration on Rights and Duties of States, a proposal was submitted by Mr. Ricardo J. Alfaro, Mr. Georges Scelle and Mr. Jesús M. Yepes to include in the Declaration an article relating to asylum.[1] It was finally decided not to include such an article in the draft Declaration, on the ground that the right of asylum had already been selected by the Commission as one of the topics for codification and would, therefore, be dealt with in due course.[2] Mr. Jesús M. Yepes was subsequently invited to prepare a working paper on this topic, for submission to the Commission at its second second session."

" [1] A/CN.4/SR.16.
" [2] A/CN.4/SR.20."

54. Mr. KORETSKY felt that the end of that paragraph somewhat distorted the facts. It was true that the Commission had decided to ask Mr. Yepes to prepare a document on the right of political asylum, but there had been no question of placing that item on the next session's agenda, which would be a full one.

55. The CHAIRMAN stated that the paragraph in question only mentioned the fact that Mr. Yepes had been requested to prepare a working document for the following session. That did not mean the question would be placed on that session's agenda.

56. Mr. ALFARO found the second sentence inaccurate. It should be either deleted or altered, so as to show the Commission's real reason for postponing the study of that question, namely that the dispute between Colombia and Peru was pending before the International Court of Justice.

57. The CHAIRMAN, supported by Mr. YEPES, thought it unnecessary to specify the reasons for which the Commission had taken that decision. He therefore proposed the deletion of the entire sentence.

It was so decided.

The third additional paragraph, as amended, was approved.

Chapter III. Draft Declaration on the Rights and Duties of States (resumed)

58. The CHAIRMAN stated that the Rapporteur had prepared a new text to replace paragraph 23 (chapter III) of his draft report. He invited the Commission to deal with that new text as well as with the brief comments which had been made by the Rapporteur after each article of the draft Declaration on the Rights and Duties of States, indicating its origin.

Paragraph 23

59. The text of paragraph 23 was as follows:

" The Draft prepared by the Commission was submitted to three readings, and each of the articles finally adopted was discussed and voted upon at each reading. Though the votes varied upon the different articles, those which were retained met in each case with the preponderant support of the members of the Commission. The Draft Declaration as a whole was finally adopted by eleven votes against two.[1] The draft declaration of the Commission is as follows: . . ."

" [1] Document A/CN.4/SR.25. After the vote on the draft Declaration as a whole, Mr. Vladimir M. Koretsky and Mr. Manley O. Hudson, who voted against it, made statements in explanation of their votes. Mr. Koretsky declared that he voted against the draft Declaration because its present text was even less satisfactory than the original text proposed by Panama. Certain shortcomings in the Panamanian Draft had not been met in the present Draft (A/CN. 4/SR. 22). Mr. Hudson stated that he voted against the draft Declaration because the provisions of its article 6 went beyond the Charter of the United Nations and beyond international law at its present stage of development (A/CN.4/SR. 25)."

60. Mr. KORETSKY did not think that the new text was altogether satisfactory. The Commission had not, in fact, taken a vote on each of the articles, each time the draft declaration had been read; a formal vote had been taken only on the final text. When, at each reading of the draft Declaration, the Chairman had called for the Commission's view on the article before it, he had merely taken the sense of the Commission.

61. Furthermore, Mr. Koretsky was opposed to the expression " preponderant support " in view of the fact that some of the articles had been adopted by a small majority.

62. Mr. AMADO (Rapporteur) read the result of the final vote on each of the articles of the draft Declaration and pointed out that they had all been adopted by a large majority.

63. The CHAIRMAN proposed that the first two sentences of paragraph 23 should be replaced by the following text: " The draft prepared by the Commission was submitted to three readings; each of the articles finally adopted was discussed at each reading and the sense of the Commission was taken on its retention. Though the views varied upon the different articles, those which were retained met in each case with the preponderant support of the members of the Commission."

That proposal was adopted.

64. The CHAIRMAN then put to the vote Mr. Koretsky's proposal to delete the word " preponderant."

That proposal was rejected by 10 votes.

Sources of the articles of the declaration [15]

65. Mr. KORETSKY pointed out that the members of the Commission had not had time to examine closely the statement [16] about the sources which the Rapporteur wished to add after each article of the draft Declaration. At first glance, it seemed to him that, with the exception of the Treaty of Paris of 1948 those statements cited only American sources of the provisions of the draft Declaration.

66. In his opinion, it was quite proper to specify articles of the Panamanian draft which had been taken over in the draft adopted by the Commission, in view of the fact that, in accordance with resolution 178 (II) of the General Assembly the Panamanian draft was to serve as a basis for discussion. Other documents, however, such as the " Principles of the International Law of the Future " should not be mentioned. It was the opinions of governments which mattered, and these were not mentioned at all.

67. Mr. Koretsky regretted that there was no indication in the statement on the sources of the debate on articles 1 and 2 of the Panamanian draft or of the reasons for which the Commission had adopted each article of the draft declaration. He thought the statements proposed by the Rapporteur should be examined more thoroughly and consequently suggested that their consideration should be postponed until the following day's meeting.

68. Mr. YEPES and Mr. CORDOVA supported that last suggestion.

69. The CHAIRMAN observed that paragraphs 26 to 28 of the draft report were devoted to the Commission's discussion and that the proposed statements were intended not to indicate the reasons for the Commission's decisions but merely the sources of the articles themselves.

Mr. Koretsky's suggestion was rejected by 6 votes to 3.

(a) *Source of article 1*

70. The text was as follows:

" Every State has the right to independence and hence to exercise freely, without dictation by any other State, all its legal powers, including the choice of its own form of government."

" This text was derived from articles 3 and 4 of the Panamanian Draft."

71. Mr. YEPES congratulated the Rapporteur on his excellent work. He proposed the addition of the following text to the comment on article 1: " Some members of the Commission were of the opinion that a last sentence should be added to the article, thus: ' It is in this sense that the sovereignty of States should be understood.' This sentence was not retained by the Commission."

72. The CHAIRMAN stated that Mr. Yepes' proposal would be considered in connexion with paragraphs 26 to 28 of the draft report.

(b) *Source of article 2*

73. The text was as follows:

" *Article 2*

" Every State has the right to exercise jurisdiction over its territory and over all persons and things therein, subject to the immunities recognized by international law."

" This text was derived from article 7 of the Panamanian Draft. The concluding phrase is a safeguard for protecting such immunities as those of diplomatic officers and officials of international organizations. Reference was made in the discussions to Article 105 of the Charter of the United Nations, and to the more recent implementation of that article."

74. Mr. KORETSKY saw no need for the last two sentences of that comment. The immunities recognized under international law were quite obviously those accorded to diplomats and officials of international organizations. It was equally unnecessary to mention that, during the debate on article 2, reference had been made to Article 105 of the Charter and to the more recent implementation of that Article. Mr. Koretsky

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[15] See A/CN.4/SR.34, para. 30.

[16] Hectographed document issued on 7 June 1949 (without symbol), the substance of which has been included in the present summary record, paras. 69-103.

therefore proposed the deletion of those two sentences.

That proposal was rejected by 8 votes to 4.

(c) *Source of article 3*

75. The text was as follows:

"*Article 3*

"Every State has the duty to refrain from intervention in the internal or external affairs of any other State."

"The substance of this text which was derived from article 5 of the Panamanian Draft, has already found place in various conventions between the American Republics."

76. Mr. KORETSKY was opposed to mentioning exclusively the conventions concluded between American Republics. He consequently proposed that the phrase "in various conventions between the American Republics" should be replaced by "in various international conventions."

That proposal was adopted.

(d) *Source of article 4*

77. The text was as follows:

"*Article 4*

"Every State has the duty to refrain from fomenting civil strife in the territory of another State, and to prevent the organization within its territory of activities calculated to foment such civil strife."

"This text was derived from article 22 of the Panamanian Draft, which in turn was based upon Principle 4 of the 'International Law of the Future'."

78. The CHAIRMAN stated that he had no objection to Mr. Koretsky's proposal of deleting the second part of that comment, in order to suppress the reference to the "Principles of the International Law of the Future."

79. Mr. KORETSKY recalled that he had never questioned the political and theoretical scope of the "Principles of the International Law of the Future". Those principles had been formulated at a time when all States had shown their wish to co-operate in the struggle against fascism; they had not, however, received official consecration in practice and it was consequently better to mention only that article of the Panamanian Draft which was the source of the provisions of article 4, or if it was so desired, the various bilateral and multilateral agreements related to the principle expressed in article 4 could also be mentioned.

80. Mr. ALFARO remarked that, from the outset the Panamanian delegation had carefully stated the various sources which it had used to prepare the draft declaration it had submitted to the General Assembly. He had himself on several occasions stressed the fact that article 22 of the Panamanian Draft had been directly inspired by Principle 4 of the "International Law of the Future". That document had been drafted by 200 United States and Canadian jurists and its authority could not be questioned. Mr. Alfaro opposed the deletion of the latter part of the comment.

81. The CHAIRMAN put to the vote Mr. Koretsky's proposal to add to the comment the following sentence: "This principle has been enunciated in various international agreements."

That proposal was adopted by 10 votes.

82. The CHAIRMAN put to the vote Mr. Koretsky's proposal to delete the second part of the comment, which read: 'which in turn was based upon Principle 4 of "The International Law of the Future' ".

That proposal was adopted by 5 votes to 4.

83. The CHAIRMAN explained that he had voted for the deletion of the reference to the "Principles of the International Law of the Future" because he had himself taken part in the drafting of that document.

84. Mr. SCELLE stated that he had voted to maintain that reference because he thought that the members of the Commission, in their capacity as jurists and not as representatives of their Governments, ought to pay a tribute to an important document prepared by other jurists. Moreover, inasmuch as the Commission's work would become a matter of public knowledge, it would have been proper to allude to a document the title of which might be of some consolation to peoples obliged to live under international law in its present stage of evolution.

(e) *Source of article 5*

85. The text was as follows:

"*Article 5*

"Every State has the right to equality in law with every other State."

"This text was derived from article 6 of the Panamanian Draft. It expresses the meaning of the phrase 'sovereign equality' employed in article 2[1] of the Charter of the United Nations, as interpreted at the Conference held in San Francisco in 1945.[1]"

"[1] Report of Committee 1 to Commission I. Document of the San Francisco Conference, VI, p. 457."

86. Mr. KORETSKY did not think that article 5 of the draft Declaration could be said to express the meaning of the term "sovereign equality" contained in Article 2, paragraph 1 of the Charter. That was by no means the opinion of all the members of the Commission; if it was desired to retain the mention of that term at all costs, it would in any case be necessary to add after the

words " It expresses ", the words " in the view of the majority of the Commission ".

87. Mr. BRIERLY remarked that the principle of equality of States was universally recognized and that it was therefore unnecessary to invoke the provisions of Article 2 of the Charter to reaffirm it.

88. The CHAIRMAN put to the vote the deletion of the second sentence of the comment.

It was decided by 6 votes to 5 to retain that sentence.

89. The CHAIRMAN next put to the vote Mr. Koretsky's proposal to insert in that sentence the phrase " in the view of the majority of the Commission ".

That proposal was adopted by 5 votes to 3.

(*f*) *Source of article 6*

90. The text was as follows:

" *Article 6*

" Every State has the duty to treat all persons under its jurisdiction with respect for human rights and fundamental freedoms, without distinction as to race, sex, language or religion."

" This text was derived from the latter part of article 21 of the Panamanian Draft. The reference to human rights and fundamental freedoms is based upon Article 1. 3, Article 13. 1 b, Article 55 c, and Article 76 c of the Charter of the United Nations. Frequent reference was made in the discussions in the Commission to the Universal Declaration of Human Rights."

91. Mr. CORDOVA pointed out that it was not correct to say that the reference to human rights and fundamental freedoms was based on the provisions of certain Articles of the Charter. In point of fact, the Commission had taken account of those provisions in deciding to insert such a reference in article 6 of the draft declaration.

92. After a brief discussion in which Mr. BRIERLY and Sir Benegal RAU took part, the CHAIRMAN put to the vote the text of the comment on article 6 as proposed by the Rapporteur.

That text was approved by 8 votes.

(g) *Source of article 7*

93. The text was as follows:

" *Article 7*

" Every State has the duty to ensure that conditions prevailing in its territory do not menace international peace and order."

" This text was derived from the introductory part of article 21 of the Panamanian Draft, which in turn was based upon Principle 2 of ' The International Law of the Future '."

94. After a short discussion in which Mr. ALFARO, Mr. KORETSKY and Mr. SCELLE took part, the CHAIRMAN put to the vote the deletion of the second part of the comment, which read: " which in turn was based upon Principle 2 of ' The International Law of the Future '."

It was decided, by 6 votes to 4, to delete that clause.

(h) *Source of article 8*

95. The text was as follows:

" *Article 8*

" Every State has the duty to settle its disputes with other States by peaceful means in such a manner that international peace and security, and justice, are not endangered."

" This text was derived from article 15 of the Panamanian Draft. Its language follows closely Article 2. 3 of the Charter of the United Nations."

The comment was approved without discussion.

(i) *Source of article 9*

96. The text was as follows:

" *Article 9*

" Every State has the duty to refrain from resorting to war as an instrument of national policy, and to refrain from the threat or use of force against the territorial integrity or political independence of another State, or in any other manner inconsistent with international law and order."

" This text was derived from article 16 of the Panamanian Draft. The first phrase is fashioned upon a provision in the Treaty of Paris for the Renunciation of War of 1928. The second phrase follows closely the provision in Article 2.4 of the Charter of the United Nations."

The comment was approved without discussion.

(j) *Source of article 10*

97. The text was as follows:

" *Article 10*

" Every State has the duty to refrain from giving assistance to any State which is acting in violation of article 9, or against which the United Nations is taking preventative or enforcement action."

" This text was derived from article 19 of the Panamanian Draft. The second phrase follows closely the language employed in the latter part of Article 2.5 of the Charter of the United Nations."

The comment was approved without discussion.

(k) *Source of article 11*

98. The text was as follows:

" *Article 11*

" Every State has the duty to refrain from recognizing any territorial acquisition by another State acting in violation of article 9."

" This text was derived from article 18 of the Panamanian Draft. Reference was made in the discussions of the Commission to the importance assigned to this principle in connexion with the Japanese invasion of Manchuria in 1931."

99. Mr. KORETSKY was opposed to the reference in the second sentence to the Japanese invasion of Manchuria in 1931. That invasion had not been the only example discussed by the Commission. As had been done in the case of the other articles of the draft declaration, reference should be made only to the Panamanian draft, to international conventions, or the Charter of the United Nations.

It was decided, by 6 votes to 3, to delete the second sentence of that comment.

(l) *Source of article 12*

100. The text was as follows:

" *Article 12*

" Every State has the right of individual or collective self-defence against armed attack."

" This text was derived from article 17 of the Panamanian Draft. The language is based upon that employed in Article 51 of the Charter of the United Nations."

That comment was approved without discussion.

(m) *Source of article 13*

101. The text was as follows:

" Every State has the duty to carry out in good faith its obligations arising from treaties and other sources of international law, and it may not invoke provisions in its constitution or its laws as an excuse for failure to perform this duty."

" This text was derived from articles 11 and 12 of the Panamanian Draft. The phrase ' treaties and other sources of international law' was borrowed from the Preamble of the Charter of the United Nations. The first phrase is a re-statement of the fundamental principle *pacta sunt servanda*. The concluding phrase of this Article reproduces the substance of a well-known pronouncement by the Permanent Court of International Justice.[1]

" [1] Series A/B, No. 44, p. 24."

102. Mr. KORETSKY was opposed to the reference, in the last sentence, to a decision by the Permanent Court of International Justice.

It was decided by 6 votes to 5, to retain the last sentence.

(n) *Source of article 14*

103. The text was as follows:

" *Article 14*

" Every State has the duty to conduct its relations with other States in accordance with international law and with the principle that the sovereignty of each State is subject to the supremacy of international law."

" This text was derived from article 13 of the Panamanian Draft, which in turn was based upon Postulate 3 of ' The International Law of the Future '."

104. The CHAIRMAN suggested that the reference to " The International Law of the Future " might be deleted, as had been done in the case of the comments on articles 4 and 7.

It was so decided.

The meeting rose at 6 p.m.

36th MEETING

Wednesday, 8 June 1949, at 11 a.m.

CONTENTS

Chairman: Mr. Manley O. HUDSON.
Rapporteur: Mr. Gilberto AMADO.

Present:

Members: Mr. Ricardo J. ALFARO, Mr. James L. BRIERLY, Mr. Roberto CÓRDOVA, Mr. J. P. A. FRANÇOIS, Mr. Shuhsi HSU, Mr. Vladimir M. KORETSKY, Sir Benegal RAU, Mr. Georges SCELLE, Mr. Jean SPIROPOULOS, Mr. Jesús María YEPES.

Secretariat: Mr. LIANG, Director, Division for the Development and Codification of International Law; Secretary to the Commission.

Draft Report to the General Assembly on the Work of the First Session *(resumed)*

CHAPTER III: DRAFT DECLARATION ON THE RIGHTS AND DUTIES OF STATES *(concluded)*

Paragraph 22

1. The CHAIRMAN placed before the Com-

mission for consideration the following re-draft of paragraph 22 proposed by Mr. Koretsky .[1]

" 22. In conformity with the resolution of the General Assembly set out in the foregoing paragraph, the Commission took as the basis of its discussions the draft Declaration on the Rights and Duties of States presented by Panama (Doc. A/285) and further took into consideration the draft of the Cuban delegation to the United Nations Conference on International Organization (Doc. 2, b/14 (9), 2 May 1945, *UNCIO Documents*, vol. 3, pp. 493-502) and that of the Ecuadorian delegation to the United Nations (Doc. A/340), as well as the comments and observations upon the Panamanian draft Declaration communicated by Governments of the following States Members of the United Nations upon the dates specified: Canada (12 May 1947, 19 June 1947 and 7 April 1948); Czechoslovakia (11 August 1947); Denmark (22 September 1947); the Dominican Republic (4 June 1947); Ecuador (17 September 1947); El Salvador (28 April 1947); Greece (4 September 1947); India (26 September 1947); Mexico (7 June 1947); The Netherlands (23 June 1947); New Zealand (25 July 1947 and 9 April 1948); The Philippines (19 December 1947 and 27 May 1948); Sweden (30 May 1947 and 26 April 1948); Turkey (14 August 1947); the United Kingdom (1 May 1947 and 27 August 1948); the United States (29 May 1947 and 11 March 1949); and Venezuela (12 September 1947)." [2]

2. Mr. AMADO (Rapporteur) said that there were several theories concerning the Commission's draft report. Some felt that it should be a reflection of the Commission's activities; others that it should be an exact picture; and others that it should be merely a general account. According to Mr. Koretsky's proposal a different system should be adopted: the report should be an expression of proceedings which had not, in fact, taken place and should merely reflect Mr. Koretsky's own ideas.

3. The Commission had had before it a basic working document (A/CN.4/2) presented by the Secretary-General containing the draft declaration of Panama with historical documents relating to it, and the Commission's work had been based mainly on that document. He did not, therefore, see any advantage in adopting Mr. Koretsky's proposed re-draft, and preferred his original text.

4. Mr. ALFARO said that he would be willing to accept Mr. Koretsky's enumeration provided it included sub-paragraphs (*b*) and (*d*) of the Rapporteur's draft [3] which had undergone minor drafting changes and had incorporated paragraph 23.

5. Mr. KORETSKY objected to Mr. Amado's implication that his proposed re-draft was not strictly in accordance with the facts. It could not be denied that the Cuban and Ecuadorian drafts and the comments of Governments actually existed. Mr. Koretsky felt that if the Commission did not adopt a text along the lines he proposed, a distorted impression of its proceedings would be given. The report should indicate that the Commission had carried out its duty of considering the comments received by Governments and should refer to them in detail.

6. The Rapporteur's draft represented the members of the Commission as technical consultants who based their work on the documents presented by the Secretariat and on nothing else. Mr. Scelle had stated that members were independent jurists and not representatives of their Governments. Mr. Koretsky, however, felt that it was the duty of members to serve their peoples and their Governments by endeavouring to reach an agreed opinion which might be implemented, and that the report should reflect that. He therefore preferred his proposed re-draft which he felt to be more in accordance with the functions of the Commission.

7. The CHAIRMAN pointed out that the Rapporteur's text did refer to the comments of Governments and to other documents before the Commission.

Mr. Koretsky's proposed re-draft of paragraph 22 was rejected by 4 votes to one.

8. Sir Benegal RAU, in view of the fact that General Assembly resolution 178 (II) instructed " the International Law Commission to prepare a draft Declaration on the Rights and Duties of States, taking as a basis of discussion the draft declaration on the rights and duties of States presented by Panama, and taking into consideration other documents and drafts on this subject ", suggested that the first sentence of Mr. Koretsky's proposed re-draft down to the word " Panama " should be retained, and that it should be followed by a new sentence such as: " The task of the Commission was facilitated by a memorandum submitted by the Secretary-General which reproduced the various relevant documents."

9. Mr. SCELLE supported that proposal on the grounds that it expressed what Mr. Koretsky had wished to say while it dispensed with the unnecessary enumeration contained in his proposal.

Sir Benegal Rau's proposal was adopted by 5 votes to one.

10. The CHAIRMAN called Sir Benegal Rau's attention to the fact that his amendment omitted the last two sentences of the Rapporteur's text.

11. Sir Benegal RAU stated that he considered those unnecessary.

12. Mr. KORETSKY insisted that it was the Commission's duty to make clear what comments from Governments had been received, and pro-

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[1] See A/CN.4/SR.34, para. 15.

[2] The various drafts and the observations of Governments thereon are collected together in the Memorandum entitled *Preparatory Study concerning a draft Declaration on the Rights and Duties of States* (Doc. A/CN. 4/2) submitted by the Secretary-General.

[3] See A/CN.4/W.10/Add.1.

posed as an amendment to the text just adopted that a reference to those comments should be added either in the text of paragraph 22 or as a footnote.

13. Mr. ALFARO stated that the paragraph was one of real importance and that the sentences deleted by the adoption of Sir Benegal Rau's amendment warranted inclusion. He approved of the enumeration contained in the report and felt that it would do no harm also to enumerate the Governments which had submitted comments. For that reason he had stated earlier that he would accept Mr. Koretsky's proposed amendment provided sub-paragraphs (*b*) and (*d*) of the Rapporteur's draft were retained. The Commission should not appear to be attempting to conceal the comments received from Governments. He therefore proposed the addition of the last two sentences in the Rapporteur's text to the amendment of Sir Benegal Rau which had been adopted.

Mr. Koretsky's proposal for the addition of a reference to the comments submitted by Governments was adopted by 5 votes to 2.

Mr. Alfaro's proposal for the addition of the last two sentences in the Rapporteur's text was adopted by 8 votes to none.

Paragraph 23

14. The CHAIRMAN placed before the Commission the following re-draft of footnotes 3 and 4 to paragraph 23 as proposed by Mr. Koretsky with minor drafting amendments: [4]

" *Re-draft of Footnotes 3 and 4 to Paragraph 23*
" *(Doc. A/CN.4/W.10/Add.1)*

" *Delete:*	Footnotes 3 and 4
" *Substitute:*	Footnote 3

" [3] Document A/CN.4/SR.25. After the vote on the draft Declaration Mr. Vladimir M. Koretsky and Mr. Manley O. Hudson, who voted against it, made the following statements in explanation of their votes.

" Mr. Koretsky declared that he voted against the draft Declaration because of its many shortcomings including, in particular, (1) the fact that it did not embody such fundamental privileges of the United Nations as the sovereign equality of all the Members thereof and the right of self-determination of peoples; (2) the fact that it did not protect States against interference by international organizations or groups of States in matters falling essentially within their domestic jurisdiction; (3) the fact that it did not set out the very important duty of States to take measures for the maintenance of international peace and security, the prohibition of atomic weapons, and for the general reduction of armaments and armed forces, and that, further, the draft Declaration did not proclaim the duty of States to abstain from participation in aggressive *blocs* such as the North Atlantic Pact and the Western Union, whose actual aim, despite false professions concerning peace and collective security, was the preparation of new wars; (4) the circumstance that the draft Declaration made no mention of the important duty of States to take measures for the eradication of the last vestiges of fascism and for the prevention of its recrudescence; (5) the circumstance that the draft Declaration ignored the no less important duty of States to ensure full equality as between its citizens, without distinction as to race or nationality, and, equally, to combat racial, national or religious prejudice amongst its population and to prevent the propagation of hatred or disdain based on such prejudice; and (6) the fact that the draft Declaration did not recite the significant duty of States to promote respect for human rights and fundamental freedoms, notably the right to work and to be protected against unemployment, by means of governmental and social measures ensuring useful work for all. Mr. Koretsky added that the draft Declaration, and especially article 14 thereof went even further than the Panamanian Draft in denying the sovereignty of States. In his view the doctrine of the 'super-State' was being resorted to in this fashion by persons or peoples seeking to achieve, or to help others to achieve, world domination. Instead of reinforcing the principles of sovereignty, self-determination, sovereign equality of States, independence, and the freedom of States from dependence upon other States, the draft Declaration, he thought, derogated from the great movements to rid the peoples of the world of the scourges of exploitation and oppression (A/CN.4/SR.22, pages 13, 14).

" Mr. Hudson stated that he voted against the draft Declaration because the provisions of its article 6 went beyond the Charter of the United Nations, and beyond international law at its present stage of development (A/CN.4/SR.25, pages 3, 6). "

15. Mr. SCELLE objected to the redraft on the grounds that the new text, which was some forty lines long, in fact constituted a minority report. The Commission was composed of scholars who had a right to defend their own views, but it had not so far been agreed that they should submit their own opinions with regard to each article of the text. He pointed out that Mr. Hudson had expressed his dissent in a mere three lines. He did not object to Mr. Koretsky's right to express an opinion, but merely to the length at which he had expressed it. Moreover, if Mr. Koretsky's footnote were adopted it might give rise to proposals by other members for the inclusion of a whole series of footnotes.

16. Mr. CORDOVA stated that Mr. Koretsky had the right to express his own views and to make that expression of whatever length he desired. He felt, however, that the draft report itself did not set out sufficiently clearly on what grounds the majority had approved the various articles of the draft Declaration and he thought that the Commission should perhaps remedy that situation.

The insertion of Mr. Koretsky's proposed footnote 3 was adopted by 7 votes to 3.

17. In view of the decision taken by the Commission, Mr. ALFARO emphasized that every member had the right to introduce footnotes

[4] *Ibid.*, para. 29.

explaining why he had voted for or against certain articles.

18. The CHAIRMAN observed that in this connexion there was a difference between votes on the draft Declaration as a whole and votes on specific articles. He was prepared to agree to the deletion of the final paragraph of the footnote to paragraph 23 expressing his views.

19. Mr. SCELLE stated that at the next reading he would submit a footnote explaining his vote on the draft Declaration.

20. Mr. SPIROPOULOS considered that those who had voted against the draft Declaration should have the right to expound their reasons for doing so. He agreed with Mr. Scelle that Mr. Koretsky's footnote to paragraph 23 was too long, but explained that he had voted for its insertion in the report because the views expressed therein were those of a whole group of States, and it was important that they should appear in the draft Declaration in order that the General Assembly should have a clear idea what those views were.

Paragraph 26

21. The CHAIRMAN asked the Commission to consider the Rapporteur's proposed redraft of paragraph 26.[5]

" *Observations concerning the Draft Declaration*

" 26. It will be noted that each of the fourteen Articles of the Commission's Draft was derived from an article in the Panamanian Draft. Some of the twenty-four Articles of the latter were not retained; some were combined with other articles, some were found to be unnecessary because their substance was contained in other articles. Two of the articles in the Panamanian Draft which were not retained precipitated a lengthy discussion which it may be useful to review.

" The Commission concluded that no useful purpose would be served by an effort to define the term ' State ', though this course had been suggested by the Government of the United Kingdom. In the Commission's draft, the term ' State ' is used in the sense commonly accepted in international practice. Nor did the Commission think that it was called upon to set forth in this Draft the qualifications to be possessed by a community in order that it may become a State. These conclusions, which emerged from protracted discussion, greatly facilitated the task of the Commission.

" It was proposed that the Draft should be introduced by an Article providing that ' Each State has the right to exist and to preserve its existence.' This was urged as a mainspring for other rights to be declared, and its importance was thought to be underscored because the right had been denied and trampled upon by the Axis Powers in the last war. On the other hand, certain members of the Commissiou deemed it to be tautological to say that an existing State has the right to exist; that right is in a sense a postulate or a presupposition underlying the whole Draft. They also thought it superfluous to declare the right of a State to preserve its existence in view of articles in the Draft concerning self-defense and non-intervention by other States. What seemed at one time to be a deadlock in the voting on this question was resolved by the view that no article should be retained unless it commanded a substantial majority in its favour."

22. Sir Benegal RAU asked that the words " the Government of the United Kingdom " in the first sentence of sub-paragraph 2 should be replaced by " the Governments of the United Kingdom and of India ".

23. At the suggestion of Mr. FRANÇOIS, Mr. AMADO (Rapporteur) agreed to the deletion of the last sentence of sub-paragraph 2, and at the suggestion of Mr. KORETSKY, to the deletion of the last sentence of sub-paragraph 3.

24. At the suggestion of Mr. CORDOVA, he further agreed to replace the words " certain members of the Commission ", in sub-paragraph 3, by " a majority of the members of the Commission ".

Paragraph 26 was adopted subject to the above amendments.

Paragraph 27

25. The redraft proposed by the Rapporteur read as follows:

" 27. Another proposed article would have provided that ' Each State had the right to have its existence recognized by other States. ' The supporters of this proposal took the view that even before its recognition by other States, a State has certain rights in international law; and they urged that when another State on an appraisal made in good faith considers that a political entity has fulfilled the requirements of statehood, it has a duty to recognize that political entity as a State. It was appreciated, however, that in the absence of an international authority with competence to effect collective recognition, each State would retain some freedom of appraisal until recognition had been effected by the great majority of States. On the other hand, certain members of the Commission thought that the proposed article would go beyond generally accepted international law in so far as it applied to new-born States; and that in so far as it related to already established States the article would serve no useful purpose. The Commission concluded that the whole matter of recognition was too delicate and too fraught with political implications to be dealt with in a brief paragraph of this Draft Declaration, and it noted that the topic is one of

[5] *Ibid.*, para. 54.

the fourteen topics the codification of which has been deemed by the Commission to be necessary or desirable."

26. Mr. KORETSKY said that paragraph 27 as redrafted by the Rapporteur appeared to contemplate some kind of central organ that would deal with the problem of collective recognition. He did not think the proposed text accurately reflected the Commission's ideas. It was true that it had been said that, when the United Nations admitted a State, that might be assumed to mean collective recognition. The third sentence of the paragraph was misleading and should be deleted. Mr. Brierly and other members had pointed out that the problem of recognition was political rather than legal, and discussion of it by the Commission was otiose until it had been settled elsewhere.

27. Mr. ALFARO opposed the deletion of the sentence. It was a complement to the previous one, and merely stated a fact. The unity of the whole conception would be destroyed if it were deleted.

28. The CHAIRMAN asked the Commission to vote on the deletion of the sentence.

The Commission decided to retain the third sentence by 6 votes to 2.

29. Mr. AMADO (Rapporteur) proposed the following text: " The supporters of the proposal considered the question of recognition as of primary importance. They expressed the view that when a State considers that a political entity has fulfilled the requirements of Statehood it has a duty to recognize in good faith this political entity as a State. In the absence of an organ of the international community with the power to decide on the recognition of States, the State granting recognition would retain wide freedom of action, inasmuch as it would be the sole judge of the fulfilment of the conditions of Statehood by the entity seeking recognition."

30. The CHAIRMAN proposed to connect the first and second sentences in the Rapporteur's first redraft by a semi-colon and to replace the phrase: " it was appreciated " by the words: " they appreciated "; furthermore, to replace the words " certain members " in the next sentence by the words: " a majority of the members ".

The paragraph thus amended was adopted.

Paragraph 28

31. The redraft proposed by the Rapporteur read as follows:

" 28. In conclusion, it will be observed that the rights and duties set forth in the Commission's Draft are formulated in general terms, without restriction or exception, as befits a declaration of basic rights and duties. The articles of the Draft enunciate general principles of international law, the extent and the modalities of the application of which are to be determined by more precise rules. Article 14 of the Commission's Draft is a recognition of this fact. It is, indeed, a global provision which dominates the whole Draft, and in the view of the Commission it appropriately serves as a key to other provisions of the Draft in proclaiming ' the supremacy of international law '."

32. Mr. KORETSKY considered that the second part of paragraph 28 in the Rapporteur's redraft, beginning with the words: " Article 14 of the Commission's draft. . . " should be either deleted or brought into accordance with the facts. Those sentences as they stood implied the destruction of sovereignty and jeopardized the whole Declaration, since it related article 14 to all the other articles, and if that were done the majority of the General Assembly would presumably vote against it.

33. The CHAIRMAN pointed out that the phrase " the supremacy of international law " was quoted from article 14; he felt that it was a perfectly suitable ending to the part of the report in question.

34. Mr. AMADO (Rapporteur) observed that he had voted in favour of Mr. Koretsky's footnote in the hope and belief that the majority of the Commission had the right to express its point of view as set forth in paragraph 28. Mr. Koretsky's objections were already expressed at length in the note which the Commission had decided to incorporate in the report.

35. Mr. CORDOVA was against the whole paragraph. Although he was in favour of emphasizing the principles embodied in article 14, he felt that the first sentence weakened the Commission's proposals.

36. Mr. SPIROPOULOS accepted the first part of the paragraph in principle, but shared Mr. Koretsky's views with regard to the last two sentences. To speak of " the supremacy of international law " was to ignore reality. He had voted against article 14, and he was surprised that the Commission should have inserted such a concept in the Declaration.

37. Mr. SCELLE did not think any jurist could deny that international law was the source of the competence of all Governments; that was the evidence of facts and of history, unless it was claimed that international law had no other source than the fluctuating arbitrary will of Governments, which would be the negation of all international law.

38. Mr. AMADO (Rapporteur) also disagreed with Mr. Spiropoulos' views. The Commission's task was to codify the international law of the future. Those who, like Mr. Koretsky, denied the almost universally recognized and proclaimed principle of the supremacy of international law had a right to their point of view, which was the logical conclusion of the views of their Govern-

ments. He could not understand, however, how Mr. Spiropoulos could express the same views.

39. Mr. SPIROPOULOS had wondered ever since article 14 was drafted why the notion of the supremacy of international law, which was a purely Teutonic theory, had to be incorporated in the draft declaration. Of course, when rules existed, they were binding by the very fact of their existence as rules. German theorists, however, had erected, on the basis of that obvious fact, a theory of the supremacy of international law. That conception was purely academic and irrelevant to the Declaration. He was in complete agreement with Mr. Koretsky on that point: the use of the term " the supremacy of international law " would lead to confusion. Oppositions between international law and internal law were arbitrary and unimportant; what was important was that a rule was binding upon those who accepted it.

The Commission decided, by 9 votes to 2, to retain the last two sentences of paragraph 28.

40. Mr. CORDOVA would not press for the deletion of the first two sentences.

41. The CHAIRMAN then called the attention of the Commission to the following redraft by Mr. Koretsky of the last sentence of paragraph 28 in the original draft report (A/CN.4/W.10/Add.1):

> " Mr. Vladimir M. Koretsky dissented from this view, expressing the opinion that articles 16 and 21 of the Statute of the Commission required the publication of any draft prepared by the Commission, together with such explanations and supporting material as the Commission might consider appropriate, and the circulation thereof to Governments with a request for observations to be made within a reasonable time, before the final submission of any document to the General Assembly."

In the absence of any objections, the redraft was adopted.

42. Mr. HSU directed attention to the wording of the second sentence of the commentary on article 6 of the draft declaration contained in the Rapporteur's redraft of paragraph 23 (A/CN.4/SR.35, para. 90). He proposed that the words " inspired by " should replace the words: " based upon ", and that, at the end of the sentence, the words: " and the Universal Declaration of Human Rights " should be added.

43. Mr. CORDOVA opposed the suggested change to " inspired by " on the grounds that it would mean putting into the draft what was already in the Charter. The Charter did not specify that the treatment of all persons under the jurisdiction of a given State with due respect for human rights and fundamental freedoms, without distinction as to race, sex, language or religion, was a duty. The Commission was proposing that that should become a duty.

44. The CHAIRMAN put Mr. Hsu's proposed substitution of the words: " inspired by " for the words: " based upon " to the vote.

The amendment was adopted by 5 votes to 4.

45. Mr. ALFARO suggested the use of a wording more in keeping with the facts and proposed the substitution of the phrase: " follows the language of " for the words: " is inspired by " in the phrase that had just been considered.

That amendment was adopted by 5 votes to 2.

46. Mr. HSU objected that his two amendments formed really one whole and that his proposed addition of the phrase " and the Universal Declaration of Human Rights " would be meaningless if his phrase " inspired by " were replaced by the words: " follows the language of ", as the latter referred to specific Articles and paragraphs of the Charter.

47. The CHAIRMAN read the paragraph in full with both amendments as originally proposed by Mr. Hsu, and put it to the vote.

The paragraph, as amended, was adopted by 7 votes to none.

48. Mr. HSU proposed the addition of a new paragraph dealing with the article he had proposed, stating that it was the duty of States involved in military action to be guided by humanitarian principles. The paragraph was worded as follows:

> " After the draft declaration was completed, Mr. Shuhsi Hsu proposed the addition of an article on the duty of States to condition military necessity by the principle of humanity in the employment of armed forces, legitimate or illegitimate. Some members objected, holding that no reference to warfare should find a place in such a Declaration. As the proposal was made late in the session, the Commission was, however, unable to give it as exhaustive a discussion as its importance warranted."

49. Sir Benegal RAU observed that the article which Mr. Hsu had proposed and which the Commission had rejected had been restricted to the field of self-defence and United Nations enforcement action. The new paragraph which Mr. Hsu proposed for insertion in the report referred to any military action. If it was to be inserted at all, it should describe the proposed article more accurately.

50. Mr. HSU felt, on the contrary, that his meaning when proposing the article in question, had been accurately stated.

51. Mr. SPIROPOULOS proposed the acceptance of Mr. Hsu's addendum as a footnote.

52. The CHAIRMAN wondered whether the proposal should be accepted as a paragraph in the report.

53. Mr. ALFARO favoured the inclusion of the paragraph proposed by Mr. Hsu, but agreed with Sir Benegal Rau that the wording did not conform

exactly to the article as proposed by Mr. Hsu. That should be remedied.

54. The CHAIRMAN put Mr. Hsu's proposed additional paragraph to the vote.

The proposal was adopted by 6 votes to 5.

55. To meet an objection of Mr. KORETSKY, who considered that the last sentence was not accurate, Mr. HSU agreed that the last sentence of the adopted paragraph should be deleted.

In the absence of any objection, the sentence was deleted.

The meeting rose at 12.50 p.m.

37th MEETING

Wednesday, 8 June 1949, at 3 p.m.

CONTENTS

Chairman: Mr. Manley O. HUDSON.

Rapporteur: Mr. Gilberto AMADO.

Present:

Members: Mr. Ricardo J. ALFARO, Mr. James L. BRIERLY, Mr. Roberto CÓRDOVA, Mr. J. P. A. FRANÇOIS, Mr. Shuhsi HSU, Mr. Vladimir M. KORETSKY, Sir Benegal RAU, Mr. Georges SCELLE, Mr. Jean SPIROPOULOS, Mr. Jesús María YEPES.

Secretariat: Mr. KERNO, Assistant Secretary-General in charge of the Legal Department; Mr. LIANG, Director of the Division for the Development and Codification of International Law, Secretary to the Commission.

Draft Report to the General Assembly on the Work of the First Session (*continued*)

AMENDMENT SUBMITTED BY MR. ALFARO TO PARAGRAPH 22 OF THE DRAFT REPORT

1. The CHAIRMAN invited the Commission to reconsider paragraph 22, to which Mr. Alfaro wished to make an addition.

2. Mr. ALFARO thought that the text of paragraph 22, as modified at the previous meeting,[1] had been reduced to such a point that that part of the report did not give an exact idea of the documentation which had been available to and utilized by the Commission. It was in order to make good that deficiency and to ensure that the report would convey as accurate a picture as possible of the work of the Commission and of the conditions in which it had been accomplished, that Mr. Alfaro proposed the insertion, after the text of paragraph 22 which had been previously approved, of a paragraph conceived in the following terms:

> " The work of the Commission was facilitated by a memorandum submitted by the Secretary-General containing a detailed analysis of the United Nations discussions on the draft, and reproducing the texts of treaties and conventions, resolutions, declarations and projects emanating from inter-governmental bodies, declarations prepared by non-governmental organizations and scientific institutions and statements by jurists and publicists."

3. The CHAIRMAN put Mr. Alfaro's proposal to the vote.

The Commission approved, by 11 votes to none, the addition to paragraph 22 of the paragraph proposed by Mr. Alfaro.

AMENDMENT SUBMITTED BY MR. KORETSKY TO PARAGRAPH 10 [2]

4. The CHAIRMAN submitted to the Commission Mr. Koretsky's proposal to replace paragraph 10 of the draft report, by the following text:

> " According to one view, inasmuch as the International Law Commission is not an autonomous organ enjoying complete liberty, but is merely a subsidiary organ of the General Assembly, it exists to carry out certain tasks which have been entrusted to it by the General Assembly and any task it undertakes must be sanctioned by the latter. In so doing it must adhere strictly to its Statute, which lays down a procedure for the different stages of the work of codification. During the first stage, the

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[1] See A/CN.4/SR.36, paras. 8-13.

[2] See A/CN.4/SR.31, paras. 12-28.

Commission has the duty of discussing the choice of topics for codification; in the second stage that of presenting a report to the General Assembly and of making recommendations on the choice of subjects. Only when the General Assembly has approved the choice of subjects, can the Commission proceed to the other stages envisaged in articles 19 to 23 of its Statute. For the Commission to act otherwise would be to ignore the ties which link it to the General Assembly and to disregard its duties towards that body."

5. The Chairman did not recall that any member of the Commission had maintained that it was an autonomous organ enjoying complete liberty.

6. Mr. YEPES remarked that from Mr. Koretsky's text it was not sufficiently clear that that text expressed the opinion of a single member of the Commission.

7. Mr. BRIERLY suggested that the first phrase of that amendment should be changed to read: " Some Members wished to emphasize that the International Law Commission was not. . . ", the remainder of Mr. Koretsky's text to stand without change.

8. Mr. KORETSKY pointed out that he had wished to contradict an opinion which he thought had been expressed in the Commission. Mr. Scelle had, in fact, maintained more than once that the Commission was an autonomous body of international jurists, who were not bound by the General Assembly resolutions and whose powers were analogous to those of the International Labour Organization.

9. Mr. SCELLE pointed out that he had not gone so far as to maintain that the Commission was entirely autonomous and independant of the General Assembly. The ties linking and subordinating it to the Assembly were too obvious to be denied. It was the General Assembly which had set up the Commission; it had entrusted it with certain tasks, and it undoubtedly had a watching brief over the Commission's work.

10. What Mr. Scelle had meant was that the members of the Commission were perfectly free to their opinion and that the Commission could, in certain cases, take decisions without referring to the General Assembly. If he had compared the Commission to the ILO, it was because, in his opinion, the Commission, like that Organization, should be entitled to choose, the questions it desired to study, and to prepare on its own account texts on such questions, which expressed the opinion of its members.

11. Mr. KORETSKY stated that in view of Mr. Scelle's explanations, he accepted the change in his amendment proposed by Mr. Brierly.

12. The CHAIRMAN thought that the first phrase of the initial text of paragraph 10 should be retained and that Mr. Koretsky's amendment should be added after it.

13. Mr. HSU supported that suggestion on the understanding that it would be clearly indicated that Mr. Koretsky's amendment expressed only his own opinion and not that of the minority.

14. The CHAIRMAN thought that that result could be obtained if the amendment began with the words: " According to one view ", which would be substituted for the phrase " Notwithstanding the view of certain members ". The paragraph would therefore be composed of the first sentence of the initial text to which would be added Mr. Koretsky's amendment, thus modified.

15. Mr. KORETSKY was not opposed to indicating that the text expressed his own opinion, since those who had shared his opinion seemed to have changed their mind. He pointed out, however, that in the course of the report, his objections had at times been attributed to some unnamed member of the Commission and at times to himself in name. He thought that a consistent rule should be adopted in that respect.

16. Mr. ALFARO objected that the last draft proposed let it be understood that a second opinion had been maintained to the effect that the Commission was a body enjoying total independence. Now Mr. Scelle's remarks had made it clear that no one had ever expressed that opinion in the Commission. The ambiguity resulting from the present text should therefore be removed.

17. Mr. BRIERLY proposed that the beginning of Mr. Koretsky's amendment should be changed to read: " According to one view, inasmuch as the International Law Commission is not an autonomous organ enjoying complete liberty, but is merely a subsidiary organ of the General Assembly, it exists to carry out certain tasks. . . "

18. The CHAIRMAN proposed that the Commission should approve Mr. Koretsky's amendment thus modified, and preceded by the first sentence of the initial text.

It was so decided.

New drafting of paragraph 18: Laws of war

19. The CHAIRMAN called the Commission's attention to a new text for paragraph 18 on the laws of war, which had been prepared by the Rapporteur on the basis of an amendment proposed by Mr. François. [3]

20. The new draft text read:

" The Commission considered whether the laws of war should be selected as a topic for codification. It was suggested that, war having been outlawed, the regulation of its conduct had ceased to be relevant. On the other hand,

[3] See A/CN.4/SR.31, para. 68.

the opinion was expressed that although the term 'laws of war' ought to be discarded, a study of the rules governing the use of armed force—legitimate or illegitimate—might be useful. The punishment of war crimes, in accordance with the principles of the Nürnberg Charter and the judgment of the Nürnberg Tribunal would necessitate a clear definition of those crimes and consequently, the establishment of rules which would provide for the case where armed force was used in a criminal manner, especially in view of the obsolescence of The Hague Conventions.

"The majority of the Commission declared itself opposed to the study of the problem at the present stage. It was considered that if the Commission, at the very beginning of its work, were to undertake this study, public opinion might interpret its action as showing lack of confidence in the efficiency of the means at the disposal of the United Nations for maintaining peace. This argument was felt to be the stronger because of the decision of the Commission not to retain among the topics for codification that of the 'peaceful settlement of international disputes.'"

21. The Chairman proposed that at the end of the first paragraph the word "obsolescence" should be replaced by "inadequacy".

It was so decided.

22. Mr. KORETSKY suggested deleting the allusion to The Hague Conventions. By taxing them with inadequacy the Commission, which should endeavour to strengthen and re-establish them, would only further undermine their authority and thus complete the work of the fascists, who alone were responsible for their inefficacy and for the discredit into which they had fallen.

23. The CHAIRMAN put to the vote the deletion of the last sentence of the first paragraph of the new text of paragraph 18.

The Commission decided to delete that sentence by 8 votes to one.

24. Mr. KORETSKY proposed the deletion of the words "at the present stage" in the first sentence of the second paragraph, which seemed to indicate that the study of the laws of war had been postponed by the Commission for some time, which would not be exact. Mr. Koretsky also proposed the deletion of the last sentence of the second paragraph.

The CHAIRMAN called for a vote on Mr. Koretsky's two proposals.

The words "at the present stage" were maintained by 6 votes to 4.

The last sentence was deleted by 9 votes to none.

The new text of paragraph 18 as amended was approved.

AMENDMENT SUBMITTED BY MR. KORETSKY TO PARAGRAPH 40

25. The CHAIRMAN called the Commission's attention to a draft amendment by Mr. Koretsky which proposed the addition of the following text to footnote (1) of paragraph 40: [4]

"Mr. Koretsky considered that the memorandum submitted by the Secretariat could not be accepted as a Commission working document. He felt that, in the first place it did not pay adequate attention to all of the world's legal systems. Many countries, Members of the United Nations, were not mentioned at all. Numerous countries were relegated to the section entitled 'Other countries' in derogatory fashion. Alphabetical order, customary in United Nations practice, was ignored. He further felt that the memorandum disclosed an inadequate knowledge on the part of its compilers of the published sources of international law in many countries. In particular, the compilers evinced utter ignorance of publications appearing in the USSR. Also, the compilers had taken a false position of principle as regards the relative weight of the sources of international law, pushing into the background international treaties—the most important source of all."

26. The CHAIRMAN announced that if the addition proposed by Mr. Koretsky was approved, he would also ask for the inclusion after footnote (1) of a note as follows:

"Mr. Hudson stated that in his view it was not for the Commission to pass judgment on the documents prepared by the Secretariat. Each member of the Commission may have his own view regarding the quality of this particular memorandum; for his part, he felt that it could not possibly be complete because of the magnitude of the task involved. That task was essentially one of finding persons equipped with the necessary technical and linguistic skill. The Division of the Legal Department which acts as Secretariat to the Commission had at one time included a staff member from the Soviet Union, but that particular person had been unable to complete his assignment on this topic. Mr. Koretsky's interesting suggestion that a survey of current treaty law be prepared lies outside the scope of Article 24. Mr. Hudson further referred to the objection that the Memorandum did not deal with the laws of Arab countries and drew attention to the reference to Egyptian law on page 61 thereof."

27. Mr. KORETSKY pointed out that he had made no suggestion and that he had merely stated

[4] See A/CN.4/SR.35, para. 32-36.

that the study of common law should also include that of its application under existing treaties.

28. Mr. YEPES felt that the insertion of the note proposed by Mr. Koretsky could be approved, on condition that it was accompanied by a brief mention of the opposing opinion expressed by a certain number of members of the Commission.

29. Mr. SPIROPOULOS felt that there was no need to insert in a report the personal opinion of a member of the Commission concerning the value of a simple working document. If the contrary were admitted, it would be necessary to include in the report the opinion of each of the other members who had expressed different views on the point. If the same rule were to be applied to the most insignificant details, the report would finally be burdened with innumerable footnotes of no real interest.

30. The CHAIRMAN put Mr. Koretsky's proposal to the vote.

Mr. Koretsky's proposal was rejected by 7 votes to one.

31. Mr. KORETSKY felt that by taking that decision, the Commission, which had already committed several infractions of its own Statute, had not respected the right of each and every member to have included in the report any opinions he had expressed in the course of the debate and to which he attached a certain importance. In the circumstances, Mr. Koretsky would make use of every means he felt to be appropriate in order to bring his opinion to the knowledge of the public.

32. Mr. KERNO (Assistant Secretary-General) respectfully called the Commission's attention to the fact that the Secretariat's only desire was to service the Commission to the best of its ability, by carrying out purely anonymous work, the standard of which it was always endeavouring to improve and for which, naturally, it expected no praise. As to the memorandum, the Secretariat would take account of all information supplied by members of the Commission in order to complete it by making the necessary addenda or by publishing an entirely new text.

Chapter VII
Co-operation with other bodies [5]

33. The CHAIRMAN presented to the Commission the draft of chapter VII of the report dealing with co-operation with other bodies and proposed the deletion of the word " of " at the beginning of the fourth line in the English text of paragraph 43.

Paragraph 43, as amended, was approved.

34. At the suggestion of Mr. BRIERLY, the CHAIRMAN proposed to replace the word " submitted " in the first sub-paragraph of paragraph 44 by the word " prepared ", to insert a comma before the word " prepared " and to delete the comma after the words "by the Secretary-General".

It was so decided.

35. Mr. KORETSKY pointed out that in that chapter all reference had been omitted to the opinion he had held concerning the interdependence of paragraphs 1 and 2 of article 26 of the Commission's Statute and concerning the need of interpreting paragraph 2 in connexion with the first paragraph which was in his opinion, the decisive factor in the matter.

36. The CHAIRMAN, in compliance with Mr. Koretsky's wishes, proposed the inclusion of a supplementary sub-paragraph after the first sub-paragraph of paragraph 44 reading as follows:

" One member of the Commission was of the opinion that paragraphs 1 and 2 of article 26 of the Statute of the Commission were closely related and that the inclusion of any organization in the list referred to in paragraph 2 would mean that the Commission might wish to consult with such organization. The majority of the Commission, however, decided that paragraphs 1 and 2 were not related and that the list referred to in paragraph 2 was only for the purpose of distribution of documents."

Paragraph 44, as amended, was approved.

Chapter VIII. Miscellaneous decisions [6]

37. The CHAIRMAN invited the Commission to consider chapter VIII which concerned the date and place of the second session, representation at the General Assembly and emoluments for members of the Commission.

38. At the request of Mr. KORETSKY, the CHAIRMAN proposed the deletion of the word " unanimously " in paragraphs 45 and 46 as well as of the words " all of " which appeared before the words " its members " in the second sub-paragraph of paragraph 47.

It was so decided.

39. The CHAIRMAN considered, moreover, that it would be better to replace the word " should " by the word " would " in the English text of paragraph 46.

It was so decided.

Proposal by Mr. Scelle to include in the report an acknowledgement of the work of the Secretariat

40. Mr. SCELLE proposed that a 48th paragraph should be added to the end of the report as follows: " The Commission wished to congratulate the

[5] See *Report*, chapter VI.

[6] See *Report*, chapter VII.

Legal Department of the Secretariat on its untiring efforts in assisting the Commission and on the valuable working documents which it placed at the disposal of the Commission."

41. Mr. YEPES heartily supported that tribute, but he thought that the place to insert it would be in the summary record of the last meeting and he would not vote in favour of Mr. Scelle's proposal for just that one reason.

Mr. Scelle's proposal was adopted by 7 votes to one.

FOOTNOTES TO PARAGRAPH 23 [7]

42. The CHAIRMAN submitted to the Commission the text of a footnote which Mr. Yepes asked to have inserted. The footnote was couched in the following terms:

> " Mr. Yepes voted for the Declaration as a whole and for each one of its articles; he thought that the Declaration marked a considerable step forward in the evolution of international law. He regretted, however, that the Declaration did not include, were it only in the preamble, a definite statement of the universal and compulsory nature of the international community. Further, Mr. Yepes regretted that the article he had proposed on *jus communicationis* had not been accepted for, in his opinion, it was one of the fundamental precepts of international law and he hoped that principle would ultimately be adopted by the Commission. Futhermore, it was regrettable that the Commission had refused to clarify the concept of state sovereignty by the addition at the end of article 1 of the last sentence, 'It is in this sense that the sovereignty of the State should be understood,' a sentence which had been adopted at first and later deleted by the majority of the Commission."

43. The Chairman thought that a footnote should not express the wishes of one member of the Commission; he therefore suggested to Mr. Yepes that the phrase " and he hoped that the principle would ultimately be adopted by the Commission " should be deleted.

44. Mr. YEPES accepted the suggestion to delete that phrase.

45. The CHAIRMAN placed before the Commission a footnote which Mr. Scelle wished to have included in the report. The footnote read:

> " Mr. Scelle voted for the Declaration although he did not find it satisfactory, first because the General Assembly had made its drafting incumbent on the Commission; secondly, because it contained in article 14 the fundamental principle of the supremacy of international law over internal legal systems. He regretted that the Declaration had not stated the legal obligation which was placed on all Governments to recognize the existence as a State of any political community fulfilling the conditions of Statehood laid down by international law. His greatest regret was that at the end of article 1 on independence, the explanatory sentence 'It is in this sense that States are sovereign' had not been retained. He still believed that sovereignty was nothing other than the sheaf of competences granted to the Governments of States by international law and that those competences should be exercised freely without any external pressure. In his opinion, sovereignty and independence were, in legal terminology, one and the same concept. "

46. The Chairman thought that those last two sentences constituted the expression of a personal theory which did not seem absolutely justified in the report.

47. Mr. SCELLE agreed to delete the last two sentences of his statement.

48. Mr. SPIROPOULOS said that every member of the Commission certainly had the right to request the inclusion of a personal statement in the report, but he did not feel it was appropriate for the members of the majority to explain their votes. If Mr. Yepes' and Mr. Scelle's footnotes were accepted, Mr. Spiropoulos would also request the inclusion of a statement explaining that he had voted in favour of the draft Declaration on the Rights and Duties of States although he had been opposed to several articles.

49. The CHAIRMAN thought that the report would be uselessly overburdened if every member wished to include his personal opinion therein. Therefore, although it explained the reasons for which he had voted against the draft Declaration, he asked that the footnote he had had inserted to paragraph 23 should be deleted.

50. Mr. SCELLE said that he would adopt the same attitude as the Chairman, that is to say, that he would not request the inclusion of his footnote if all the members of the Commission would consent to do the same.

51. Mr. CORDOVA pointed out that the members of the minority had a perfect right to explain the reasons for which they had voted against the draft; he did not think, however, that the right should be exercised by the members of the majority.

52. Mr. ALFARO remarked that Mr. Koretsky's footnote went far beyond the explanations which were usually given to justify a vote; that statement was really an exposition of a theory of international law. Paragraph 23 did not explain the motives which had impelled the majority to adopt the draft Declaration in its present form; if members of the minority had the right to explain their reasons for voting against the draft Declaration, it was logical that the members of the

[7] See paras. 67-83.

majority should be able to explain the reasons for which they had approved that draft.

53. The CHAIRMAN said that the footnotes to paragraph 23 which Mr. Yepes and Mr. Scelle had asked to have included should appear in the report.

54. Mr. SPIROPOULOS therefore requested the inclusion of the following footnote: " Mr. Spiropoulos voted in favour of the Declaration though he did not agree with some of its articles."

55. Mr. ALFARO also requested the inclusion of the following footnote:

> " Mr. Alfaro voted for the Declaration in general, and despite any minor defects that it might contain in the opinion of individual members, because it reflects the noble advances made by international law and because it states sound principles that command the respect of a preponderant majority of the scientific and popular opinion of the world, and have been accepted by the majority of nations."

56. The CHAIRMAN suggested that all the statements, those of the minority as well as those of the majority, should be annexed to the report and not inserted in the footnote to paragraph 23.

57. Mr. KORETSKY opposed that suggestion. He recalled that the Commission had already taken a decision concerning the footnotes inserted at the request of members of the minority; there could be no question of altering that decision. Mr. Koretsky realized that all of the members of the Commission had the right to have their opinion given in the report, but he maintained that basically all statements should appear as a footnote to paragraph 23.

58. Mr. Koretsky felt that all of the members of the minority had a perfect right to explain the reasons for their position as lengthily as they wished; that was indispensable to enable readers of the report to understand the objections of principle which had governed the actions of certain members of the Commission. The criticisms which Mr. Koretsky wished to see included in the report referred to the draft Declaration as a whole and to the interpretation to be given to the Commission's work: those criticisms were doubtless not appreciated by all of the members of the Commssion, but that could not justify their suppression and their inclusion merely as an annex.

59. The CHAIRMAN said that all of the statements which members had requested to have inserted would appear as footnotes to paragraph 23, with the exception of his own which was withdrawn.

Title of the report

60. The CHAIRMAN stated that three titles had been suggested; namely:

1. Report to the General Assembly on the Work of the First Session;

2. Report to the General Assembly on the First Session;

3. First report to the General Assembly.

After a short discussion, it was decided to leave the selection of the title of the report to the Rapporteur.

Form of the report

61. Mr. KORETSKY pointed out that the draft Declaration on the Rights and Duties of States was only one chapter of the draft report; nevertheless, that matter would be listed as a separate item on the agenda of the forthcoming session of the General Assembly. It therefore would seem that the draft Declaration should be a separate document; the Commission would thus make it clear that the General Assembly was seized of two different items: first, the report on the work of the Commission; secondly, the draft Declaration on the Rights and Duties of States.

62. The CHAIRMAN recalled that it had been decided to present the text of the draft Declaration as a special document. That paper would thus make it possible to inscribe the draft Declaration on the Rights and Duties of States as a separate item on the agenda of the General Assembly.

63. Mr. KERNO (Assistant Secretary-General) suggested that the report of the Commission's work as a whole should confine itself to mentioning that the draft Declaration on the Rights and Duties of States was the subject of a special report, which would be drafted from Chapter III of the present draft report.

64. Mr. SPIROPOULOS thought that it would be better to present only one report, without devoting a special report to the draft Declaration.

65. After a brief discussion, the CHAIRMAN proposed that the Commission's report should be divided into two parts: the first relating to the Commission's work as a whole, and the second to be devoted to the draft Declaration on the Rights and Duties of States.

It was so decided.

Footnote to the paragraph entitled: " Request to Governments for data "

66. The CHAIRMAN noted that Mr. Koretsky had requested the inclusion of a footnote to the paragraph headed: " Request to Governments for data. " [8] That footnote read as follows:

> " Mr. Koretsky opposed this decision on the ground that the Commission, pursuant to articles 18 and 19 of its Statute, is empowered to address requests to Governments only after approval

[8] See A/CN.4/SR.35, para. 60.

by the General Assembly of the Commission's recommendations as to the topics selected."

That insertion was accepted.

FURTHER CONSIDERATION OF THE QUESTION OF FOOTNOTES TO PARAGRAPH 23 [9]

67. Mr. BRIERLY said that after meeting with so me of his colleagues, he thought it advisable to appeal to the members of the majority who had requested the inclusion of footnotes to paragraph 23.

68. The Declaration on the Rights and Duties of States should have as great moral authority and prestige as possible. The draft had been adopted by 11 votes to 2; it was regrettable that it had not been adopted unanimously, but it seemed that it would have more weight in the eyes of the General Assembly if the members of the majority would agree to omit the remarks they had offered from the report.

69. Mr. Brierly then asked the members of the majority who had requested the inclusion of footnotes to paragraph 23 to consider whether, by so doing, they were not prejudicing the draft Declaration.

70. The CHAIRMAN warmly supported Mr. Brierly's appeal and recalled that he had withdrawn his own note to paragraph 23; he thought that too many comments could only weaken the prestige and authority of the draft Declaration.

71. Mr. CORDOVA also supported Mr. Brierly's appeal. He pointed out that all of the members of the majority had had occasion to criticize certain articles of the draft, but he did not think that was an adequate reason for adding remarks to the report which might give the General Assembly the impression that the Commission was not entirely satisfied with the draft it was submitting. Mr. Córdova hoped that his colleagues would heed the appeal which had been made to them.

72. Mr. AMADO thanked Mr. Brierly for the efforts he was making in the interests of the draft Declaration. The Commission had accomplished much worthwhile work after continuous effort and many compromises; it would be regrettable to let the General Assembly believe that the members of the Commission were not entirely satisfied with their work; the General Assembly might thus be led to show less interest in completing the work undertaken by the Commission.

73. Mr. SPIROPOULOS recalled that he had only requested the inclusion of his remarks because the Commission had decided to accept those of Mr. Yepes and Mr. Scelle. For his part he had always been of the opinion that the members of the majority should not insert comments in the report. Mr. Spiropoulos said that he was quite prepared to withdraw his request.

74. Mr. SCELLE thought that when an appeal was made to sentiment or to courtesy, there was the risk of favouring those who were strong enough and obstinate enough to maintain their position. All of the members of the majority who had requested the inclusion of remarks would certainly respond to Mr. Brierly's appeal, thus permitting Mr. Koretsky to be only one to offer his opinion and to submit, in consequence, a true minority report.

75. Mr. Scelle recalled that Mr. Koretsky had stated that he would inform public opinion, otherwise than through the Commission's report, of those of his remarks which could not appear in the report; Mr. Scelle reserved the rights to follow the same procedure and to make known to public opinion the criticisms which he might have to make with regard to the draft Declaration.

76. Mr. Scelle withdrew his request for the inclusion of a footnote to paragraph 23.

77. Mr. ALFARO thought that in all fairness, the members of the majority should have the same opportunity to explain their vote as that enjoyed by the members of the minority. Mr. Alfaro could not, however, ignore Mr. Brierly's appeal and he withdrew his request for the inclusion of a footnote to paragraph 23.

78. Mr. YEPES said that his only desire had always been to contribute to the preparation of as perfect a draft Declaration as possible. It was with that aim in mind that he had presented amendments and that he had objected to certain parts of the report. In the interests of the prestige of the Commission and of its work, Mr. Yepes adopted the same attitude as Mr. Spiropoulos, Mr. Scelle and Mr. Alfaro.

79. The CHAIRMAN was happy to note that the four members of the majority who had requested the inclusion of footnotes to paragraph 23 had responded to Mr. Brierly's appal. Their decision could not but contribute to the prestige and authority of the draft Declaration and of the Commission's report.

80. The Chairman pointed out that his footnote to paragraph 23, which he had withdrawn, explained that he had opposed the draft Declaration only on account of the provisions of article 6; after reflection, the Chairman thought that the draft Declaration and the report would gain in authority if his footnote were maintained in company with that of the other member of the Commission who had voted against the draft Declaration. Consequently, the Chairman requested that his footnote should be retained.

It was so decided.

81. Mr. YEPES suggested that the Chairman should change his attitude towards the draft Declaration as a whole; he might state that he

[9] See *Supra*, paras. 42-59.

favoured the draft Declaration while making certain formal reservations with regard to article 6. Mr. Yepes thought that such a measure would facilitate the Chairman's task when he represented the Commission in the General Assembly.

82. Mr. SPIROPOULOS supported Mr. Yepes' suggestion.

83. The CHAIRMAN thought that the inclusion of his footnote to paragraph 23 was sufficient indication of what his attitude towards the draft Declaration had been; it was therefore pointless for him to reconsider his vote on the draft Declaration.

Use of working languages

84. Mr. YEPES recalled that throughout the session he had spoken in French. He had done so in order to render homage to the French language, which had long been pre-eminently the diplomatic language, and also in order to expedite the Commission's work because the use of Spanish would have required a supplementary translation.

85. Mr. Yepes emphasized that that fact should not create a precedent; the Spanish language was a working language of the General Assembly and on that subject he reserved all his rights and those of the representatives of his country in the General Assembly.

The meeting rose at 5.30 p.m.

38th MEETING

Thursday, 9 June 1949, at 3.45 p.m.

CONTENTS

Chairman: Mr. Manley O. HUDSON.

Rapporteur: Mr. Gilberto AMADO.

Present:

Members: Mr. Ricardo J. ALFARO, Mr. James L. BRIERLY, Mr. Roberto CÓRDOVA, Mr. J. P. A. FRANÇOIS, Mr. Shuhsi HSU, Mr. Vladimir M. KORETSKY, Sir Benegal RAU, Mr. Georges SCELLE, Mr. Jean SPIROPOULOS, Mr. Jesús María YEPES.

Secretariat: Mr. KERNO, Assistant Secretary-General in charge of Legal Department; Mr. LIANG, Director of the Division for the Development and Codification of International Law, Secretary to the Commission.

Adoption of the Report to the General Assembly on the Work of the First Session

1. The CHAIRMAN invited the members of the Commission to discuss and approve the draft report to the General Assembly (A/CN.4/W.10/Rev.1).

2. Mr. KORETSKY recalled that when the Commission established the order of priority in which topics chosen for codification should be studied, Mr. Yepes had stressed the importance of the question of nationality and of statelessness. The last sentence of paragraph 19 [1] of the report should therefore be amended and the words " and statelessness " inserted after " the question of nationality ".

It was so decided.

3. Mr. KORETSKY pointed out that some confusion might be caused by placing the comments on the various articles of the draft declaration on rights and duties of States immediately after the articles themselves. In certain cases such comments might appear to be a second paragraph of the article. He felt that that shortcoming should be corrected.

4. After a brief exchange of views between the CHAIRMAN, Mr. ALFARO and Mr. KORETSKY, the CHAIRMAN said that the Secretariat would ensure that comments were presented in such a manner as to prevent any possible confusion.

5. Mr. KORETSKY said that a uniform procedure should be maintained both as to the way in which the names of members were mentioned in the report as well as to the way in which his opinion, which differed from that expressed by the majority, had been recorded. He had no objection to his name being mentioned, but insisted that it be mentioned everywhere.

6. After a brief discussion in which Mr. SPIROPOULOS, Mr. KORETSKY, the CHAIRMAN and the RAPPORTEUR took part, the Commission decided to adopt the practice followed by all United Nations Commissions, with the exception of the Main Committees of the General Assembly, and not to mention the Rapporteur's name at the beginning of the report.

7. The CHAIRMAN then put to the vote the draft report as a whole.

The draft report, under the title " Report to the General Assembly of the work of the first session" was adopted by 11 votes to one.

Closing Speeches

8. Mr. SCELLE felt that it should be his privilege, because of his age, to be the first to express his warmest thanks to the Chairman and to the officers of the Commission.

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[1] Corresponds to para. 19 of the *Report.*

9. The Commission's members were unanimous in their admiration for the authoritative manner in which the Chairman had conducted the debates. He had brought the work of the Commission to a successful issue and everyone was to be congratulated on the results achieved. The two Vice-Chairmen had contributed with their personal qualities. Mr. Scelle paid a special tribute to the Commission's Rapporteur who had fulfilled his task to perfection. He had been friendly with all his colleagues not only because he had wished to please everybody but mainly because he had not wished to hurt anyone.

10. In conclusion, Mr. Scelle expressed the Commission's hope that the efforts made at future sessions would be crowned with even greater success, so that the Commission would deserve the confidence which the General Assembly and the peoples of the world had placed in it.

11. Mr. SPIROPOULOS, associating himself with Mr. Scelle's remarks, paid a special tribute to Mr. Alfaro who had been the first member to submit to the Commission a document which had been the subject of careful and lengthy examination. The Commission had used that document as a basis for the draft Declaration on the Rights and Duties of States which it would submit to the fourth session of the General Assembly. Mr. Spiropoulos was certain that that draft would receive the attention it deserved from the General Assembly, and that Mr. Alfaro would have the satisfaction of seeing it adopted unanimously.

12. Mr. ALFARO expressed his warmest thanks to Mr. Spiropoulos. He was very satisfied with the results of the Commission's discussions, and was glad that the basic points of the Panamanian draft had been maintained. He emphasized that the delegation of Panama did not claim the honour of having introduced any new ideas in the matter; it could only take credit for having drawn the General Assembly's attention to the necessity of preparing a declaration of universal scope proclaiming the rights and duties of all States, just as the declaration adopted at Montevideo in 1933 had laid down the rights and duties of the American States.

13. Mr. Alfaro thanked the Chairman and the Commission's officers for the efforts they had made to carry out successfully the work entrusted to them. He also expressed his thanks to the members of the Secretariat who had assisted the Commission at all stages of its work.

14. The CHAIRMAN expressed his thanks to the members of the Secretariat, as well as the thanks of all members of the Commission. Mr. Kerno and all the members of his Department, the interpreters, précis writers and the representative of the Department of Public Information, had placed all their technical knowledge and untiring devotion at the Commission's service. The Chairman congratulated them on the quality of their work.

15. He also thanked the members of the Commission for the indulgence they had shown him. If at times he had given the impression of being somewhat impatient, and had attempted to overaccelerate the rhythm of the work of the Commission, it was because of his keen desire to obtain positive results at the first session.

16. The work which still had to be accomplished was very difficult. It could only be carried out if all the Commission's members directed their persevering efforts and individual ability towards their common goal. If appreciable results were not obtained immediately that should not be a reason for discouragement. Any success, even though partial and achieved by unrelenting effort, would mark the beginning of a new era in the development of international law.

17. Mr. KERNO (Assistant Secretary-General) said that he and the members of the Secretariat who had serviced the Commission, felt honoured at having followed its work and at having made a small contribution to the work it had carried out. The two last months of close co-operation with the Commission's members had been particularly gratifying to him. He assured members that, within the limit of its means and knowledge, the Secretariat was animated by keen enthusiasm and carried out its work with complete objectivity. The expressions of appreciation from the Commission were its greatest recompense.

18. Sir Benegal RAU associated himself with the preceding speakers and expressed his thanks to the Chairman who had, with considerable vigour and authority, brought the work of the Commission to a successful conclusion and within the prescribed time.

19. Mr. CORDOVA stated that it had been an honour for him to serve on the Commission. He was sure that with patience and mutual understanding the Commission would succeed in expediting the establishment of the reign of international law which would ensure to each and every one a happy existence.

20. Mr. AMADO expressed his very sincere thanks to the Commission's members and, in particular, to Mr. Scelle for his kind words. He would take with him the happiest memories of his association with every member of the Commission, and it was with a mixed feeling of happiness and deep emotion that he took leave of the Commission until its next session.

21. Mr. SPIROPOULOS asked the members of the Commission to remember with indulgence the vehemence he had at times displayed which had been due solely to the fact that he was animated by a profound enthusiasm for the work of the Commission, to which he had endeavoured to contribute in every way within his means.

22. Mr. YEPES stated that of all the national

and international conferences which he had been privileged to attend, the session of the Commission just closing had left on him the deepest impression.

23. Mr. HSU associated himself with the remarks of his colleagues and expressed his thanks to the Chairman and his best wishes for the future of the Commission.

24. Mr. FRANÇOIS said that the Commission had done very satisfactory work, and expressed his conviction that the task it had undertaken would be crowned with success in the course of subsequent sessions.

25. Mr. BRIERLY said he had been happy to be a member of the Commission, where a spirit of friendliness and close collaboration had reigned. He looked forward with pleasure to meeting his colleagues again in Geneva.

26. Mr. AMADO, in the name of the Commission's members, paid a tribute to Mr. Sandström whose tact and understanding had been appreciated by all.

27. The CHAIRMAN asked the Secretariat to forward to Mr. Sandström a copy of the meeting's summary record as proof of the esteem in which he was held by his colleagues.

28. He then declared the first session of the International Law Commission closed.

The meeting rose at 5.30 p.m.

II

DOCUMENTS

OF THE

FIRST SESSION

CHECK LIST OF DOCUMENTS OF THE FIRST SESSION OF THE INTERNATIONAL LAW COMMISSION

Document No.	*Title*	*Observations and references to other sources*
A/CN.4/1/Rev.1	Survey of international law in relation to the work of codification of the International Law Commission	United Nations publication Sales No.: 1948.V.I(1)
A/CN.4/2	Preparatory study concerning a draft Declaration on the Rights and Duties of States	*United Nations publication*, Sales No.: 1949.V.4
A/CN.4/2/Add.1	Preparatory study concerning a draft Declaration on the Rights and Duties of States—Detailed table of contents of appendices	Mimeographed document only
A/CN.4/3	Draft agenda	Incorporated at the beginning of Part I
A/CN.4/4	Statute of the International Law Commission and other resolutions of the General Assembly relating to the International Law Commission	United Nations publication, Sales No.: 1949.V.5
A/CN.4/5	The Charter and Judgment of the Nürnberg Tribunal—History and Analysis	United Nations publication, Sales No.: 1949.V.7
A/CN.4/6	Ways and means of making the evidence of customary international law more readily available	United Nations publication, Sales No.: 1949.V.6
A/CN.4/6/Corr.1	Ways and means of making the evidence of customary international law more readily available—Corrigendum	Ditto
A/CN.4/7/Rev.1	Historical survey of the question of international criminal jurisdiction	United Nations publication, Sales No.: 1949.V.8
A/CN.4/8	International and national organizations concerned with questions of international law	Mimeographed document only
A/CN.4/9	Agenda for the first meeting	Incorporated in table of contents to A/CN.4/SR.1
A/CN.4/10	List of documents (A/CN.4/1/Rev.1 to A/CN.4/9)	Mimeographed document only
A/CN.4/11	Table of equivalents as between the Articles of the Declaration of the Rights and Duties of Nations Adopted by the American Institute of International Law and the Draft Declaration on the Rights and Duties of States proposed by the Minister of Foreign Affairs of Panama	Mimeographed document only
A/CN.4/12	Formulation of the principles recognized in the Charter of the Nürnberg Tribunal and in the judgment of the Tribunal—The principles as stated by Sir Hartley Shawcross before the American Bar Association in 1946	Incorporated in A/CN.4/SR. 17, para. 7
A/CN.4/13	Report to the General Assembly on the work of the first session	*Official Records of the General Assembly, Fourth Session, Supplement No. 10* (A/925)—Printed in Part II
A/CN.4/13/Corr. 1-3	Report to the General Assembly on the work of the first session—Corrigenda	Incorporated in Part II

Document No.	*Title*	*Observations and references to other sources*
A/CN.4/14	International and national organizations concerned with questions of international law	Mimeographed document only
A/CN.4/W.1	Working Paper No. 1 based on Parts I and III of the Survey of international law in relation to the work of codification of the International Law Commission	Mimeographed document only—See document A/CN. 4/1/Rev.1
A/CN.4/W.2	List of topics contained in Part II of the Survey of international law in relation to the work of codification of the International Law Commission	Mimeographed document only—See document A/CN. 4/1/Rev.1
A/CN.4/W.3	Tentative list of topics for codification adopted by the International Law Commission	Incorporated in A/CN.4/SR. 6, para. 69
A/CN.4/W.4 and Rev.1-4	Draft Declaration on the Rights and Duties of States—Summary of action taken by the Commission with regard to the Draft (A/CN.4/2)	Mimeographed documents only—See summary records
A/CN.4/W.5	Draft Declaration on the Rights and Duties of States—As proposed by the Sub-Committee on the draft Declaration	Incorporated in document A/CN.4/SR.19, footnote 2
A/CN.4/W.6	Formulation of the principles recognized in the Nürnberg Tribunal and in the Judgment of the Tribunal—Draft proposed by the Sub-Committee on the formulation of the Nürnberg principles	Incorporated in document A/CN.4/SR.25, footnote 9
A/CN.4/W.7	Draft Declaration on the Rights and Duties of States—Summary of action taken by the Commission after second reading of the Draft	Mimeographed document only
A/CN.4/W.8	Draft Declaration on the Rights and Duties of States—Summary of action taken by the Commission after third reading of the Draft	Incorporated in document A/CN.4/SR.23, footnote 1
A/CN.4/W.9	Working Paper based on Part III of the preparatory work done by the Secretariat upon ways and means of making the evidence of customary international law more readily available (A/CN.4/6)	Incorporated in document A/CN.4/SR.31, footnote 9
A/CN.4/W.10	Chapters I and II of the draft Report to the General Assembly on the work of the first session	Mimeographed document only— Parts which differ from the Report are reproduced in footnotes to summary records—See *Report* (Part II of the Yearbook)
A/CN.4/W.10/Add.1	Chapter III of the draft Report to the General Assembly on the work of the first session	Ditto
A/CN.4/W.10/Add.2	Chapters IV, V and VI of the draft Report to the General Assembly on the work of the first session	Ditto
A/CN.4/W.10/Add.3	Chapters VII and VIII of the draft Report to the General Assembly on the work of the first session	Ditto
A/CN.4/W.10/Rev.1	Draft Report to the General Assembly on the work of the first session	Mimeographed document only—See *Report* (Part II of the Yearbook)
A/CN.4/W.11	Formulation of the principles recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal— Proposal by Professor Georges Scelle	Incorporated in document A/CN.4/SR.28, para. 88
A/CN.4/W.12	Formulation of the principles recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal Texts recommended by the Sub-Committee	Incorporated in document A/CN.4/SR.31, footnote 7
A/CN.4/SR.1 through A/CN.4/SR.38		Printed in Part I

REPORT TO THE GENERAL ASSEMBLY

TABLE OF CONTENTS

PART I: GENERAL

PART II: DRAFT DECLARATION ON RIGHTS AND DUTIES OF STATES

PART I : GENERAL

CHAPTER I

Introduction

ESTABLISHMENT AND MEMBERSHIP OF THE COMMISSION

1. The International Law Commission was established by resolution 174 (II) adopted by the General Assembly at its 123rd plenary meeting on 21 November 1947. In pursuance of the same resolution and in accordance with the provisions of the Statute of the Commission,[1] the General Assembly, at its 154th and 155th plenary meetings on 3 November 1948, elected the following fifteen members:

Name	*Nationality*
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
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. Jesús M. Yepes	Colombia
Mr. Jaroslav Zourek	Czechoslovakia

PLACE AND DURATION OF THE FIRST SESSION

2. The first session of the Commission opened on 12 April 1949, at Lake Success, New York. In the course of the session which terminated on 9 June 1949, the Commission held thirty-eight meetings. With the exception of Faris Bey el-Khoury and Mr. Jaroslav Zourek, who were unable to attend, all the members of the Commission were present.

ELECTION OF OFFICERS

3. At its first and second meetings, on 12 and 13 April, the Commission elected, for a term of one year, the following officers:
Chairman: Mr. Manley O. Hudson;
First Vice-Chairman: Mr. Vladimir M. Koretsky;
Second Vice-Chairman: Sir Benegal N. Rau;
Rapporteur: Mr. Gilberto Amado.

SECRETARIAT

4. 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.

RULES OF PROCEDURE

5. In accordance with rule 150 of the rules of procedure of the General Assembly, the Commission decided that the rules relating to the procedure of committees of the General Assembly (rules 88 to 122 inclusive), as well as rules 38 and 55, should apply to the procedure of the Commission. It was further decided that the Commission should, when the need arose, adopt its own rules of procedure.

AGENDA

6. Taking into consideration its functions under the Statute as well as the tasks assigned to it by resolutions of the General Assembly, the Commission adopted its agenda in the form in which it had been drawn up by the Secretariat. It consisted of the following items:

(1) Planning for the codification of international

[1] See *Official Records of the General Assembly, Second Session, Resolutions*, page 105.

law: survey of international law with a view to selecting topics for codification (article 18 of the Statute of the Commission).

(2) Draft declaration on the rights and duties of States (resolution 178 (II), adopted by the General Assembly on 21 November 1947).

(3) (*a*) Formulation of the principles recognized in the Charter in the Nürnberg Tribunal and in the Judgment of the Tribunal; (*b*) preparation of a draft code of offences against the peace and security of mankind (resolution 177 (II), adopted by the General Assembly on 21 November 1947).

(4) Desirability and possibility of establishing an international judicial organ for the trial of persons charged with genocide or other crimes over which jurisidiction will be conferred upon that organ by international conventions (resolution 260 (III) B, adopted by the General Assembly on 9 December 1948).

(5) Ways and means for making the evidence of customary international law more readily available (article 24 of the Statute of the Commission).

(6) 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 Commission).

7. In considering its programme of work, the Commission had in mind that questions referred to it by the General Assembly [2] should be taken up without undue delay. At the same time, it was recognized that the codification of international law and, more immediately, the selection of topics for codification, constituted one of the Commission's main functions. It was, accordingly, agreed that the Commission should first take up item (1) of its agenda. The Commission considered during its first session every item on the agenda. The action taken in respect of every such item, except the draft Declaration on Rights and Duties of States (item (2)), is set out in part I of the present report. Part II of the report is devoted to the consideration given to the draft Declaration on Rights and Duties of States.

Preparatory work by the Secretariat

8. The Commission had before it a number of memoranda relating to the several items of its agenda, submitted by the Secretary-General in pursuance of resolution 175 (II) of the General Assembly, which instructed the Secretary-General to do the necessary preparatory work for the beginning of the activity of the Commission.[3]

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[2] Items (2), (3) and (4) of the agenda.

[3] The memoranda submitted by the Secretary-General were the following:

1. Survey of International Law in relation to the Work of Codification of the International Law Commission (A/CN.4/1/Rev.1).

2. Preparatory Study concerning a draft Declaration on the Rights and Duties of States (A/CN.4/2).

3. The Charter and Judgment of the Nürnberg Tribunal: History and Analysis (A/CN.4/5).

4. Ways and Means of making the Evidence of Customary International Law more readily available (A/CN. 4/6).

5. Historical Survey of the Question of International Criminal Jurisdiction (A/CN.4/7.)

6. International and National Organizations concerned with Questions of International Law: tentative list (A/ CN.4/8).

Chapter II

Survey of international law and selection of topics for codification

The powers of the Commission with respect to the selection of topics

9. Under article 18, paragraph 1, of its Statute, the Commission was directed to " survey the whole field of international law with a view to selecting topics for codification". In undertaking this function, the Commission had to determine at the outset its precise powers and, in this connexion, it had to clarify the meaning and implication of article 18, paragraph 2. This paragraph provides that " when the Commission considers that the codification of a particular topic is necessary or desirable, it shall submit its recommendations to the General Assembly ". The question arose as to whether, under this provision, the Commission was competent to proceed with the work of codification under articles 19 to 23 without awaiting action by the General Assembly on recommendations made by the Commission under article 18, paragraph 2. The Commission consulted the records of the second session of the General Assembly, at which the Statute was adopted and, in particular, those of Sub-Committee 2 of the Sixth Committee, which prepared the draft.

10. Some members of the Commission held the view that under the said paragraph the Commission was bound to submit to the General Assembly

any topics the Commission had selected for codification before beginning the work of codification of such topics. According to Mr. Vladimir M. Koretsky, inasmuch as the Commission was not an autonomous organ enjoying complete liberty, but merely a subsidiary organ of the General Assembly, it existed to carry out certain tasks which had been entrusted to it by the General Assembly and any task it undertook must be sanctioned by the latter. In so doing it must adhere strictly to its Statute, which laid down a procedure for the different stages of the work of codification. During the first stage, the Commission had the duty of discussing the choice of topics for codification; in the second stage, that of presenting a report to the General Assembly and of making recommendations on the choice of subjects. Only when the General Assembly had approved the choice of subjects could the Commission proceed to the other stages envisaged in articles 19 to 23 of its Statute. For the Commission to act otherwise would be to ignore the ties which linked it to the General Assembly and to disregard its duties towards that body.

11. Other members of the Commission were of the opinion that the logical interpretation of paragraph 2 of article 18 was that the Commission, having selected a topic, was competent to proceed with the work of codification of that topic, in accordance with articles 18 to 22 of the Statute, unless otherwise directed by the General Assembly. Only after having completed this work would the Commission make recommendations to the General Assembly in one or other of the modes prescribed in article 23, paragraph 1, of the Statute. It was also argued that the Commission was not obliged to await the response of the General Assembly to its recommendations respecting the selection of topics before beginning work upon those whose codification was considered necessary or desirable.

12. The question at issue was summed up by the Chairman and put to the Commission in the following terms: "Has the Commission competence to proceed under articles 19 to 23 without awaiting action by the General Assembly on recommendations made by the Commission under article 18, paragraph 2?" By ten votes to three, the Commission decided in the affirmative.

Survey of international law

13. In undertaking a survey of the whole field of international law with a view to selecting topics for codification, in accordance with article 18, paragraph 1, of the Statute, the Commission conceived the task as one calling for a general review of the topics of international law. The primary purpose was to select particular topics the codification of which the Commission considered necessary or desirable; the survey of the whole field of international law was merely the logical means of making the selection. In this connexion, the Commission had before it a memorandum entitled *Survey of International Law in relation to the Work of Codification of the International Law Commission*,[4] submitted by the Secretary-General. This memorandum surveys the field of the international law of peace and, in the opinion of the majority of the Commission, enumerates in a comprehensive and satisfactory way topics in that field.

The question of a general plan of codification

14. The Commission discussed the question whether a general plan of codification, embracing the entirety of international law, should be drawn up. Those who favoured this course had in view the preparation at the outset of a plan of a complete code of public international law, into the framework of which topics would be inserted as they were codified. The sense of the Commission was that, while the codification of the whole of international law was the ultimate objective, it was desirable for the present to begin work on the codification of a few of the topics, rather than to discuss a general systematic plan which might be left to later elaboration.

Topics of international law considered by the Commission

15. Using the memorandum of the Secretary-General as a basis of discussion, the Commission reviewed, consecutively, the following topics:

(1) Subjects of international law;
(2) Sources of international law;
(3) Obligations of international law in relation to the law of States;
(4) Fundamental rights and duties of States;
(5) Recognition of States and Governments;
(6) Succession of States and Governments;
(7) Domestic jurisdiction;
(8) Recognition of acts of foreign States;
(9) Jurisdiction over foreign States;
(10) Obligations of territorial jurisdiction;
(11) Jurisdiction with regard to crimes committed outside national territory;
(12) Territorial domain of States;
(13) Régime of the high seas;
(14) Régime of territorial waters;
(15) Pacific settlement of international disputes;
(16) Nationality, including statelessness;
(17) Treatment of aliens;
(18) Extradition;
(19) Right of asylum;

[4] A/CN.4/1./Rev.1.

(20) Law of treaties;
(21) Diplomatic intercourse and immunities;
(22) Consular intercourse and immunities;
(23) State resposibility;
(24) Arbitral procedure;
(25) Laws of war.

Topics of international law provisionally selected by the Commission

16. After due deliberation, the Commission drew up a provisional list of fourteen topics selected for codification, as follows:

(1) Recognition of States and Governments;
(2) Succession of States and Governments;
(3) Jurisdictional immunities of States and their property;
(4) Jurisdiction with regard to crimes committed outside national territory;
(5) Régime of the high seas;
(6) Régime of territorial waters;
(7) Nationality, including statelessness;
(8) Treatment of aliens;
(9) Right of asylum;
(10) Law of treaties;
(11) Diplomatic intercourse and immunities;
(12) Consular intercourse and immunities;
(13) State responsibility;
(14) Arbitral procedure.

17. It was understood that the foregoing list of topics was only provisional and that additions or deletions might be made after further study by the Commission or in compliance with the wishes of the General Assembly.

Laws of war

18. The Commission considered whether the laws of war should be selected as a topic for codification. It was suggested that, war having been outlawed, the regulation of its conduct had ceased to be relevant. On the other hand, the opinion was expressed that, although the term "laws of war" ought to be discarded, a study of the rules governing the use of armed force—legitimate or illegitimate—might be useful. The punishment of war crimes, in accordance with the principles of the Charter and Judgment of the Nürnberg Tribunal, would necessitate a clear definition of those crimes and, consequently, the establishment of rules which would provide for the case where armed force was used in a criminal manner. The majority of the Commission declared itself opposed to the study of the problem at the present stage. It was considered that if the Commission, at the very beginning of its work, were to undertake this study, public opinion might interpret its action as showing lack of confidence in the efficiency of the means at the disposal of the United Nations for maintaining peace.

Priority of topics

19. Having provisionally selected fourteen topics for codification, the Commission next considered which of these should be studied first. One suggestion was that priority should be given to the question of the régime of the high seas, statelessness, and consular intercourse and immunities. Another was that the questions of the law of treaties and of arbitral procedure should be given priority. A third stressed the importance of the question of nationality and statelessness, and a fourth that of the right of asylum.

20. The Commission finally decided to give priority to the following three topics:

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

Election of rapporteurs

21. The foregoing three topics were entrusted to three rapporteurs, each of whom was to prepare a working paper for submission to the Commission at its second session. The rapporteurs electep by the Commission are:

Mr. James L. Brierly (law of treaties);
Mr. Georges Scelle (arbitral procedure);
Mr. J. P. A. François (régime of the high seas).

Request to Governments for data

22. Pursuant to the provisions of article 19, paragraph 2, of its Statute, the Commission decided that a request should be addressed to Governments to furnish the texts of laws, decrees, judicial decisions, treaties, diplomatic correspondence and other documents relevant to the foregoing three topics. The rapporteurs were invited to prepare, in consultation with the Chairman of the Commission and the Secretary-General, the terms of the request which would be sent to the Governments in the name of the Commission through the Secretary-General.[5]

The topic of the right of asylum

23. During the discussion on the draft Declaration on Rights and Duties of States, a proposal was submitted by Mr. Ricardo J. Alfaro, Mr. Georges Scelle and Mr. Jesús M. Yepes to include in the draft Declaration an article relating to the right of asylum.[6] It was finally decided not to include such an article. [7] Mr. Jesús M. Yepes was subsequently invited to prepare a working paper on this topic, for submission to the Commission at its second session.

[5] Mr. Vladimir M. Koretsky opposed this decision on the ground that the Commission, pursuant to articles 18 and 19 of its Statute, was empowered to address requests to Governments only after approval by the General Assembly of the Commission's recommendations as to the topics selected.

[6] A/CN.4/SR.16, page 15.

[7] A/CN.4/SR.20, page 20.

Chapter III

Formulation of the Nürnberg principles and preparation of a draft code of offences against the peace and security of mankind

Resolution 177 (II) adopted by the General Assembly

24. The General Assembly, at its 123rd meeting on 21 November 1947, adopted resolution 177 (II) which reads as follows:

"*The General Assembly*

"*Decides* to entrust the formulation of the principles of international law recognized in the Charter of the Nürnberg Tribunal and in the judgment of the Tribunal to the International Law Commission, the members of which will, in accordance with resolution 174 (II), be elected at the next session of the General Assembly; and

"*Directs* the Commission to

"(*a*) Formulate the principles of international law recognized in the Charter of the Nürnberg Tribunal and in the judgment of the Tribunal; and

"(*b*) Prepare a draft code of offences against the peace and security of mankind, indicating clearly the place to be accorded to the principles mentioned in sub-paragraph (*a*) above."

Formulation of the Nürnberg principles

25. The Secretary-General had submitted to the Commission a memorandum entitled *The Charter and Judgment of the Nürnberg Tribunal: History and Analysis.*[8] This memorandum contained: (*a*) a survey of the Charter of the Nürnberg Tribunal and of the trial before the Tribunal; (*b*) an account of the deliberations in the United Nations concerning the formulation of the principles of international law recognized in the Charter and Judgment of the Tribunal; (*c*) an analysis of the Judgment of the Tribunal; and (*d*) as an addendum, a note on the trial of major war criminals before the International Military Tribunal for the Far East.

26. The wording of resolution 177 (II) of the General Assembly directing the Commission to "formulate the principles of international law recognized in the Charter of the Nürnberg Tribunal and in the judgment of the Tribunal" gave rise to some doubt as to the exact scope of the task assigned to the Commission. 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 of the Commission was that, since the Nürnberg principles had been affirmed by the General Assembly in resolution 95 (I) of 11 December 1946, the task of the Commission was not to express any appreciation of these principles as principles of international law but merely to formulate them. Furthermore, the Commission was of the opinion that it should not concern itself with those provisions of the Charter of the Tribunal relating to procedural matters. Its task was to formulate principles of a substantive character, and in particular those embodied in articles 6, 7 and 8 of the Charter of the Tribunal.

27. The Commission also considered the question whether, in formulating the principles of international law recognized in the Charter and Judgment of the Tribunal, it should also formulate the general principles of international law which underlie the Charter and judgment. Mr. Georges Scelle advocated the latter course and in furtherance thereof presented a set of draft principles.[9] The majority of the Commission, however, took the contrary view and were therefore unable to accept certain of the principles enunciated by Mr. Scelle which, in their opinion, went beyond the scope of the task of the Commission.

28. The Commission appointed a sub-committee, composed of Mr. J. P. A. François, Mr. A. E. F. Sandström and Mr. Jean Spiropoulos, which submitted a working paper[10] containing a formulation of the Nürnberg principles. After a careful consideration of this working paper, the Commission retained tentatively a number of draft articles and referred them back to the Sub-Committee for redrafting. The Sub-Committee thereafter presented a further draft[11] to the Commission.[12]

29. In considering what action should be taken with respect to the further draft submitted by the Sub-Committee, the Commission took into account its terms of reference as laid down in General Assembly resolution 177 (II). It noted that, thereunder, the task of formulating the Nürnberg principles appeared to be so closely connected with that of preparing a draft code of offences against the peace and security of mankind that it would be premature for the Commission to give a final formulation to these principles before the work of preparing the draft code was

[8] A/CN.4/5.

[9] A/CN.4/W.11.

[10] A/CN.4/W.6.

[11] A/CN.4/W.12.

[12] With regard to this further draft, Mr. Georges Scelle declared that he was unable to associate himself with it.

further advanced. It was, accordingly, decided to refer the further draft to a rapporteur who should submit his report thereon to the Commission at its second session.

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

30. The Commission next considered the question of the preparation of a draft code of offences against the peace and security of mankind, in pursuance of General Assembly resolution 177 (II), quoted above. The Commission decided that a rapporteur should be appointed to prepare a working paper on the subject and to submit it to the Commission at its second session. It was 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 envisaged in the aforementioned resolution of the General Assembly.

ELECTION OF RAPPORTEUR

31. At a subsequent meeting the Commission appointed Mr. Jean Spiropoulos rapporteur to continue the work of the Commission with respect to: (*a*) the formulation of the principles of international law recognized in the Charter and Judgment of the Nürnberg Tribunal; and (*b*) the preparation of a draft code of offences against the peace and security of mankind, indicating clearly the place to be accorded to the principles mentioned in (*a*) above. It was understood that the rapporteur should present to the Commission at its second session a report on the Nürnberg principles and a working paper on the draft code.

CHAPTER IV

Study of the question of international criminal jurisdiction

32. In pursuance of resolution 260 (III) B of the General Assembly, the Commission began a preliminary study of 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. This resolution, adopted at the 179th meeting, on 9 December 1948, reads as follows:

" *The General Assembly,*

" *Considering* that the discussion of the Convention on the Prevention and Punishment of the Crime of Genocide has raised the question of the desirability and possibility of having persons charged with genocide tried by a competent international tribunal,

" *Considering* that, in the course of development of the international community, there will be an increasing need of an international judicial organ for the trial of certain crimes under international law,

" *Invites* 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;

" *Requests* the International Law Commission, in carrying out this task, to pay attention to the possibility of establishing a Criminal Chamber of the International Court of Justice."

33. The Secretary-General had submitted to the Commission a memorandum entitled *Historical Survey of the Question of International Criminal Jurisdiction.*[13] This memorandum gave a factual account of the consideration of the question of an international criminal jurisdiction from the Peace Conference of 1919 up to and including the adoption of the above-quoted resolution by the General Assembly.

34. After a preliminary discussion, the Commission decided to appoint Mr. Ricardo J. Alfaro and Mr. A. E. F. Sandström rapporteurs on this subject. The rapporteurs were requested to make a study of the question, and to submit to the Commission at its second session one or more working papers thereon.

CHAPTER V

Ways and means for making the evidence of customary international law

35. In accordance with article 24 of its Statute, the Commission began the consideration of ways and means for making the evidence of customary international law more readily available. In this connexion, the Secretary-General had submitted to the Commission a memorandum entitled *Ways and Means of making the Evidence of Customary International Law more readily available,*[14] and a working paper[15] based thereon.

[13] A/CN.4/7.

[14] A/CN.4/6.

[15] A/CN.4/W.9.

36. The Commission had a discussion on the basis of the documents before it. Attention was given to the two methods of making the evidence of customary international law more readily available mentioned as examples in article 24 of the Statute—the collection and publication of documents concerning State practice, and the collection of decisions of national and international courts on questions of international law. The possibility of assembling texts of national legislation relevant to international law was also considered.

37. As a result of the discussion, the Chairman of the Commission was invited to prepare a working paper on the subject. The Chairman acceded to this suggestion, and undertook to present a paper to the Commission at its next session.

Chapter VI

Co-operation with other bodies

38. With reference to item 6 of its agenda, the Commission discussed whether it was necessary at its first session to take any decision in regard to consultation with any of the organs of the United Nations or with international or national organizations, as envisaged in article 26, paragraph 1, of its Statute. The sense of the Commission was that consideration of this question should be postponed to its next session.

39. The Commission examined a tentative list of international and national organizations concerned with questions of international law, prepared by the Secretary-General in accordance with article 26, paragraphs 2 and 3, of the Statute, for the purpose of distribution of documents of the Commission. [16] Mr. Vladimir M. Koretsky was of the opinion that paragraphs 1 and 2 of article 26 of the Statute of the Commission were closely related and that the inclusion of any organization in the list referred to in paragraph 2 would mean that the Commission might wish to consult with such organization. The majority of the Commission, however, decided that paragraphs 1 and 2 were not related, and that the list referred to in paragraph 2 was only for the purpose of distribution of documents. Some members proposed additions to this list and it was understood that further additions could be made at any time. The Commission took note of a statement by the representative of the Secretary-General that the Secretariat would continue its efforts to secure further information so that national organizations of all Member States might be included.

[16] A/CN.4/8 (International and National Organizations concerned with Questions of International Law: tentative list).

Chapter VII

Miscellaneous decisions

Date and place of the second session

40. The Commission decided to hold only one session in 1950. After consultation with the Secretary-General, it was decided that the session would be held in Europe, at Geneva. The opening meeting of the session, which is scheduled for a maximum period of ten weeks, will take place towards the end of May 1950.

Representation at the General Assembly

41. The Commission decided that it would be represented, for purposes of consultation, by its Chairman during the fourth regular session of the General Assembly.

Emoluments for members of the Commission

42. In the view of the majority of the Commission, experience has shown that the *per diem* allowance provided for under article 13 of the Statute of the Commission, is hardly sufficient to meet the living expenses of members. Assuming that the Commission will be in session for at least two months each year, its work will entail for each of the members the sacrifice of a substantial part of his income; for those members who are asked to serve as rapporteurs and as such to do extensive work in the interim between sessions of the Commission, it would involve an even greater sacrifice. Since, in fact, most mem-

bers are dependent on their current earning, it would be in the interest of the work of the Commission, in order to enable the time of its members to be enlisted in this work, that methods should be explored by which service in the Commission may be made less onerous financially. To this end, the General Assembly may wish to reconsider the terms of article 13 of the Statute of the Commission.

Acknowledgement of the work of the Secretariat

43. The Commission wishes to thank the Secretary-General for the services rendered to it and to congratulate the Legal Department of the Secretariat on its untiring efforts in assisting the Commission and on the valuable working documents placed at the disposal of the Commission.

PART II : DRAFT DECLARATION ON RIGHTS AND DUTIES OF STATES

Resolution 178 (II) adopted by the General Assembly

44. The General Assembly, at its 123rd meeting, on 21 November 1947, adopted resolution 178 (II) which reads as follows:

" *The General Assembly,*

" *Noting* that very few comments and observations on the draft declaration on the rights and duties of States presented by Panama have been received from the States Members of the United Nations,

" *Requests* the Secretary-General to draw the attention of States to the desirability of submitting their comments and observations without delay;

" *Requests* the Secretary-General to undertake the necessary preparatory work on the draft declaration on the rights and duties of States according to the terms of resolution 175 (II);

" *Resolves* to entrust further study of this problem to the International Law Commission, the members of which in accordance with the terms of resolution 174 (II) will be elected at the next session of the General Assembly;

" *And accordingly*

" *Instructs* the International Law Commission to prepare a draft declaration on the rights and duties of States, taking as a basis of discussion the draft declaration on the rights and duties of States presented by Panama, and taking into consideration other documents and drafts on this subject."

Preparation by the Commission of the draft Declaration

45. In conformity with the resolution of the General Assembly set out in the foregoing paragraph, the Commission took as the basis of its discussions the draft Declaration on the Rights and Duties of States presented by Panama.[17] The task of the Commission was facilitated by a memorandum submitted by the Secretary-General containing a detailed analysis of the United Nations discussions on this subjects, and reproducting comments and observations communicated by Member States on the Panamanian draft,[18] the texts of treaties and conventions, resolutions, declarations and projects emanating from inter-governmental bodies, declarations prepared by non-governmental organizations and scientific institutions, and statements by jurists and publicists.[19] The Commission examined article by article the Panamanian draft in the light of other documents before it. Its deliberations are recorded in its summary records.[20]

46. The draft Declaration prepared by the Commission was subjected to three readings. Each of the articles finally adopted was discussed at each reading and the sense of the Commission was taken on its retention. Though views varied on the different articles, those which were retained met in each case with preponderant support of the members of the Commission. The draft

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[17] A/285.

[18] Comments and observations on the Panamanian draft were made by the following Governments: Canada (12 May 1947, 19 July 1947 and 7 April 1948); Czechoslovakia (11 August 1947); Denmark (22 September 1947); Dominican Republic (4 June 1947); Ecuador 17 September 1947); El Salvador (28 April 1947); Greece (4 September 1947); India (26 September 1947 and 11 June 1948); Mexico (7 June 1947); Netherlands (23 June 1947); New Zealand (25 July 1947 and 9 April 1948); Philippines (19 December 1947 and 27 May 1948); Sweden (30 May 1947 and 26 April 1948); Turkey (14 August 1947); United Kingdom (1 May 1947 and 24 August 1948); United States of America (29 May 1947 and 11 March 1949); Venezuela (12 September 1947).

[19] A/CN.4/2 (Preparatory Study concerning a draft Declaration on the Rights and Duties of States).

[20] A/CN.4/SR.7 to A/CN.4/SR.16, A/CN.4/SR.19 to A/CN.4/SR.25, A/CN.4/SR.29 and A/CN.4/SR.30.

Declaration as a whole was finally adopted by eleven votes to two.[21]

The draft Declaration as drawn up by the Commission reads as follows:

DRAFT DECLARATION ON RIGHTS AND DUTIES OF STATES

Whereas the States of the world form a community governed by international law,

Whereas the progressive development of international law requires effective organization of the community of States,

Whereas a great majority of the States of the world have accordingly established a new international order under the Charter of the United Nations, and most of the other States of the world have declared their desire to live within this order,

Whereas a primary purpose of the United Nations is to maintain international peace and security, and the reign of law and justice is essential to the realization of this purpose, and

Whereas it is therefore desirable to formulate certain basic rights and duties of States in the light of new developments of international law and in harmony with the Charter of the United Nations,

The General Assembly of the United Nations adopts and proclaims this

Declaration of Rights and Duties of States

Article 1

Every State has the right to independence and hence to exercise freely, without dictation by any other State, all its legal powers, including the choice of its own form of government.

This text was derived from articles 3 and 4 of the Panamanian draft.

Article 2

Every State has the right to exercise jurisdiction over its territory and over all persons and things therein, subject to the immunities recognized by international law.

This text was derived from article 7 of the Panamanian draft. The concluding phrase is a safeguard for protecting such immunities as those of diplomatic officers and officials of international organizations. Reference was made in the discussions to Article 105 of the Charter of the United Nations, and to the more recent implementation of that Article.

Article 3

Every State has the duty to refrain from intervention in the internal or external affairs of any other State.

The substance of this text, which was derived from article 5 of the Panamanian draft, has already found place in various international conventions.

Article 4

Every State has the duty to refrain from fomenting civil strife in the territory of another State, and to prevent the organization within its territory of activities calculated to foment such civil strife.

This text was derived from article 22 of the Panamanian draft. The principle has been enunciated in various international agreements.

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[21] A/CN.4/SR.25. After the vote on the draft Declaration, Mr. Vladimir M. Koretsky and Mr. Manley O. Hudson, who voted against it, made statements in explanation of their votes.

Mr. Koretsky declared that he voted against the draft declaration because of its many shortcomings including, in particular: (1) that it deviated from such fundamental principles of the United Nations as the sovereign equality of all the Members thereof and the right of self-determination of peoples; (2) that it did not protect the interests of States against interference by international organizations or groups of States in matters falling essentially within their domestic jurisdiction; (3) that it did not set out the most important duty of States to take measures for the maintenance of international peace and security, the prohibition of atomic weapons, and the general reduction of armaments and armed forces, and that, further, the draft Declaration did not proclaim the duty of States to abstain from participation in any aggressive blocs such as the North Atlantic Pact and the Western Union, which under the cloak of false phrases concerning peace and self-defence were actually aimed at preparing new wars; (4) that the draft Declaration ignored the most important duty of States to take measures for the eradication of the vestiges of fascism and against the danger of its recrudescence; (5) that the draft Declaration ignored the most important duty of States not to allow the establishment of any direct or indirect restriction of the rights of citizens or the establishment of direct or indirect privileges for citizens on account of their race or nationality, and not to allow any advocacy of racial or national exclusiveness or of hatred and contempt; (6) that the draft Declaration did not recite the most important duty of States to ensure the effectiveness of fundamental freedoms and human rights, notably the right to work and the right to be protected against unemployment, ensured on the part of the State and society by such measures as would provide wide possibilities for all to participate in useful work and as would prevent unemployment. Mr. Koretsky added that the draft Declaration, and especially article 14 thereof, went even further than the Panamanian draft in denying the sovereignty of States. In his view the doctrine of the " super-State " was being resorted to in this fashion by persons or peoples seeking to achieve, or to help others to achieve, world domination. Instead of reinforcing the principles of sovereignty, self-determination sovereign equality of States, independence, and the freedom of States from dependence upon other States, the draft Declaration, he thought, derogated from the great movements to rid the peoples of the world of the scourges of exploitation and oppression (A/CN.4/SR.22, pages 13-14).

Mr. Hudson stated that he voted against the draft Declaration because the provisions of its article 6 went beyond the Charter of the United Nations, and beyond international law at its present stage of development (A/CN.4 SR.25, pages 3 and 6).

Article 5

Every State has the right to equality in law with every other State.

This text was derived from article 6 of the Panamanian draft. It expresses, in the view of the majority of the Commission, the meaning of the phrase "sovereign equality" employed in Article 2. 1 of the Charter of the United Nations as interpreted at the San Francisco Conference, 1945.[22]

Article 6

Every State has the duty to treat all persons under its jurisdiction with respect for human rights and fundamental freedoms, without distinction as to race, sex, language, or religion.

This text was derived from the latter part of article 21 of the Panamanian draft. The reference to human rights and fundamental freedoms is inspired by Article 1. 3, Article 13, paragraph 1. b, Article 55 c, and Article 76 c, of the Charter of the United Nations and by the Universal Declaration of Human Rights.

Article 7

Every State has the duty to ensure that conditions prevailing in its territory do not menace international peace and order.

This text was derived from the introductory part of article 21 of the Panamanian draft.

Article 8

Every State has the duty to settle its disputes with other States by peaceful means in such a manner that international peace and security, and justice, are not endangered.

This text was derived from article 15 of the Panamanian draft. Its language follows closely Article 2. 3 of the Charter of the United Nations.

Article 9

Every State has the duty to refrain from resorting to war as an instrument of national policy, and to refrain from the threat or use of force against the territorial integrity or political independence of another State, or in any other manner inconsistent with international law and order.

This text was derived from article 16 of the Panamanian draft. The first phrase is fashioned upon a provision in the Treaty of Paris for the Renunciation of War of 1928. The second phrase follows closely the provision in Article 2. 4 of the Charter of the United Nations.

Article 10

Every State has the duty to refrain from giving assistance to any State which is acting in violation of article 9, or against which the United Nations is taking preventive or enforcement action.

This text was derived from article 19 of the Panamanian draft. The second phrase follows closely the language employed in the latter part of Article 2. 5 of the Charter of the United Nations.

Article 11

Every State has the duty to refrain from recognizing any territorial acquisition by another State acting in violation of article 9.

This text was derived from article 18 of the Panamanian draft.

Article 12

Every State has the right of individual or collective self-defence against armed attack.

This text was derived from article 17 of the Panamanian draft. The language is based upon that employed in Article 51 of the Charter of the United Nations.

Article 13

Every State has the duty to carry out in good faith its obligations arising from treaties and other sources of international law, and it may not invoke provisions in its constitution or its laws as an excuse for failure to perform this duty.

This text was derived from articles 11 and 12 of the Panamanian draft. The phrase "treaties and other sources of international law" was borrowed from the Preamble of the Charter of the United Nations. The first phrase is a re-instatement of the fundamental principle *pacta sunt servanda*. The concluding phrase reproduces the substance of a well-known pronouncement by the Permanent Court of International Justice.[23]

Article 14

Every State has the duty to conduct its relations with other States in accordance with international law and with the principle that the sovereignty of each State is subject to the supremacy of international law.

This text was derived from article 13 of the Panamanian draft.

GUIDING CONSIDERATIONS

17. During the preparation of the foregoing draft Declaration, the Commission took into account certain guiding considerations. It was felt that the draft Declaration should be in harmony

[22] Report of Committee 1 to Commission I, Documents of the San Francisco Conference, VI, page 457.

[23] Permanent Court of International Justice, Series A/B, Judgments, Orders and Advisory Opinions, Fascicule No. 44, page 24.

with the provisions of the Charter of the United Nations: that it should be applicable only to sovereign States; that it should envisage all the sovereign States of the world and not only the Members of the United Nations; and that it should embrace certain basic rights and duties of States.

Summary of contents

48. In conformity with these considerations, the Commission restricted the draft Declaration to the statement of four rights and ten duties of States. The rights are those of independence, comprehending the right of the State to exercise freely all its legal powers, including the choice of its form of government; of jurisdiction over State territory in accordance with international law; of equality in law; and of self-defence, individual or collective, against armed attack. The duties which are stated are of necessity expressed at greater length. They include the duty of the State to conduct its international relations in accordance with international law and to observe its legal obligations. They also include the duty to settle disputes by peaceful means and in accordance with law and justice, and to refrain from intervention and from resorting to war or other illegal use of force. The duties of refraining from assisting any State resorting to war or other illegal use of force, or any State against which the United Nations is taking preventive or enforcement action, and of refraining from recognizing any territorial acquisition resulting from war or other illegal use of force, are likewise stated as corollaries of the foregoing. And, finally, there are set out the duties of the State to refrain from fomenting civil strife in the territory of other State and to prevent the organized incitement thereof from within its own territory; to ensure in general that conditions in its territory do not menace international peace and order; and to treat all persons within its jurisdiction with due respect for human rights and fundamental freedoms for all, without distinction as to race, sex, language, or religion.

Observations concerning the draft Declaration

49. It will be noted that each of the fourteen articles of the Commission's draft was derived from an article in the Panamanian draft. Some of the twenty-four articles of the latter were not retained; some were combined with other articles; some were found to be unnecessary because their substance was contained in other articles. Two of the articles in the Panamanian draft which were not retained precipitated a lengthy discussion which it may be useful to review.

The Commission concluded that no useful purpose would be served by an effort to define the term " State ", though this course had been suggested by the Governments of the United Kingdom and of India. In the Commission's draft, the term " State " is used in the sense commonly accepted in international practice. Nor did the Commission think that it was called upon to set forth in this draft Declaration the qualifications to be possessed by a community in order that it may become a State.

It was proposed that the draft Declaration should be introduced by an article providing that " Each State has the right to exist and to preserve its existence ". This was urged as a mainspring for other rights to be declared, and its importance was thought to be underscored because the right had been denied and trampled upon by the Axis Powers in the last war. On the other hand, a majority of the members of the Commission deemed it to be tautological to say that an existing State has the right to exist; that right is in a sense a postulate or presupposition underlying the whole draft Declaration. They also thought it superfluous to declare the right of a State to preserve its existence in view of articles in the draft Declaration concerning self-defence and non-intervention by other States.

50. Another proposed article would have provided that " Each State has the right to have its existence recognized by other States ". The supporters of this proposal took the view that, even before its recognition by other States, a State has certain rights in international law; and they urged that, when another State on an appraisal made in good faith considers that a political entity has fulfilled the requirements of statehood, it has a duty to recognize that political entity as a State; they appreciated, however, that, in the absence of an international authority with competence to effect collective recognition, each State would retain some freedom of appraisal until recognition had been effected by the great majority of States. On the other hand, a majority of the members of the Commission thought that the proposed article would go beyond generally accepted international law in so far as it applied to new-born States; and that in so far as it related to already established States the article would serve no useful purpose. The Commission concluded that the whole matter of recognition was too delicate and too fraught with political implications to be dealt with in a brief paragraph in this draft Declaration, and it noted that the topic was one of the fourteen topics the codification of which has been deemed by the Commission to be necessary or desirable.

51. After the draft Declaration was completed, Mr. Shuhsi Hsu proposed the addition of an article on the duty of States to condition military necessity by the principle of humanity in the employment of armed forces, legitimate or illegitimate. Some members objected, holding that no

reference to warfare should find a place in such a Declaration as drafted. The Commission did not accept the proposed addition.

52. In conclusion it will be observed that the rights and duties set forth in the draft Declaration are formulated in general terms, without restriction or exception, as befits a declaration of basic right and duties. The articles of the draft Declaration enunciate general principles of international law, the extent and the modalities of the application of which are to be determined by more precise rules. Article 14 of the draft Declaration is a recognition of this fact. It is, indeed, a global provision which dominates the whole draft and, in the view of the Commission, it appropriately serves as a key to other provisions of the draft Declaration in proclaiming " the supremacy of international law ".

Submission of the draft Declaration to the General Assembly

53. The Commission gave careful consideration to the question of the procedure to be followed with respect to the draft Declaration, and in particular to the question whether or not the latter should be submitted immediately to the General Assembly. In this connexion, the Commission was guided by the terms of General Assembly resolution 178 (II) and the relevant provisions of its own Statute. It also took into account the terms of a similar resolution, namely, resolutions 260 (III) B of the General Assembly, whereunder it was assigned the special task of studying the question of an international criminal jurisdiction.

The Commission, with Mr. Vladimir M. Koretsky dissenting, came to the conclusion that its function in relation to the draft Declaration fell within neither of the two principal duties laid upon it by its Statute, but constituted a special assignment from the General Assembly. It was within the competence of the Commission to adopt in relation to this task such a procedure as it might deem conducive to the effectiveness of its work. In this connexion, it was noted that the Panamanian draft, which had served as a basis of discussion, had, in pursuance of resolution 38 (I) adopted by the General Assembly on 11 December 1946, already been transmitted to the Governments of all Members of the United Nations with a request for comments and observations; it was also noted that this request had been reinforced by a circular letter issued by the Secretary-General in pursuance of General Assembly resolution 178 (II) adopted on 21 November 1947. All Governments had thus had ample opportunity to express their general views on the subject matter and, moreover, all Members of the United Nations would have another opportunity so to do when the General Assembly came to consider the draft Declaration.

The Commission therefore decided, by twelve votes to one, to submit the draft Declaration, through the Secretary-General, to the General Assembly immediately, and to place on record its conclusion that it was for the General Assembly to decide what further course of action should be taken in relation to the draft Declaration and, in particular, whether it should be transmitted to Member Governments for comments.

Mr. Vladimir M. Koretsky dissented from this view, expressing the opinion that articles 16 and 21 of the Statute of the Commission required the publication of any draft prepared by the Commission, together with such explanations and supporting material as the Commission might consider appropriate, and the circulation thereof to Governments with a request for observations to be made within a reasonable time, before the final submission of any document to the General Assembly.

INDEX

INDEX

ABBREVIATIONS

Art., Article
Cttee., Committee
Draft code of offences, Draft code of offences against the peace and security of mankind
Dr. Dec., Draft Declaration on the Rights and Duties of States
Dr. dec. sub. Pan., Draft declaration on the rights and duties of States submitted by Panama
GA, General Assembly
ILC, International Law Commission
Int., International
Nürn. prin., Nürnberg principles, formulation of
Para., paragraph
Prin., principle
Res., resolution

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XII. 56

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