Document:-
A/CN.4/SR.10

Summary record of the 10th meeting

Topic:
Fundamental rights and duties of States

Extract from the Yearbook of the International Law Commission:-
1949 , **vol. I**

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.

---

[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

---

[1] See A/CN.4/SR.10, paras. 67 and 70.