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Summary record of the 13th meeting

Topic:
Fundamental rights and duties of States

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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.

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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