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Summary record of the 14th meeting

Topic:
Fundamental rights and duties of States

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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