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A/CN.4/SR.16

Summary record of the 16th meeting

Topic:
Fundamental rights and duties of States

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in economic science would be competent to discuss it. The meaning of the article was too vague and too general. All the principles established therein called for restrictions without which its adoption would be exceedingly dangerous and would arouse the opposition of all economists.

96. Mr. YEPES recognized the importance of the principle of economic co-operation and free access to raw materials, but felt that economic questions were not the Commission's business. Moreover, the second part of the article, restricting the power of States to control national economy, might constitute a grave danger for those countries which still needed to protect newborn industries. Mr. Yepes was therefore in favour of deleting the article or at least the last part of it.

97. The CHAIRMAN noted that the consensus of opinion in the Commission appeared to be in favour of deleting the article.

98. Mr. ALFARO felt that at least the first part of the article, which dealt with the principle of equal access, should be retained.

99. Mr. AMADO did not think that equal access was a principle of international law, as international law had not yet evolved to that point.

100. Mr. ALFARO recalled that the principle was related to paragraph 3 of Article 1 of the Charter.

101. The CHAIRMAN pointed out that the Charter only established the necessity for co-operation in the economic field.

102. Mr. BRIERLY remarked that Article 1 of the Charter merely expressed a hope for the future.

103. In view of the opinions expressed by the other members of the Commission, Mr. ALFARO withdrew his proposal.

The Chairman stated that article 23 was therefore deleted.

ARTICLE 24: PROHIBITION OF PACTS INCOMPATIBLE WITH THE DISCHARGE OF INTERNATIONAL OBLIGATIONS

104. The CHAIRMAN said that the first part of the article repeated principle 10 of " International Law of the Future " (A/CN.4/2, p. 161).

105. Mr. SPIROPOULOS was categorically opposed to the inclusion of that article in the Declaration. Such inclusion could not be justified as the article did not set forth a basic principle of international law on the rights and duties of States.

106. Mr. FRANÇOIS said that the idea reflected in the article already appeared in article 13 of the draft, dealing with the supremacy of international law.

107. Mr. ALFARO emphasized that article 24 was also based on Article 103 of the Charter.

108. Mr. FRANÇOIS remarked that Article 103 simply declared that the obligations of the Members of the United Nations under the Charter should always prevail over their obligations under any other international agreement.

109. Mr. SCELLE thought that article 24 raised the very difficult problem of contradiction between treaties, which might be summed up as follows: could State A conclude with State B a treaty incompatible with the provisions of a treaty previously concluded between A and C? The study of that problem required careful thought. The Commission could, for the moment, only repeat Article 103 of the Charter by stating, for instance, that when a State joined a community of States, it could do nothing which was contrary to the Charter of that community.

110. In view of the divergences of opinion, the CHAIRMAN thought it better to adjourn the discussion until the next meeting.

The meeting rose at 6 p.m.

16th MEETING

Thursday, 5 May 1949, at 3 p.m.

CONTENTS

Chairman: Mr. Manley O. HUDSON.

Rapporteur: Mr. Gilberto AMADO.

Present:

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

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

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

ARTICLE 24: PROHIBITION OF PACTS INCOMPATIBLE WITH THE DISCHARGE OF INTERNATIONAL OBLIGATIONS (concluded)

1. The CHAIRMAN asked the Commission to resume the discussion of article 24, the usefulness of which in the declaration had been disputed.

2. Mr. SPIROPOULOS recalled that he had opposed the retention of this article.

3. Mr. SCELLE supported the retention of the principle stated in article 24, namely, that any State which was a member of an international organization comprising the community of States must comply with the rules of that organization and must not conclude any treaty inconsistent with its pact.

4. Mr. ALFARO explained that article 24, which was based both on Article 103 of the Charter and on Principle 10 of International Law of the Future, provided that it was the duty of States to refrain from concluding not only treaties incompatible with the provisions of the United Nations Charter, but also treaties contrary to the principles of general international law. He urged the retention of this article, which dealt with a problem of capital importance.

5. Mr. SCELLE considered that this idea should be broadened by stipulating that if a State entered an international organization, any treaty or agreement previously concluded by that State contrary to the rules of the organization concerned was *ipso facto* revoked. A provision of this nature had previously been included in Article 20 of the League of Nations Covenant.

6. Mr. SPIROPOULOS stressed that article 24 was of purely academic interest and should not be included in a Declaration on the Rights and Duties of States.

7. The CHAIRMAN proposed that the two parts of article 24 be considered separately, and called upon the Commission to vote on the retention of the first part, reading as follows:

> " It is the duty of every State to refrain from concluding with other States agreements, the observance of which is inconsistent with the discharge of its obligations under international law."

The first part of article 24 was rejected by 6 votes to 5.

8. The CHAIRMAN proceeded to the second part of the article, relating to the prohibition of treaties, the provisions of which were inconsistent with the " constitutive pact of the community of States ". If the term " constitutive pact " was meant to signify the Charter, that should be stated explicitly.

9. Mr. ALFARO said that if the Commission rejected the second part, it would be running counter to the provisions of Article 103 of the Charter itself, which stated that " In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail." The Commission should therefore retain at least the second part of article 24, the principle of which was inspired directly by the Charter.

10. Mr. SCELLE said that if States were permitted to conclude treaties the provisions of which were inconsistent with the principles of the international organization of which they were members, there could no longer be any international organization.

11. The CHAIRMAN pointed out that since the first part of article 24 had been rejected, the second was somewhat unnecessary in view of Article 103 of the Charter, particularly since it could not apply to States not members of the United Nations.

12. Mr. BRIERLY, replying to the argument put forward by Mr. Alfaro, said that the silence of the declaration on this point would not be equivalent to a rejection of the provisions of the Charter, which still remained valid. He had voted against the article because he considered that this provision should not be included in the Declaration.

13. Mr. CORDOVA stated that he would vote against the second part of article 24 because it was based on Article 103 of the Charter, the provisions of which bound only Members of the United Nations.

14. The CHAIRMAN put to the vote the second part of article 24, on the prohibition of treaties incompatible with the " constitutive pact of the community of States ".

The second part of article 24 was rejected by 8 votes to 2.

ADDITIONAL ARTICLE PROPOSED BY MR. SCELLE

15. The CHAIRMAN read the additional article proposed by Mr. Scelle, as follows:

> " It is hereby declared that the words ' Rights and Duties of States ', as enumerated and defined in this Declaration, are to be understood as meaning the legal rules governing the powers with which State Governments recognized as such by the international community are vested by customary, conventional or judicial international law ".

16. Mr. SCELLE explained that the additional article which he was proposing was of an essentially technical character and did not in any way

modify the scope of the articles already adopted. The purpose of the article was to make it clear that States as such could not take action to enforce rights or fulfil duties, but that this rested with the representative organs of States which were the juridical agents of State interests. In other words, the rights and duties of States were exercised through the agency of the governmental authorities which represented them.

17. This additional article supplemented article 4 on the independence of States by defining the manner in which international relations developed between the various members of the international community.

18. The CHAIRMAN pointed out that this article stated neither a right nor a duty, and asked Mr. Scelle whether he would agree to the idea being introduced in the preamble.

19. Mr. Scelle accepted this proposal.

20. Mr. KORETSKY said that it was difficult to give an opinion at first sight on a text of considerable theoretical implications. At the same time, in view of the rejection of article 14, on the relations between the municipal law of States and international law, he considered that there was no reason to insert Mr. Scelle's article in the Declaration. The purpose of the article was to define the rights and duties of States; but it was not the Commission's task to theorize. The word " State " had a generally accepted meaning, and there was no need to start a barren academic argument on the subject.

21. Mr. Scelle's formula tended to replace the idea of the State by that of the Government: according to him there were no States, but only Governments. But this favourite thesis of Mr. Scelle's could not be accepted, in the first place because it was the Constitution of each State which determined the form of its government, and secondly because it rested with the sovereign people to " recognize " its Government, not with the international community. The Commission had decided that the State existed irrespective of recognition by other States; why, therefore, did Mr. Scelle wish to introduce this restriction as regards recognition? Why should the obligations provided for in the Declaration, particularly the obligation of ensuring the maintenance of international peace and security, be the responsibility only of recognized States?

22. Mr. Scelle's proposal was equivalent to replacing the sovereignty of the people by that of a chimerical non-existent super-State; it ran counter to the wishes of the peoples, who were entitled to create Governments in their own image. No super-State law and no world organization competent to recognize or reject the Statehood of any community was yet in existence. The Declaration should not be a theoretical text reflecting the very controversial opinions of a specialist or group of specialists.

23. In conclusion, this article was inacceptable, because it was based on an interpretation of sovereignty reflecting the principles of international law advocated by the colonial Powers which wished to dominate the world.

24. Mr. BRIERLY said that in the absence of any established procedure under which the international community could recognize States, the term " recognized as such by the international community " should not be retained. He asked whether Mr. Scelle would not agree to delete it.

25. Mr. SCELLE agreed to delete this part of his article. In reply to Mr. Koretsky he said that the latter's penetrating analysis, intended to demonstrate the uselessness of the additional article, on the contrary constituted an argument in favour of its retention. Apart from the question of recognition, the " rights and duties of States " signified the decisions which Governments could or could not take; in other words, their powers. The Commission was now faced with two opposed conceptions. The first was just stated by Mr. Koretsky, representing the classical conception of a State vested with an inherent sovereignty which it could, if it so desired, surrender voluntarily. The Briand-Kellogg Pact was based on this conception of the voluntary surrender of sovereignty. The second conception was that to which the community of nations was now tending: the idea that States and Governments had no other rights than those conferred upon them by the international juridical order, which alone possessed sovereignty. It should be made clear, therefore, that an act of State was valid only in so far as it was exercised in virtue of the powers conferred upon the juridical agents of the State by the international juridical order.

26. In France, for example, whenever there was a dispute as to the validity of any act, the first question asked was whether the public agent who performed the act had the power to do so. If it was found that he had not, the act was declared void. This theory had received solemn confirmation at Nürnberg. There the accused had been sentenced only because they had exceeded their powers. The question of the responsability of the German State as such had arisen only as a side issue. The question to be decided had always been whether such and such a " ruler " had exceeded his powers. The State was, therefore, responsible only by reason of the illegality of the acts of its agents.

27. To conclude, therefore, this was not a question of purely theoretical interest. The article would enable an international tribunal to decide whether an act attributed to a State was legal or illegal.

28. Mr. SPIROPOULOS said that in his view the article was unnecessary, but he would nevertheless vote with the majority if it decided to incorporate the principle in the preamble. The

declaration that there were no States but only Governments involved a danger. It was bound to astonish the world, which had long been used to the notion of the State. This notion was merely a fiction; everyone knew that behind the State there was the individual, the official vested with State powers. But the word " State " had for long been traditional, and could not create any confusion. While personally opposed to the article, he could see no major objection to its inclusion, in modified form, in the preamble.

29. Sir Benegal RAU stressed that to identify " States " and " Governments " was a contradiction of article 4 of the Declaration, in accordance with which each State could choose its own form of government. But the choice of a Government rested with the people and not with the Government. Similarly, article 7, on jurisdiction, brought out the same contradiction. Jurisdiction might rest not only with the executive power but with the legislative or judiciary power. Hence, if it was desired to use the word " Government " in the Article proposed by Mr. Scelle, the term should be understood in its broadest sense, including not only the executive power but the judiciary and legislative powers. But even if the word " Government " was given this general significance, the Article would nevertheless be inacceptable since it was inconsistent with article 4.

30. The CHAIRMAN did not understand what Mr. Scelle meant by " international judicial law ". In his view, the tribunals applied only the conventional or customary international law. He therefore proposed that the words " or judicial " be deleted.

31. Mr. SCELLE said that jurisprudence was generally considered to be a source of law. Under Article 38 (*d*) of the Statute of the International Court of Justice, the Court could apply judicial decisions in the settlement of disputes submitted to it.

32. The CHAIRMAN remarked that that Article allowed the Court to apply judicial decisions " as subsidiary means for the determination of rules of law ", that is to say, in his opinion, as a means of determining conventional or customary law.

33. On the other hand, he was opposed to the inclusion of the idea of " powers " in the declaration. It seemed to him inappropriate to speak of the conditions under which States might exercise their powers, since Governments held their powers not only by virtue of international law but also under the constitution of the State. He would prefer to adhere to the Committee's terms of reference and to include in the declaration only a statement of the rights and duties of States. He did not think that Governments had such rights and duties.

34. Mr. FRANÇOIS stated that while sharing Mr. Scelle's opinion that the sovereignty of the State was subject to international law, he could not accept the additional article Mr. Scelle had proposed because in his opinion the State itself and not only the Government was subject to law. The text proposed by Mr. Scelle could only be justified by a negation of this principle.

35. Mr. AMADO hoped that he would one day see Mr. Scelle's doctrines universally admitted and international law become the only authority capable of investing States with their sovereignty. The declaration must, however, confine itself to positive law. He regretted that he would have to vote against the proposal, which in his opinion was out of place in a declaration proclaiming very elementary principles, for it departed too much from present realities.

36. Mr. ALFARO stated that the basis of Mr. Scelle's proposal was entirely in conformity with the essential idea of the first and second paragraphs of the preamble to the Panamanian draft which said " The co-existence of States in the juridical community should be based on the determination in the most accurate terms possible of the rights which each may exercise and the duties which all must fulfil; the definition of the rights and duties of States necessarily involves fundamental principles and rules, the observance of which is essential for the maintenance of international peace and security, the supreme aim of the community of States ". Of the two texts he preferred the more concise, which was Mr. Scelle's.

37. He also considered that under Article 38 of the Statute of the Court, international judicial law was a source of law.

38. Mr. CORDOVA considered that the introduction of Mr. Scelle's theory of the powers of States into the declaration would create confusion in the mind of the public at large and even amongst Members of the General Assembly, and would be an obstacle to the general acceptance of the declaration. If Mr. Scelle's text were adopted, however, the words " or judicial " should be included in it.

39. Mr. SPIROPOULOS supported the Chairman's remarks. If the Commission decided to retain the idea contained in the article in question and embody it in the preamble or in the text of the declaration itself, it would certainly be necessary to modify the form in which it was expressed.

40. Quoting by way of example the Preamble and Article 110 of the Charter, he drew the Commission's attention to the fact that in several international instruments the words " States " and " Governments " were used indiscriminately to designate one and the same thing. Hence the preamble to the Declaration on the Rights and Duties of States might include a phrase indicating that Governments should be inspired in their international relations by the principles set forth in the declaration.

41. Mr. KORETSKY shared the view that the article proposed by Mr. Scelle should not be included in the declaration. The idea expressed

in that article was a variant of the doctrine of the supremacy of the international law, that is supremacy of certain groups of States over others, taught by the Viennese school, a doctrine which had fortunately not prevailed.

42. Mr. SCELLE had declared that States, through their Governments, had no other rights and duties than those conferred upon them by the international legal order. In other words it was not the States which would contribute their rights and duties to the international community, but the international community which would confer those rights and duties upon the States. It was in that sense that Mr. Scelle had interpreted the provisions of article 4 of the declaration. Nothing in that article, however, justified such an interpretation.

43. The debate on article 4 [1] had revealed that the members of the Commission did not all have the same conception of the sovereignty of the State. According to some, the State derived its rights from the people while according to others the State was subject to a higher authority, the international community. In consequence of that divergence of views, agreement could not be reached on the text proposed by Mr. Scelle.

44. In his opinion, the Nürnberg Charter had in no way confirmed the thesis upheld by Mr. Scelle. That Charter had been drawn up by the four victorious Governments to ensure the punishment of the war criminals and destroy the last vestiges of Fascism. None of the principles which it proclaimed supported the idea contained in the proposed additional article, which at bottom expressed the desire of the colonial States to continue their domination, and to suppress possible rebellion. Unlike Mr. Alfaro, he did not think that Mr. Scelle's proposal was in conformity with the preamble to the draft declaration submitted by Panama. The second paragraph of that preamble proclaimed that the supreme aim of the community of States was to ensure the maintenance of international peace and security, which did not mean that States enjoyed only those rights which were conferred upon them by a higher authority.

45. To sum up, he was opposed to the adoption of the additional article proposed by Mr. Scelle, for no people could admit that its rights were conferred upon it by someone else. Apart from the fact that it did not square with the ideas of a large number of international jurists, its addition would only introduce an element of confusion into the declaration.

46. The CHAIRMAN put to the vote the additional article proposed by Mr. Scelle.

By 9 votes to 4, the Commission decided not to include in the declaration the additional article proposed by Mr. Scelle.

[1] See A/CN.4/SR. 11 and 12.

ARTICLE PROPOSED BY MR. HSU TO REPLACE ARTICLES 1 AND 2 OF THE DECLARATION

47. The CHAIRMAN said that Mr. Hsu proposed to replace articles 1 and 2 of the declaration by the following text:

> "Every State has the right to existence and the benefit (or protection) of international law, irrespective of whether it is recognized."

48. Mr. BRIERLY pointed out that the Commission was not yet in a position to decide whether or not it was advisable to reconsider texts that had been provisionally adopted at first reading. It would therefore be better to examine Mr. Hsu's proposal at a later stage in the Commission's proceedings.

49. Mr. HSU stated that he had no objection to the postponement of the examination of his proposal.

The Commission decided to postpone the examination of Mr. Hsu's proposal.

ADDITIONAL ARTICLE PROPOSED BY MR. HSU

50. The CHAIRMAN said that Mr. Hsu proposed to include the following additional article in the declaration:

> "Every State is entitled to take measures in support of any State which exercises the right set forth in article 17."

51. Mr. SPIROPOULOS was of the opinion that it was not advisable to devote a separate article to the application of article 17. Moreover, he pointed out that the idea of collective self-defence included the right to take measures in support of a State which was itself exercising the right of self-defence, individual or collective.

52. Mr. ALFARO supported Mr. Spiropoulos' remarks.

53. Mr. KORETSKY said that it was impossible to express an opinion on the additional article proposed by Mr. Hsu before a final decision had been taken on article 17, since the proposed additional Article was intended to complement the provisions of article 17. It would therefore be advisable to postpone the examination of Mr. Hsu's proposal until after the second reading of the draft declaration.

54. Mr. HSU stated that the question to be settled was whether the right of collective self-defence did or did not include the right to take measures in support of a State which was itself exercising the right of self-defence. Personally he feared that the text of article 17 was not sufficiently precise and provided only for cases in which steps had been taken in advance to deal with aggression. In such a case the contracting parties decided in advance on the kind of measures they would take to support a State which was attacked. It was also necessary, however,

to consider the case in which collective self-defence would come into action after aggression and without any previous agreement. In such a case, if every State had the right to decide for itself the kind of measures it would take to support the State which had been attacked, it would be free to determine the extent and duration of the aid to be supplied by it.

55. Nevertheless, if the Commission was of the the opinion that this last case was also covered by the provisions of article 17, Mr. Hsu would not insist on his proposal.

56. The CHAIRMAN put to the vote the additional article proposed by Mr. Hsu.

The article was rejected by 8 votes to 4.

57. Mr. ALFARO explained that he had voted against the proposed article because he was of the opinion that the right proclaimed therein was included in the right of collective self-defence.

58. Mr. CORDOVA explained that he had voted against the proposed additional article because in his opinion collective self-defence could have no other meaning than that attributed to it by Mr. Hsu.

Communication from the Secretary-General transmitting a note from the American Federation of Labor

59. The CHAIRMAN called upon Mr. Brierly to report to the Commission on the communication from the American Federation of Labor dated 28 April 1949.

60. Mr. BRIERLY stated that he and Mr. Córdova had acquainted themselves with the note which the American Federation of Labor desired to submit to the Commission in connexion with the discussion of article 22 of the Draft Declaration on the Rights and Duties of States. The Federation wished the Commission to make it a crime against international law for any Government to organize or support directly or indirectly any Fifth Column, or Fifth Column activities, in any country with which it was at peace. The Federation had appended to its note a report on Communist Party activities which it described as Fifth Column activities, in France, Poland, Hungary and Chile, and also the text of a statement by Mr. Jules Moch.

61. Mr. Córdova and himself were of the opinion that the terms of the declaration provisionally adopted by the Commission was such as to give satisfaction to the American Federation of Labor, and consequently they recommended that the Commission should not take action on the Federation's note.

62. Mr. KORETSKY regretted that Mr. Brierly had not been sufficiently objective in the explanation he had just given to the Commission. He should have refrained from repeating—and the Chairman should have prevented him from doing so—the calumnious accusations contained in the note from the American Federation of Labor, and he should have confined himself to stating whether Mr. Córdova and he were of the opinion that the note should be submitted to the Commission for study together with article 22 of the draft declaration.

63. He had hoped that the Chairman would himself examine the contents of the note and report objectively to the Commission on the action to be taken in regard to it. He pointed out that in other organs of the United Nations, such as the Commission on Human Rights, for example, when a communication was received, it was studied by a small committee, which subsequently reported to the Commission without revealing the actual contents of the communication. He hoped that no similar incident would occur in the future, and that the Chairman would adopt such a procedure in respect of any futher communication that might be received.

64. In reply to a remark by Mr. SANDSTROM, Mr. KORETSKY stated that to describe as a "Fifth Column" progressive forces struggling for the liberation of peoples was incontestably a calumny.

65. Mr. SPIROPOULOS pointed out that the question raised by the American Federation of Labor was not relevant to the declaration on the rights and duties of states, for the proposal purported to describe something as a crime and not to codify a right or a duty.

66. The CHAIRMAN noted that in accordance with the recommendation of Mr. Brierly and Mr. Córdova, the Commission was of the opinion that the note of the American Federation of Labor not be examined.

Additional article proposed by Mr. Alfaro, Mr. Scelle and Mr. Yepes

67. The CHAIRMAN said that Mr. Alfaro, Mr. Scelle and Mr. Yepes proposed that the following additional article be included in the declaration:

> "Every State has the right to accord asylum to persons of any nationality who request it in consequence of persecutions for offences which the State according asylum deems to have a political character. The State of which the refugee is a national has the duty to respect the asylum accorded and may not consider it an unfriendly act."

68. Mr. YEPES said that the proposed article introduced no new element into the declaration; it merely gave expression to the existing law and endorsed a practice followed by all States.

69. Although the Latin American States were not alone in recognizing the right of granting asylum to political refugees, they had practised this right most often. They were to be congratu-

lated on having acted in this manner, for they had prevented veritable hecatombs from taking place during the civil wars which had ravaged their countries in the nineteenth century. In the modern world, which was constantly threatened by internal revolt or military *coups d'état*, the right of asylum was essential for all nations, and not only for the Latin American countries. By making frequent use of the right of asylum, those countries had enabled political leaders who would otherwise have been sacrificed to the hatred and revenge of their opponents to render their countries invaluable service.

70. The right of asylum was based on the fact that in politics there were no offences or crimes, but only errors or mistakes. A person considered at a given moment as a political criminal might later be brought to the apex of power, perhaps by the very persons who had persecuted him most strenuously. He quoted as an example the case of Masaryk, who had been condemned to death as a traitor by the Austrian-Hungarian courts and had later become the head of the Czechoslovak State. The right of asylum had always existed in all countries of the world and in all eras of history. From the times of ancient Greece until the most recent period of modern history, asylum had been the only safeguard of those who were persecuted for their political convictions. Although it was true that the policy pursued at the time by the Netherlands had forced Grotius—who had been called the father of international law—to seek asylum in France, it had to be remembered that the same Netherlands had decided to give asylum to Kaiser William II at the end of the First World War and had, in a memorable note, called upon all Governments, in the name of the existing law, to respect that asylum. He thought that note contained the best defence of the right of asylum, which the authors of the additional article wished to include in the declaration.

71. The history of countries such as France, Switzerland, the United Kingdom, Greece, the Scandinavian countries, the United States of America and the USSR contained many examples of cases in which the right of asylum had been exercised. He regretted that his insufficient knowledge of the history of India and China prevented him from stating that the right of asylum had also been exercised in those countries, but he had no doubt that they would welcome the insertion of a right which was so much in line with their philosophy.

72. Although the right of asylum had been exercised at all times by all the countries in the world, and although it had been acknowledged as a State right by the custom of many centuries, if not milleniums, the Latin American countries were the only ones to have established its juridical status by convention. He cited the Convention of Havana and Montevideo, concluded in 1928 and 1933 respectively, and stated that the Latin American Republics were proud of having been the champions of the recognition of this humanitarian institution, which mitigated to some degree the violence and ferocity of political struggles.

73. The right of asylum was one of the noblest creations of customary international law. It would be inconceivable not to include it in a general declaration on the rights and duties of States, and the proposed additional article should therefore be included in the declaration which the Commission was preparing.

74. He stressed that recognition of the right of States to grant asylum did not bind them to grant it to all political refugees who asked for it. The States themselves were free to decide whether or not asylum should be given to a political refugee. The duty corresponding to the right of asylum was not that of granting asylum whenever it was requested, but that of respect for the asylum granted on the part of the State of which the refugee was a national. That State should in no case consider the granting of asylum as an unfriendly act against it.

75. It was for the State granting asylum to decide whether the crime imputed to the refugee constituted a political crime or a common law offence. That was the rule laid down by conventional and customary law with regard to extradition. That rule had been expressly included in the Convention on the Right of Asylum adopted in 1933 by the Seventh Pan American Conference and also in another regional Convention concluded in 1939 between several Latin American States.

76. He drew the Commission's attention to the fact that, in order to take into consideration the objections rightly put forward by Mr. Brierly, the authors of the additional article had not mentioned in their text asylum granted on warships or military aircraft. He hoped that the article would be approved unanimously by the Commission, since its purpose was to insert in the declaration a right already recognized in several international instruments and sanctioned by the juridical conscience of the civilized world and by custom, which was one of the most important sources of international law.

77. Mr. HSU warmly supported Mr. Yepes' proposal; he wished to assure the Commission that China was as anxious as any other country to exercise and recognize the right of asylum. He noted the existence of a tendency to turn this right into a duty.

78. Mr. SANDSTROM gave his full support to the proposal submitted by Mr. Yepes.

79. Mr. CORDOVA said that he was a warm supporter of the right of asylum, but he wished to ask for an explanation of the expression " persons of any nationality ". He thought the right of asylum should only be granted to nationals of

the " persecuting " State, and it should be remembered that certain national legislations forbade foreigners to take part in political activities.

80. The CHAIRMAN thought a state had the right to grant asylum to any person regardless of his nationality.

81. Mr. KORETSKY said that he was in favour of the right of asylum, but wished the text of the article to make a reservation with regard to war criminals; certain war criminals had not yet been extradited after the Second World War.

82. Mr. YEPES pointed out that the question of extradition was quite different from that of the right of asylum. He had only alluded to extradition in his statement in order to bring out the fact that it was for the State concerned to decide whether a crime should give rise to extradition or to asylum. He fully shared Mr. Koretsky's opinion on the extradition of war criminals.

83. Mr. ALFARO said that there was no question of including war criminals amongst persons to whom asylum could be granted, since it was impossible to describe the crimes of which they were accused as having a " political character ". The Nürnberg Charter and the Convention on Genocide stated what special provisions were applicable to war criminals.

84. Mr. SCELLE supported Mr. Alfaro's remarks. The question of war criminals was a supra-national one, whereas the right of asylum was a matter of relations between States.

85. Mr. BRIERLY recalled that Mr. Yepes had quoted the case of the Netherlands, which had granted asylum to the Kaiser after the First World War. Clearly any State had the right to receive political refugees and to refuse to give them up, if there were no extradition treaties or if the latter included clauses concerning political refugees, as was usually the case. He drew attention to the practice, especially prevalent in Latin American countries, of granting asylum in legations or embassies. That practice had not been accepted by the majority of European States, and by the United Kingdom Government in particular. He therefore thought that the text of the article should be amended in order to specify that legations and embassies were not considered as places of asylum.

86. Mr. YEPES said that warships, military aircraft and legations or embassies had been enumerated in the original text of the article on the right to political refuge as places of asylum which had to be respected. This list had been omitted, in order to meet the objections raised by Mr. Brierly. The text finally proposed gave each State full latitude in deciding the places where it would grant asylum. The text he had submitted was proposed merely as a basis for discussion; any alterations would be acceptable, provided that the principle of the right of asylum was respected.

87. The CHAIRMAN proposed that, in order to meet Mr. Brierly's wishes, the words " in its territory " should be added after the word " asylum ".

88. Mr. YEPES thought that such a restriction would not be compatible with existing law. The question of the right to political refuge was amongst the subjects which it seemed necessary or desirable to codify. It would therefore be preferable for the Commission to deal only with the principle of the right of asylum, without going into details.

89. The CHAIRMAN thought it might be difficult to deal with the question merely in an article of the declaration on the rights and duties of states. He therefore called upon the Commission to vote on the question whether the principle of the right of political refuge should be included in the draft declaration. In the event of an affirmative reply, the Commission would continue to consider the wording of the text submitted.

By 9 votes 3, it was decided to include an article on the right to political refuge.

90. The CHAIRMAN doubted whether the word " offences " was suitable and thought it might be preferable to replace it by the word " acts ".

91. Mr. ALFARO pointed out that most penal codes contained chapters on crimes against the State; these crimes included revolutions, *coups d'état* and even mere attempts at violence. Thus, both the meaning and the purpose of the article would be restricted by replacing the word " offences " by the word " acts ". He thought that the Chairman's objection might be overcome by using the phrase " . . . acts which the State according asylum deems to be political offences ".

92. Mr. FRANÇOIS doubted whether the addition of the words " in its territory " would be enough to ensure that legations or embassies were not included among places of asylum, and pointed out that some members of the Commission considered legations and embassies as parts of the territory of the States to which they belonged. He could not accept the proposed article unless legations and embassies were expressly excluded.

93. The CHAIRMAN thought that the concept of extra-territoriality was an obsolete one. It had been established by jurisprudence that legations or embassies did not constitute a part of the territory of the State to which they belonged.

94. Mr. YEPES said that if asylum in legations or embassies were excluded, this would constitute a retrogression as compared with the existing situation. The right of asylum in embassies were currently recognized in many countries and should therefore be respected. He suggested that the consideration of the question be postponed until the Commission's next session, if no agreement could be reached on that important point.

95. Mr. BRIERLY having pressed for the adoption of his amendment, as formulated by the

Chairman, the latter pointed out that Mr. François was not sure whether the proposed addition would really have the desired result.

96. Mr. SANDSTROM thought that the Commission should confine itself to stating the principle of the right to political refuge, without going into the details of its application.

97. Mr. SPIROPOULOS thought it would be advisable to investigate the existing legal situation with regard to the right to political refuge and the practical effects of adopting the proposed article. There could be no doubt that every State currently had the right to grant asylum in its legations and embassies; the question was whether that asylum had to be respected. Another question was that of warships and military aircraft; opinions differed on that subject, and it would be desirable to know how the point would be settled by an international jurisdiction.

98. If the Commission adopted the proposed article with Mr. Brierly's amendment, what would the legal position be with regard to legations or embassies and warships and military aircraft? A possible interpretation would be to claim that the right of asylum did not exist in such cases. It seemed, therefore, that there was a risk of altering existing international law.

99. The CHAIRMAN recalled that certain States granted asylum in their legations; that had happened in Spain during the last civil war. On the other hand, many States refused to grant asylum in their legations, and denied this right to other States. The Commission was not in a position to solve the problem.

100. He drew attention to article 14 of the Universal Declaration of Human Rights, which used the expression " . . .to enjoy in other countries asylum. . . ". Those terms were very vague and did not create a precedent which the Commission should follow.

101. Mr. SCELLE pointed out that, since article 14 of the Universal Declaration of Human Rights gave everyone " the right to seek and to enjoy in other countries asylum from persecution ", States had the right and even the duty to grant such asylum. Nevertheless, the main question was the classification of the crime. In this connexion, it had to be remembered that international co-operation in penal matters was one of the duties of States.

102. A State had the right to grant asylum provided that the refugee was being persecuted for offences of a political character. The State might decide in the first instance, but in case of dispute the final decision should rest with the International Court of Justice.

103. He suggested that the text of the article should be amended in order to make that point clear. He thought that was essential, since there was too much tendency to forget that the world was evolving towards international organization, in which the right of decision of States must be subordinate to that of the international jurisdiction; the world was evolving towards " instituted " bodies. He proposed the addition of the words, " This judgment is subject to the decision of the International Court of Justice ".

104. The CHAIRMAN thought it would be difficult to make the addition, in view of provisions of Article 36 of the Statute of the International Court.

105. Mr. FRANÇOIS pointed out that, if two States were not in agreement, they would obviously have to resort to the methods for peaceful settlement given in Article 35 of the Charter and the case would go to the International Court of Justice, if they had accepted its jurisdiction as compulsory. He therefore thought Mr. Scelle's amendment unnecessary.

106. The CHAIRMAN put to the vote the amendment consisting in the addition of the words " in its territory " after the word " asylum ".

The amendment was rejected by 9 votes to 2.

107. The CHAIRMAN put to the vote the first sentence of the proposed article, namely, " Every State has the right to accord asylum to persons of any nationality who request it in consequence of persecutions for offences whith the State according asylum deems to have a political character."

The text was adopted by 8 votes to 3.

108. The CHAIRMAN pointed out that the second sentence of the article dealt with the corresponding duty of other States. That had not been done in the other articles of the draft declaration; it did not seem desirable to create such a precedent, which would involve the revision of all the articles already adopted.

109. Mr. YEPES explained that the main purpose of the second sentence of the article was to make it clear that the fact of according asylum should not be considered as an " unfriendly act ".

110. The CHAIRMAN put to the vote the second sentence of the proposed article, namely " The State of which the refugee is a national has the duty to respect the asylum accorded and may not consider it an unfriendly act."

The sentence was rejected by 7 votes to none.

Article 9: Respect for the rights of the State by other States (resumed and concluded)

Article 10: Limitation of the rights of the State (resumed and concluded)

111. The CHAIRMAN recalled that the Commission had reserved its decision when these articles were originally considered. [1] He thought that article 10 had no place in a declaration on

[1] See A/CN.4/SR.13, para. 71.

the rights and duties of States. With regard to article 9, he proposed that it should be considered together with the preamble, since it was not concerned with a specific right or duty, but rather with a general statement on the rights and duties of States.

The Chairman's two proposals were adopted unanimously.

Formation of a committee

112. The CHAIRMAN pointed out that, although most of the twenty-four articles submitted to the Commission had been adopted in principle, many questions remained to be solved; the most important were the following:

(1) The preamble, which would have to be worded to take into account Mr. Scelle's draft, article 9 and various ideas arising out of the Panamanian draft;

(2) The question whether the declaration on the rights and duties of States should consist of " articles " or " paragraphs ";

(3) The order of these articles or paragraphs;

(4) The style;

(5) The question of the various sub-titles;

(6) A study of the phraseology, in order to achieve uniform texts in the various languages.

113. All these questions involved the consideration of the draft as a whole. In order to do this, it might be advisable to set up a small committee which would report to the Commission as soon as possible after having studied the draft and drawn up a new text. In accordance with the Committee's report, the Commission would decide whether it could proceed to prepare a final draft during its current session or whether that task should be postponed until the second session.

114. The Chairman decided, in accordance with the usual procedure, that the committee should be composed of the following members: Sir Benegal Rau (Chairman), Mr. Alfaro, Mr. Brierly and Mr. Scelle. He recalled that the Committee's special task was the study of the various questions he had enumerated.

115. Mr. KORETSKY thought it would be well to specify whether the committee was merely to prepare the way for a second reading of the draft declaration or whether it was to draw up a final draft, which would be submitted as such to the General Assembly, He thought the first solution preferable, unless the committee could draw up a text which it would recommend for submission to the Assembly.

116. The CHAIRMAN agreed with Mr. Koretsky and thought that the Commission should give the committee a free hand. He specified that Mr. Hsu's first proposal would be referred to the committee.

The meeting rose at 6.05 p.m.

17th MEETING

Monday, 9 May 1949, at 3 p.m.

CONTENTS

Chairman: Mr. Manley O. HUDSON.

Rapporteur: Mr. Gilberto AMADO.

Present:

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

Secretariat: Mr. LIANG, Director of the Division for the Development and Codification of International Law, Secretary to the Commission.

Formulation of the principles recognized in the Charter of the Nürnberg Tribunal and in the judgment of the Tribunal (A/CN.4/5)

GENERAL DISCUSSION

1. The CHAIRMAN invited the Commission to begin the discussion of item 3 on the agenda, which included the following two paragraphs:

(*a*) Formulation of the principles recognized in the Charter of the Nürnberg Tribunal and in the judgment of the Tribunal.

(*b*) Preparation of a draft code of offences against the peace and security of mankind.

2. Those two questions had been included in the agenda in pursuance of resolution 177 (II) of the General Assembly dated 21 November 1947 (See A/CN.4/5, p. 33). Previously, by its resolution 95 (I) of 11 December 1946 (See A/CN.4/5, pp. 14 and 15), the General Assembly had already affirmed " the principles of international law recognized by the Charter of the Nürnberg Tribunal and the judgment of the Tribunal " and had referred the matter to the Committee on the Progressive Development of International Law and its Codification.

3. The report of that Committee (A/AC. 10/52; also A/CN.4/5, pp. 18 and 19) proposed that the General Assembly should request the International Law Commission to prepare a draft Convention incorporating the principles of international law recognized by the Charter of the Nürnberg Tribunal and sanctioned by the judgment of that