Document:-
A/CN.4/SR.31

Summary record of the 31st meeting

Topic:
<multiple topics>

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

of a questionnaire, but insisted that a rapporteur should be appointed.

81. Mr. SANDSTROM supported Mr. Scelle's proposal.

82. The CHAIRMAN drew the Commission's attention to the Secretary-General's Memorandum: a Historical Survey of the Question of International Criminal Jurisdiction (A/CN.4/7) which might later be useful in the consideration of that question. He put to the vote the question whether the Commission should decide on the matter at the present meeting.

The Commission decided by 10 votes in favour to take a decision on the matter at its present meeting.

83. The CHAIRMAN then put to the vote the proposal by Mr. Amado and Mr. Koretsky that the matter should be postponed until the following session.

The proposal was rejected by 9 votes to 4.

84. The CHAIRMAN called for a vote on Mr. Scelle's proposal that a rapporteur should be appointed to study the question and present a report thereon to the following session of the Commission.

The proposal was adopted by 8 votes to 4.

85. The CHAIRMAN declared the discussion on the matter closed.

The meeting rose at 6 p.m,

31st MEETING

Wednesday, 1 June 1949, at 3 p.m.

CONTENTS

Chairman: Mr. Manley O. HUDSON.

Rapporteur: Mr. Gilberto AMADO.

Present:

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

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

Draft Report to the General Assembly on the Work of the First Session (Chapters I and II)

1. The CHAIRMAN requested the Commission to consider chapters I and II of the draft report to the General Assembly on the work of the first session. [1]

GENERAL OBSERVATIONS

2. Mr. AMADO (Rapporteur) stated that he had attempted to prepare a sober, precise and clear text which would accurately reflect the discussions which had taken place in the Commission. He realized that some gaps would undoubtedly be found and that certain deletions might have to be made. The comments of the Commission would prove most helpful in that respect.

3. He wished to point out that he had given special attention to reporting the discussion on the Commission's competence as outlined in article 18, sub-paragraph 2, of the Statute. He hoped that the report would meet with the Commission's approval and that it would be considered as an objective presentation of the Commission's opinion.

CHAPTER I. INTRODUCTION

Paragraph 1: Establishment and membership of the Commission

4. Mr. ALFARO thought that the listing of countries, as it stood, might seem to indicate that the members were representatives of those countries. He therefore suggested that the names of the members should be followed by the word " of " and then the name of the corresponding country.

5. The CHAIRMAN pointed out that the word " nationality " could be inserted at the head of the column of countries and the adjective of nationality could then be listed in the column instead of the name of the country.

6. Mr. KORETSKY preferred the draft presented by the Rapporteur. He saw no reason not to indicate the fact that a member was a citizen of a particular country. In order to satisfy Mr.

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[1] The text of the draft report has not been reproduced in the present publication. In order to follow the discussion of the draft report, see text of the Report. Parts of the draft report which differ from the Report have been included in footnotes to the summary records.

Alfaro's objection, however, there might be some mention of the fact that members had been elected in accordance with the provisions of the Commission's Statute.

7. The CHAIRMAN pointed out that paragraph 1, sub-paragraph 2, stated that the General Assembly had elected the members " in accordance with the provisions of the Statute of the Commission ".

8. Mr. LIANG (Secretary to the Commission) stated that the Legal Department had consulted the Yearbook of the International Court of Justice in which, after the names of the judges, there was a column giving their nationality. While he thought that the procedure followed by the Rapporteur was perfectly clear, the Commission could, if it wished, adopt the form used by the International Court.

9. The CHAIRMAN put to the vote the proposal to insert the word " nationality " over the column listing the countries of which the members were nationals.

The proposal was adopted by 9 votes.

Paragraph 2: Place and duration of the first session

There were no comments on paragraph 2.

Paragraph 3: Election of officers

There were no comments on paragraph 3.

Paragraph 4: Secretariat

Paragraph 5: Rules of procedure

There were no comments on paragraph 5.

Paragraph 6: Adoption of the agenda

There were no comments on paragraph 6.

Paragraph 7: Programme of work

10. Mr. KORETSKY suggested that the report should stress the fact that decisions of the General Assembly had been given priority in the Commission's discussions. Accordingly, since items 5 and 6 had not hitherto been dealt with, he proposed that the first sentence should be inserted after sentence 2 in order to stress the work that the Commission had done. He thought it was unfortunate that the report declared codification to be the main function of the International Law Commission, for in his view the most important task of that body was to carry out the instructions of the General Assembly.

Mr. Koretsky's proposal to invert the order of the first two sentences of paragraph 7 was adopted by 4 votes to none.

11. The CHAIRMAN pointed out that in accordance with that decision the Rapporteur would have to make certain drafting changes in the text of paragraph 7. In consideration of a comment by Mr. Córdova, the Chairman requested the Rapporteur to re-word the phrase " the Commission was anxious ".

Paragraph 8: Preparatory work by the Secretariat

There were no comments on paragraph 8.

CHAPTER II. SURVEY OF INTERNATIONAL LAW AND SELECTION OF TOPICS FOR CODIFICATION; POWERS OF THE COMMISSION WITH RESPECT TO THE SELECTION OF TOPICS

Paragraph 9

There were no comments on paragraph 9.

Paragraphs 10 and 11

12. Mr. KORETSKY felt that paragraphs 10 and 11 raised an extremely significant issue, which had occupied a considerable amount of the Commission's time. While the drafting of paragraphs 10 and 11 in the Rapporteur's report was not incorrect, he felt the issue had been over-simplified. Acute differences, both political and theoretical, had arisen among members of the Commission on that question. Nevertheless, the opposing views were not adequately expressed in the report, although more satisfactory treatment of the issue appeared in the summary records. He therefore suggested that those paragraphs should be developed in more detail; he would be willing to assist the Rapporteur in drafting a statement of his own position.

13. The CHAIRMAN agreed that those paragraphs could be amplified. He pointed out, however, that the function of a report was different from that of a summary record, in that the former should include only matters of interest to the General Assembly. His personal view on those paragraphs had been that they explained the issue in too great detail.

14. Mr. AMADO (Rapporteur) pointed out that it would be unwise to attempt to include individual opinions throughout the report. In the case in question, however, he thought the Commission would be justified if it decided to present the opinions of the various members, since it was a matter of great importance.

15. Mr. KORETSKY did not wish to have his individual point of view incorporated in the report but he did wish emphasis to be placed on the fact that the differences of opinion among members of the Commission were of a fundamental nature. The discussion had, in fact, resolved into a struggle between those favouring the autonomy of the Commission and those favouring its dependence upon the parent body.

16. Mr. CORDOVA did not consider Mr. Koretsky's statement of the main issue correct. Although some members had touched on the question whether the Commission was dependent or not on the General Assembly, the matter had not been discussed. He thought that the Rapporteur's report was clear on the issue, which in his opinion was summed up accurately in paragraph 12 of the report.

17. Mr. SCELLE proposed that the Commission should vote whether it was satisfied with paragraphs 10 and 11 as they stood, or whether it desired those paragraphs to be amplified.

18. Sir Benegal RAU proposed that the phrase " unless otherwise directed by the General Assembly " should be inserted at the end of the first sentence of paragraph 11.

19. Mr. KORETSKY stated that his objections would be partially satisfied if that amendment were adopted.

Sir Benegal Rau's amendment was adopted by 10 votes to none.

20. Mr. BRIERLY thought that individual representatives should be allowed to revise any formulation of their opinions to be included in the report.

21. Mr. SCELLE supported that view. Since it was agreed to revise paragraphs 10 and 11 to satisfy Mr. Koretsky's objections, Mr. Scelle withdrew his proposal of a vote.

22. Mr. BRIERLY thought that the last sentence of paragraph 11 was misleading regarding the stage at which the Commission would make recommendations.

23. The CHAIRMAN requested Mr. Brierly to present his suggestion for revision of that sentence to the Rapporteur. In his opinion it was sufficient for the individual views of members to be included in the summary records.

24. Mr. SCELLE pointed out that if member's requests to include specific points of view in the report were not complied with, it would mean that the Commission would be forced to present a report with no reservations whatsoever.

25. The CHAIRMAN observed that the members could explain in the report their final vote on it.

26. Mr. SPIROPOULOS stated that under the procedure which had been followed in the Sixth Committee of the General Assembly during its last session, if a Member wished for an expression of his opinion to be included in the report, the Committee decided whether that request should be granted.

27. Mr. KORETSKY pointed out that he would agree with the Chairman in cases where the report reflected the views of the Commission as a whole, but whenever the opinions of certain members were outlined in the report they would have to be given in the proper detail, and each member could request a correction or amplification.

28. The CHAIRMAN agreed with that point of view.

Paragraph 12

29. The CHAIRMAN suggested that the phrase " by 10 votes to 3 " in the last sentence should be deleted, and that a similar procedure might be followed throughout the report.

30. Mr. KORETSKY suggested that " a majority " might be inserted at the beginning of the sentence.

31. Mr. SCELLE could not support the Chairman's proposal, because the report of the exact number of votes helped materially to define the tenor of the Commission's discussions, giving a truer picture of the decisions it reached.

Paragraph 13: Survey of international law

32. Mr. KORETSKY objected to the last sentence of that paragraph. There was a difference of opinion as to the merits of the memorandum to which it referred. He felt it was unnecessary to praise such documents. If, however, the Commission insisted on including favourable remarks with regard to the memorandum, it should be indicated that that was the opinion of some members of the Commission and not of the Commission as a whole.

33. Mr. AMADO (Rapporteur) did not feel that Mr. Koretsky's criticism of the sentence was entirely justified but he was willing to accept the decision of the Commission in the matter.

34. The CHAIRMAN agreed that the sentence was not essential to the paragraph.

35. Mr. CORDOVA could not agree to the deletion of the sentence, since the document in question had formed the basis of the Commission's discussions and he thought that some reference should be made to it. He suggested that Mr. Koretsky's objections might be answered if the following phrase were included: " in the opinion of a majority of the Commission ".

36. Mr. LIANG (Secretary to the Commission) stated that the sentence did not make propaganda either for or against the memorandum. It merely contained an objective statement of the document's contents, but the Secretariat had no strong views regarding its retention. He hoped, however, that should the Commission decide to delete the sentence, that decision would not be interpreted to indicate either censure or approval of the memorandum in question.

37. Mr. ALFARO favoured retaining the substance of the sentence and even wanted to word it more in conformity with truth and justice. A discussion on the memorandum had taken place in the Commission and the paragraph reflected the opinion of the majority. In order to satisfy Mr. Koretsky's objections, however, he would

suggest that the sentence should be amended to read as follows:

"The majority of the Commission found that this memorandum surveys the field of international law of peace and enumerates in a comprehensive and satisfactory way topics in that field."

38. Mr. KORETSKY thought it was unnecessary to appraise documents which had been submitted to the Commission by the Secretariat. He could understand the Secretariat's attitude in the matter but at the same time he considered that it was for the Commission and not for the Secretariat to say whether or not comments and criticisms of the Secretariat's work were just or unjust. If there was any misunderstanding of that fact, it should be made quite clear to the persons concerned.

39. The CHAIRMAN did not feel it would be wise to limit the freedom of the representatives of the Secretariat to express their opinions.

Mr. Koretsky's proposal to delete the last sentence of paragraph 13 was rejected by 8 votes to one.

40. The CHAIRMAN thought it would be better either to insert Mr. Alfaro's amendment, or to delete the rest of the sentence after the phrase "international law of peace".

41. Mr. ALFARO thought that since the Commission had decided that the memorandum was comprehensive and satisfactory, the report should include a statement to that effect and he would maintain his amendment.

Mr. Alfaro's amendment was adopted by 5 votes to 4.

Paragraph 14: The question of a general plan of codification

There were no comments on paragraph 14.

Paragraph 15: Topics of international law considered by the Commission

42. Mr. BRIERLY pointed out that sub-paragraph 1 should read "subjects of international law" and that sub-paragraph 3 should read "the law of States". [2]

43. Mr. KORETSKY thought it was unnecessary to include paragraph 15 in the report: it merely listed the twenty-five topics and included yet another reference to the memorandum submitted by the Secretary-General, which he thought completely superfluous. He saw no reason for listing the twenty-five topics the Commission had reviewed if the Commission intended to list in paragraph 16 of the report the fourteen topics it had eventually decided to recommend for codification. A comparison of the two paragraphs would lead an intelligent reader to inquire why some topics had been rejected and why others had been retained. Moreover, he did not feel that paragraph 15 was relevant to the General Assembly's consideration of the Commission's report.

44. The CHAIRMAN thought that Mr. Koretsky had raised several valid points. An inclusion of both lists would undoubtedly give rise to the question why the Commission had decided to select fourteen specific topics and to omit eleven others. Those paragraphs would undoubtedly invite criticism, especially from those who had no means of knowing why the Commission had acted as it did.

45. Mr. AMADO (Rapporteur) explained that he had included paragraph 15 because the Commission had selected its topics on the basis of that list. He felt that the paragraph merely reflected the Commission's actions. In view of the arguments which had been advanced by Mr. Koretsky, however, he would not object to the deletion of paragraph 15.

46. Mr. CORDOVA felt that it was important to retain paragraph 15, which reflected much of the work which had been accomplished by the Commission. It would not be difficult, should the Commission so desire, to insert a short explanation of the reasons for which it had selected the topics appearing in paragraph 16 and rejected the others.

47. Mr. YEPES thought that paragraph 15 was a simple statement of fact, which should be included in the report, especially since a review of the summary records would show that the Commission had considered twenty-five topics for codification. The paragraph reflected the results of several days' work by the Commission.

48. Mr. ALFARO thought that paragraph 15 served a useful purpose, particularly as it would invite constructive criticism. It would also provide a helpful basis for comparison for the General Assembly, which might decide to instruct the Commission to make up subjects other than those mentioned in paragraph 16, in the light of its consideration of the topics listed in paragraph 15.

49. Sir Benegal RAU wondered whether paragraph 15 could be considered out of place in the report, since General Assembly resolution 175 (II) specifically instructed the Secretariat to prepare the study referred to in paragraph 15.

50. Mr. BRIERLY did not feel particularly strongly on the question but thought it wiser to delete paragraph 15, since it would invite the question why some topics had been rejected. If the paragraph were included, some explanation of the Commission's action should be made, and that in turn would be difficult, in view of the fact that there had been no one reason but many

[2] In lieu of "subject of international law" and "the law of the States."

individual reasons which had decided members to exclude certain topics.

51. Mr. SANDSTROM did not feel that it would be difficult to explain why certain topics had been omitted but thought that a phrase to the effect that the Commission had viewed and selected a provisional list for the first stage of the codification work could be inserted.

52. Mr. SCELLE thought it might be advisable to indicate the reasons for the Commission's actions. He agreed with Mr. Sandström that it would not be difficult to include a short explanation, especially since the report also included a statement of how priority had been granted to topics 5, 10 and 14 of paragraph 16.

53. Mr. KORETSKY could not agree to placing the memorandum submitted by the Secretary-General on the same level as the Panamanian draft Declaration on Rights and Duties of States, which had really been an essential document for the Commission's work. The Commission could have compiled the list of topics without the aid of the memorandum and there was no need to give the impression that the Commission had been unduly dependent upon the Secretariat. He agreed with Mr. Scelle that the emphasis should be on paragraph 16 and the succeeding paragraphs of the report, and for that reason he did not think that paragraph 15 should be included.

54. Paragraph 16 could be limited to a list of the fourteen topics which had been selected and some mention of the fact could be made that they had been chosen out of a possible twenty-five. The report might also state that the Commission expected to make recommendations on three specific topics. He would point out, however, that the General Assembly was not interested in processes of ratiocination but in results, namely paragraph 16, together with an explanation of the reasons for granting priority to three specific topics.

55. The CHAIRMAN pointed out that if paragraph 15 were deleted the introduction to paragraph 16 would have to be expanded. It might be possible to state in the introduction to paragraph 16 that the Commission had considered twenty-five topics and had excluded certain of those topics for general reasons. That statement could then be followed by a summary of the criteria used by the Commission in making its selection.

56. Mr. HSU preferred to retain paragraph 15 because the list of topics contained therein would be of great assistance to the various delegations when the report was considered by the General Assembly. He did not feel that the fact that the inclusion of paragraph 15 might invite criticism should be a valid reason for deleting it; his view was quite the contrary.

The proposal to delete paragraph 15 was rejected by 8 votes to 4.

Paragraph 16: Topics of international law provisionally selected by the Commission

57. The CHAIRMAN requested the Rapporteur to expand the introduction to paragraph 16, which the latter agreed to do.

58. Mr. YEPES suggested that item 1 should be amended to correspond with the parallel item 5 in paragraph 15, by the addition of the words " and Governments ".

That suggestion was adopted.

59. Mr. YEPES thought that since statelessness was the main issue discussed in connexion with item 7 and since that item appeared in paragraph 15 under item 16 with the inclusion of the words " including statelessness ", item 7 should be amended accordingly.

That suggestion was adopted by 8 votes to one.

60. Mr. YEPES pointed out that items 11 and 12 were worded too briefly and should be redrafted to correspond with the phraseology used in items 21 and 22 in paragraph 15.

That suggestion was adopted by 10 votes to none.

Paragraph 17

61. The CHAIRMAN asked the Rapporteur to consider a suggestion made by Mr. Yepes that another expression should be found for the verb in the phrase " the Commission desires to emphasize ". [3]

62. Mr. SCELLE was not clear regarding the full implications of the last sentence of paragraph17. It seemed merely to express the Commission's good intentions.

63. Mr. AMADO (Rapporteur) agreed that it could be deleted. [4]

It was so decided.

Paragraph 18: The Laws of War [5]

64. Mr. HSU thought paragraph 18 was unnecessary. It did not reflect very well the views expressed and he preferred that it should be deleted.

65. The CHAIRMAN supported that proposal. It was unnecessary to include paragraph 18,

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[3] Later changed to " It was understood ".

[4] That sentence, read as follows: " The Commission would, in the course of time, endeavour to make detailed studies of each of these topics."

[5] Paragraph 18 read as follows:

" 18. The Commission considered whether the laws of war should be selected as a topic for codification, and decided in the negative. It was suggested that the horrors of the Second World War were fresh in the memory of the peoples of the world and that if the Commission took up the subject of the laws of war, its action might have an unfortunate psychological effect upon world opinion."

since a comparison of the list of topics included in paragraphs 15 and 16 would indicate that the Commission had decided to delete the topic " the laws of war ".

66. Mr. AMADO (Rapporteur) supported that suggestion.

67. Mr. FRANÇOIS, on the contrary, considered that the paragraph should be explained in more detail. He felt it was extremely important for the General Assembly to know why the Commission had decided against including the topic of " the laws of war ". He thought that in general the report of the Rapporteur had been extremely well prepared but that in that particular instance it was little too succinct since it gave only one argument brought forward in favour of excluding that topic. Other arguments had been used in support of that point of view, and there had also been a considered expression of opinion in favour of codifying the laws of war.

68. He proposed the insertion of a paragraph to the effect that the Commission had considered whether " the laws of war " should be selected as a topic for codification. It had realized that in view of the principles of international law recognized by the Charter and judgment of the Nürnberg Tribunal, war crimes had been declared crimes under international law. The punishment of those crimes in the event of any future armed conflict, whether in a collective action by the United Nations or in the exercise of the right of self-defence, would require the prior determination of what acts constituted war crimes, and consequently the codification of the laws of war. On the other hand the Commission had realized that it was unable to complete that task without the assistance of a fairly large number of military experts. Furthermore, it had feared that if it took up the subject of the laws of war at the very outset of its work its action might be interpreted to indicate a lack of confidence in the effectiveness of the means at the disposal of the United Nations for the prevention of war. In those circumstances the Commission had decided not to begin the study of that problem.

69. The CHAIRMAN requested the Commission to decide whether it preferred too keep some reference to the debate on the laws of war on the understanding that if such a reference were retained the Rapporteur would redraft the text of paragraph 18, taking into consideration Mr. François' proposal.

70. Mr. KORETSKY thought that the paragraph should be deleted. There was no reason to include a particular reference to the omission of the topic, " the laws of war ", unless an explanation were given for the omission of the other topics. He thought, furthermore, that in the draft presented by Mr. François the text would have a certain political significance. It would be of great assistance to the warmongers who were constantly promoting a new war, because it would give them a legalistic basis for their actions. He did not believe that the members of the International Law Commission would wish to constitute a legal staff committee to the countries which had signed the Atlantic Pact and were preparing a third world war. He therefore felt that paragraph 18 was out of place and that it would lead to a misinterpretation of the Commission's position in that matter.

71. Mr. SCELLE pointed out that if paragraph 18 were omitted there would be no indication of a lengthy discussion which had taken place in the Commission, also in connexion with the Nürnberg principles. On those grounds he felt that paragraph 18 would have to be retained and he agreed with Mr. François that it was necessary to explain the reasons for the Commission's decision to omit the topic " the laws of war ". In that connexion he pointed out that war was no longer lawful, since it had been declared a crime and he therefore thought that in the interests of logic the title " the laws of war " would have to be revised. In his opinion, the rules for the use of force or for the action of an international police unit would have to be codified, because in order to enforce the law it would always be necessary to resort to some form of compulsion.

72. The CHAIRMAN pointed out that if paragraph 18 were retained it would not necessarily have to have a sub-title. The sub-title put it out of focus. It might be stated that all the selected topics related to the law of peace and that the laws of war were related to the Nürnberg principles. In order to establish the proper perspective it might be wise to include the following sentence in paragraph 18: " It will be noted that each of the topics mentioned in paragraph 16 refers to the peacetime relations of States ".

73. Mr. HSU would not press for the deletion of paragraph 18 if an acceptable alternative were adopted by the Commission. If the latter procedure were followed he thought that two paragraphs similar to those drafted on the controversial question of the Commission's competence should be prepared. He was not sure that the brief paragraph composed by Mr. François would fully expose the complex aspects of the question.

74. Mr. KORETSKY was surprised that whereas at the beginning of the discussion the Chairman had supported the proposal to delete paragraph 18, he had just proposed the insertion of a sentence which would imply that, from the moment an aggressor had unleashed his campaign of aggression, he would no longer be bound by international law, as all existing international law was law of peace. The effect of the sentence proposed by the Chairman would be to rule out the possibility of applying international law to the con-

duct of an aggressor. He considered it an extremely dangerous sentence and open to grievous misinterpretation.

75. He did not think it would be advisable to delete only the heading of paragraph 18. To adopt such a subterfuge was not a suitable way for the Commission to act. Paragraph 18 should be deleted, since any other course would amount to the legalization of war.

The proposal to delete paragraph 18 was received 5 votes in favour and 5 against.

76. The CHAIRMAN stated that under the rules of procedure the proposal had been rejected and he requested the Rapporteur to redraft paragraph 18 in the light of the discussions just held.[6]

77. Mr. KORETSKY observed that it had been the general practice of the Commission that when a vote was equally divided, the final decision was postponed until the following meeting. That procedure should be followed or the records and the report should indicate that the vote had been equally divided.

The Chairman's ruling was upheld by 8 votes.

78. Sir Benegal RAU explained that he had abstained in the vote on the deletion of paragraph 18, because he had not known what the alternative was: If the Rapporteur's new paragraph was satisfactory he would vote in favour of it, otherwise he would vote for the deletion of paragraph 18.

79. Mr. SPIROPOULOS regretted that he had not taken part in the vote. He would have voted in favour of retaining paragraph 18, since he felt that such a vital question should be mentioned in the report.

Paragraph 19: Priority of Topics

80. The CHAIRMAN suggested that paragraph 19 should be deleted. It would not be of interest to the General Assembly and the necessary information was contained in paragraph 20.

81. Mr. YEPES stated that the report should reflect the Commission's proceedings; it was impossible to deny a historical fact. The Chairman's criterion was not necessarily that of the General Assembly, which might be interested in everything the Commission had done.

The proposal to delete paragraph 19 was rejected by 8 votes to 4.

Paragraph 20

82. The CHAIRMAN proposed the deletion of the last sentence,[7] as he felt that it was unnecessary for the Commission to state its working time-table.

83. In reply to a question by Mr. KORETSKY, he stated that it was quite clear that the three topics referred to would be given priority and that the question of the Commission's programme after the present session would be contained in a later section of the Commission's report.

The last sentence of paragraph 20 deleted by 7 votes.

Formulation of the Principles recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal *(concluded)*

84. The CHAIRMAN drew attention to the text[8] presented by the Sub-Committee, in accordance with a decision taken at the 29th meeting (A/CN.4/SR.29, para. 68).

85. Mr. YEPES felt that the Sub-Committee's text did not go far enough or draw all the possible principles from the Charter and Judgment; certain conclusions were formulated, but no principles, and the latter had been the task given to the Commission.

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[6] See A/CN.4/SR.37, paras. 19-24.

[7] That sentence read as follows: " It was further decided that these topics would be dealt with as soon as the Commission had finished its consideration of items 2, 3 and 4 of its agenda, namely those questions referred to it by the General Assembly ".

[8] " 1. Any person who commits or is an accomplice in the commission of an act which constitutes a crime under international law is responsible therefor and liable to punishment.

" 2. Such person is responsible under international law whether or not his act is punishable under any domestic law.

" 3. The official position of a person as Head of State or responsible official does not free him from responsibility (or mitigate punishment).

" 4. The fact that a person acts pursuant to order of his Government or of a superior does not free him from responsibility. It may, however, be considered in mitigation of punishment, if justice so requires.

" 5. The following acts constitute crimes under international law:

" (*a*) Crimes against peace: namely:

" (i) Planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances;

" (ii) Participation in a common plan or conspiracy for the accomplishment of any of the acts mentioned under (i).

" (*b*) War crimes: namely violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deportation to slave labour or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity.

" (*c*) Crimes against humanity: namely murder, extermination, enslavement, deportation and other inhumane acts done against a civilian population, or persecutions on political, racial or religious grounds, when such acts are done or such persecutions are carried on in execution of or in connexion with any crime against peace or any war crime.

" 6. Any person accused of a crime under international law has the right of defense."

86. Mr. SPIROPOULOS drew attention to the fact that the Commission had already discussed the principles and that the Sub-Committee had only made certain minor drafting modifications.

87. Mr. YEPES asked why paragraph 1 of the Sub-Committee's original draft had been deleted from the new recommendations without explanation. [9] If it was founded on the Nürnberg Charter and Judgment it should not be omitted, as it was a very important principle.

88. Mr. SPIROPOULOS replied that the Judgment contained that idea but not the Charter. It was included as a real principle of law, however, but merely as one of the Tribunal's considerations.

It was unanimously decided to refer the text presented by the Sub-Committee to the next session and to appoint a Rapporteur on that subject.

Ways and Means for Making the Evidence of Customary International Law more Readily Available (A/CN.4/6)

89. The CHAIRMAN felt that the preparation of a comprehensive collection of all the existing evidence of customary international law suggested in the working paper prepared by the secretariat [10] would take many years and could never be complete.

90. With regard to the Secretariat's second suggestion for a new publication containing a more limited amount of material, various official government publications containing much material

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[9] See A/CN.4/SR.28, para. 53.

[10] That document read as follows:

1. *Possible Methods of Procuring the Publication of More Complete Collections of Evidence of Customary International Law.*

(*a*) *General.* The Commission could consider

(i) The preparation of a comprehensive collection of all the existing evidence of customary international law; or

(ii) A new publication containing a more limited amount of material; or

(iii) The continuation or elaboration of some existing publication or publications.

(*b*) *A comprehensive collection.* Some suggestions as to how an enterprise of this sort might be undertaken are contained in Section 2 of this paper.

(*c*) *Publications of a less comprehensive type.* Publications of this sort might contain either.

(i) Current material only. Cf. the *United Nations Treaty Series.*

(ii) Current material and also material dating from the relatively recent past. Cf. the *United Nations Reports of International Arbitrations.* Such a publication may be divided into

(*a*) Current series; and

(*b*) Earlier series; cf. Moore's *International Adjudications, Ancient and Modern Series,* and the *Annual Digest and Reports of Public International Law Cases, Supplementary Volume.*

(*d*) *Continuation of Existing Publications.* It would be within the scope of Article 24 of its Statute for the Commission to recommend the continuation, and possibly the expansion, of such well-known existing works as the *Annual Digest and Reports of Public International Law Cases,* the *Fontes Juris Gentium* series, the *United Nations Reports of International Arbitrations,* Flournoy and Hudson, *Collection of Nationality Laws,* Morrison, *Collection of Piracy Laws,* Feller and Hudson, *Collection of Diplomatic and Consular Laws,* and Lapradelle and Politis, *Recueil des arbitrages internationaux.*

2. *The Organization of the Preparation of a Systematic and Comprehensive Compilation of Evidence of Customary International Law.*

(*a*) *Possible methods.* The following alternatives, or combinations of them, may be considered:

(i) All or part of the work to be undertaken and carried out by the Secretariat of the United Nations under the direction of the Commission; or

(ii) All or part of the work to be undertaken and carried out under the auspices of Governments; or

(iii) All or part of the work to be undertaken and carried out in existing unofficial scientific institutions in the different countries; or

(iv) All or part of the work to be undertaken and carried out by individual experts, pursuant to a plan laid down by the Commission and under the direction of the Secretariat.

(*b*) *The Secretariat as Central Organ.* In view of the evident need for centralization, there is a strong case to be made out for the entrusting of this task to the Secretariat, under the direction of the Commission. The Secretariat is equipped to provide for the translation of texts into the official and working languages of the United Nations, and for their publication.

The following is an indication as to what the method would involve when applied to different parts of the undertaking:

(i) *Digest of the Practice of States.* In connexion with the preparation of digests of State practice, the Governments would need to furnish relevant materials, which would be edited, translated and published by the Secretariat in accordance with instructions drawn up by the Commission.

(ii) *Collections of International Decisions.* For the making of collections of international decisions, Governments would supply to the Secretariat copies of all past arbitral awards and, possibly, furnish copies of all future awards in the same manner as, in conformity with Article 102 of the Charter, they now furnish copies of treaties.

(iii) *Decisions of National Courts.* In connexion with the collecting of national decisions, the Secretariat would collaborate with individual experts, national scientific institutions or correspondents, and, in the case of some countries, perhaps also with Governments, for the assembling of such decisions.

(iv) *National Legislation.* As respects the collection of national legislation, the Secretariat would collaborate with appropriate correspondents in the different countries, and Government might possibly agree to communicate relevant texts for the future.

(*c*) *Individual Undertakings by Governments.* The co-operation of Governments is clearly essential to the success of any undertaking for which the Secretariat is to be primarily responsible. An alternative would be to place the main responsibility upon Governments, and to limit the function of the Secretariat to the furnishing of such auxiliary services as translation and publication. There might be many advantages in such a scheme, particularly in so far as concerns the preparation of digests of State practice which will involve extensive consultation with national archives. And it is to be noted that not only has at least one Govern-

on the subject were available. He was particularly indebted to the annual volumes published by the Central and South American States, a list of which was contained in document A/CN.4/6 (p. 10 to 12). Some of those " *Memoria* " had been published for a very long time. He also drew attention to a comparable United States Government publication, " Foreign Relations ".

91. Mr. SPIROPOULOS felt that the question was a very complicated one though it had nothing to do with the codification of international law as such and need not necessarily be done by a legal expert. The Secretariat study (A/CN.4/6) was extremely valuable but it would necessitate serious consideration. The Commission could consider the Secretariat working paper paragraph by paragraph or it could appoint a Rapporteur to draw up proposals for the Commission's consideration. He felt that the latter course might be more advisable, since the Commission had not given the subject sufficient thought or preparation to be able to consider its substance.

92. Mr. KORETSKY agreed with Mr. Spiropoulos that the Commission was not in a position to take a decision on that item; the documents involved were too numerous for one individual to study, even in a whole life-time. The Secretariat's study, however, so highly praised by Mr. Spiropoulos, would not enable the Commission to decide the direction in which it should work. He did not wish to indulge in mere criticism of the Secretariat but he felt that it was impossible to follow the Secretariat's suggestions.

93. The data given did not cover all countries, though the study purported to deal with the whole world; with regard to certain countries the information was inadequate or inaccurate; hardly any reference was made to developments in the Arab countries, Sweden or China, which were included under the heading of " Other Countries ". The development of international customary law in the People's Democracies was almost entirely neglected although a great deal of information was available to those who wished to find it; for example, there was a three-volume bibliography on the subject in the Moscow Library. Judging from pages 18 and 19 of the Secretariat's study, however, the author of that document seemed unduly interested in pre-revolutionary Russia but displayed utter ignorance with regard to the situation in the USSR. It was unpardonable that the Secretary-General should sanction such a display of ignorance.

94. The USSR and the other People's Democracies had a substantial contribution to make and were parties to numerous international treaties. Information was available but the Legal Department did not seem to wish to give the International Law Commission objective information; it had made no attempt to find the available documentation but had resorted to the consultation of experts who did not possess the necessary authority, but were ignorant and displayed anti-democratic tendencies. Proof that

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ment, that of the United States, already prepared and published digests of its State practice, but numerous others regularly publish extensive collections of material relevant in this connexion. Mention may be made in particular of the periodical *Boletins* and like publications of the various South American Governments. But the method would not be free from drawbacks unless a minimum of uniformity were assured, for instance by the issue by the Commission of detailed suggestions for compilation.

(*d*) *Division of Labour between Governments and the Secretariat.* Another possibility which clearly exists is a combination of the two methods last treated.

(*e*) *Utilization of National Institutions or Committees.* Governments favourable to the idea of such a comprehensive undertaking as is here suggested but not willing to assume responsibility for the work might be willing to entrust their share thereof to national commissions, which would be either official or unofficial as national practice and tradition would dictate. The creation *de novo* of official national research bodies, for which there are ample precedents, might also be considered. Co-ordination between bodies of this sort might be achieved either by means of instructions issued by the Commission or by the formation of an international co-ordinating committee.

(*f*) *Enlistment of Individual Experts.* The contribution which individual experts can make to such a comprehensive undertaking as in contemplated here is large, but there are clear limits to that contribution. Thus a Government might think it desirable to entrust the compilation of a digest of its State practice to an individual scholar. But, though the earlier United States digests and notably that of Moore, were prepared in that way, it is now generally agreed that the task of digesting the extensive materials in national archives is beyond the power of any one man, although a team directed by a qualified individual may effectively discharge it. In so far as concerns the compilation of digests of international decisions, national decisions, or national legislation, there would appear to be ample scope for individual effort, as such works as Moore's *International Adjudications*, the *Fontes Juris Gentium* collection of the decisions of the German Supreme Court, and Flournoy and Hudson's *Collection of Nationality Laws* sufficiently demonstrate. The employment of individual experts is not, however, an alternative method of carrying out the whole undertaking and presupposes the adoption of one or other of the methods discussed already. Such experts may be entrusted with specific tasks by Governments in the same manner as it has been suggested in the case of national scientific bodies. Likewise their co-operation may be enlisted in connexion with any task entrusted to the Secretariat.

3. *Some Secondary Suggestions.*

Other matters worthy of the attention of the Commission in connexion with Article 24 of its Statute might include:

(i) Possibility of consultation with Governments for the granting of more easy access to national archives.

(ii) Methods of promoting wider distribution of existing collections of evidence of international law, e.g. the ascertainment of the exact contents of existing libraries, the provision of nuclear collections in appropriate places, the provision of phostotatic copies of works now out of print, and the enlistment of the co-operation of Governments and private foundations with a view to the establishment and maintenance of standard libraries of international law in different parts of the world.

information was available from the Soviet countries was to be found in the " Human Rights Year Book "; the Legal Department, however, seemed determined to maintain a conspiracy of silence with regard to the People's Democracies and the USSR.

95. He would be frank: the Secretariat's study was definitely biased in favour of the United States; it was an excellent piece of research work on United States publications by persons who sympathized with the United States viewpoint; events in Asia and Africa were apparently considered unimportant. The document was in fact completely lacking in any sense of proportion. It was intolerable that the Secretariat should bow to the will of an influential Member of the United Nations and assist that Member to impose a hegemony of thought throughout the world. Such a tendency was incompatible with the principle of sovereign equality laid down in Article 2, paragraph 7, of the Charter and was particularly regrettable in the compilation of a document of that type.

96. The study referred to certain papers and praised certain collections such as the United Kingdom " Annual Digest and Reports of the International Law Cases ", which did not deserve that praise. That collection was interesting but it did not contain an objective explanation of customary international law. The editor was clearly undemocratic and had no sympathy with the USSR. Even when quoting the objective decision handed down by such judges as Lord Justices Scrutton and Banks, he had quoted all the arguments against the USSR and none of those in its favour; such editing was designed to condition international lawyers to take decisions against the USSR.

97. Similarly, Mr. Koretsky understood the motives that had inspired the Secretariat in drawing up its study. The author of the document was anti-democratic and anti-Soviet; his eyes were closed to the new aspects of international customary law arising in Eastern Europe and he was happy in his ignorance.

98. Mr. Koretsky recalled that in 1947 he had warned the Secretariat on the dangers of consulting private experts and had been accused of not recognizing the value of specialists; the Secretariat's study fully justified his premonitions. The authorities quoted were authorities on biased opinions alone and it was unfortunate that the Secretariat should subsidize the representatives of countries which sought to dominate the world.

99. With regard to the substance of the question, he felt that at this juncture customary international law was too vague to be important and might moreover be fashioned into a tool to serve certain deplorable tendencies. Custom existed because States were unequal and slavery still prevailed. He quoted the example of mixed courts which had been used to promote colonial infiltration in dependent territories; customary law had also been used by the counter-revolutionaries to impose a foreign yoke on certain countries, such as China, for example, in connexion with which he referred to the system of capitulations and extra-territoriality. He wondered whether Mr. Hsu would agree with such a system. He personally felt that it should be rooted out in the interests of the world-wide liberation of all peoples. The world was now entering a new phase. The Commission should rather study the new documents and treaties which were being drawn up throughout the world; any other procedure would mark a retrogression to the black past.

100. In conclusion, he stated that the Commission should reject the Secretariat's study as unworthy of its attention and should seek real ways and means for making international law more readily available. To that end, the Secretariat should compile a study which did in fact relate to all countries; the Commission would then be in a better position to accomplish its task. That would not be possible at the current session, however; more time and better documents were needed.

101. Mr. YEPES felt that the Secretariat document clearly proved the injustice of Mr. Koretsky's accusations; it was an extremely useful and learned document based on a profound study of customary international law throughout the world. It contained a list of reference documents which the Commission might usefully study and it referred to all available Soviet sources. United States documents were available to everyone and if the USSR documents were not, that was not the Secretariat's fault. He admitted, however, that certain documents such as the *Recueil des Cours de l'Académie de Droit International de la Haye* might usefully have been included. The gaps in the memorandum did not concern the USSR alone and in any case they were not intentional.

102. Mr. SPIROPOULOS reaffirmed his opinion that the document was an extremely good one and added that Mr. Koretsky's criticism seemed unfair. Obviously the study was not complete but it would have been impossible to make it complete at that time; furthermore, the Commission's task was not to obtain a complete list of all publications on international law but to ascertain the best method of compiling an exhaustive documentation on the subject.

103. Since the question was on the Commission's agenda and was referred to in article 24 of its Statute, he felt that the Secretariat working paper might form a useful basis for a general discussion on what documents the Commission required and on how it could set about obtaining them. Furthermore, there should be a Rapporteur's report on the subject.

104. Mr. HSU felt that the Secretariat document spoke for itself and did not need his defence. He

appreciated Mr. Koretsky's motives in referring to extra-territorial consular jurisdiction in China. He pointed out, however, that such jurisdiction was not based on custom but on Treaties, though the provisions of those Treaties had been somewhat expanded.

105. The CHAIRMAN remarked that the Secretariat had been confronted with a very difficult task. Although the document it had produced had certain limitations, he felt that the Secretariat deserved the Commission's congratulations.

The meeting rose at 6.10 p.m.

32nd MEETING

Thursday, 2 June 1949, at 3 p.m.

CONTENTS

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

Present:

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

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

Ways and Means of Making the Evidence of Customary International Law more Readily Available (A/CN.4/6) (*concluded*)

1. The CHAIRMAN re-opened the discussion of this item.

2. Mr. HSU wished to complete the remarks which he had made at the end of the preceding meeting. He had carefully perused both documents under discussion and had found them as good as could be expected under the circumstances. The work was still at a preliminary stage and could not therefore be complete, but it did not deserve the severe criticism and political accusations levelled against it by Mr. Koretsky.

3. The Secretariat paper had been prepared in a very scientific manner and had listed different methods by which the objective might be reached. Mr. Hsu therefore felt that the most effective method would be to instruct the Secretariat to prepare a systematic and comprehensive compilation of evidence of customary international law; the Secretariat would be the central organ for that work and would seek the co-operation of the governments, organizations and experts.

4. The Commission should base its discussion on the Secretariat working paper, starting with page 2, paragraph 2 (*b*). [1] He pointed out, in that connexion, that the document followed the outline of the Secretary-General's Memorandum containing a survey of compilations and digests of evidence of customary international law (A/CN.4/6). The working paper could thus be discussed paragraph by paragraph in conjunction with the corresponding sections of the survey.

5. The CHAIRMAN considered Mr. Hsu's suggestion useful He agreed that the different paragraphs of the working paper covered certain sections of the survey; thus paragraph 2 (*b*) (i), Digest of the Practice of States, covered part two, I, section B of the survey; paragraph 2 (*b*) (ii), Collections of International Decisions, covered sections D to H of the same part; paragraph 2 (*b*) (iii), Decisions of National Courts, covered sections I and J, and paragraph 2 (*b*) (iv) covered section K. He suggested that the Commission should follow Mr. Hsu's proposal and begin with the discussion of paragraph 2 (*b*) (i).

6. Mr. SCELLE thought that both Mr. Hsu's proposal and the proposal made by Mr. Spiropoulos at the preceding meeting were acceptable. It was a difficult question and its study would require much time. With regard to the survey which had been strongly criticized by Mr. Koretsky, he pointed out that every work was bound to contain some faults. Nevertheless, Mr. Scelle found that he had learned a great deal from the document.

7. Mr. Koretsky's vehement attack had been defeated by its own arguments. While there might be certain gaps in the survey, they were certainly not due to bad faith on the part of the Secretariat. Mr. Scelle also felt that the survey should be completed, but even in its existing form it was the most valuable study on the question extant.

8. Mr. Scelle therefore supported Mr. Spiropoulos' proposal that it should be taken as one of the major subjects for study and that a rapporteur should be appointed to complete the survey and consider how the evidence of customary law, which was as yet the main source of international law, could best be made available. In a sociological sense, international law was yet at an

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[1] See A/CN.4/SR.31, footnote 9.