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Summary record of the 5th meeting

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Programme of work

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70. The Secretariat's memorandum quoted the advisory opinion of the Permanent Court of International Justice, according to which "in the relations between Powers who are contracting Parties to a treaty, the provisions of municipal law cannot prevail over those of the treaty". The Court had pronounced the opinion that no State could escape its international obligations by invoking the provisions of its municipal law.

71. Mr. SPIROPOULOS considered that that subject should not be codified for the time being. States could not be forced to amend their Constitutions, for that question was exclusively within their own jurisdiction.

72. Mr. SANDSTROM acknowledged that the subject could be codified but, like Mr. Spiropoulos, he was of the opinion that it should not be done at the moment.

73. The CHAIRMAN recalled that an international convention was not the only means of codifying that topic. The Commission might perhaps limit itself to a statement affirming the priority of international law over the law of States, and leave each State free to determine the way in which it would comply with its international obligations.

74. Mr. BRIERLY pointed out that a declaration of the type suggested by the Chairman would have a certain value, but the Commission must go no further than that. States must be left to decide for themselves how they would comply with it.

75. Mr. ALFARO drew the Commission's attention to the fact that the draft declaration on the rights and duties of States, which was item 2 on the Commission's agenda, contained provisions relating to that question.

The Chairman noted that the Commission seemed to be of the opinion that it would be better to postpone until later the question of the obligations of international law in relation to the law of the State.

(f) FUNDAMENTAL RIGHTS AND DUTIES OF STATES

76. The CHAIRMAN said that that question would be examined at the same time as the draft declaration on the rights and duties of States.

The meeting rose at 6 p.m.

5th MEETING

Tuesday, 19 April 1949, at 3 p.m.

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Chairman: Mr. Manley O. HUDSON.

Rapporteur: Mr. Gilberto AMADO.

Present:

Members: Mr. Ricardo J. ALFARO, Mr. James L. BRIERLY, Mr. Roberto CORDOVA, 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. FELLER, Principal Director of the Legal Department; Mr. LIANG, Director of the Division for the Development and Codification of International Law, Secretary to the Commission.

Planning for the codification of international law: survey of international law with a view to selecting topics for codification. (Article 18 of the Statute of the International Law Commission) (A/CN.4/1/Rev.1) (*continued*)

(a) RECOGNITION OF STATES

1. The CHAIRMAN recalled that at the previous meeting he had pointed out that that subject had several aspects and had often been considered a political rather than a legal question. The recognition of States included the question of the recognition of belligerents, to which Mr. Amado had referred at the previous meeting, as well as that of insurgents. The question of collective recognition was mentioned in paragraph 42 of the Secretary-General's memorandum and observed that the transition from individual action of States to collective recognition would mark a step forward in the development of international law.

2. Mr. YEPES stated that it would be very difficult to solve the question of the recognition

of States by relying solely on legal principles in view of its very marked political character. There were various theories on the subject, but so far it had been impossible to reach agreement on any one of them. He recalled that the Ninth International Conference of American States (Bogotá, 1948) had not been able to reach a decision on the question of the recognition of States.¹ It had had to refer that matter to the next conference, to be held in Caracas. Mr. Yepes considered that for the time being the Commission should not codify that question.

3. The CHAIRMAN drew the Commission's attention to the fact that the observations submitted by the United Kingdom Government on the Draft Declaration of Rights and Duties of States, pointed out that the whole question of the recognition of States, Governments (*de jure* and *de facto*), of belligerency and insurgency, might well form the subject of a special study by the International Law Commission (A/CN.4/2, p. 187, para. 6 of the English text).

4. Mr. CORDOVA considered that the Commission should study and codify the question of the recognition of States and Governments, and especially that of the collective recognition of those States and Governments. By providing for the admission of new States to the United Nations, the Charter had tacitly acknowledged that collective recognition of such States was possible. That was further reason for not omitting that question from the list of subjects suitable for codification.

5. The CHAIRMAN remarked that the question of the definition of the State had been raised in the Permanent Court of International Justice in connexion with the admissibility of appeals addressed to the Court.

6. Mr. KERNO (Assistant Secretary-General) pointed out that current practice in the United Nations offered a number of examples of the recognition of States or of the succession of States and Governments; he mentioned in particular the cases of India and Pakistan, Indonesia, and Israel.

7. Mr. FELLER (Secretariat) added that no question had preoccupied the Legal Department of the United Nations more than that of the recognition of States. The Department had been asked to give its opinion on what should be understood by the word "State", in order that a decision might be taken whether communications from certain bodies of people should be communicated to all representatives on the Security Council in accordance with the Council's rules of procedure. The same question had arisen in connexion with the deposit of international conventions,

the texts of which sometimes had to be communicated to non-member States.

8. Mr. SCELLE was of the opinion that, since it had been agreed that States possessed international personality, the State should first of all be defined and the manner in which it should be recognized determined. The objection that had been raised that the question was political rather than legal was not pertinent; the Commission's task was precisely to distinguish what was legal even in the most political questions. It should endeavour to enlarge the field of international law at the expense of that of politics.

9. Mr. ALFARO recalled that two articles of the draft Convention on the Rights and Duties of States dealt with the question of the recognition of States. One of them concerned the right of any State to have its existence recognized, and the other enunciated the principle that the political existence of a State was independent of its recognition by other States. It would be well to fix universally accepted criteria, as a guide in deciding which bodies of people could be recognized as States. He considered that on account of its great importance, the codification of that question was both necessary and desirable.

10. Mr. SANDSTROM agreed with Mr. Alfaro's remarks, and added that the codification of the question should be granted a certain priority.

11. Mr. YEPES pointed out that the recognition of a new State should not be confused with that of a new Government. It was the latter only which had a political rather than a legal character. He agreed with Mr. Scelle that the Commission should avoid introducing politics into its work, and that it should give priority to the question of the recognition of new States.

12. Mr. BRIERLY observed that the memorandum submitted by the Secretary-General (A/CN.4/1/Rev.1, para. 40) quoted an opinion expressed by him before the League of Nations Committee of Experts, in which he had requested the Committee to refuse categorically to discuss the question of the recognition of Governments. In the twenty years that had passed since then his opinion had changed and he now thought that an attempt should be made to codify the question, even if it was not certain to be successful.

13. The CHAIRMAN remarked that the general opinion of the Commission was that the question of the recognition of States was a suitable topic for codification.

Following some remarks by Mr. Brierly and Mr. Scelle, the Chairman stated that for the time being the whole question would be placed on the list of selected topics, without any indication as to whether it included the recognition of Governments, belligerents or rebels.

¹ See *Final Act of the Ninth International Conference of American States*. Pan American Union, Washington, D.C. 1948, p. 51.

(b) SUCCESSION OF STATES AND GOVERNMENTS

14. Mr. CORDOVA considered that the Commission should take up the above topic, which was closely linked with that of the recognition of States.

15. Mr. FRANÇOIS, as well as Mr. SCELLE and Mr. ALFARO, agreed and Mr. François pointed out that the subject had fewer political aspects than the preceding one.

There being no other observations, the Chairman announced that the question of the succession of States and Governments would be included in the list of topics considered suitable for codification.

(c) DOMESTIC JURISDICTION

16. Mr. YEPES drew the Commission's attention to the question of domestic jurisdiction which, although of considerable interest from the point of view of the nature of international law and its codification, appeared to have been omitted in the memorandum submitted by the Secretary-General.

17. In the opinion of Mr. Yepes, the Commission's work would be incomplete, it would be deprived of one of its main foundations, if the question of domestic jurisdiction were omitted. Consideration of that question was both necessary and desirable because, if contemporary international policy and the discussions of the main United Nations bodies were analysed, it would be found that the best plans for ensuring international peace and security had always come up against the domestic jurisdiction of the State, the worst enemy of international law.

18. Article 2, paragraph 7 of the United Nations Charter marked a retrogressive step as compared with the Covenant of the League of Nations in that it authorized each State to define its domestic jurisdiction by itself, whereas Article 15, paragraph 8 of the Covenant had given the Council the necessary powers to do so. Since it was absolutely necessary to lay down clearly what was meant by domestic jurisdiction, he proposed that that question should be included in the list of suitable topics for codification.

19. In reply to a question by Mr. BRIERLY, Mr. Yepes explained that he wished a general study to be made of the question and not just of the meaning to be given to domestic jurisdiction as indicated in Article 2, paragraph 7 of the Charter.

20. The CHAIRMAN pointed out that the Permanent Court of International Justice, in its advisory opinion No. 4 concerning the Nationality Decrees issued in Tunis and Morocco (French

Zone),² had had occasion to state that the question whether a matter did or did not fall solely within the domestic jurisdiction of a State was essentially relative and depended primarily upon the development of international relations. Thus during the fifty preceding years the list of questions coming under international jurisdiction had grown longer, whereas the list of questions coming solely under the domestic jurisdiction of a State had been correspondingly reduced.

21. Mr. SPIROPOULOS supported the Chairman's remarks. He also pointed to the difficulty of codifying in such a relative matter. At the most, the Commission might indicate some limits to domestic jurisdiction.

22. Mr. SCELLE, though he had certain reservations to make on the way in which the Court had expressed its opinion, felt that it would be better to say, as Article 15, paragraph 8 of the League of Nations Covenant had done, that international law determined the scope of domestic jurisdiction.

23. In his opinion the Commission should study the provisions of Article 2, paragraph 7 of the Charter in relation to those of Article 15, paragraph 8 of the Covenant and decide whether international law or a State's own opinion must determine whether a given act did or did not fall within the domestic jurisdiction of the State in question. As far as that question was concerned he felt that the Commission's work could be completed quite speedily.

24. The CHAIRMAN remarked that opinion on the question was divided. According to certain authors, as long as there existed no positive rule of international law on a question, it belonged to domestic jurisdiction; conversely, as soon as a rule of international law was established on any given question, that question ceased to be exclusively a matter of domestic jurisdiction.

25. Mr. LIANG (Secretary to the Commission) wished to point out that the Secretariat had indeed examined the question of domestic jurisdiction, but had reached the conclusion that it was unnecessary to make a special topic of it, as it formed a part of many other topics considered in the Survey. Mr. Liang noted that the Institute of International Law had requested last year in Brussels that a report should be submitted to it on the question of domestic jurisdiction, in the general meaning as well as in that of Article 2, paragraph 7 of the Charter. That report could be most useful to the Commission. It would also be useful to consult the jurisprudence of the various organs of the United Nations on that question. The Secretariat had already undertaken the task of collecting that jurisprudence.

² See *Collection of Advisory Opinions*, Publications of the Permanent Court of International Justice, Series B, No. 4, February 7th, 1923.

26. The CHAIRMAN stated that in his opinion, it was difficult to draw a clear dividing line between domestic and international jurisdiction.

27. Mr. SPIROPOULOS, while he recognized the importance of the question of domestic jurisdiction, from a theoretic as well as from a practical viewpoint, thought that the Commission should not, for the time being, undertake its codification. It would be useless to draw up a list of the acts that a State was free to perform and of those in which its authority was limited, for as the Chairman had emphasized, the question was a very relative one and it was often necessary to take into account the theory of the abuse of law. Mr. Spiropoulos thought the Commission should wait until it had drawn up a code of international law before considering the question of including in it provisions concerning domestic jurisdiction.

28. Mr. SCELLE agreed with Mr. Liang that the question of domestic jurisdiction would be raised in connexion with the study of several other questions. In the circumstances, he would not press that it should be a separate topic for codification.

29. Mr. YEPES too did not wish to press the matter, but the debate had proved the necessity of discussing the question at length.

The Chairman announced that the question of domestic jurisdiction would not be entered on the list of topics suitable for codification.

(d) RECOGNITION OF ACTS OF FOREIGN STATES

30. The CHAIRMAN thought the title of the topic unsatisfactory, in view of the fact that the word "recognition" had in this case a different meaning from the one it had in the words "recognition of States". The recognition of the acts of foreign States signified the effect given in a State to the acts of another State. It would first have to be decided whether the topic came under public or private international law.

31. Mr. LIANG (Secretary to the Commission) explained that the Secretariat had felt it should include the question of the recognition of the acts of foreign States in its Survey. The Commission, however, should decide whether that question constituted or not a suitable topic for codification.

32. The CHAIRMAN said there was a considerable amount of documentation on certain aspects of the question. There were, for example, two conventions on the recognition and enforcement of the arbitral awards of foreign courts which had been concluded under the auspices of the League of Nations. One of the Conventions prepared by The Hague Conference on Private International Law dealt with the enforcement of judicial decisions of foreign courts in a limited field. Moreover, Mr. Feller had made a valuable

contribution to the draft convention on judicial assistance prepared by the Harvard Research.³

33. Mr. FELLER (Secretariat) pointed out that the subject was a very broad one in view of the numerous acts of States and of the complexity of the problems that each of those acts might raise. The Legal Department, while recently studying a question of such secondary importance as the international effect of the declaration of the decease of a person reported missing during the war, had had occasion to ascertain that even on so limited a subject there already existed a great deal of documentation and that numerous difficulties were occasioned by differences in national legislation. It did not seem, therefore, that the Commission could, at that juncture, do more than codify certain specific questions that might be of some particular interest, such as the procedure to be followed in the hearing of witnesses in a foreign country.

34. Mr. SANDSTROM thought that since national courts were so often seized of cases involving recognition of legislative or judicial acts of a foreign State, uniform laws on the subject should be adopted. The question did in fact border on both international public and private law; but it none the less fell within the competence of the Commission, which should consider it a subject for codification, without, however, giving it any special priority among the questions to be studied.

35. Mr. SPIROPOULOS shared Mr. Feller's views. Although the questions under discussion were already ripe for codification and came within the scope of international public, private and even administrative law, the Commission could not begin work forthwith in so vast and complex a field. With regard to the advisability of standardizing the laws in that field, to which Mr. Sandström had referred, Mr. Spiropoulos pointed out that the Commission's task was to codify existing laws, not to standardize them.

36. Mr. ALFARO observed that the Commission apparently wished to shelve the question for the time being, even though it fully recognized its importance for the future.

The Chairman stated that the question of the recognition of acts of foreign States would not be included in the preliminary list of topics for codification.

(e) JURISDICTION OVER FOREIGN STATES

37. The CHAIRMAN pointed out that the title in question should be completed as follows: jurisdiction over foreign States and their property. The problem actually embraced the jurisdictional

³ See *Research in International Law under the Auspices of the Faculty of the Harvard Law School*. Supplement section to the American Journal of International Law, Vol. 33, 1939, pp. 15-25.

immunities not only of States, of their sovereigns and their armed forces, but also of their property and vessels. There was a wealth of domestic jurisprudence in that branch of international law. The Secretariat's Survey very rightly drew attention to the particular problems raised by the increased economic activities of States in the foreign sphere, and to the special position of protectorates with respect to jurisdictional immunities, together with the disadvantages inherent in the fact that the executive power was partly responsible for the admission of the right to jurisdictional immunity. With respect to the Brussels Convention, to which reference was made at the end of paragraph 51, the Chairman recalled that the Convention had been amended since 1926, and that, in any case, it had only been ratified by a few States.

38. Mr. SPIROPOULOS considered that in view of its nature, importance and practical scope, that well-defined question of public international law should be given priority on the list of topics to be codified.

39. Mr. SANDSTROM supported that opinion.

The Chairman said that he would accordingly put the question of jurisdiction over foreign States on the preliminary list.

(f) OBLIGATIONS OF TERRITORIAL JURISDICTION

40. The CHAIRMAN thought the English title of the question, which in fact concerned the damage caused by one State to the property of another, lacked clearness. Two famous decisions illustrated the problem; the *Trail Smelter Arbitration*⁴ case and the *Savarkar* case.⁵

41. Mr. BRIERLY objected to the inclusion of the topic on the list. As was pointed out in paragraph 60 of the Memorandum, the various matters enumerated in that section were entirely unconnected. In the circumstances, it appeared difficult to codify them.

42. Mr. SPIROPOULOS agreed with Mr. Brierly. The matters included under the heading in question were not connected, and some of them raised general principles, such as the *Trail Smelter Arbitration* case, which was bound up with the idea of abuse of a right.

43. Mr. SANDSTROM also thought that that topic should not be retained for the moment and that some of the questions which it raised could be considered when the responsibility of States was examined.

44. Mr. LIANG (Secretary to the Commission) thought that what all those obligations had in common was the fact that they corresponded to the duties of States as already specified in the draft declaration submitted by Panama, submitted to the Commission under item 2 of the agenda. If then the Commission did not retain them at present, those questions would come up again when that draft was examined.

45. Mr. ALFARO emphasized that in effect the questions enumerated in paragraph 60 of the Memorandum all concerned cases where one State injured another State through the exercise of its territorial jurisdiction. The principle that a State should not injure another State was the very foundation of the draft Declaration of the Rights and Duties of States. It appeared again in article 9 which dealt with the respect of the rights of the State by other States; in article 10 which stated that the exercise of the rights of the State had no other limit than the exercise of the rights of other States, in accordance with international law, and that it was the duty of every State not to overstep that limit; in article 1, which stated that the right to exist did not imply any excuse or justification for the State which, in order to protect and preserve its existence, committed unjust acts towards other States; and lastly, in article 21 which made it incumbent upon the State to ensure that the conditions prevailing within its territory did not threaten international peace and order. However, in Mr. Alfaro's opinion, those questions could not as yet be codified in the form of articles.

46. The CHAIRMAN, reverting to the table of duties of the State outlined by Mr. Alfaro, recalled that the fourth principle of future international law imposed on every State the duty of forbidding all activities within its territory aimed at fomenting civil war on the territory of another State. That principle, which had been discussed in great detail, was an important one, owing to the rapidity of communication in the modern world.

With regard to the question of duties in connexion with territorial jurisdiction, the Chairman noted that the Commission was not in favour of inscribing it on the preliminary list.

(g) JURISDICTION WITH REGARD TO CRIMES COMMITTED OUTSIDE NATIONAL TERRITORY

47. The CHAIRMAN recalled the study devoted to that question by the Harvard Research; that body's Draft Convention was mentioned in paragraph 63 of the Secretariat's Survey. In effect, the whole problem of national criminal jurisdiction was being raised in this connexion; the problem was rather a complex one in view of the fact that some legal codes considered aliens

⁴ See *Reports of International Arbitral Awards*, United Nations publication, Sales Number: 1949.V.2. Vol. III, pp. 1905-1982.

⁵ See *Les travaux de la Cour Permanente d'Arbitrage de la Haye* New York, Oxford University Press, 1921, pp. 294-302.

who had committed crimes abroad as subject to their jurisdiction.

48. Mr. SCELLE thought that that question was of the utmost interest both in itself and also in so far as it related to the formulation of the principles of Nürnberg and the drafting of an international criminal code.

49. The CHAIRMAN, supported by Mr. KORETSKY, pointed out that the question concerned national jurisdiction only in the case of crimes committed abroad by aliens, and that, viewed from that angle, it had no connexion with the principles of Nürnberg nor with the code of laws on crimes against the peace and security of humanity.

50. Mr. SCELLE objected that the question of extradition, for example, and that of responsibility for damages caused abroad by aliens should be included in an international criminal code.

51. Mr. CORDOVA thought a distinction should be made between crimes committed abroad against a State and those committed against an individual. The first category only could be considered an appropriate topic for codification. In his opinion, the question of criminal jurisdiction in the matter of crimes committed outside national territory should not be codified at present.

52. Mr. BRIERLY wished to see that question included in the provisional list, as he shared the optimistic views on the possibility of codification expressed in the Introduction to the Draft Convention of the Harvard Research cited at the end of paragraph 63 of the Memorandum.

53. Mr. SPIROPOULOS also thought that the problem of the jurisdiction of a State in criminal matters was clearly a question of international law of great practical interest. However, the judgment of the Permanent Court of International Justice in the case of the *Lotus*⁶ had decided the question temporarily. For that reason the study of that question was not a very urgent one.

54. The CHAIRMAN noted that it was generally agreed that The Hague Court had shown excessive discretion in the case of the *Lotus*. A further study of the problem could therefore usefully be made, the more so as there were among States more points of agreement in the matter of criminal jurisdiction than was usually supposed.

In accordance with the Commission's decision, the question of jurisdiction with regard to crimes committed outside national territory was inscribed on the list of topics for codification, but without any mention of priority.

⁶ See *Collection of Judgments*. Publications of the Permanent Court of International Justice, Series A, No. 10, pp. 4-108.

(h) THE TERRITORIAL DOMAIN OF STATES

55. The CHAIRMAN thought that certain questions dealt with under the above heading in the memorandum lacked clarity, particularly the doctrine of *post-liminium* and the reference to the conflicting claims in the polar regions. Paragraph 65 of the Memorandum drew attention to the question of acquisitive prescription on which very little positive law existed except for the *British-Venezuelan Guiana Arbitration*.⁷

56. In regard to the role of conquest as conferring a legal title to territory which was recognized by earlier treatises on international law, the Chairman agreed with Mr. Amado and Mr. Koretsky that the time was ripe for a reevaluation of that concept in the light of the new principles of the Charter. In paragraph 67 of the Memorandum, reference was made to the protection of residents of territories affected by transfers of sovereignty. The right of option was one of the ways in which such protection was ensured.

57. Mr. ALFARO recalled that article 18 of the Panamanian draft Declaration on the Rights and Duties of States met the need, which the Chairman had pointed out, to renew that part of international law which dealt with the acquisition of territory by conquest. That article made it the duty of every State to refrain from recognizing territorial acquisitions obtained through the use or threat of force. He did not think that the problem of the territorial domain of States was suitable for immediate codification.

58. Mr. SPIROPOULOS shared that view. There was very little connexion between the various questions raised under that topic. The study of prescription should come under the general part of the code, and not merely under the heading of territorial acquisitions. The right of option was a problem which should be settled in peace treaties, for there would be some difficulty in making general rules about it.

59. Mr. LIANG (Secretary to the Commission) pointed out that there was some reason for speaking of prescription in connexion with territorial domain, since only acquisitive prescription was involved; the Napoleonic Code also dealt with the question in the chapter on property laws. It was extinctive prescription which should be included in the general part mentioned by Mr. Spiropoulos. Speaking of transfers of sovereignty, Mr. Liang said that they were not always necessarily the result of a war; they might also be brought about by plebiscites, recourse to which had been much more frequent in recent years. A general work on codification should include a chapter corresponding to the property laws to be found in the civil code, which would deal with the

⁷ See *British and Foreign State Papers* (1899-1900), p. 160.

prescription and transfer of rights in cases of change of sovereignty.

60. Mr. SPIROPOULOS agreed that those questions could be studied, but he thought that there were more pressing problems which were demanding the Commission's immediate attention.

61. The CHAIRMAN pointed out a matter which, though not suitable for codification, deserved study, namely, the principles governing the frontiers of States and also certain recent practices such as, for example, the arrangement for neutral zones between States made between Saudi Arabia and Iraq in order to protect the interests of the nomad populations by avoiding a fixed frontier.

As the Commission did not intend to take up now the question of the territorial domain of States, it would not be included on the list of topics for codification.

(i) THE RÉGIME OF THE HIGH SEAS

62. The CHAIRMAN observed that the question of the régime of the high seas seemed suitable for rapid codification. Certain of its aspects had been the subject of numerous conventions, particularly conventions dealing with the exploitation of the products of the sea. The fundamental idea in most of the conventions on fisheries, especially in the most recent of them, was that fishing should be so regulated as to ensure the preservation of the sea's natural resources. Reserved zones affecting the sea approaches to various territories had thus been established despite the time-honoured principle of the freedom of the high seas. Another question was that of the "continental shelf" to which a rather vague reference was made at the end of paragraph 72 of the Secretary-General's memorandum. Moreover, the freedom of the seas had also been restricted in order to ensure the safety of navigation. The Chairman drew attention to the failure to mention, among the conventions listed in paragraph 70 of the memorandum, the rules relating to sea routes which had been in existence since 1863 and were still of considerable importance.

63. Mr. FRANÇOIS thought that, in view of the importance of the subject and the very wide measure of agreement that had been reached in that field, the topic should be one for codification. It would also be very useful for the Commission to study the modern regulations regarding the "continental shelf", although that question fell within the scope of the progressive development of international law rather than of its codification.

64. Mr. ALFARO, Mr. SCALLE and Mr. SPIROPOULOS agreed that the topic was suitable for codification.

The Chairman accordingly included the régime of the high seas in the list of topics to be codified.

(j) THE RÉGIME OF TERRITORIAL WATERS

65. The CHAIRMAN recalled that Mr. François had been rapporteur for that question at The Hague Codification Conference of 1930.

66. Mr. FRANÇOIS explained that the attempt at codification at The Hague had failed mainly because of lack of time agreement on the extent of the territorial waters; the Conference had been nearing agreement, on the other points, and he thought that the difficulties which had arisen at that time might have diminished since. He therefore considered that the question should be retained for codification.

67. The CHAIRMAN recalled that since 1930 many countries had modified their national legislation on the extent of territorial waters and that the current practice of States, which should be taken into account above all else, as Mr. Koretsky had so justly pointed out at the beginning of the current session, differed greatly from what had been advocated at The Hague and from the views expressed in recent publications. Consequently, it was still not known where the line of demarcation should be drawn between the high seas and territorial waters.

68. Mr. SPIROPOULOS shared Mr. François' opinion, because apart from the question of the limit of territorial waters, it seemed that agreement had been reached at The Hague Conference on the juridical status of territorial waters in general. Some results could thus be achieved on that point. It was also possible that agreement on the extent of territorial waters might be more easily reached than had been believed, as questions of prestige, important at the time, might have been followed by a more conciliatory attitude.

The Chairman, noting the opinion of the members of the Commission, added the question of the régime of territorial waters to the list of topics to be codified.

(k) PACIFIC SETTLEMENT OF INTERNATIONAL DISPUTES

69. The CHAIRMAN invited the Commission to state its opinion on the topic proposed by Mr. Alfaro, namely: the pacific settlement of international disputes.

70. Mr. ALFARO thought that question should be codified, because in practice the procedures established by The Hague Conventions had undergone important modifications. The Commission should take account of the current work of the Interim Committee of the General Assembly, but it was for the Commission to formulate new methods for the pacific settlement of international disputes; its work could be parallel to that of the Interim Committee, and must not duplicate it.

71. The CHAIRMAN drew the Commission's attention to the Secretariat's publication entitled

A Systematic Survey of Treaties for the Pacific Settlement of International Disputes, 1928-1948 (Lake Success, New York, 1948). The Interim Committee had taken as a basis for discussion the General Act of Geneva, 1928; the International Law Commission could obviously draw up more effective models of arbitration treaties than those included in the General Act, by basing itself on Article 33 of the Charter; it was open to doubt, however, whether such work would really be codification.

72. Mr. SPIROPOULOS did not share Mr. Alfaro's opinion. In his view, the codification of international law and that of certain rules of procedure should not be confused. Furthermore, the examples of The Hague Conventions and the General Act of 1928 were not encouraging. The Interim Committee was now studying the question of the pacific settlement of international disputes; it would therefore be premature for the International Law Commission to undertake the codification of that topic.

73. The CHAIRMAN drew attention to certain special problems which had arisen in connection with attempts to reach pacific settlements; that might be material for codification.

74. Mr. FELLER (Secretariat) pointed out that the question could be considered from two points of view: the Commission could either view the problem of the pacific settlement of international disputes as a whole, as Mr. Alfaro had done, or, as the Chairman suggested, it should simply consider the various questions arising from the operation of Mixed Arbitral Tribunals of other arbitral bodies. The first alternative governed the work of the Interim Committee; the second had been partially dealt with in section IX of the second part of the Secretary-General's memorandum concerning arbitral procedure. Mr. Feller thought that the question of the pacific settlement of international disputes should be considered by the Commission from one of those two points of view.

75. Mr. LIANG (Secretary to the Commission) indicated that the report of the Sub-Committee of the Interim Committee⁸ stated that the work of the Interim Committee should be carried out in close collaboration with the International Law Commission. Theoretically, it was difficult to contend that the codification of the pacific settlement of international disputes did not come within the scope of the International Law Commission's activities, but in practice, it was useless to undertake a task analogous to that which had already been undertaken by the Interim Committee. However, since the latter hoped that the International Law Commission would

study that question, all possibility of its consideration should not be excluded.

76. Mr. ALFARO wished to confirm Mr. Feller's explanations: he envisaged the question of the pacific settlement of international disputes as a whole, in accordance with Article 2, paragraph 3, of the Charter. A similar provision was to be found in the draft Declaration of Rights and Duties of States. The International Law Commission should thus promote the application of those important clauses by deciding to include the question of the pacific settlement of international disputes in the list of topics which it was necessary or desirable to codify.

77. Mr. SCALLE supported Mr. Alfaro's views. He thought the work of the Commission should include that topic, but without duplicating the work of the Interim Committee.

78. Mr. SPIROPOULOS thought the question, viewed as a whole, had a clearly political aspect; that was what had made the Interim Committee deal with it; it should consequently not be considered by the International Law Commission. But the question of arbitral procedure was a topic of international law and the Commission could include it in the list of topics to be codified.

79. Mr. BRIERLY thought there was no reason for retaining the question proposed by Mr. Alfaro. The General Act of 1928 had always been a dead letter, and there was every reason to fear that the same fate would befall any similar document. States adopted the procedure which they judged advisable to settle their disputes, without concerning themselves about the opinions which jurists might give them; the Commission would therefore not be performing any useful task in undertaking the codification of such a topic.

80. The CHAIRMAN pointed out that, while the General Act had never literally been applied, it was none the less true that it had served as a model for several treaties.

81. Mr. SANDSTROM thought the question of the pacific settlement of international disputes was connected with the progressive development of international law and not with its codification. He was therefore of the opinion that there was no reason to retain that topic.

82. Mr. CORDOVA suggested that consideration of that question should be deferred, because the time did not seem ripe for establishing a procedure for pacific settlement which might have a reasonable chance of being observed; however, in view of the provisions of Article 2, paragraph 3 of the Charter, that topic would have to be codified sooner or later.

The Chairman concluded that the general opinion for the moment did not favour retaining the question of the pacific settlement of international disputes among the topics the codification of which seemed necessary or desirable.

⁸ A/AC.18/SC.6/4.

(1) THE LAW OF NATIONALITY

83. Mr. YEPES expressed his satisfaction at the way in which the Secretariat had treated the section relating to the individual in international law, in particular the paragraphs concerning the law of nationality. The question of statelessness was of particular importance at the existing time: whereas there had only been 200,000 stateless persons in 1930, there were now 3,000,000. The possession of a nationality was the only bond between the individual and the law of nations; stateless persons were therefore deprived of the essential rights which the Charter guaranteed to all human beings. The stateless person had no guaranteed civil status, no consular protection, no passport enabling him to move about; he was faced with difficulties in such matters as marriage, wills etc. The International Law Commission could not remain indifferent to such a problem which was both human and legal. The Charter, which made the individual a subject of international law, would be inoperative so long as no solution had been found to the problem of stateless persons.

84. Mr. Yepes thought that the Commission should give priority to the examination of that subject, whose solution, moreover, was quite simple: all that need be done was to establish as a fundamental right of the individual the right to possess a nationality, which could not be lost unless a new nationality had been acquired.

85. The CHAIRMAN said he had been impressed by Mr. Yepes' arguments, but it must be realized that the question of statelessness was a very complex problem. As Mr. Koretsky had pointed out, economic and social phenomena must be taken into account, as must also the differences of opinion between those States which had a large immigrant population and those whose population had a marked tendency to emigration. The problem of migration was at the very basis of the question of nationality.

86. Mr. LIANG (Secretary to the Commission) drew attention to footnote 63a to paragraph 78 of the Secretary-General's memorandum, which stated that the Economic and Social Council had asked for a study of the problem of statelessness. The Secretary-General had presented a comprehensive document on the subject (E/1112). It could be asked whether the Commission should examine the problem of statelessness, deciding to include the subject of nationality in the list of topics for codification, or if it should leave to the Economic and Social Council the task of applying the resolution which guaranteed to each individual the right to a nationality.

87. Mr. FELLER (Secretariat) pointed out that the Economic and Social Council had before it the whole of the question dealt with in that section of Part II of the Secretary-General's

memorandum. The International Law Commission might therefore be duplicating the work of the Economic and Social Council and its subsidiary organs, in particular the Commission on Human Rights and the Commission on the Status of Women, not only in the question of statelessness but in other subjects dealt with in that Section. It would perhaps be advisable, therefore, to consider whether the Commission's report to the General Assembly should not contain suggestions on the relations of the International Law Commission with the Economic and Social Council.

88. Mr. SPIROPOULOS did not think that the question of nationality should be dealt with by the Commission; there were indeed few rules in international law which related to it. Besides, it had already been said during the meeting that the question of nationality came within the domestic jurisdiction of States. He pointed out that the Codification Conference of 1930 had dealt with that question; the only positive results had been obtained by the Nationality Commission, thanks to the skill of Mr. Politis; they were but trifling results, however, compared with the importance of the question as a whole. Divergences of political views had prevented the drawing up of a general convention on nationality. He stressed that in the matter of nationality it was a question of unifying existing law; that question was not within the domain of the Commission, whose mission was to codify law. At the moment, the question of nationality came within the competence of the Economic and Social Council, which was a political organ; the Commission would not have to study that question unless it was referred to it by the General Assembly following the work of the Economic and Social Council.

89. The CHAIRMAN thought that the Commission might point out to the General Assembly that it was necessary to unify the provisions of domestic law relating to nationality; such a recommendation might be made in accordance with article 23, paragraph (d), of the Statute of the Commission.

90. Mr. SCALLE did not think the arguments advanced against the selection of the subject of nationality convincing. The Commission had already decided that it should not be deterred by the fact that another United Nations organ was already seized of a question it proposed to examine; moreover, there were no grounds for deciding whether the question of nationality actually came under private or public international law: it could scarcely be admitted that such an important matter as statelessness came within the domestic jurisdiction of States. The Commission must take up the question; public opinion was keenly interested in the Commission's first work: it would be very surprised if a question which concerned millions of human beings did

not appear on the list of subjects to be studied, particularly since that question was closely connected with the Universal Declaration of Human Rights and the draft Declaration on the Rights and Duties of States. He again affirmed his conviction that the question of nationality should appear on the list of suitable topics for codification.

91. Mr. HSU shared Mr. Scelle's opinion. The priority to be given to that subject would have to be discussed, but there seemed no doubt whatever that it was among those topics whose codification was necessary or desirable. The failure of the League of Nations in that field should be an incentive rather than a deterrent. Moreover, the situation had changed: the International Law Commission was a technical organ; it was not required to elaborate a convention, as had been the case for the League of Nations, but it could recommend that the General Assembly should adopt one of the four solutions envisaged in article 23 of the Statute.

92. The CHAIRMAN pointed out that many States were in the process of making great changes in their national legislation. It would therefore be advisable to wait until the upheavals of the war had calmed down before undertaking a study of the question of nationality.

93. Mr. SANDSTROM pointed out that, if the topic were retained, a shorter or longer period, according to the priority it was given, would elapse before it was examined. There was therefore no need to wait before placing that question on the list of topics for codification.

94. Mr. SCELLE stressed that the difficulties arising from the conflicting laws relating to nationality constituted one of the barriers to the formation of an international universal society and even to normal relations between individuals. The mission of the International Law Commission was to promote the integration of that international society; it would be contrary to the spirit of its work to decide not to undertake the study of the question of nationality.

95. Mr. FRANÇOIS and Mr. YEPES supported the point of view expressed by Mr. Scelle.

The Chairman concluded that the general opinion was in favour of including the question of nationality in the list of suitable topics for codification.

(m) THE TREATMENT OF ALIENS

96. The CHAIRMAN thought that the question of the treatment of aliens could be linked up with the question of State responsibility, dealt with in Section VIII of Part II of the Secretary-General's memorandum, since the State responsibility visualized was connected with damages caused to aliens.

97. Mr. SANDSTROM thought there might be some value in retaining the question of the treat-

ment of aliens, for it served as an introduction to the question of State responsibility.

98. Mr. SCELLE was also in favour of including that question, for he considered it a necessary complement to the question of nationality, whose inclusion had been decided upon. He pointed out that the question of State responsibility was subordinate to that of the treatment of aliens, since the responsibility only arose if the State was under an obligation to treat aliens in a certain way.

99. Mr. SPIROPOULOS said that his position with regard to that question was identical to that which he had stated in connexion with the question of nationality: it was a question of unification and not of codification. In view, however, of the decision taken by the Commission on the question of nationality, the question of the treatment of aliens should be placed on the list of topics for codification.

The Chairman concluded that the question of the treatment of aliens would be placed on the list of suitable topics for codification.

The meeting rose at 6 p.m.

6th MEETING

Wednesday, 20 April 1949, at 3 p.m.

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Chairman: Mr. Manley O. HUDSON.

Rapporteur: Mr. Gilberto AMADO.

Present:

Members: Mr. Ricardo J. ALFARO, Mr. James L. BRIERLY, Mr. Roberto CORDOVA, 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.