Document:-
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Summary record of the 6th meeting

Topic:
Programme of work

Extract from the Yearbook of the International Law Commission:-
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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 treatment 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.

CONTENTS

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

Present:

Members: Mr. Ricardo J. Alfaro, Mr. James L. Brierly, Mr. Roberto Córdova, Mr. J. P. A. François, Mr. Shuhsi Hsu, Mr. Vladimir M. Koretsky, Sir Benegal N. Rau, Mr. A. E. F. Sandström, Mr. Georges Scelle, Mr. Jean Spiropoulos, Mr. Jesús María Yepes.

Secretariat: Mr. KERNO, Assistant Secretary-General in charge of the Legal Department; Mr. 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) EXTRADITION

1. The CHAIRMAN pointed out a serious omission in the comments in the Secretary-General's memorandum, which were otherwise very comprehensive. There was no mention therein of the fact that the first extradition treaties contained a detailed list of crimes for which a person could be extradited, which had progressively become considerably longer; in recent years a tendency had been noted not to include that list in treaties, and to replace it by a general description of the characteristics of the crimes for which a person could be extradited. That tendency had been noticeable in the Convention on Extradition signed at Montevideo in 1933.[1]

2. He was glad to note that the Secretary-General's memorandum stated that the law of extradition was an instrument of international co-operation for the suppression of crime. He thought it unnecessary to emphasize the five questions [2] chosen by the League of Nations Committee of Experts as being proper subject matter of codification by way of a general international convention. He drew attention to the rule that an extradited person should not be tried for an offence other than that for which he was extradited; that rule had been erroneously interpreted in certain countries.

3. Mr. FRANÇOIS did not consider that the topic should be included. Extradition was an act of mutual assistance for the suppression of crime; it depended on the existence of similar political conditions in the two States concerned. Seeing that identical political conditions did not exist in all States, it would be useless to attempt to create uniform rules for extradition. He thought it would be preferable to maintain the existing practice of regulating the conditions of extradition by means of bilateral or regional treaties.

4. Mr. BRIERLY concurred in the views expressed by Mr. François. Multilateral conventions were founded on mutual confidence between the signatories and on an identical conception of the administration of justice. The facts showed that generally speaking those conditions were not fulfilled at the existing juncture. It seemed therefore that the law of extradition should continue to be regulated by bilateral treaties.

The Chairman observed that none of the members of the Commission was in favour of the codification of that topic; it would therefore not be included in the list of topics of which the codification appeared necessary or desirable.

(b) THE RIGHT OF ASYLUM

5. The CHAIRMAN considered that the Secretary-General's memorandum contained expressions which were not warranted when it spoke of "the obligation not to extradite" persons accused of political offences and of "a positive duty" to receive them.[3]

6. Mr. LIANG (Secretary to the Commission) pointed out that in diplomatic correspondence the right of asylum was frequently "claimed"; if the right of asylum was admitted to exist, it could logically be asserted that that right, which could be claimed, implied a corresponding obligation.

7. Mr. YEPES requested that the subject of the right of political asylum should be given special priority; the question appeared to be one of those the codification of which was eminently necessary and desirable. The right of asylum occupied a very important place in the customary law of Latin America and its universal codification was called for by the existing world situation. He emphasized that the right of asylum had been the means of averting holocausts in a number of countries; if it had been universally respected, the world would have been spared the tragedies it had known.

8. The Conventions of Havana and Montevideo, concluded in 1928 and 1933, could be used as a basis in drawing up an important chapter of international law which the world was anxiously awaiting. He therefore proposed that the codification of the right of political asylum should be placed on the agenda of the first session of the Commission; it might be useful to set up a sub-committee to consider the question and submit a special report to the Commission.

9. Mr. SCELLE also felt it was highly important to include that topic. He wished, however, to emphasize that there was a close connexion between the question of extradition and the question of the right of political asylum. He had not expressed himself in favour of the codification of the right of extradition, since it was obvious that the codification of that right would lead the

[1] See Manley O. Hudson. *International Legislation*, Vol. VI, 1932-1934, pp. 597-606.

[2] See A/CN.4/1/Rev.1, para. 85.

[3] *Ibid.*, para. 88.

Commission too far. The difficulties that would be encountered in the codification of the right of extradition would not arise, however, in the codification of the right of asylum. The Commission should include the topic of the right of political asylum, at least for the elaboration of some broad general principles if not for complete codification.

10. Mr. BRIERLY said he found it difficult to form a precise opinion on the subject, as he wondered what was meant by right of asylum. Did it refer to the right of a State to grant asylum? Such a right was indisputable. Or was it the right of an individual to demand admission to a State? The latter right did not exist at that time, and there was no reason to suggest that it should be established.

11. The CHAIRMAN thought that the right of asylum should be interpreted as the right of a State to grant asylum to certain individuals, in legations, warships and military camps, for instance. There could be no question of the right to demand asylum, but only of the right of a State to offer asylum and to have that asylum respected by the State which had jurisdiction over the individual concerned.

12. Mr. ALFARO pointed out that there was, on the one hand, the right of a State to grant asylum and the corresponding obligation on the part of another State to respect that asylum and, on the other hand, the right of an individual to seek asylum. The latter right had been examined for the first time in 1865 after a revolution in Peru in the course of which the deposed Ministers had sought asylum in the French legation which, on the instructions of the Government of Napoleon III, had refused to hand them over. A conference then convened in Peru had given formal recognition to the right of asylum. The highly humanitarian character of that right had been respected ever since throughout the American continent. The right of a State to grant asylum and the obligation of another State to respect that asylum was a most important question which, as Mr. Yepes and Mr. Scelle had suggested, should be selected as a topic for codification.

13. Mr. LIANG (Secretary to the Commission) pointed out that the right of an individual to seek asylum was dealt with in article 14 of the Universal Declaration of Human Rights. There could therefore be no question of contesting an expression used in so important a document.

The Chairman concluded that the question of the right of asylum would be included in the list of topics to be retained.

(c) The law of treaties

14. The CHAIRMAN drew the Commission's attention to certain observations in the Secretary-General's memorandum. He did not agree that there was " uncertainty as to the necessity of ratification with regard to treaties which have no provision for ratification ", nor did he think that there was any uncertainty " in the matter of the important subject of the relevance of the constitutional limitations upon the treaty-making Power ".[4]

15. Mr. BRIERLY proposed that the topic should be selected for codification and should be given a certain priority. The only possible objection to its inclusion in the list was that it was a very wide question which might take up several meetings of the Commission. He would like to have seen some reference in the Secretary-General's memorandum to the possible consequences of the breach of a treaty by one of the parties: would such a breach release the other party from its obligations under the treaty?

16. Mr. SCELLE supported Mr. Brierly's statement. It was undoubtedly difficult to undertake the codification of the whole question of treaties; there were still many points, however, that were not well defined and in that respect the work of the Commission would be useful and even essential.

17. Mr. SPIROPOULOS also supported Mr. Brierly's proposal. The question of treaties was one of the most important questions of international law, both in its theoretical and practical aspects. The Permanent Court of International Justice had established a jurisprudence in the matter which far from preventing the work of codification should on the contrary encourage and help it.

18. Mr. ALFARO agreed entirely with the views expressed by the previous speakers. He wished to draw the Commission's attention to the need of establishing specific rules on the value of the principle of *pacta sunt servanda* in relation to the clause *rebus sic stantibus*. There was regrettable uncertainty on that question. He would like to see a " code for the observance of treaties ".

19. Mr. FRANÇOIS noted that Mr. Brierly had emphasized the particular importance of the question. It seemed to him, however, that there were two aspects to that question: the unification of the drafting of treaties on the one hand, and the unification of the fundamental principles of treaties on the other. The Commission could therefore devote itself first of all to the elimination of any divergencies in the wording of treaties, so as to avoid any contentious interpretations or at least unnecessary doubts. The Secretariat would be able to give the Commission particularly effective help in that work.

20. Mr. YEPES thought, like the other members of the Commission, that the question of treaties

[4] *Ibid.*, para. 91.

was most important and he was therefore in favour of its inclusion on the list of topics for codification. He pointed out that paragraph 92 of the Secretary-General's memorandum presented the question in a way that might give the impression that the revision of treaties was favoured: it should be made clear that such an interpretation of the paragraph would be wrong.

The Chairman said the subject of treaties would be included in the list of topics to be retained.

(d) Diplomatic intercourse and immunities

21. The CHAIRMAN noted that the Secretary-General's memorandum dealt principally with the question of immunities. It was to be regretted that the memorandum did not also examine "the various aspects of diplomatic intercourse in general."

22. Mr. BRIERLY thought the topic should be retained but not given any kind of priority, since there was no immediate urgency for its consideration.

23. Mr. SCELLE and Mr. SPIROPOULOS shared Mr. Brierly's opinion.

As there were no objections, the Chairman said the subject of diplomatic intercourse and immunities would appear in the list of topics to be retained.

(e) Consular intercourse and immunities

24. The CHAIRMAN pointed out that bilateral treaties provided abundant material for the study of the above question; he mentioned among others the Convention adopted by the Sixth International Conference of American States held at Havana in 1928 [5] and the work of the Harvard Research.[6] He noted that new ideas had recently appeared in consular conventions.

25. Mr. ALFARO observed that having retained the subject of diplomatic intercourse and immunities, the Commission should also retain, with the same priority, the subject of consular intercourse and immunities.

26. Mr. SPIROPOULOS and Mr. BRIERLY supported Mr. Alfaro's proposal.

The Chairman concluded that the general opinion was in favour of retaining the subject of consular intercourse and immunities.

(f) State responsibility

27. The CHAIRMAN thought the observations in the Secretary-General's memorandum would have gained by being more detailed. He pointed out that the subject had first been considered to concern the responsibility of States for damage to the person and property of aliens; it had then been extended to the penal responsibility of States and of individuals acting in the name of the State. It was therefore related to the principles of the Nürnberg Charter. He drew the Commission's attention to the comment on "extinctive prescription" in the memorandum. He was sorry the memorandum made no reference to a question which was of great importance, particularly in the eyes of the Latin-American countries, namely the *Calvo doctrine:* how far would domestic laws have the last word in the matter of State responsibility?

28. Mr. CORDOVA thought that the question of State responsibility was of particular importance and that the Commission should retain it among the topics for codification. The question was closely connected with that of the position of aliens, whose codification had been envisaged. Replying to the Chairman, he stated that the Commission should not restrict itself to the question of State responsibility toward aliens, but should study all infringements of the duties incumbent on States.

29. Mr. FRANÇOIS recalled that the study of those questions had completely broken down at The Hague Conference in 1930; the failure had been so complete that a report had not even been drawn up. The situation did not appear to have developed sufficiently to justify a hope of success at the existing time. He therefore proposed that the subject of State responsibility should not be retained.

30. Mr. BRIERLY observed that that question was one of the most legal of all those set forth in the Secretary-General's memorandum; the Commission would therefore fail in its duty if it did not undertake the codification of that topic. There were certainly difficulties, as Mr. François had indicated, but it could be imagined that there had been a certain development of ideas since 1930. It would undoubtedly be inadvisable to recommend the adoption of a convention, but the Commission might recommend to the General Assembly one of the other measures visualized in article 23 of the Statute. It would therefore be a pity to exclude that subject from the list of topics for codification.

31. Mr. SPIROPOULOS shared Mr. Brierly's point of view. While the facts to which Mr. François had drawn attention were admittedly correct, it must not be forgotten that the opinion of Governments was after all that of the jurists who represented them: it was not therefore an objective opinion, and an evolution might well have taken place since the previous attempt at codification.

32. Mr. SCELLE did not consider that the failure at the 1930 conference was an adequate

[5] See Manley O. Hudson, *International Legislation*, Vol. IV, 1928-1929, pp. 2394-2401.

[6] See Supplement to *American Journal of International Law*, Vol. 26, 1932, pp. 189-449.

reason for not undertaking the codification of the subject. The Commission should of course be very cautious and should approach the subject in such a way as to avoid any very great difficulties, at least in the early stages. The question of State responsibility would recur constantly during the study of the majority of the subjects which the Commission had already placed on the list of topics for codification; it would therefore be difficult not to include that question also.

The Chairman concluded that the general opinion was in favour of including the question of State responsibility on the list of topics to be retained.

(g) Arbitral procedure

33. The CHAIRMAN called upon members of the Commission to state their views on the inclusion of arbitral procedure in the list of topics suitable for codification. He drew their attention to the observation in paragraph 99 of the Secretary-General's memorandum that the codification might include provision for the appellate jurisdiction of the International Court of Justice.

34. Mr. ALFARO favoured the inclusion of that question in the list of topics for codification. He suggested, however, that to bring the title of that topic into line with the provisions of Article 2 of the Charter, it should be changed to " The Law of Pacific Settlement ". There were few bilateral agreements which established the obligation of the contracting parties to settle their disputes by arbitration. Only optional recourse to arbitration had met with some success. The Commission should inquire into and establish rules for the means of compelling States to settle their disputes by pacific methods.

35. The CHAIRMAN expressed some doubt as to the acceptability of Mr. Alfaro's suggestion in view of the fact that the Commission had decided at the preceding meeting not to retain for the time being the question of pacific settlement of international disputes which Mr. Alfaro had proposed as a topic for codification.

36. Mr. BRIERLY, supported by Mr. SPIROPOULOS, was of the opinion that arbitral procedure should be included without change of title in the list of topics for codification.

37. Mr. LIANG (Secretary to the Commission) drew the Commission's attention to the report of Sub-Committee 6 of the Interim Committee (A/AC.18/SC.6/4), to which he had referred at the preceding meeting. It was stated in the report that the Sub-Committee's Working Group had worked out the plan of study on the question of peaceful settlement of disputes among nations " with the responsibilities of the International Law Commission in view ", and that the " future studies in this field should also be co-ordinated with the work of the International Law Commission " (page 4).

38. Mr. SPIROPOULOS pointed out that when the Commission had taken its decision at the preceding meeting on the topic proposed by Mr. Alfaro, it had not been in possession of the facts which Mr. Liang had just put before it. Since it seemed to be the intention of the Interim Committee that the International Law Commission should deal with the question of the peaceful settlement of disputes, that question might perhaps be included in the list, without, however, being given high priority.

39. Mr. KORETSKY emphasized that the International Law Commission took its directives from the General Assembly only. That was the only United Nations organ that had the right to submit suggestions to the Commission. Mr. Koretsky did not want to delay the Commission's work by stating his views on the Interim Committee, which in his opinion was illegal and had been set up in violation of the Charter, but he asked the Commission to disregard the report of the Interim Committee's Sub-Committee 6, in order to avoid unnecessary complications.

40. In reply to a question by the CHAIRMAN, Mr. HSU, who was the representative of China on the Interim Committee, explained that the report in question had been adopted without any amendment by Sub-Committee 6 and by the Interim Committee itself. He thought that in submitting that report to the Commission, Mr. Liang had not had the slightest intention of submitting a request from the Interim Committee; he had no doubt simply wished to draw the Commission's attention to the fact that the Interim Committee had expressed the view that part of its work might be carried out by the International Law Commission.

41. Mr. HSU explained that he had not intervened in the preceding meeting's debate on Mr. Alfaro's proposal because he had felt that it had not been presented at a suitable time. Since arbitration was one of the methods of peaceful settlement of disputes, it seemed that the time had come to consider the question as a whole, in the form in which it had been presented by Mr. Alfaro.

42. Mr. KERNO (Assistant Secretary-General) pointed out that the organs of United Nations other than the General Assembly were referred to in two articles of the Statute of the Commission: article 17, which mentioned the principal organs of the United Nations, thus excluding the Interim Committee, and paragraph 1 of article 25, where reference was made to " any of the organs ", which applied to the Interim Committee as well as to the others. Mr. Kerno recalled that the Interim Committee had been set up by a decision of the General Assembly and that certain Members of the United Nations considered that organ illegal.

43. The CHAIRMAN pointed out that according

to the terms of paragraph 2 of article 25, the documents of the Commission which were circulated to Governments would also be circulated to such organs of the United Nations as were concerned. That same paragraph permitted those organs to furnish information and to make suggestions. He was of the opinion that if an organ of the United Nations wished to make a suggestion to the International Law Commission, it should communicate with it to that effect. It was not for the Commission itself to take the initiative of looking through the documentation of the various organs of the United Nations for any reference to its activities. In view of the fact that the Commission had not been in possession of all the factors of the question at its last meeting, he asked the members of the Commission if they wished to reopen the debate on the proposal submitted the previous day by Mr. Alfaro.

44. Mr. ALFARO stated that he was quite ready to submit his proposal again at a later stage in the work of the Commission.

The Chairman thought that there was general agreement to include the law of arbitral procedure, without changing its title in any way, on the list of topics to be retained.

(h) The law of war

45. Mr. ALFARO asked the members of the Commission to decide whether the question of the law of war, which had been suggested by Mr. François, and that of neutrality should be included on the list of topics to be retained.

46. The CHAIRMAN read paragraph 14 of the working paper prepared by the Secretariat (A/CN. 4/W.1). He pointed out that in his opinion the principles upon which the Charter and the judgment of the Nürnberg Tribunal were based were those dealing with wars of aggression.

47. Mr. SCELLE thought that the topic should be examined, but under another heading. Since the Charter had outlawed war, there could in fact no longer be any question of the law of war, namely, of the right of a State to commit a criminal act. On the other hand, the Commission would have to consider the regulation of the use of force in international relationships.

48. According to the concept of the Briand-Kellogg Pact, war was the right of a Government, acting in virtue of its sovereignty, to have recourse to the use of force in order to ensure the triumph of a national ambition. The Charter of the United Nations, contrary to the spirit of the League of Nations Covenant, had endeavoured to organize an international police system for the prevention of war. War and the use of an international police force were two essentially different and even diametrically opposed ideas. While war was an anarchistic phenomenon, whereby a State made use of force in order to ensure the prevalence of what it considered to be law, the use of an international police was a resort to force in order to maintain international order.

49. Mr. SCELLE was of the opinion that the regulation of the employment of an international police force should be one of the chief preoccupations of the Commission, that specific rules should be established for that most dangerous executive function, and that there should be no further mention of the law of war.

50. Mr. SANDSTROM wondered whether the question presented by Mr. Scelle did not fall within the province of the progressive development of international law rather than that of its codification. In his opinion, the Commission would be well advised to postpone the study of that question until a later time. Mr. Sandström pointed out that an International Red Cross Conference was to take place in Geneva on 21 April 1949; it would deal with war conventions. That proved that if the law of war belonged to the past, war itself still remained a reality.

51. Mr. SPIROPOULOS agreed with Mr. Scelle, but for different reasons, that there was no need to codify the law of war. War was unfortunately a possibility; it could result from a decision of the Security Council; again it could arise from a conflict between two States and could involve all the other States. In such a case, the law of war had necessarily to be applied. Mr. Spiropoulos recalled that in spite of the agreement of the signatories of the Briand-Kellogg Pact, to have no recourse to war, it had been necessary to apply the law of war to World War II. The Commission should not, however, take up that question immediately, because the greater part of the law of war had already been codified by international conventions, in particular by The Hague Convention and by the London Declaration of 1909, which, if they were to be applied, would prove highly efficacious, whereas nothing had as yet been codified in the field of the law of peace.

52. Mr. HSU thought that the only question was that of the priority to be given to the study of that subject. The Commission had in fact to regulate the law of war, in particular that of aerial war, for the situation had changed considerably since the signature of the international conventions mentioned by Mr. Spiropoulos It was true that war had been outlawed as an instrument of national policy. It could, however, be ordered by the Security Council. The possibility of a defensive war might also be envisaged. It was essential, therefore, to draw up regulations governing the laws of war.

53. Mr. KORETSKY could not conceal his astonishment at the fact that certain members of the Commission refused to place such items as the peaceful settlement of international disputes among the appropriate subjects for codification, and asked that the laws of war should be retained as a necessary or desirable subject for codification.

54. The horrors of the Second World War were known to everyone, and no one should be ready to forget them. Mr. Scelle had suggested that the Commission should regulate the employment of international police. If the Commission did so, it could be justly reproached with having taken part in political and legal preparation for a Third World War. The Commission should not transform itself into a legal general staff which would pursue its activities in concert with the general staff of the North Atlantic Treaty Organisation. It should categorically refuse to discuss war. It should not even contemplate the possibility of a Third World War, as Mr. Spiropoulos had done, for its mission was to prepare legal formulas which were most likely to ensure the peace and security of the peoples and to regulate friendly relations between States.

55. Mr. BRIERLY supported Mr. Koretsky's remarks. Contrary to Mr. Spiropoulos's opinion, he felt that international conventions regarding war were far from satisfactory. The Commission should however, refrain from taking up the question of the laws of war because if it did so its action might be interpreted as a lack of confidence in the United Nations and the work of peace which the latter was called upon to carry out, and as a proof of the very relative value which might be attached to the obligation assumed by the signatories to the Charter to settle their disputes by peaceful means. Nothing would create a worse impression of the Commission's work, nothing would upset public opinion more.

56. The Commission's task was to lay the foundations of a peaceful world. It could be rightly criticized if it turned its consideration to war. Furthermore, Mr. Brierly did not think that the members of the Commission were qualified to study the technical aspects of the problem of war. In fact, jurists should neither study new methods of warfare, which developed with amazing rapidity, nor regulate the use of various weapons of war. Attempts had been made to regulate the use of certain weapons, but they had always failed. For those reasons, and particularly for the first, he considered that the Commission should not place the law of war among the suitable topics for codification.

57. Mr. CORDOVA stated that he was somewhat surprised that Mr. Alfaro had asked for the law of war to be placed among those subjects chosen by the Commission for codification. The Latin-American countries took credit for having played an important part in the fight against war. It was the Mexican delegation that had first submitted to the Havana Conference in 1928 a proposal that wars of aggression should be outlawed. Some months later the Briand-Kellogg Pact had forbidden its signatories to have recourse to war, whatever its nature. The members of the Commission, as well as the Members of the United Nations, were linked by the Charter. In view of the fact that the latter condemned war, the Commission could not undertake the study of a subject which referred to war, that was to say a question which was counter to the real purpose for which the Commission had been set up.

58. It was true that Article 51 of the Charter referred to the right of self-defence, but it should not be forgotten that even in national legislation the principle of self-defence was not codified. Since the Charter imposed on its signatories the obligation to settle their disputes by peaceful means, the Commission could not apply itself to the task of drawing up standards to govern the settlement by force of those disputes.

59. Mr. ALFARO regretted that his words had been misinterpreted by Mr. Córdova. What he had wished to say was that since the Commission was reviewing the whole of international law, its study would be incomplete if it did not also include the law of war which, as Mr. François had pointed out at the first meeting, constituted one of the longest chapters in the law of nations. He had never, however, had the slightest desire to have that question placed on the list of topics for codification, for what seemed to him the very adequate reason which had just been added to the arguments of Mr. Koretsky and Mr. Brierly, that, having refused to place the question of the pacific settlement of disputes on its list, the Commission could not place the law of war upon it without shocking the conscience of the world.

60. Sir Benegal RAU shared the opinions expressed by Mr. Koretsky and Mr. Brierly. It seemed that the Commission had enough work to do without taking up the study of the law of war, the codification of which at the existing time would not fail to have a deplorable psychological effect on world opinion.

61. Mr. SCELLE observed that the spirit of his previous intervention hat not been correctly understood by Mr. Koretsky. The real question was whether the Commission was going to refuse to codify international criminal law. Could it shirk that duty, when the General Assembly itself had instructed it to draw up the Nürnberg principles, which were an integral part of criminal law and involved all questions connected with the suppression of recourse to war—a crime in itself—and all the additional crimes committed during war, such as the bad treatment of prisoners and the wounded?

62. It was not therefore a question of stating in what cases it was permissible to make war, or of drawing up the law of war in the original sense of the term. It had been recognized once and for all that war was a crime, but from the legal point of view every crime must be defined. The Commission's task was to specify in what circumstances a crime had been committed and to state that the unlawful use of force constituted that crime whereas its lawful use was of quite a

pifferent nature, namely, international police action for the clear purpose of repressing the crime which was being committed and maintaining peace. Following the example of the International Red Cross Conference at Geneva and without thereby being accused of establishing the law of war, the Commission should lay down a certain number of rules making it possible to define the supplementary crimes which might be committed during a war and which formed to some extent the circumstances aggravating the chief crime which lay in the unlawful use of force.

63. To claim that any such regulation became impossible once war had been outlawed would be tantamount to stating that it was impossible to make laws for murder on the grounds that murder also was prohibited, as were all other crimes and offences. The fact that war was prohibited did not mean that the Commission was no longer bound to consider the penalty for that crime and for all those which might be committed in connexion with it. Public opinion was awaiting the establishment of rules which would define the crime of war and all crimes connected with it and the methods for their prevention; that question should be included in the list of topics for codification.

64. Mr. YEPES thought that the outlawing of war by the Charter rendered it a state of international anarchy for which rules could not be established. The New World had laid down final regulations on that question at the Ninth Pan-American Conference in 1948, at which the Bogotá Pact had been drawn up making it obligatory for all the States to settle their disputes by peaceful means and categorically prohibiting war. It would certainly create an unfortunate impression on public opinion if the law of war were included in the list of topics for codification.

65. Mr. AMADO suggested that the examination of that question should be adjourned until the Commission had studied item 3 of the agenda, the formulation of the principles of Nürnberg, which had been specially referred to the Commission by the General Assembly.

66. Mr. BRIERLY stated that he was opposed to the codification of the law of war in the original meaning of that term but that he did not see any objection to the Commission's considering at a later date the totally different subject introduced by Mr. Scelle.

67. Mr. LIANG (Secretary to the Commission) drew the Commission's attention to item 3 (*b*) of the agenda, which envisaged the preparation of a draft code of offences against the peace and security of mankind. The question raised by Mr. Scelle might be examined at the same time as that item of the agenda. As a general rule, the Secretariat refrained from expressing a definite opinion on the questions submitted to the Commission, but in that particular case he felt that he should state that, in his opinion, the Commission should exclude the law of war from its subjects for codification, since the Charter had clearly condemned the previous conception that war was a natural calamity creating a situation in which the two parties concerned were on an equal footing and enjoyed equal rights.

The Chairman noted that the majority of the Commission was opposed to including the law of war on the list of topics for codification.

(i) NEUTRALITY

68. Mr. ALFARO thought that since the Commission had decided not to study the law of war, it should not retain on its list of topics for codification the subject of neutrality which was merely a consequence of war.

The Chairman stated that subject would not be included on the provisional list.

(j) GENERAL PLAN OF CODIFICATION

69. The CHAIRMAN announced that the provisional list of topics for codification was closed; it comprised the following fourteen points:

1. Recognition of States.
2. Succession of States and Governments.
3. Jurisdictional immunities of States and their property.
4. Jurisdiction with regard to crimes committed outside national territory.
5. Régime of the high seas.
6. Régime of territorial waters.
7. Nationality.
8. Treatment of aliens.
9. Right of asylum.
10. Law of treaties.
11. Diplomatic intercourse and immunities.
12. Consular intercourse and immunities.
13. State responsibility.
14. Arbitral procedure.

70. The CHAIRMAN noted with satisfaction that the Commission had been able to draw the list up rapidly thanks to the carefully prepared document produced by the Secretariat. The list, however, was only preliminary and provisional, and would have to be re-examined at the next session in case the Commission might wish to cut out or to add certain topics. Moreover, the Commission would have to decide on the order to be adopted for the examination of the topics. While the priorities suggested by the members had been noted, the Commission would have to reach final agreement at least on the first topics which it thought should be taken up as soon as possible.

71. Mr. Spiropoulos and other members had expressed the wish that the Commission should

consider drafting a code of international law which would include the various topics as they were codified. The first report to the General Assembly should mention that intention, and should further indicate that the Commission had provisionally chosen certain topics for codification which would come within the framework of that code. A statement of that nature in the report would create a favourable impression in the General Assembly and stimulate its interest in the work of the Commission. Other members of the Commission, however, did not share that view.

72. The Commission should therefore decide whether or not it wished to consider the possibility of establishing, at an advanced stage of its work, a kind of code which, if not complete, would at least be fairly broad. It should also decide whether those topics which had been retained in the provisional list should be included in such a code, bearing in mind the fact that a decision on that matter might have a bearing on the priority given to those topics.

73. Mr. KORETSKY felt that the question merited careful consideration. As the idea was to draw up a general plan in which the different topics for codification would be arranged, the Commission should not simply, by force of habit, adopt the traditional classifications of treaties, manuals and existing draft codes. Mr. Amado had been somewhat justified in stating that a kind of revolution had taken place in international law. From the historical point of view it could not be denied that the recognized law of nations had been drawn up during the era of liberal capitalism, on the basis of contemporary Roman law and by the transposition of the principles of civil rights in the international field. The twentieth century had, however, seen the establishment of new legal systems both at the national and the international level. Co-operation between States which were at different stages of historical evolution required a re-classification of matters of international law which took into account those modern concepts. Instead of placing emphasis on dogmatic problems, such a classification should stress recent aspects of the law of nations, such as the maintenance of international peace and security, co-operation between States, the struggle against the remnants of fascism, and the struggle against war, in the sense in which Mr. Scelle had spoken in his second statement.

74. In that way, the general plan for codification would lose the academic aspect of ordinary classifications and would emphasize the political significance of international law in relation to the existing historical situation, the principal factor of which was the creation of an international organization which was to bring peace and security to the world. It was such a document as that that should be submitted to the General Assembly, which, being an assembly of a fundamentally political nature, would show more interest in a plan for codification reflecting the political conditions of the twentieth century than in a classification which was more than one hundred years old.

75. Mr. Koretsky thought that he himself might be able to submit a draft plan of codification seen from that angle, but he would not be able to do so at the moment, as such work should be the result of slow and careful preparation.

76. The CHAIRMAN said that he would be prepared to examine any new system for classification which took into account the present international community, on condition that he was not asked to stray too far into the political field since that was not within his competence nor that of the Commission. It would be better, in his opinion, for the Commission to limit itself to presenting to the General Assembly each year documents which would modestly bear the imprint of the current year, rather than trying to produce a work bearing the mark of the twentieth century.

77. Moreover, an examination of the topics which had been retained for codification would show that the majority of them constituted a heritage of the past, and yet each of them posed questions which existed today. The Commission should not be deterred from its purpose by the pretext that the world had for centuries attempted in vain to find a solution to those problems. Whatever Mr. Koretsky might have said, it appeared that in principle he accepted the idea of a general plan of codification as an objective to be reached in the not too distant future.

78. Mr. SPIROPOULOS stated that when he had proposed the establishment of a general plan he had had in view the codification of international law as a whole. However wide in scope a codification might be, it was well to follow a plan which would serve as a guide to the work and within which the codified topics could be inserted. That had been the method followed in the conferences held in London and The Hague, when the rules governing war on land and sea had been drawn up. It was all the more necessary to use that method when undertaking the codification of international law in its entirety.

79. The PRESIDENT asked Mr. Spiropoulos whether he would agree to the more practical idea of a plan drawn up on fairly broad lines but which did not cover the whole of International law inasmuch as the Commission had decided against the codification of a certain number of topics.

80. Mr. SPIROPOULOS felt that the Commission could not be too ambitious in that field, and that if for practical reasons the plan could not be drawn up in too great detail, it should at least be as complete as possible. In his opinion, no better impression could be made on the General Assembly than by informing it that the Commission's final aim was to give to the world a complete

code of international law. With regard to Mr. Koretsky's objections, Mr. Spiropoulos pointed out that the general outline of the plan could not prejudge its contents, and that topics could very well be given a new aspect within the framework of the traditional divisions of recognized international law.

The meeting rose at 6 p.m.

7th MEETING

Thursday, 21 April 1949 at 3 p.m.

CONTENTS

Chairman: Mr. Manley O. HUDSON.

Rapporteur: Mr. Gilberto AMADO.

Present:

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

Secretariat: Mr. KERNO, Assistant Secretary-General in charge of the Legal Department; Mr. 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) (*concluded*)

REVISION OF THE PROVISIONAL LIST AND PRIORITY OF TOPICS

1. The CHAIRMAN asked whether the members of the Commission wished to revise the list of fourteen topics which had been retained for codification. He thought for his part that such a revision was hardly necessary at that stage since the Commission was free to re-examine the subject later.

2. Mr. KORETSKY stated that he found it difficult to say immediately which subjects could be codified with any chance of success. He reminded the Commission that he had proposed that it should postpone the detailed and final examination of that question and request the Rapporteur to make a preliminary study of it with the assistance of the Secretariat. Since the Rapporteur had not felt that he should accept that task, Mr. Koretsky thought that it might be useful to set up a sub-committee for that purpose.

3. He recalled that under article 18 of the Statute the Commission was called upon to survey the *whole* field of international law. The preparatory work resulting in that text made it impossible to doubt that its authors had intended the survey to cover both customary international law and the law concerning treaties, of which there were a considerable number. The treaties published and registered by the United Nations during the last two years alone filled thirteen volumes.

4. He considered that the Commission had not so far reviewed the whole field of international law in conformity with the General Assembly's instructions. Its selection had been guided by intuition, scientific considerations and the personal experience of its members rather than by objective realities. It was quite possible that the passivity of the old theories still dominated the conceptions of certain members who had participated in previous attempts at codification. The Statute laid down that the Commission should consider existing codification drafts whether emanating from Governments or private institutions. The Commission had already had occasion to note that if it left aside all political considerations in the selection of topics, it would not achieve the results which were expected of it.

5. Mr. KORETSKY recalled that so far international law had been tinged with the Europeanism of the Nineteenth Century, a period when French capital had supported Czarism, when French had been the diplomatic language *par excellence*, and when French doctrines had predominated. The United Kingdom had also played an equally dominant role at that time, particularly in matters of maritime law. With the Twentieth Century, what might be called Americanism had made its appearance in international law; that was an obvious fact which could not be left out of account. Thus international law had hitherto been dominated by two tendencies the European and the American, which ignored any conceptions that had arisen in other parts of the world. Apparently, therefore, America and Europe wished to retain a monopoly of civilization. It was well