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ORIGINAL: ENGLISH

COMMITTEE ON THE PROGRESSIVE DEVELOPMENT OF
INTERNATIONAL LAW AND ITS CODIFICATION

SUMMARY RECORD OF THE NINTH MEETING

Held at Lake Success, New York, Thursday, 22 May 1947 at 3:00 p.m.

Present:

Chairman:	Sir Dalip Singh	(India)
	Dr. Enrique Ferrer Viqueira	(Argentina)
	Dr. W. A. Wynos	(Australia)
	Mr. Gilberto Amado	(Brazil)
	Dr. Shuhsi Hsu	(China)
	Mr. Osman Ebeid	(Egypt)
	Prof. Henri Donnedieu de Vabres	(France)
	Dr. J. G. de Beus	(Netherlands)
	Mr. Roberto de la Guardia	(Panama)
	Dr. Alexander Rudzinski	(Poland)
	Mr. Erik Sjoborg	(Sweden)
	Prof. Dr. Vladimir Koretsky	(Union of Soviet Socialist Republics)
	Prof. J. L. Brierly	(United Kingdom)
	Prof. P. C. Jessup	(United States of America)
	Dr. Perez Perozo	(Venezuela)
	Prof. Milan Bartos	(Yugoslavia)

The CHAIRMAN opened the meeting and apologized that some of the proposals made by the members had not been put to the vote. With regard to some of them, he had considered there was a unanimous opinion about them, with regard to others he had not understood the representatives in question were making formal proposals. He therefore requested the members who wanted their proposals to be put to the vote, to announce expressly that they made a formal proposal and to read the text out slowly so that it could be taken down.

3. Improvement in Techniques of Multipartite Instruments

The CHAIRMAN opened the discussion on paragraph 3 of Chapter I A of the Secretariat memorandum (document A/AC.10/7). At the request of Prof. KORETSKY (Union of Soviet Socialist Republics) the three sub-headings of that paragraph were taken up separately.

(a) Uniform Treaty Clauses

Dr. WYNES (Australia) observed that although general discussions during the first week had been most useful, he feared that during the last days too much time had been spent on procedural questions. He reminded the Committee of the fear expressed by the representative for France that the Committee would have no time to deal with Item 4 of the Agenda. Taking as a basis the resolution adopted at the previous meeting on the subject matter of I A 2 of the Secretariat memorandum, Dr. WYNES suggested that the following resolution be adopted with regard to 3 (a):

That the Committee requests the Rapporteur to include in his report a reference to the utility and importance of improvement in techniques of multipartite instruments in relation to such matters as uniform treaty clauses. The Rapporteur is also requested to indicate that the Commission to be appointed should consider this matter and ways and means of bringing about such improvements with a view to ultimate recommendations to the General Assembly.

Dr. WYNES had considered that a composite resolution for the three matters covered by sub-paragraphs a, b, and c, would have been possible, but out of deference to Prof. KORETSKY'S request he restricted his proposal to 3 (a).

Prof. KORETSKY (Union of Soviet Socialist Republics) observed that he could not agree to the suggestion made by the Secretariat with regard to uniform treaty clauses. In his opinion there was a confusion between the conception of codification as an effort to lay down uniform rules binding on all countries and the leveling of all treaties to a single model. He emphasized that the legislations of the Member States varies. Every State should be allowed itself to determine its legal relations in accordance with its own traditions. It might be useful to make a collection of treaty provisions, and to make digests of their contents, but uniform rules should not be imposed on the States.

/Prof. KORETSKY

Prof. KORETSKY also expressed his opposition to the idea of establishing an international drafting bureau which in his opinion constituted an underestimation of the competence of every single State. The South American countries, for instance, had long since proved their expert ability in the matter of drafting, and the United Nations should not exercise any trusteeship over them in this respect. Prof. KORETSKY therefore proposed to delete from Dr. WYNES' text the word "uniform" and to insert instead the words "study and collection of".

Dr. LIANG (Secretary) did not share Prof. KORETSKY'S fears as to the effect which the suggestions made in the paragraph under discussion would have. The uniformity of treaty clauses referred to would only concern the provisions of a formal character, not the substantive ones. With regard to the international drafting bureau, the Secretariat's suggestion was made before it was known that a permanent commission might be created to study matters which might fall under the work of the suggested Drafting Bureau.

Dr. LIANG recalled the very useful work done by the Co-ordination Committee at the San Francisco Conference which performed with regard to the wording of the Charter exactly the same functions as were envisaged under 3 (a) for the international drafting bureau with regard to any multipartite instrument. The Preparatory Committee which met in London had followed the same procedure. It had not been at all the Secretariat's idea to suggest that the international drafting bureau should undertake drafting on behalf of the States, nor that the drafting of treaties on matters of substance should follow a definite pattern. Clauses dealing with matters of substance should certainly not be unified. In his opinion, the restricted scope of sub-paragraph 3 (a) followed clearly from the examples given in the same paragraph.

In Dr. LIANG'S opinion uniformity of the purely formal clauses which occur in all multipartite treaties would obviate many difficulties of interpretation and unexpected complications, and stated that his opinion was shared by many scientists.

Prof. JESSUP (United States of America) feared there was some misunderstanding with regard to the suggestion made under 3 (a). The uniformity of treaty clauses would be quite inappropriate for bipartite treaties, but in his opinion they should be recommended for multipartite instruments. In all international conferences where conventions had to be drawn up, these formal clauses had to be considered and much time had been wasted on them in the past. Prof. JESSUP shared Dr. LIANG'S opinion that many difficulties could be avoided if clear examples were available as a basis.

Dr. KERNO (Assistant Secretary-General) also emphasized that in this sub-heading 3 (a) firstly, only multilateral treaties were envisaged; secondly, only uniformity of the final formal clauses, and, thirdly, it was only meant as a recommendation and not as an obligation for the States. Any conferences would be perfectly free to ignore or alter the examples of treaty clauses drawn up. Dr. KERNO considered, however, that these sample clauses would be very useful. Up till the present the United Nations organizations had been drafting such clauses which had resulted in a most varied disorderly collection of provisions.

Prof. BARTOS (Yugoslavia) shared the opinion of Prof. KORETSKY and feared that the drawing up of such clauses would result in a collection of formulas such as used in notarial practice. Delegates at international conferences might be tempted to adopt such clauses automatically without giving due consideration to the question whether they were practical in any given case. Variations were useful although, of course, a variety of clauses might give rise to various interpretations. In Prof. BARTOS' opinion the suggestion made here would not result in development of international law, but rather in the stultifying of international law and might even result in international conferences adopting uniform clauses which had been given them as an example which in the meantime had become anachronisms.

/As to

As to the emphasis laid by the previous speakers on the fact that the suggestion was made for multipartite treaty clauses only, Prof. BARTOS feared there would be a tendency to use them as well in bipartite treaties. Therefore, the clauses in bipartite treaties should also be studied and it would become clear that they vary from State to State, which is caused by the differences between the various legislations and the changes to which they are constantly subjected.

The CHAIRMAN mentioned that Dr. WYNES' proposal was the only formal one and asked whether the members wanted to proceed to a vote on it.

Prof. KORETSKY (Union of Soviet Socialist Republics) proposed that the text submitted by Dr. WYNES be used as a basis, but that another term should be substituted for "uniform", which term was to express the idea that a collection and study of treaty clauses should be made. The method might be of a purely technical nature but was not at all simple. It was also a problem of languages. Prof. KORETSKY referred to the fact that in recent years Arabic had been admitted as an official language at international conferences.

In Prof. KORETSKY'S opinion the treaty clauses should be studied but not standardized.

The example quoted by Dr. LIANG of the practice followed at the United Nations conferences, where there was a more practical necessity for uniformity, could not be relied on with the same force in the wider field of international treaties where the circumstances being much more divergent might make a greater variety of clauses desirable.

At the CHAIRMAN'S request Prof. KORETSKY formally moved the following amendment:

To replace in the text proposed by Dr. WYNES the words "uniform treaty clauses" at the end of the first sentence by "study and collection of treaty clauses on certain matters".

/Mr. AMADO

Mr. AMADO (Brazil) expressed his agreement with the text as proposed by Dr. WYNES as the uniformity is only envisaged for the usual final clauses of treaties.

Dr. VIEYRA (Argentina) suggested to delete the word "uniform" only.

Dr. RUDZINSKI (Poland) raised a point of order as in his opinion the amendment proposed by the representative for the Union of Soviet Socialist Republics is inconsistent with the wording of Dr. WYNES' proposal. The "improvement of techniques" could not be brought into connection with the study and collection of treaty clauses.

Dr. WYNES (Australia) suggested using the word "standard" instead of "uniform" and Prof. BRIERLY (Rapporteur) proposed that the first sentence end after the word "instruments".

Dr. WYNES (Australia) accepted Prof. BRIERLY'S proposal and considered that it might even be accepted for the whole of paragraph 3.

Prof. KORETSKY (Union of Soviet Socialist Republics) expressed his agreement with this point of view if only it would not appear later on that the improvement of techniques should result in uniformity.

Prof. JESSUP (United States of America) asked for clarification on the vote to be taken. If Prof. KORETSKY'S acceptance of Prof. BRIERLY'S amendment was subject to the understanding that the future Commission would be excluded from recommending uniform treaty clauses, he was opposed to it. Prof. JESSUP supported the text originally proposed by Dr. WYNES.

Prof. KORETSKY pointed out that he had not wanted to bind the future Commission by the decision the present Committee would take on this subject.

Prof. DONNEDIEU DE VABRES (France) said that in view of the fact that Dr. WYNES had withdrawn his original proposal in favour of the amendment moved by Prof. BRIERLY, he wanted to re-introduce the original text as his own amendment, which in his opinion should be voted on first. After a discussion on the proper procedure to be followed with regard to

/the order

the order in which the proposals should be put to the vote, it was decided to vote first on the amendment furthest removed from the original text.

The CHAIRMAN thereupon put to the vote the amendment proposed by the representative for the Union of Soviet Socialist Republics to replace the words "uniform treaty clauses" by the words "collection and study of treaty clauses". This amendment had 3 votes in favour and 13 against it, and was therefore rejected.

A vote on the Argentine proposal to delete the word "uniform" was rejected by 11 votes against, 4 in favour, and 1 abstention.

The original proposal submitted by Dr. WYNES was put to the vote and accepted by 12 votes in favour, 3 against and 1 abstention.

(b) Encouragement of Ratifications and Accessions

The CHAIRMAN opened the discussions on paragraph 3 (b).

PROF. BARTOS (Yugoslavia) observed that in principle he was not opposed to the suggestions made under this sub-heading, but he proposed an alteration in the last part of the first paragraph. In his opinion the publication referred to in this paragraph should be extended to the ratifications of and accessions to conventions concluded under the auspices of the United Nations.

Dr. LIANG (Secretary) replied that this was the intention of the suggestion made in this paragraph and was expressed in the words "continuing the practice of the League of Nations". However, the Rapporteur would undoubtedly improve on the wording in order to avoid misunderstanding.

Prof. BARTOS (Yugoslavia) further observed that not only the ratification of conventions concluded under the auspices of the United Nations should be published but likewise those of conventions concluded by Members of the United Nations.

Prof. KORETSKY (Union of Soviet Socialist Republics) observed that for the conventions concluded under the auspices of the United Nations or by Members of the United Nations efforts should certainly be made to secure their ratification and bringing into effect. However, this Committee

should not engage in a probing of everything done in the past. Prof. KORETSKY did not consider it proper for the Committee blindly to adopt all conventions concluded at the time of the League of Nations. It would be for the politicians to decide which conventions would be taken over or not. Prof. KORETSKY therefore proposed that all reference to previous conventions should be omitted from this paragraph in the report to be drawn up.

Dr. LIANG (Secretary) emphasized that the paragraph under discussion did not concern itself with the treaties concluded under the auspices of the League of Nations but only with the League of Nations practice of periodically publishing information concerning ratifications, etc. In reply to a question by Prof. KORETSKY whether the first paragraph could not be deleted and only the second paragraph accepted, Dr. LIANG pointed out that his would not be enough as the second paragraph only referred to another way of encouraging ratifications and accessions and not to periodical publication thereof.

Dr. WYNES (Australia) observed that there was no actual disagreement amongst the members and moved a resolution similar to the one adopted for paragraph 3 (a), merely substituting for the words "uniform treaty clauses" the words "encouraging the ratification of and accession to multipartite instruments".

Prof. BRIERLY (Rapporteur) considered that the words "improvements in techniques" could be deleted as they do not belong in the wording proposed. Prof. BRIERLY asked whether the United Nations Secretariat is actually continuing the League of Nations practice. In his opinion the activities referred to under sub-heading 3 (b) were really the task of the Secretariat and he wondered what a Codification Commission could do in this field.

Dr. LIANG (Secretary) explained that the two paragraphs of the sub-heading each had their separate meaning. Quoting as an example the Convention on Immunities and Privileges which have not so far received

/many ratifications

many ratifications he pointed out that if the Secretary-General periodically published information on the progress of ratifications and accessions this would indirectly urge the States to take steps to ratify or to accede. However, some Members might take this as an admonition coming from the Secretary-General, therefore it would be useful if the Secretary-General could act on a recommendation by the Codification Commission. As to the second paragraph, this was intended to elicit an instruction for the Secretary-General to remind those States who failed to ratify or accede to any United Nations convention.

Prof. JESSUP (United States of America) asked whether Dr. WYNES would accept the following amendment in order to meet the point raised by Prof. BRIERLY: delete "improvement in techniques" till the end of the sentence and replace by "encouragement of ratifications of and accessions to multipartite instruments".

Dr. WYNES (Australia) accepted this amendment and in reply to a question from Dr. LIANG (Secretary) Prof. JESSUP (United States of America) agreed that the desirability of publication would be implied in the text as not worded.

Prof. BARTOS (Yugoslavia) observed that the points raised by Dr. LIANG with regard to both paragraphs 1 and 2 of sub-heading 3 (b) were really covered by General Assembly resolutions and needed no further action. With regard to the example of the Convention on Immunities and Privileges given by Dr. LIANG, he considered this was not a very fortunate one. It was true that up to the present only three States had ratified the Convention but several had caused it to be known that their ratification only awaited that by the United States as the party primarily concerned with the subject matter of the Convention. Several other United Nations Conventions however, had already received many ratifications and were about to enter into force. In Prof. BARTOS' opinion General Assembly resolutions should be enough and if he supported the proposal made by

/Dr. WYNES

Dr. WYNES it was only because it was in agreement with General Assembly resolutions.

Dr. LIANG (Secretary) pointed out that the General Assembly resolution with regard to the registration of treaties instructed the Secretary-General to publish ratifications or accessions as they are received but not to publish periodically lists of treaties in regard to which ratifications or accessions have not been sent in. A formal resolution of the General Assembly was needed to remind Member States of the desirability of ratifying the General Convention on Immunities and Privileges. The procedure suggested by the Secretariat would make the reminder less pointed.

Prof. KORETSKY (Union of Soviet Socialist Republics) appreciated the zeal of the Secretariat but considered that it should not go too far. Sovereign states should not be compelled to express their will at moments other than at which they were willing to do so and the Secretariat certainly would not wish to publish a sort of black list of Member States. Prof. KORETSKY stated that in his opinion the League of Nations' practices should not be referred to on all possible occasions. The United Nations might respect the past but should be organized on a basis of its own. Prof. KORETSKY therefore proposed to leave out all references to the League of Nations and seconded Prof. JESSUP'S amendment.

Dr. WYNES (Australia) proposed to delete in the second sentence of the text the words "and the ways and means of bringing about the suggested improvements".

The CHAIRMAN thereupon put to the vote the following text: "That the Committee request the Rapporteur to include in his report a reference to the utility and importance of encouraging the ratification of and accession to multipartite instruments. The Rapporteur is also requested to indicate that the commission to be appointed should consider this matter with a view to ultimate recommendations to the General Assembly".

This proposal was agreed to unanimously.

(c) Encouragement of the Use of Organs of the United Nations in the Conclusion of Multipartite Instruments

The CHAIRMAN opened the discussion on sub-heading (c) of paragraph 3.

Mr. SJOBERG (Sweden) observed that this paragraph bore a great resemblance to that of Item 3 (b) of the Agenda and he therefore proposed that the discussion be postponed until that item should be dealt with. Dr. LIANG (Secretary) replied that in paragraph 3 (c) of the Secretariat's memorandum the emphasis was on the desirability of concentrating the conclusion of multipartite instruments in the United Nations organs instead of the practice followed up to the present of having the States convene the conferences themselves. He did not insist however on this point and the Committee decided to take up paragraph 3 (c) simultaneously with Item 3 (b) of the Agenda.

B. METHODS FOR ENCOURAGING THE DEVELOPMENT
OF CUSTOMARY INTERNATIONAL LAW

The CHAIRMAN opened the discussion on Chapter I B of the Secretariat memorandum.

Prof. KORETSKY (Union of Soviet Socialist Republics) asked what the Secretariat understood by the small committee referred to at the end of the second paragraph.

Dr. LIANG (Secretary) replied that when the memorandum was written the Secretariat did not yet know that a single codification commission would be recommended for the future work. The task envisaged in this paragraph could now be entrusted to this commission which would also have to consider whether it considered the setting up of an additional committee desirable.

Prof. JESSUP (United States of America) considered that the Committee would not have to draw up a resolution for each of the paragraphs of the Secretariat memorandum but could give expression to its opinion on each of them. In Prof. JESSUP'S opinion the Rapporteur should leave out of his report the last sentence of the second paragraph suggesting that in

each country a certain number of experts would undertake the preliminary research with regard to the customary international law of that State.

Prof. BRIERLY (United Kingdom) concluded that the Committee wished him to mention in his report merely the desirability of making the digests referred to in paragraph B.

C. METHODS FOR ENCOURAGING THE DEVELOPMENT OF
INTERNATIONAL LAW THROUGH THE JUDICIAL PROCESS .

The CHAIRMAN opened the discussions on paragraph C. Prof. KORETSKY (Union of Soviet Socialist Republics) considered that the suggestions made here would not meet with any objections as to their substance but did not wish the Rapporteur to report on the suggestions in full. For instance, opinio juris is a term which may be used only for States having common law but not for other States. Prof. KORETSKY also considered that reports should not contain references to non-official digests, which, however valuable they might be, were often not perfect as to completeness and accuracy. As this Committee is composed of government representatives, it should only refer to official digests. On the same grounds as he raised under paragraph 3 (b), Prof. KORETSKY also expressed the opinion that the continuation of the publications of the Permanent Court of International Justice should not be referred to.

Prof. BRIERLY (Rapporteur) considered that it was not for this Committee to encourage the International Court of Justice in doing what was already its duty to perform and he asked for leave to exercise discretion in drawing up his report.

The CHAIRMAN stated that the Committee of course agreed on this and proposed that now the discussion of A 1 (B) open.

A. METHODS FOR ENCOURAGING INTERNATIONAL LEGISLATION

Prof. KORETSKY (Union of Soviet Socialist Republics) requested that the Committee now should consider whether the time had not arrived to decide generally whether the same or different methods should be used for development of international law and codification.

Mr. SJOBOG (Sweden) supported Prof. KORETSKY and the CHAIRMAN thereupon opened the discussions on Chapter II of the Secretariat memorandum and paragraph 13 of the Rapporteur's report (document A/AC.10/26).

Dr. LIANG (Secretary) pointed out that it should be borne in mind that the two methods, namely, the method of international convention and the method of scientific restatements, were not mutually exclusive, a point which was stressed in the last paragraph of the Secretariat memorandum. Restatement was only a step preliminary to codification by convention.

Prof. KORETSKY (Union of Soviet Socialist Republics)* had understood that the Secretariat allowed for two methods of equal value. From the very outset his position was that the General Assembly, the other United Nations Organs and Agencies should use only one of the methods, namely, that of international conventions. The United Nations was not a scientific organization and it must lay down definite rules in multilateral conventions. There was no such difference between development of international law and codification as would justify the use of different methods. International law could not move forward without definite rules. This was the understanding of the General Assembly in its instructions with regard to the Nuremberg principles. Only in this way could good progressive development be made. Many statements by members of the Committee proved that they were in support of this point of view and that they preferred the practice of States to scientific work. As an example, Prof. KORETSKY quoted the very useful work done under the Inter-American system. In the outline of the Inter-American system prepared by the Secretariat (document A/AC.10/8, page 31) it was said that "the task of codifying international law is intrinsically bound up with the progressive development of that law. In the words of the Committee [the Inter-American Juridical Committee] itself, the task of codifying international law is a large part de lege ferenda, the formulation of new rules to meet the changing conditions in the mutual relation of States".

* Full text of statement in document A/AC.10/32.

No agency should be allowed to impose its will on states. The United Nations is an intergovernmental agency and not a superstate. It could obtain the implementation of the obligations assumed by the Member States, but it could not oblige the states to accept norms. Therefore, Article 13 of the Charter only mentioned the initiating of studies and the making of recommendations in this field of codification of international law. The history of the United Nations showed that all efforts to turn it into a legislative organ had failed.

Why should the convention method be only appropriate for progressive development and not for codification? Prof. KORETSKY considered that it was easier to codify existing law than to make new developments and certainly the San Francisco example justified the belief in the efficacy of this method. Truly there would be many difficulties but they could be overcome as was shown by various international conventions which had been concluded in spite of objections by some of the states. However, no convention could be concluded if there was no real wish to reach a common formula, but, on the contrary, a wish to force one's will on other powers.

Restatements would lead to no results. Scientific restatements are admirable in themselves as was proven by the work performed by the Harvard Law School and it provided valuable material for study. But this Committee should not appose its seal to this kind of work as it was not enough. Otherwise, the task of codification could be left entirely to the scientific organizations. Prof. KORETSKY mentioned that the International Law Association itself in its report had stated that if a programme for codification were not carried through it would do more harm than good. Of course, restatements might be made into international conventions, but this intergovernmental agency should not limit itself to restatement with only scientific value, and it would only weaken the efforts at codification entrusted to us by the Charter. It would weaken public belief in the work of the United Nations and thereby would cause much harm.

/Prof. KORETSKY

Prof. KORETSKY admitted that codification had met with many failures but it would be necessary to study the reasons, mostly apparently of a technical nature but also substantive reasons, and Prof. KORETSKY reminded the Committee of the fact that the Union of Soviet Socialist Republics and the United States of America did not join the efforts under the League of Nations in the codification of international law and this had made the task more difficult. Also, at the time of the Hague Conference of 1930 the flames of fascism were already apparent and the fight between fascism and democracy had begun.

In the more peaceful atmosphere of the American continent the results achieved under the Inter-American system had been very different and proved what could be done. When the Montevideo treaties were concluded, Europe was already on the brink of war and immediately after the war in 1945 the American States again took up the task of codification.

Prof. KORETSKY concluded that only by general conventions could the obligations of the Charter be implemented and security be brought to the peoples.

The meeting adjourned at 6:15 p.m.
