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Summary record of the 2nd meeting

Topic:
<multiple topics>

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45. With regard to the first item of the agenda on the selection of topics for codification, the Secretariat memorandum, if it did nothing else, did set forth all the questions that could be codified and could therefore serve as a basis for that work. Once the Commission had selected its topics, it seemed to be bound by article 18 of the Statute to submit them to the General Assembly which would decide which ones were to be finally retained; only then would the actual work of codification commence.

46. On the other hand, the Commission had been specially instructed by the Assembly to deal with the three questions listed in items 2, 3 and 4 of the agenda. They should be examined one after the other either in plenary meeting or in a sub-commission and a report to the General Assembly should be prepared on each. As Mr. Scelle had suggested, items 1 and 2 of the agenda could be considered simultaneously.

47. Mr. SCELLE drew attention to the danger of too narrow an interpretation of the priority mentioned in article 18. Such an interpretation would place the Commission entirely at the disposal of the General Assembly and lead it to devote all its time to examining special questions at the expense of its main work which was the codification of international law.

48. Mr. ALFARO remarked that all the questions raised during the debate could be discussed and clarified when the Commission came to examine the first item of the agenda on the organization of its work for the codification of international law. He therefore proposed that that item should be the first subject of discussion.

It was so decided.

The meeting rose at 5.15 p.m.

2nd MEETING

Wednesday, 13 April 1949, at 3.15 p.m.

CONTENTS

Chairman: Mr. Manley O. HUDSON.

Rapporteur: Mr. Gilberto AMADO.

Present:

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

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

Election of the Rapporteur

1. The CHAIRMAN recalled that at the previous meeting the Commission had decided to postpone the election of a Rapporteur until the following meeting. He called upon the members of the Commission to proceed with the election.

2. Mr. SCELLE, supported by Mr. YEPES, Mr. BRIERLY, Mr. CORDOVA and Mr. ALFARO proposed Mr. Amado.

Mr. Amado was unanimously elected Rapporteur of the Commission.

3. Mr. AMADO expressed his appreciation of the honour bestowed upon him and assured the Commission that he would spare no effort in conveying as faithfully as possible the views of the eminent jurists of whom the Commission was composed.

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)

4. The CHAIRMAN opened the general debate on the organization of the Commission's work. As an introduction, he stressed that article 15 of the Statute of the Commission distinguished between the " progressive development of international law " and the " codification of international law ". The Statute also drew a distinction between the procedure to be followed with regard to the progressive development of international law as set forth in articles 16 and 17, and that applicable to the codification of international law as stated in articles 18 to 23. Examination of those articles led to the conclusion that, by drafting rules of so elastic a nature, the authors of the Statute had wished to grant the Commission a great deal of freedom in choosing the method for studying a definite question.

5. The CHAIRMAN then remarked that the procedure established by article 16 applied only " when the General Assembly referred to the Commission a proposal for the progressive development of international law ", while paragraph 3 of article 18 placed the Commission under obligation to " give priority to requests of the General Assembly to deal with any question ". From the fact that article 16 was placed in the section on the progressive development of international law and that paragraph 3 of article 18 was placed in

the section on the codification of international law, he concluded that the priority referred to in that paragraph applied only to questions being examined with a view to codification. Unless the General Assembly itself specified that it was acting in pursuance of the provisions of the first sentence of article 16 or in application of paragraph 3 of article 18, it would be for the Commission to determine, as each case arose, in which category the Assembly's proposal or request should be classified. The Chairman announced that Mr. Liang would shortly distribute to members a Secretariat memorandum to clarify that point of view.

6. The Chairman recalled that article 23 of the Statute stated the four types of recommendations which the Commission might make to the General Assembly on the codification of international law: (1) to take no action, the report having already been published; (2) to take note of or adopt the report by resolution; (3) to recommend the draft to Members with a view to the conclusion of a convention; (4) to convoke a conference to conclude a convention. If those provisions of article 23 were borne in mind, there would be greater latitude in the selection of suitable topics for codification than if the Commission had to restrict itself to questions which could only be codified by international conventions. The Chairman stated in that connexion that he had directed the work of the " Harvard Research in International Law " for twelve years in the United States, and that the activities of that institution had been handicapped by the fact that it had always attempted to codify international law by means of international agreements.

7. Turning to the examination of article 18 of the Statute and, in particular, of paragraph 2 of that article, the Chairman expressed the opinion that, if the Commission made its recommendations to the General Assembly on a topic the codification of which it considered necessary or desirable, it was not under any obligation to await the General Assembly's decision on those recommendations before it began to carry out the procedure set forth in article 19 and the subsequent articles of the Statute. It was clear that, in order to judge whether the codification of a topic was necessary or desirable, it was essential to study that topic thoroughly and, to a certain degree, to examine the possibilities of its codification.

8. According to article 18, paragraph 1, of the Statute, the Commission was to survey the whole field of international law with a view to selecting topics for codification. The Secretariat had considered the whole field of international law and had submitted its report to the members of the Commission (A/CN.4/1/Rev.1). The Chairman considered that study an essential part of the preparatory work of the Commission's first session and congratulated the Secretariat. Naturally it did not exhaust the studies that could be undertaken on the subject and, in some cases, the Chairman's views differed from those of the Secretariat on the approach to certain questions. However, the usefulness of the document, which contained an account of all that had been done in the past in the various fields of international law, could not be denied.

9. Like Mr. Koretsky, the Chairman thought that the Secretariat had dealt with the question somewhat vaguely and should have presented the Commission with concrete suggestions. In a conversation with the Chairman, Mr. Liang had said that he had already begun to prepare a kind of summary of the document previously submitted with a view to drawing from it concrete topics for codification. That new document would shortly be circulated to the members.

10. The Secretariat's study of international law was divided into three parts. The first part dealt with the functions of the Commission and the selection of matters for codification; the second was a study of the relationship between international law and codification, and the third dealt with the methods to be followed by the Commission and with its work. The Chairman thought that the first and third parts might have been combined and suggested that the general discussion in the Commission should bear upon those two parts of the document, leaving for subsequent consideration the second part and the selection of topics for codification.

11. Mr. KORETSKY reserved the right to express his views on the question as a whole later. He asked the Chairman, first, whether it was really expedient to abandon methods of codification through international conventions, and, secondly, whether paragraph 2 of article 18 was not being too liberally interpreted when it was taken to mean that the Commission would not be expected to await the approval of the General Assembly before beginning to consider the topics the codification of which it regarded as necessary or desirable, in accordance with the procedure outlined in article 19 and those following of the Statute.

12. The CHAIRMAN admitted that he personally preferred the method of codification through international conventions. However, he did understand the advantages of codifying certain topics by what had been called the " restatement " of the topic and he thought the question had been settled by the drafters of article 23 of the Statute, which provided for means of codification other than international agreements.

13. His interpretation of paragraph 2 of article 18 was based on the fact that he considered it inconceivable that the Commission should be obliged to wait until the General Assembly had approved its recommendations before it could begin consideration of the topics the codification

of which it considered necessary or desirable. The Chairman stressed that his opinion on the matter was in no way final and that he would be glad to know how the members of the Commission interpreted the paragraph in question. In that connexion, he drew their attention to the footnote to paragraph 106 of the Secretariat's survey which gave two proposals made to Sub-Committee 2 of the Sixth Committee for a more precise definition of the word " recommendations ", both of which had not been accepted by the Sub-Committee.[1]

14. Mr. ALFARO offered the Commission a few suggestions designed to facilitate and speed up its work. It appeared, from the preliminary discussion at the previous meeting, from the remarks just made by the Chairman and from the rules governing the Commission, that the conclusion could be drawn that, in formulating its programme of work, the Commission should deal with the four questions which followed:

1. How the Commission was to carry out the work assigned to it under paragraph 1 of article 18, namely, the survey of the whole field of international law with a view to selecting suitable topics for codification;

2. The meaning to be given to the terms " codification " and " progressive development " of international law which appeared in Article 13 of the Charter and in articles 15 and 18 of the Statute of the Commission;

3. Whether item 1 and items 2, 3 and 4 of the Commission's agenda should be discussed simultaneously;

4. The interpretation of paragraphs 2 and 3 of article 18 of the Statute.

15. With regard to the first question, clearly the survey which the Commission was to make should not consist of an academic study of all the fields of international law, but of a general review of the established topics of international law with a view to selecting those suitable for codification. The primary purpose was the selection of topics; the study of international law was merely the logical and natural means of making the selection. Mr. Alfaro thought that the Commission could ask a committee of three to five members to prepare a list of the various topics of international law together with brief comments, if it considered them necessary, as well as a list of topics which might be codified or which were important enough to warrant some priority in codification. Once it had received the committee's report, the Commission itself could select topics suitable for codification.

16. There was no doubt that the second question should be discussed by the Commission in plenary meeting because the meaning given to the terms " codification " and " progressive development " of international law sould serve as a guide in the drafting of the code which the Commission had been called upon to formulate. Despite the importance of the question, Mr. Alfaro did not think it should give rise to long discussion, since the members of the Commission doubtless had very clear ideas on the subject. In his opinion, the statements made by Mr. Brierly, as Rapporteur of the Committee on the Progressive Development of International Law and its Codification, might serve as an excellent basis for discussion.

17. With regard to the third question, Mr. Alfaro noted that the Commission might very well find itself obliged to discuss item 1 and items 2, 3 and 4 of its agenda simultaneously. Several jurists maintained that the codification of international law, strictly speaking, should be preceded by a general statement of basic principles similar to that which appeared in the draft declaration of the rights and duties of States. It was clear that before beginning to draft articles on a given topic of international law, there had to be a knowledge of the fundamental rules governing the subject. The Commission should decide whether to discuss those rules immediately after if had selected the topics suitable for codification. The decision on whether the Commission would consider items 3 and 4 of its agenda at the same time as item 1 would depend on its interpretation of paragraphs 2 and 3 of article 18 of its Statute since, if those two items of the agenda were considered " requests " of the General Assembly in the meaning of the above-mentioned paragraph 3 of article 18, they would have to be given priority. Personally, Mr. Alfaro did not think so and he therefore considered it indispensable for the Commission to have a thorough discussion on the interpretation of paragraphs 2 and 3 of article 18 of its Statute which was the fourth question with which the Commission had to deal.

18. In conclusion, Mr. Alfaro submitted for the consideration of the members of the Commission the plan of work he had outlined.

19. Mr. FRANÇOIS thought that the Secretary-General's memorandum was right in emphasizing the continuity of the current efforts at codification and those previously made by the organs of the League of Nations. The continuity was so real that there seemed no need to stress, as the document did, that the work of the International Law Commission was entirely new. Of course, to take

[1] " Proposals made in Sub-Committee 2 to define more specifically the word 'recommendations' were defeated. Mr. Beckett (United Kingdom) proposed at the eleventh meeting of Sub-Committee 2 that this paragraph should be amended to read ' . . . it should present its recommendations to the General Assembly in the form of draft articles or otherwise'. This proposed addition was not carried, there being 7 votes in favour and 7 against. The representative of Australia then proposed that the paragraph be amended to read: ' . . . should present its recommendations to that effect'. This proposed addition was rejected by 7 votes against 5. "

the Statute literally, the Commission no longer need inquire, as had the League of Nations Committee of Experts, whether the codification of such matter was possible: it need only consider it necessary or desirable. That resulted from the fact that the Commission could prepare texts which would vary in official authority according to how far the General Assembly implemented them and would undoubtedly enable the Commission to extend its choice beyond subjects which could be codified in conventions by international conference. It would be dangerous, however, to believe that the Commission could disregard the possibility of actually establishing a codification which it judged necessary or desirable. Such a conception of the Commission's role might frustrate its efforts. The Commission was not a scientific body with purely academic terms of reference but a subsidiary organ of the General Assembly, itself a political body. The world did not expect the Commission to produce a general long-term plan but definite and rapid results. Indeed, the League of Nations had failed in that sphere, not by any means through lack of a general plan of codification, but because it had relied solely on conventions for carrying out its plans.

20. First place should be given to questions which might be solved by international agreement. Obviously, the more important ones should be taken first; but there should be no undue presumption. It was very difficult to unify law in a world in which unity of spirit was more than ever absent. The Commission should not therefore be over-ambitious. It would be better to obtain positive results on one or two less important questions than to draw up a general systematic plan which would subsequently prove impracticable.

21. The choice of topics was, therefore, above all a practical problem. The Commission should seek to ascertain which topics were sufficiently ripe for codification or progressive development and should, of course, give priority to the more important of those, while also taking into account the questions referred to it by the General Assembly. The order in which those different questions should be examined was, however, a matter for the Commission to determine and recommend.

22. It mattered little if the Commission at first gave the impression that it was interested only in minor topics taken at random. If its first attempts succeeded it would be able to venture further and introduce an element of cohesion and unity into its work of codification, although recent experience in that regard was not very encouraging. That was the method currently used at the conference on international private law at The Hague which, without drawing up any general systematic plan, was trying to select for codification topics most likely to be adopted by the international community.

23. He wondered whether the Commission's work should be restricted to the codification and progressive development of the law of peace. Admittedly, it would be even more difficult to come to a general agreement on the law of war. That, however, was not a sufficient reason for dismissing categorically at the outset the possibility of studying any topic related to war. The law of war, as stated in The Hague Conventions of 1899 and 1907, had been so outdated by events that it ought to be completely redrafted. A diplomatic conference was currently being held in Geneva at the instance of the International Red Cross with a view to a partial revision of that law. Nevertheless, too many other branches, such as air law, would remain antiquated. The law of war should not, therefore, be dropped forthwith from the Commission's programme.

24. Mr. LIANG (Secretary to the Commission) suggested, with regard to Mr. François' statement on the memorandum submitted by the Secretary-General, that the Secretariat's interpretation of the term " realizable " as applied to codification meant—as appeared from the context—realizable by international conference. It was, of course, for the Commission to decide whether that means of realization should be used as a criterion in its choice of topics. The adjective " realizable " had, however, never been used at any stage of the discussions which had preceded the establishment of the Commission. He recalled the failure of The Hague Conference on Codification of 1930, the topics of which had been chosen according to that criterion and could not, in fact, be codified. The memorandum was above all intended to draw the Commission's attention to article 23 of its Statute which, by implication, ruled out the criterion of realization by convention for the procedures mentioned in sub-paragraphs (*a*) and (*b*) to the effect that the Commission's report should be either simply published or that the General Assembly should take note of it or adopt it by resolution.

25. Mr. SPIROPOULOS, supported by Mr. SCELLE and Mr. CORDOVA, said that the discussion should be general, but seemed to be developing into a detailed discussion which might make it impossible to reach a decision within a reasonable time.

26. The CHAIRMAN pointed out that he could not prevent members of the Commission stating their views in as much detail as they thought necessary.

27. Mr. AMADO thought that, in drawing up its plan of work, the Commission should bear in mind the wide scope of its work which could only produce satisfactory results after a number of years.

28. It must also, of course, bear in mind that

it was a subsidiary organ of the General Assembly and must as a result pay special attention to the topics referred to it by the Assembly, in connexion with both the codification and the progressive development of international law. Those special duties must not, however, impede the Commission in the accomplishment of its essential function, the selection of suitable topics for codification. Moreover the two roles were not irreconcilable: for example, during its current session the Commission could work on a survey of international law and the preparation of its plan of work on parallel lines and at the same time undertake a detailed study of the topics referred to it by the Assembly. Such a programme should not raise any difficulties.

29. The problem which arose at the outset was that of defining the use the Commission intended to make of the freedom it had been granted to select, from the vast field of international law, appropriate topics for codification. That freedom of choice could only be exercised rationally, if it was governed by certain criteria. The Commission's Statute provided no such criteria, and it therefore lay with the Commission itself to determine them, after having first established the exact nature of the codification to be undertaken. Once that point was settled and the criteria adopted, it only remained to determine the order of priority of the topics chosen in virtue of those criteria. The plan of codification work would follow almost automatically from those three elements.

30. The International Law Commission was in a better position than the codifiers of The Hague or Geneva, since it had more time at its disposal and since there would, as a result, be more continuity in its work. Further, although it also must seek to have its drafts accepted by States, in order to give them the form of international conventions, there were other ways open to it. Its reports could be approved by the General Assembly and would thus not fail to influence States when they came to deal with them. If the Assembly merely took note of them, they would still have a value as subsidiary means for the determination of rules of law, according to sub-paragraph (*d*) of the first paragraph of Article 38 of the Statute of the International Court of Justice.

31. The Commission's work of codification did not, therefore, depend on immediate acceptance by States. Moreover, there was no need for the Commission to restrict itself to the formulation of universally accepted traditional rules. Its main duty was to fill the many gaps in existing law, to settle dubious interpretations wherever they arose and even to amend existing law in the light of new developments, having particular regard to the principles of the Charter.

32. It followed that the choice of topics must not depend on the prospects of their codification being accepted. Current matters which were likely to be the subject of universal agreement could be of but little importance. The Commission must choose instead topics offering difficulties to be solved and gaps prejudicial to the very prestige of international law. It was, of course, difficult to say what topics it was most necessary to codify, but it seemed that, by taking as a yardstick the principles and practice of the United Nations, it would be possible to determine a certain number of traditional fields of classic international law in which the need for re-organization made itself clearly felt.

33. He saw no objection to adopting the suggestion made in the memorandum submitted by the Secretary-General, according to which the work of codification was to be carried out within the framework of a comprehensive scheme embracing the entirety of international law. The work could be done by following to a certain extent the logical order of the topics, but without the Commission being obliged to keep to that course. The topics referred to the Commission by the General Assembly would have to be studied within the framework of the general plan as well as the isolated subjects chosen by the Commission itself. Thus, as it grew with the years, the Commission's work would retain as uniform a structure as possible.

34. The work could not, of course, be purely theoretical. It would have to take into account political contingencies and the opinion of governments. His point of view in that respect had not changed since he had made the following statement before the Committee on the Progressive Development and Codification of International Law:

> " Neither the codification nor the development of law can be achieved merely by the submission of learned opinions. They must take the form of resolutions by the General Assembly or of multilateral conventions. But those resolutions and conventions must not be submitted under ' take it or leave it ' conditions." (A/AC.10/28).

35. In his opinion, to use the formula of Mr. de Visscher, supported by Mr. Brierly and other members of the Commission, any codification work must be carried out in the following three stages: choice of topics suitable for codification, the precise statement of the existing law and collation which was the codifier's work, properly speaking.

36. The Commission had an excellent instrument with which to carry out that work in its Statute, which had been drawn up with due regard to the reasons for the failure of earlier attempts at codification which had been directed solely towards the immediate conclusion of international conventions and to the necessity for reconciling

the work of scientific preparation with political requirements and the need to take the interests of States into account.

37. Mr. SPIROPOULOS did not think that the Commission should start by trying to establish general principles. A more practical method should be adopted; one or more topics should be selected and studied and only in the course of that study should the general *a posteriori* rules be defined.

38. With regard to the four-point programme suggested by Mr. Alfaro, it was not necessary for the selection of topics to be preceded by a general study of international law, a subject with which the members of the Commission were very familiar. Furthermore, that work had already been carried out by all the previous codification commissions and their conclusions were still valid. It did not seem necessary to discuss the criteria which should govern the selection of topics and which were given in article 18, paragraph 2, of the Statute, or the possibility of practical realization to which Mr. François had referred. Most of the topics were at the same stage of codification. It was therefore a matter of personal opinion whether or not it was necessary or desirable to codify any of them.

39. Mr. SPIROPOULOS thought that any discussion of the second question would be useless as the extract from Mr. Brierly's statement, which was reproduced on page 3 of the Secretariat memorandum, provided a very satisfactory reply: codification could not be limited to stating the existing law: consequently the codifier must supplement and improve that law, thereby necessarily acting as a legislator.

40. The third question had been settled at the previous meeting since it had been decided to examine simultaneously the first and three following items of the agenda. Lastly, with regard to the interpretation of article 18, paragraphs 2 and 3, of the Statute, Mr. Spiropoulos thought that it would be advisable to determine the meaning of those paragraphs immediately.

41. Sir Benegal RAU compared articles 18 and 22 of the Statute and noted that both of them spoke of recommendations which the Commission should submit to the General Assembly; it was not possible to determine, however, whether two separate recommendations were involved—one requesting the Assembly's permission to study a topic for codification, and the other submitting the conclusions of that study to the Assembly—or whether both cases merely referred to the final recommendation which would close the examination of the topic for codification.

42. The footnote to paragraph 106 of the memorandum submitted by the Secretary-General did not enable the intention of the authors of the Statute to be interpreted with any certainty. In those circumstances it must be concluded that there was more than one answer to the question. The solution would vary with the circumstances: for example, if the Commission considered it necessary or desirable to codify a topic which the General Assembly had already referred to another organ of the United Nations, the Commission would obviously have to begin by asking permission to consider that question. On the other hand, if the topic selected had not yet been referred to another organ, the Commission could examine it and need only submit a recommendation when that examination had been completed.

43. Mr. BRIERLY drew attention to article 18, paragraph 2, which stated that the Commission should submit its recommendation to the Assembly when it considered that the codification of a particular topic was necessary or desirable. That judgement could only be made after a thorough study of the subject, which would involve the application of articles 19 and following and would inevitably lead to the recommendation referred to in article 22. Article 18 therefore could only refer to the same final recommendation.

44. Mr. CORDOVA also thought that the Commission would not have a recommendation to submit to the General Assembly until it had completed the examination of a topic: that recommendation should take one of the forms provided for in article 23 of the Statute. The Commission was not obliged to have its selection of topics confirmed by the Assembly; it derived that power of selection from its terms of reference; in the case of article 18, paragraph 3, however, the Commission should conform to the Assembly's choice when the latter was particularly interested in a given question and directly requested the Commission to study it; in that case the Commission would be bound to give it the priority provided for by that paragraph.

45. Mr. SCELLE agreed with Mr. Córdova. The Commission's main duty was to select suitable topics for codification; it was therefore not obliged to seek the Assembly's permission in carrying out its selection. The only recommendations which it had to submit were those provided for in article 23 of the Statute. That interpretation left the Commission completely free to proceed with its work of codification. It was clear from the preparatory work which had preceded the establishment of the Commission that the latter was a body with complete freedom, the equal of the International Court of Justice. In matters of codification it had the same free authority that the Court had with regard to disputes.

46. Mr. CORDOVA did not see what purpose would be served by submitting two recommendations to the General Assembly: firstly, to ask it to approve the choice of a topic the codification of which the Commission deemed necessary and desirable; and secondly, after the Commission's

work on the topic had been concluded, to request it to take one of the measures provided for in article 23 of the Statute. That procedure would give rise, at two sessions of the General Assembly, to two identical debates similar to those which would have taken place in the Commission. The first recommendation therefore seemed to be useless. The only logical solution was to select a topic, to study it thoroughly and to undertake its codification; when concrete results had been obtained they would be submitted to the General Assembly accompanied by one of the recommendations provided for in article 23; the General Assembly would then take its decision. Mr. Córdova concluded by stating that the four recommendations listed in article 23 were the only ones the Commission could put forward; they covered every eventuality.

47. Mr. SANDSTROM shared Mr. Córdova's opinion concerning article 23, and supported Mr. Spiropoulos' view on the question as a whole; the selection of topics for codification was the most important problem. It should be made on the basis of practical considerations the relative importance of which the Commission was entirely free to determine. The considerations were *inter alia:* importance of the topic, extent to which agreement would be reached by Commission members, state of international law on the matter, position of the various States, political difficulties which might impede efficient work, and the time needed to complete such work.

48. Mr. Sandström drew the Commission's attention to the procedure with regard to item 2 on its agenda. Two courses were open: either to lay down the general principles first and then to consult the States, or to adopt the opposite method and ask States to give a detailed statement of their views and establish general principles therefrom. Mr. Sandström had no definite views on the subject; it was an important question which should be studied carefully by the Commission.

49. Mr. SPIROPOULOS felt that the word " recommendations " was incorrectly used in the second paragraph of article 18. When the Commission informed the General Assembly that it considered codification of a certain topic to be necessary or desirable, it was not submitting a recommendation. Certain Commission members felt that article 18 should be linked with articles 23 and 22; such an interpretation seemed perfectly logical. There could, however, be some doubts in that regard. For his part, Mr. Spiropoulos agreed with the interpretation as it was natural to plead *pro domo sua.*

50. The CHAIRMAN noted that there were two articles in the statute bearing on the stage at which the Commission's recommendations should be submitted to the General Assembly. Article 18, paragraph 2, on the one hand, stated that the Commission would submit its recommendations to the General Assembly when it " considers that the codification of a particular topic is necessary or desirable "; such a decision could only be made after a very searching study of the topic, as Mr. Brierly had pointed out. Article 22, on the other hand, provided that, " taking such comments into consideration ", the Commission should prepare the final draft; the words " taking such comments into consideration " referred to the provisions of article 21 which became effective only after application of article 20 which, in turn, depended upon the provisions of article 19 being implemented. Thus the Commission submitted the recommendations mentioned in article 22 after having completed the process prescribed in articles 19, 20 and 21.

51. Consequently, regardless of whether taken literally or interpreted in the light of the subsequent articles, the second paragraph of article 18 did not permit of the conclusion that the Commission must submit its recommendations to the General Assembly in order to request the letter's authorization to undertake the codification of a topic.

52. Mr. KORETSKY felt that the Commission should not spend so much time on questions of its Statute's interpretation before undertaking the concrete work expected of it. A number of Commission members were trying, deliberately or otherwise, to give article 18, paragraph 2, an interpretation which would in fact change the provisions adopted by the General Assembly in respect of a point which had been much debated in the Committee on the Progressive Development of International Law and its Codification.

53. In order to interpret paragraph 2 of article 18 in the light of history the origin of the preparatory work must be remembered. The International Law Commission was, no doubt, a body of experts chosen for their personal competence; it should not be forgotten, however, that those experts had been appointed by the General Assembly and that the United Nations was defraying the Commission's expenses. Consequently the United Nations was entitled to be kept informed of the Commission's work.

54. Mr. Koretsky felt that the Chairman was rejecting as illogical the only possible interpretation of article 18, paragraph 2. Indeed, articles 18 to 23 were intentionally given in a certain order so as to form a uniform basis on which to establish the organization of the Commission's work: first, the Commission examined the various topics which arose; it then selected, after thorough consideration but without exhaustive study, those topics which it deemed desirable or necessary to codify, especially from the political point of view; it was at that stage that the Commission approached the General Assembly to find out whether the topic chosen could and should be immediately codified. If the General Assembly's reply to the Commission's suggestion was favourable, the latter

applied the provisions of articles 19, 20 and 21 consecutively; the Commission finally completed its work in accordance with the provisions of article 22, the recommendations mentioned in that article falling into one of the four categories listed in article 32. Thus article 23 was unquestionably linked to article 22, and not to article 18, as claimed by certain Commission members.

55. Mr. Koretsky pointed out that his interpretation was justified in view of the fact that two trends had appeared in the Committee on the Progressive Development of International Law and its Codification; the first trend had been to set up a commission of experts whose activities would not take external conditions, the position of the various governments, nor the political responsibilities of the General Assembly into account. That trend had prevailed in the sense that the Commission members had been appointed for their personal competence and not as representatives of their governments. The principles of the other trend had been borne out by the fact that the Commission was actually only a subsidiary organ of the General Assembly whose activities must be in conformity with the wishes of the latter and United Nations principles.

56. The International Law Commission was not the government of philosophers advocated by Plato; it was composed of citizens of various countries whose mission was to promote the progressive development of international law and its codification in accordance with the directives of the General Assembly and the wishes of their governments. It was therefore natural for the Commission to request the opinion of the General Assembly on the programme of work which it contemplated.

57. Mr. Koretsky expressed the view that article 18, paragraph 2 must be interpreted as he had indicated; otherwise the Commission might work to no avail. The topics which it had codified with great difficulty might not be considered interesting by a number of States or by the General Assembly.

58. Finally Mr. Koretsky expressed the hope that the general discussion which was in progress would no longer pertain to questions of interpretation and that the question of the selection of topics for codification might be taken up. Moreover he pointed out that it would be well to give thought to the questionnaire which the Commission had to circulate to States Members of the United Nations in order to learn their wishes and their opinions with regard to the work of the Commission.

59. Mr. YEPES could not share the point of view of Mr. Koretsky. Under article 18, paragraph 2, the Commission was self-governing; it chose the topics which it considered suitable for codification. The first paragraph of article 18 mentioned criteria to be used in determining whether topics were suitable or not. The autonomy of the Commission was limited only by the aims of the United Nations, set forth in the Charter, and by the provisions of article 18, paragraph 3, which gave priority to requests of the General Assembly.

60. Mr. SANDSTROM thought that, in interpreting article 18, paragraph 2, the proposal made in Sub-Committee 2 of the Sixth Committee to define the term " recommendations " more precisely must be taken into consideration. The first proposal had been submitted by Mr. Beckett (United Kingdom) whose view was identical with the view of the majority of the members of the International Law Commission. That proposal had not been adopted since there had been 7 votes for and 7 against. It would seem that the opponents of the first proposal considered the text of the paragraph sufficiently clear. The second proposal had been submitted by the representative of Australia who held the same view as Mr. Koretsky. That proposal had been rejected by 7 votes to 5. That led to the conclusion that the interpretation given by Mr. Koretsky was unacceptable.

61. Mr. SCELLE stated that he had listened to the two opposing arguments with the greatest interest. Mr. Koretsky's argument would seem tenable if the text were given a strictly literal interpretation. The Chairman's argument seemed in greater harmony with the ultimate aims of the International Law Commission. The current discussion referred to a question of primary interest in the development of international law and its codification; that type of question arose in all new international organizations set up with all the defects of former political organizations, in other words, where there was no clear separation of powers. All organizations with federalist tendencies wished to centralize all power in their own hands without clearly stating the relative jurisdiction of their various organs. In setting up the International Law Commission, the General Assembly had intended to remedy in part the confusion with regard to powers; it had given the Commission " pre-legislative " power similar to the power of the General Conference of the International Labour Organisation. The texts adopted by that General Conference were not binding in nature; nevertheless it was true that that Conference was an international legislative body with universally recognized jurisdiction in its field. In the same way, the International Court of Justice was an organ the decisions of which were not binding; nevertheless the Court had an incontestable jurisdiction which even the organ which had set it up could not retract.

62. The question was therefore whether the General Assembly had intended to give the International Law Commission jurisdiction of its own or whether it had wished to make it merely a consultative organ under its aegis. The reply

to that question seemed to have been given by the Chairman whose argument was the only progressive one: the International Law Commission had jurisdiction of its own; its powers had not been delegated to it by the General Assembly.

63. Care must be taken lest excessive timidity and a literal interpretation of texts made the International Law Commission, from its very inception, lose the tremendous influence which it might have on the integration of the United Nations. The Commission was at a turning point in the existence of the United Nations; it must face its responsibilities if it did not wish to retard progress in the organization of international society.

64. Mr. SPIROPOULOS remarked that Mr. Koretsky had been right in pointing out that article 18, paragraph 2 had given rise to lively discussion in Sub-Committee 2 of the Sixth Committee. Two arguments had been put forward, neither of which seemed to have prevailed. There might therefore be some doubt as to the precise meaning of article 18, paragraph 2. The records of the meetings at which the matter had been discussed would have to be examined before the exact wishes of the General Assembly could be ascertained. If the records did not settle the matter, the interpretation which won the support of the majority of the Commission members would have to be adopted.

65. With regard to the relationship of the Commission to the General Assembly, there was no need to ask the Assembly for an interpretation of article 18, paragraph 2. The Commission had been provided with a Statute and it was for the Commission to interpret it. If the General Assembly considered it necessary it could subsequently declare the Statute null and void or modify it.

66. Mr. KERNO (Assistant Secretary-General) recalled that he had stated at the first meeting that the Commission should study its Statute with a view to determining its terms of reference or purview, as Mr. Scelle had suggested. One of the most important questions was the interpretation to be given to article 18, paragraph 2, which dealt with the relationship of the Commission to the General Assembly. That question had been discussed at length in 1947, the main discussion having taken place in Sub-Committee 2 of the Sixth Committee. The records of those discussions were very concise and did not clearly reveal the reasons why the two proposals for making the meaning of the word " recommendation " more precise had been rejected. He stated that the Secretariat would implement Mr. Spiropoulos' suggestion by making the fullest possible search for references enabling the Commission to clear up that extremely important matter.

67. Mr. KORETSKY welcomed the Assistant Secretary-General's assurances. With regard to Mr. Scelle's observations, he remarked that everyone was influenced by his customary activiti.es Mr. Scelle compared the International Law Commission to the General Conference of the ILO and regarded the Commission as a self-governing body. Mr. Koretsky had been a member of General Assembly Commissions and considered the International Law Commission to be a subsidiary organ. He thought his own attitude a more reasonable one than that of Mr. Scelle. Mr. Scelle's idea would have to be rejected, however attractive it might seem. The International Law Commission was not entitled to assume powers which did not belong to it; it merely had to carry out the work assigned to it by the General Assembly in accordance with the latter's directives.

68. He felt that the Chairman was too generous and liberal in his interpretation of the Commission's Statute. There must be no room for sentiment and the text adopted by the General Assembly must be respected to the letter. He pointed out that the work of the Commission consisted not in drafting an imposing number of plans but rather in preparing a limited number of plans which would interest the General Assembly and would thus not run the risk of remaining dead letters.

69. He concluded by requesting the Commission to adopt his interpretation of article 18, paragraph 2, or if that did not seem possible immediately, not to take any decision before studying the additional information which the Secretariat could provide and which might cast light upon that as yet abstruse question.

70. The CHAIRMAN felt that the Commission could adopt Mr. Koretsky's last suggestion. No interpretation would be adopted before the Commission had been able to study all the references which the Secretariat could provide on the matter.

It was so decided.

The meeting rose at 6.00 p.m.

3rd MEETING

Thursday, 14 April 1949, at 3 p.m.

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