

UNITED



NATIONS

**REPORT
OF THE
INTERNATIONAL LAW
COMMISSION**

**COVERING ITS FIRST SESSION
12 APRIL — 9 JUNE 1949**

**GENERAL ASSEMBLY
OFFICIAL RECORDS : FOURTH SESSION
SUPPLEMENT NO. 10 (A/925)**

LAKE SUCCESS, NEW YORK, 1949

(14 p.)

U N I T E D N A T I O N S

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| A/925 |
| 24 June 1949 |

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PART I: GENERAL

Chapter I

Introduction

ESTABLISHMENT AND MEMBERSHIP OF THE COMMISSION

1. The International Law Commission was established by resolution 174 (II) adopted by the General Assembly at its 123rd plenary meeting on 21 November 1947.

In pursuance of the same resolution and in accordance with the provisions of the Statute of the Commission,¹ the General Assembly, at its 154th and 155th plenary meetings on 3 November 1948, elected the following fifteen members:

| Name | Nationality |
|--------------------------|-------------------------------------|
| Mr. Ricardo J. Alfaro | Panama |
| Mr. Gilberto Amado | Brazil |
| Mr. James Leslie Brierly | United Kingdom |
| Mr. Roberto Córdova | Mexico |
| Mr. J. P. A. François | Netherlands |
| Mr. Shuhsy Hsu | China |
| Mr. Manley O. Hudson | United States of America |
| Faris Bey el-Khoury | Syria |
| Mr. Vladimir M. Koretsky | Union of Soviet Socialist Republics |
| Sir Benegal Narsing Rau | India |
| Mr. A. E. F. Sandström | Sweden |
| Mr. Georges Scelle | France |
| Mr. Jean Spiropoulos | Greece |
| Mr. Jesús M. Yépes | Colombia |
| Mr. Jaroslav Zourek | Czechoslovakia |

PLACE AND DURATION OF THE FIRST SESSION

2. The first session of the Commission opened on 12 April 1949, at Lake Success, New York. In the course of the session, which terminated on 9 June 1949, the Commission held thirty-eight meetings. With the exception of Faris Bey el-Khoury and Mr. Jaroslav Zourek, who were unable to attend, all the members of the Commission were present.

ELECTION OF OFFICERS

3. At its first and second meetings, on 12 and 13 April, the Commission elected, for a term of one year, the following officers:

Chairman: Mr. Manley O. Hudson;
First Vice-Chairman: Mr. Vladimir M. Koretsky;
Second Vice-Chairman: Sir Benegal N. Rau;
Rapporteur: Mr. Gilberto Amado.

SECRETARIAT

4. Mr. Ivan S. Kerno, Assistant Secretary-General for Legal Affairs, represented the Secretary-General. Mr. Yuen-li Liang, Director of the Division for the Development and Codification of International Law, acted as Secretary of the Commission.

RULES OF PROCEDURE

5. In accordance with rule 150 of the rules of procedure of the General Assembly, the Commission decided that the rules relating to the procedure of committees of the General Assembly (rules 88 to 122 inclusive), as well as rules 38 and 55, should apply to the procedure of the Commission. It was further decided that the Commission should, when the need arose, adopt its own rules of procedure.

AGENDA

6. Taking into consideration its functions under the Statute as well as the tasks assigned to it by resolutions of the General Assembly, the Commission adopted its agenda in the form in which it had been drawn up by the Secretariat. It consisted of the following items:

(1) 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 Commission).

(2) Draft declaration on the rights and duties of States (resolution 178 (II), adopted by the General Assembly on 21 November 1947).

(3) (a) Formulation of the principles recognized in the Charter of the Nürnberg Tribunal and in the judgment of the Tribunal; (b) preparation of a draft code of offences against the peace and security of mankind (resolution 177 (II), adopted by the General Assembly on 21 November 1947).

(4) Desirability and possibility of establishing an international judicial organ for the trial of persons charged with genocide or other crimes over which jurisdiction will be conferred upon that organ by international conventions (resolution 260 (III) B, adopted by the General Assembly on 9 December 1948).

(5) Ways and means for making the evidence of customary international law more readily available (article 24 of the Statute of the Commission).

(6) Co-operation with other bodies: (a) consultation with organs of the United Nations and with international and national organizations, official and non-official; (b) list of national and international organizations prepared by the Secretary-General for the purpose of distributing documents (articles 25 and 26 of the Statute of the Commission).

7. In considering its programme of work, the Commission had in mind that questions referred to it by the General Assembly¹ should be taken up without undue delay. At the same time, it was recognized that the codification of international law and, more immediately, the selection of topics for codification, constituted one of the Commission's main functions. It was, accordingly, agreed

¹ See *Official Records of the second session of the General Assembly, Resolutions*, page 105.

² Items (2), (3) and (4) of the agenda.

that the Commission should first take up item (1) of its agenda.

The Commission considered during its first session every item on the agenda. The action taken in respect of every such item, except the draft Declaration on Rights and Duties of States (item (2)), is set out in part I of the present report. Part II of the report is devoted to the consideration given to the draft Declaration on Rights and Duties of States.¹

PREPARATORY WORK BY THE SECRETARIAT

8. The Commission had before it a number of memoranda relating to the several items of its agenda, submitted by the Secretary-General in pursuance of resolution 175 (II) of the General Assembly, which instructed the Secretary-General to do the necessary preparatory work for the beginning of the activity of the Commission.¹

Chapter II

Survey of international law and selection of topics for codification

THE POWERS OF THE COMMISSION WITH RESPECT TO THE SELECTION OF TOPICS

9. Under article 18, paragraph 1, of its Statute, the Commission was directed to "survey the whole field of international law with a view to selecting topics for codification". In undertaking this function, the Commission had to determine at the outset its precise powers and, in this connexion, it had to clarify the meaning and implication of article 18, paragraph 2. This paragraph provides that "when the Commission considers that the codification of a particular topic is necessary or desirable, it shall submit its recommendations to the General Assembly". The question arose as to whether, under this provision, the Commission was competent to proceed with the work of codification under articles 19 to 23 without awaiting action by the General Assembly on recommendations made by the Commission under article 18, paragraph 2. The Commission consulted the records of the second session of the General Assembly, at which the Statute was adopted and, in particular, those of Sub-Committee 2 of the Sixth Committee, which prepared the draft.

10. Some members of the Commission held the view that under the said paragraph the Commission was bound to submit to the General Assembly any topics the Commission had selected for codification and to await the General Assembly's approval before beginning the work of codification of such topics. According to Mr. Vladimir M. Koretsky, inasmuch as the Commission was not an autonomous organ enjoying complete liberty, but merely a subsidiary organ of the General Assembly, it existed to carry out certain tasks which had been entrusted to it by the General Assembly and any task it undertook must be sanctioned by the latter. In so doing it must adhere strictly to its Statute, which laid down a procedure for the different stages of the work of codification. During the first stage, the Commission had the duty of discussing the choice of topics for codification; in the second stage, that of presenting a report to the General Assembly and of making recommendations on the choice of subjects. Only when the General Assembly had approved the choice of subjects could the Commission proceed to the other stages envisaged in articles 19 to 23 of its Statute. For the Commission to act otherwise would be to ignore the ties which linked it to the General Assembly and to disregard its duties towards that body.

11. Other members of the Commission were of the opinion that the logical interpretation of

paragraph 2 of article 18 was that the Commission, having selected a topic, was competent to proceed with the work of codification of that topic, in accordance with articles 18 to 22 of the Statute, unless otherwise directed by the General Assembly. Only after having completed this work would the Commission make recommendations to the General Assembly in one or other of the modes prescribed in article 23, paragraph 1, of the Statute. It was also argued that the Commission was not obliged to await the response of the General Assembly to its recommendations respecting the selection of topics before beginning work upon those whose codification was considered necessary or desirable.

12. The question at issue was summed up by the Chairman and put to the Commission in the following terms: "Has the Commission competence to proceed under articles 19 to 23 without awaiting action by the General Assembly on recommendations made by the Commission under article 18, paragraph 2?" By ten votes to three, the Commission decided in the affirmative.

SURVEY OF INTERNATIONAL LAW

13. In undertaking a survey of the whole field of international law with a view to selecting topics for codification, in accordance with article 18, paragraph 1, of the Statute, the Commission conceived the task as one calling for a general review of the topics of international law. The primary purpose was to select particular topics the codification of which the Commission considered necessary or desirable; the survey of the whole field of international law was merely the logical means of making the selection. In this connexion, the Commission had before it a memorandum entitled *Survey of International Law in relation to the Work of Codification of the Inter-*

¹ The memoranda submitted by the Secretary-General were the following:

1. Survey of International Law in relation to the Work of Codification of the International Law Commission (A/CN.4/1/Rev.1).

2. Preparatory Study concerning a Draft Declaration on the Rights and Duties of States (A/CN.4/2).

3. The Charter and Judgment of the Nürnberg Tribunal: History and Analysis (A/CN.4/5).

4. Ways and Means of making the Evidence of Customary International Law more readily available (A/CN.4/6).

5. Historical Survey of the Question of International Criminal Jurisdiction (A/CN.4/7).

6. International and National Organizations concerned with Questions of International Law: tentative list (A/CN.4/8).

national Law Commission,¹ submitted by the Secretary-General. This memorandum surveys the field of the international law of peace and, in the opinion of the majority of the Commission, enumerates in a comprehensive and satisfactory way topics in that field.

THE QUESTION OF A GENERAL PLAN OF CODIFICATION

14. The Commission discussed the question whether a general plan of codification, embracing the entirety of international law, should be drawn up. Those who favoured this course had in view the preparation at the outset of a plan of a complete code of public international law, into the framework of which topics would be inserted as they were codified. The sense of the Commission was that, while the codification of the whole of international law was the ultimate objective, it was desirable for the present to begin work on the codification of a few of the topics, rather than to discuss a general systematic plan which might be left to later elaboration.

TOPICS OF INTERNATIONAL LAW CONSIDERED BY THE COMMISSION

15. Using the memorandum of the Secretary-General as a basis of discussion, the Commission reviewed, consecutively, the following topics:

- (1) Subjects of international law;
- (2) Sources of international law;
- (3) Obligations of international law in relation to the law of States;
- (4) Fundamental rights and duties of States;
- (5) Recognition of States and Governments;
- (6) Succession of States and Governments;
- (7) Domestic jurisdiction;
- (8) Recognition of acts of foreign States;
- (9) Jurisdiction over foreign States;
- (10) Obligations of territorial jurisdiction;
- (11) Jurisdiction with regard to crimes committed outside national territory;
- (12) Territorial domain of States;
- (13) Regime of the high seas;
- (14) Regime of territorial waters;
- (15) Pacific settlement of international disputes;
- (16) Nationality, including statelessness;
- (17) Treatment of aliens;
- (18) Extradition;
- (19) Right of asylum;
- (20) Law of treaties;
- (21) Diplomatic intercourse and immunities;
- (22) Consular intercourse and immunities;
- (23) State responsibility;
- (24) Arbitral procedure;
- (25) Laws of war.

TOPICS OF INTERNATIONAL LAW PROVISIONALLY SELECTED BY THE COMMISSION

16. After due deliberation, the Commission drew up a provisional list of fourteen topics selected for codification, as follows:

- (1) Recognition of States and Governments;

- (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) Regime of the high seas;
- (6) Regime of territorial waters;
- (7) Nationality, including statelessness;
- (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.

17. It was understood that the foregoing list of topics was only provisional and that additions or deletions might be made after further study by the Commission or in compliance with the wishes of the General Assembly.

LAWS OF WAR

18. The Commission considered whether the laws of war should be selected as a topic for codification. It was suggested that, war having been outlawed, the regulation of its conduct had ceased to be relevant. On the other hand, the opinion was expressed that, although the term "laws of war" ought to be discarded, a study of the rules governing the use of armed force — legitimate or illegitimate — might be useful. The punishment of war crimes, in accordance with the principles of the Charter and judgment of the Nürnberg Tribunal, would necessitate a clear definition of those crimes and, consequently, the establishment of rules which would provide for the case where armed force was used in a criminal manner.

The majority of the Commission declared itself opposed to the study of the problem at the present stage. It was considered that if the Commission, at the very beginning of its work, were to undertake this study, public opinion might interpret its action as showing lack of confidence in the efficiency of the means at the disposal of the United Nations for maintaining peace.

PRIORITY OF TOPICS

19. Having provisionally selected fourteen topics for codification, the Commission next considered which of these should be studied first. One suggestion was that priority should be given to the question of the regime of the high seas, statelessness, and consular intercourse and immunities. Another was that the questions of the law of treaties and of arbitral procedure should be given priority. A third stressed the importance of the question of nationality and statelessness, and a fourth that of the right of asylum.

20. The Commission finally decided to give priority to the following three topics:

- (1) Law of treaties;
- (2) Arbitral procedure;
- (3) Regime of the high seas.

ELECTION OF RAPPORTEURS

21. The foregoing three topics were entrusted to three rapporteurs, each of whom was to prepare

¹ A/CN.4/1/Rev.1.

a working paper for submission to the Commission at its second session. The rapporteurs elected by the Commission are:

Mr. James L. Brierly (law of treaties);
 Mr. Georges Scelle (arbitral procedure);
 Mr. J. P. A. François (regime of the high seas).

REQUEST TO GOVERNMENTS FOR DATA

22. Pursuant to the provisions of article 19, paragraph 2, of its Statute, the Commission decided that a request should be addressed to Governments to furnish the texts of laws, decrees, judicial decisions, treaties, diplomatic correspondence and other documents relevant to the foregoing three topics. The rapporteurs were invited

to prepare, in consultation with the Chairman of the Commission and the Secretary-General, the terms of the request which would be sent to the Governments in the name of the Commission through the Secretary-General.¹

THE TOPIC OF THE RIGHT OF ASYLUM

23. During the discussion on the draft Declaration on Rights and Duties of States, a proposal was submitted by Mr. Ricardo J. Alfaro, Mr. Georges Scelle and Mr. Jesús M. Yépes to include in the draft Declaration an article relating to the right of asylum.² It was finally decided not to include such an article.³ Mr. Jesús M. Yépes was subsequently invited to prepare a working paper on this topic, for submission to the Commission at its second session.

Chapter III

Formulation of the Nürnberg principles and preparation of a draft code of offences against the peace and security of mankind

RESOLUTION 177 (II) ADOPTED BY THE GENERAL ASSEMBLY

24. The General Assembly, at its 123rd meeting on 21 November 1947, adopted resolution 177 (II) which reads as follows:

"The General Assembly

"Decides to entrust the formulation of the principles of international law recognized in the Charter of the Nürnberg Tribunal and in the judgment of the Tribunal to the International Law Commission, the members of which will, in accordance with resolution 174 (II), be elected at the next session of the General Assembly, and

"Directs the Commission to

"(a) Formulate the principles of international law recognized in the Charter of the Nürnberg Tribunal and in the judgment of the Tribunal, and

"(b) Prepare a draft code of offences against the peace and security of mankind, indicating clearly the place to be accorded to the principles mentioned in sub-paragraph (a) above."

FORMULATION OF THE NÜRNBERG PRINCIPLES

25. The Secretary-General had submitted to the Commission a memorandum entitled *The Charter and Judgment of the Nürnberg Tribunal: History and Analysis*.¹ This memorandum contained: (a) a survey of the Charter of the Nürnberg Tribunal and of the trial before the Tribunal; (b) an account of the deliberations in the United Nations concerning the formulation of the principles of international law recognized in the Charter and judgment of the Tribunal; (c) an analysis of the judgment of the Tribunal; and (d) as an addendum, a note on the trial of major war criminals before the International Military Tribunal for the Far East.

26. The wording of resolution 177 (II) of the General Assembly directing the Commission to "formulate the principles of international law recognized in the Charter of the Nürnberg Tribunal and in the judgment of the Tribunal" gave

rise to some doubt as to the exact scope of the task assigned to the Commission. The question arose as to whether or not the Commission should ascertain to what extent the principles contained in the Charter and judgment constituted principles of international law. The conclusion of the Commission was that, since the Nürnberg principles had been affirmed by the General Assembly in resolution 95 (I) of 11 December 1946, the task of the Commission was not to express any appreciation of these principles as principles of international law but merely to formulate them. Furthermore, the Commission was of the opinion that it should not concern itself with those provisions of the Charter of the Tribunal relating to procedural matters. Its task was to formulate principles of a substantive character, and in particular those embodied in articles 6, 7 and 8 of the Charter of the Tribunal.

27. The Commission also considered the question whether, in formulating the principles of international law recognized in the Charter and judgment of the Tribunal, it should also formulate the general principles of international law which underlie the Charter and judgment. Mr. Georges Scelle advocated the latter course and in furtherance thereof presented a set of draft principles.⁴ The majority of the Commission, however, took the contrary view and were therefore unable to accept certain of the principles enunciated by Mr. Scelle which, in their opinion, went beyond the scope of the task of the Commission.

28. The Commission appointed a sub-committee, composed of Mr. J. P. A. François, Mr. A. E. F. Sandström and Mr. Jean Spiropoulos, which submitted a working paper⁵ containing a formulation of the Nürnberg principles. After a careful consideration of this working paper, the

¹ Mr. Vladimir M. Koretsky opposed this decision on the ground that the Commission, pursuant to articles 18 and 19 of its Statute, was empowered to address requests to Governments only after approval by the General Assembly of the Commission's recommendations as to the topics selected.

² A/CN.4/SR.16, page 15.

³ A/CN.4/SR.20, page 20.

⁴ A/CN.4/W.11.

⁵ A/CN.4/W.6.

Commission retained tentatively a number of draft articles and referred them back to the Sub-Committee for redrafting. The Sub-Committee thereafter presented a further draft¹ to the Commission.²

29. In considering what action should be taken with respect to the further draft submitted by the Sub-Committee, the Commission took into account its terms of reference as laid down in General Assembly resolution 177 (II). It noted that, thereunder, the task of formulating the Nürnberg principles appeared to be so closely connected with that of preparing a draft code of offences against the peace and security of mankind that it would be premature for the Commission to give a final formulation to these principles before the work of preparing the draft code was further advanced. It was, accordingly, decided to refer the further draft to a rapporteur who should submit his report thereon to the Commission at its second session.

PREPARATION OF A DRAFT CODE OF OFFENCES AGAINST THE PEACE AND SECURITY OF MANKIND

30. The Commission next considered the question of the preparation of a draft code of offences

against the peace and security of mankind, in pursuance of General Assembly resolution 177 (II), quoted above. The Commission decided that a rapporteur should be appointed to prepare a working paper on the subject and to submit it to the Commission at its second session. It was also decided that a questionnaire should be circulated to Governments inquiring what offences, apart from those defined in the Charter and judgment of the Nürnberg Tribunal, should, in their view, be comprehended in the draft code envisaged in the aforementioned resolution of the General Assembly.

ELECTION OF RAPPORTEUR

31. At a subsequent meeting the Commission appointed Mr. Jean Spiropoulos rapporteur to continue the work of the Commission with respect to: (a) the formulation of the principles of international law recognized in the Charter and judgment of the Nürnberg Tribunal; and (b) the preparation of a draft code of offences against the peace and security of mankind, indicating clearly the place to be accorded to the principles mentioned in (a) above. It was understood that the rapporteur should present to the Commission at its second session a report on the Nürnberg principles and a working paper on the draft code.

Chapter IV

Study of the question of international criminal jurisdiction

32. In pursuance of resolution 260 (III) B of the General Assembly, the Commission began a preliminary study of the desirability and possibility of establishing an international judicial organ for the trial of persons charged with genocide or other crimes over which jurisdiction will be conferred upon that organ by international conventions. This resolution, adopted at the 179th meeting, on 9 December 1948, reads as follows:

"The General Assembly,

"Considering that the discussion of the Convention on the Prevention and Punishment of the Crime of Genocide has raised the question of the desirability and possibility of having persons charged with genocide tried by a competent international tribunal,

"Considering that, in the course of development of the international community, there will be an increasing need of an international judicial organ for the trial of certain crimes under international law,

"Invites the International Law Commission to study the desirability and possibility of establish-

ing an international judicial organ for the trial of persons charged with genocide or other crimes over which jurisdiction will be conferred upon that organ by international conventions;

"Requests the International Law Commission, in carrying out this task, to pay attention to the possibility of establishing a Criminal Chamber of the International Court of Justice."

33. The Secretary-General had submitted to the Commission a memorandum entitled *Historical Survey of the Question of International Criminal Jurisdiction*.¹ This memorandum gave a factual account of the consideration of the question of an international criminal jurisdiction from the Peace Conference of 1919 up to and including the adoption of the above-quoted resolution by the General Assembly.

34. After a preliminary discussion, the Commission decided to appoint Mr. Ricardo J. Alfaro and Mr. A. E. F. Sandström rapporteurs on this subject. The rapporteurs were requested to make a study of the question, and to submit to the Commission at its second session one or more working papers thereon.

Chapter V

Ways and means for making the evidence of customary international law more readily available

35. In accordance with article 24 of its Statute, the Commission began the consideration of ways and means for making the evidence of customary international law more readily available. In this connexion, the Secretary-General had submitted

to the Commission a memorandum entitled *Ways and Means of making the Evidence of Customary International Law more readily available*,² and a working paper³ based thereon.

¹ A/CN.4/W.12.

² A/CN.4/6.

³ A/CN.4/W.9.

² With regard to this further draft, Mr. Georges Scelle declared that he was unable to associate himself with it.

36. The Commission had a discussion on the basis of the documents before it. Attention was given to the two methods of making the evidence of customary international law more readily available mentioned as examples in article 24 of the Statute — the collection and publication of documents concerning State practice, and the collection of decisions of national and international

courts on questions of international law. The possibility of assembling texts of national legislation relevant to international law was also considered.

37. As a result of the discussion, the Chairman of the Commission was invited to prepare a working paper on the subject. The Chairman acceded to this suggestion, and undertook to present a paper to the Commission at its next session.

Chapter VI

Co-operation with other bodies

38. With reference to item 6 of its agenda, the Commission discussed whether it was necessary at its first session to take any decision in regard to consultation with any of the organs of the United Nations or with international or national organizations, as envisaged in article 26, paragraph 1, of its Statute. The sense of the Commission was that consideration of this question should be postponed to its next session.

39. The Commission examined a tentative list of international and national organizations concerned with questions of international law, prepared by the Secretary-General in accordance with article 26, paragraphs 2 and 3, of the Statute, for the purpose of distribution of documents of the Commission.¹

Mr. Vladimir M. Koretsky was of the opinion

that paragraphs 1 and 2 of article 26 of the Statute of the Commission were closely related and that the inclusion of any organization in the list referred to in paragraph 2 would mean that the Commission might wish to consult with such organization. The majority of the Commission, however, decided that paragraphs 1 and 2 were not related, and that the list referred to in paragraph 2 was only for the purpose of distribution of documents.

Some members proposed additions to this list and it was understood that further additions could be made at any time. The Commission took note of a statement by the representative of the Secretary-General that the Secretariat would continue its efforts to secure further information so that national organizations of all Member States might be included.

Chapter VII

Miscellaneous decisions

DATE AND PLACE OF THE SECOND SESSION

40. The Commission decided to hold only one session in 1950. After consultation with the Secretary-General, it was decided that the session would be held in Europe, at Geneva. The opening meeting of the session, which is scheduled for a maximum period of ten weeks, will take place towards the end of May 1950.

REPRESENTATION AT THE GENERAL ASSEMBLY

41. The Commission decided that it would be represented, for purposes of consultation, by its Chairman during the fourth regular session of the General Assembly.

EMOLUMENTS FOR MEMBERS OF THE COMMISSION

42. In the view of the majority of the Commission, experience has shown that the *per diem* allowance provided for under article 13 of the Statute of the Commission, is hardly sufficient to

meet the living expenses of members. Assuming that the Commission will be in session for at least two months each year, its work will entail for each of the members the sacrifice of a substantial part of his income; for those members who are asked to serve as rapporteurs and as such to do extensive work in the interim between sessions of the Commission, it would involve an even greater sacrifice.

Since, in fact, most members are dependent on their current earnings, it would be in the interest of the work of the Commission, in order to enable the time of its members to be enlisted in this work, that methods should be explored by which service in the Commission may be made less onerous financially. To this end, the General Assembly may wish to reconsider the terms of article 13 of the Statute of the Commission.

ACKNOWLEDGMENT OF THE WORK OF THE SECRETARIAT

43. The Commission wishes to thank the Secretary-General for the services rendered to it and to congratulate the Legal Department of the Secretariat on its untiring efforts in assisting the Commission and on the valuable working documents placed at the disposal of the Commission.

¹ A/CN.4/8 (International and National Organizations concerned with Questions of International Law: tentative list).

PART II: DRAFT DECLARATION ON RIGHTS AND DUTIES OF STATES

RESOLUTION 173 (II) ADOPTED BY THE GENERAL ASSEMBLY

44. The General Assembly, at its 123rd meeting, on 21 November 1947, adopted resolution 178 (II) which reads as follows:

"The General Assembly,

"Noting that very few comments and observations on the draft declaration on the rights and duties of States presented by Panama have been received from the States Members of the United Nations,

"Requests the Secretary-General to draw the attention of States to the desirability of submitting their comments and observations without delay;

"Requests the Secretary-General to undertake the necessary preparatory work on the draft declaration on the rights and duties of States according to the terms of resolution 175 (II);

"Resolves to entrust further study of this problem to the International Law Commission, the members of which in accordance with the terms of resolution 174 (II) will be elected at the next session of the General Assembly;

"And accordingly

"Instructs the International Law Commission to prepare a draft declaration on the rights and duties of States, taking as a basis of discussion the draft declaration on the rights and duties of States presented by Panama, and taking into consideration other documents and drafts on this subject."

PREPARATION BY THE COMMISSION OF THE DRAFT DECLARATION

45. In conformity with the resolution of the General Assembly set out in the foregoing paragraph, the Commission took as the basis of its discussions the draft Declaration on the Rights and Duties of States presented by Panama.¹ The task of the Commission was facilitated by a memorandum submitted by the Secretary-General containing a detailed analysis of the United Nations discussions on this subject, and reproducing comments and observations communicated by Member States on the Panamanian draft,² the texts of treaties and conventions, resolutions, declarations and projects emanating from inter-govern-

mental bodies, declarations prepared by non-governmental organizations and scientific institutions, and statements by jurists and publicists.¹ The Commission examined article by article the Panamanian draft in the light of other documents before it. Its deliberations are recorded in its summary records.²

46. The draft Declaration prepared by the Commission was subjected to three readings. Each of the articles finally adopted was discussed at each reading, and the sense of the Commission was taken on its retention. Though views varied on the different articles, those which were retained met in each case with preponderant support of the members of the Commission. The draft Declaration as a whole was finally adopted by eleven votes to two.³

¹ A/CN.4/2 (Preparatory Study concerning a Draft Declaration on the Rights and Duties of States).

² A/CN.4/SR.7 to A/CN.4/SR.16, A/CN.4/SR.19 to A/CN.4/SR.25, A/CN.4/SR.29 and A/CN.4/SR.30.

³ A/CN.4/SR.25. After the vote on the draft Declaration, Mr. Vladimir M. Koretsky and Mr. Manley O. Hudson, who voted against it, made statements in explanation of their votes.

Mr. Koretsky declared that he voted against the draft declaration because of its many shortcomings including, in particular: (1) that it deviated from such fundamental principles of the United Nations as the sovereign equality of all the Members thereof and the right of self-determination of peoples; (2) that it did not protect the interests of States against interference by international organizations or groups of States in matters falling essentially within their domestic jurisdiction; (3) that it did not set out the most important duty of States to take measures for the maintenance of international peace and security, the prohibition of atomic weapons, and the general reduction of armaments and armed forces, and that, further, the draft Declaration did not proclaim the duty of States to abstain from participation in any aggressive blocs such as the North Atlantic Pact and the Western Union, which under the cloak of false phrases concerning peace and self-defence were actually aimed at preparing new wars; (4) that the draft Declaration ignored the most important duty of States to take measures for the eradication of the vestiges of fascism and against the danger of its recrudescence; (5) that the draft Declaration ignored the most important duty of States not to allow the establishment of any direct or indirect restriction of the rights of citizens or the establishment of direct or indirect privileges for citizens on account of their race or nationality, and not to allow any advocacy of racial or national exclusiveness or of hatred and contempt; (6) that the draft Declaration did not recite the most important duty of States to ensure the effectiveness of fundamental freedoms and human rights, notably the right to work and the right to be protected against unemployment, ensured on the part of the State and society by such measures as would provide wide possibilities for all to participate in useful work and as would prevent unemployment. Mr. Koretsky added that the draft Declaration, and especially article 14 thereof, went even further than the Panamanian draft in denying the sovereignty of States. In his view the doctrine of the "super-State" was being resorted to in this fashion by persons or peoples seeking to achieve, or to help others to achieve, world domination. Instead of reinforcing the principles of sovereignty, self-determination, sovereign equality of States, independence, and the freedom of States from dependence upon other States, the draft Declaration, he thought, derogated from the great movements to rid the peoples of the world of the scourges of exploitation and oppression (A/CN.4/SR.22, pages 13-14).

Mr. Hudson stated that he voted against the draft Declaration because the provisions of its article 6 went beyond the Charter of the United Nations, and beyond international law at its present stage of development (A/CN.4/SR.25, pages 3 and 6).

¹ A/285.

² Comments and observations on the Panamanian draft were made by the following Governments: Canada (12 May 1947, 19 July 1947 and 7 April 1948); Czechoslovakia (11 August 1947); Denmark (22 September 1947); Dominican Republic (4 June 1947); Ecuador (17 September 1947); El Salvador (28 April 1947); Greece (4 September 1947); India (26 September 1947 and 11 June 1948); Mexico (7 June 1947); Netherlands (23 June 1947); New Zealand (25 July 1947 and 9 April 1948); Philippines (19 December 1947 and 27 May 1948); Sweden (30 May 1947 and 26 April 1948); Turkey (14 August 1947); United Kingdom (1 May 1947 and 24 August 1948); United States of America (29 May 1947 and 11 March 1949); Venezuela (12 September 1947).

The draft Declaration as drawn up by the Commission reads as follows:

DRAFT DECLARATION ON RIGHTS AND DUTIES OF STATES

Whereas the States of the world form a community governed by international law,

Whereas the progressive development of international law requires effective organization of the community of States,

Whereas a great majority of the States of the world have accordingly established a new international order under the Charter of the United Nations, and most of the other States of the world have declared their desire to live within this order,

Whereas a primary purpose of the United Nations is to maintain international peace and security, and the reign of law and justice is essential to the realization of this purpose, and

Whereas it is therefore desirable to formulate certain basic rights and duties of States in the light of new developments of international law and in harmony with the Charter of the United Nations,

The General Assembly of the United Nations adopts and proclaims this

Declaration on Rights and Duties of States

Article 1

Every State has the right to independence and hence to exercise freely, without dictation by any other State, all its legal powers, including the choice of its own form of government.

This text was derived from articles 3 and 4 of the Panamanian draft.

Article 2

Every State has the right to exercise jurisdiction over its territory and over all persons and things therein, subject to the immunities recognized by international law.

This text was derived from article 7 of the Panamanian draft. The concluding phrase is a safeguard for protecting such immunities as those of diplomatic officers and officials of international organizations. Reference was made in the discussions to Article 105 of the Charter of the United Nations, and to the more recent implementation of that Article.

Article 3

Every State has the duty to refrain from intervention in the internal or external affairs of any other State.

The substance of this text, which was derived from article 5 of the Panamanian draft, has already found place in various international conventions.

Article 4

Every State has the duty to refrain from fomenting civil strife in the territory of another State, and to prevent the organization within its territory of activities calculated to foment such civil strife.

This text was derived from article 22 of the Panamanian draft. The principle has been enunciated in various international agreements.

Article 5

Every State has the right to equality in law with every other State.

This text was derived from article 6 of the Panamanian draft. It expresses, in the view of the majority

of the Commission, the meaning of the phrase "sovereign equality" employed in Article 2, (1) of the Charter of the United Nations as interpreted at the San Francisco Conference, 1945.¹

Article 6

Every State has the duty to treat all persons under its jurisdiction with respect for human rights and fundamental freedoms, without distinction as to race, sex, language, or religion.

This text was derived from the latter part of article 21 of the Panamanian draft. The reference to human rights and fundamental freedoms is inspired by Article 1 (3), Article 13, paragraph 1 (b), Article 55 (c), and Article 76 (c), of the Charter of the United Nations and by the Universal Declaration of Human Rights.

Article 7

Every State has the duty to ensure that conditions prevailing in its territory do not menace international peace and order.

This text was derived from the introductory part of article 21 of the Panamanian draft.

Article 8

Every State has the duty to settle its disputes with other States by peaceful means in such a manner that international peace and security, and justice, are not endangered.

This text was derived from article 15 of the Panamanian draft. Its language follows closely Article 2 (3) of the Charter of the United Nations.

Article 9

Every State has the duty to refrain from resorting to war as an instrument of national policy, and to refrain from the threat or use of force against the territorial integrity or political independence of another State, or in any other manner inconsistent with international law and order.

This text was derived from article 16 of the Panamanian draft. The first phrase is fashioned upon a provision in the Treaty of Paris for the Renunciation of War of 1928. The second phrase follows closely the provision in Article 2 (4) of the Charter of the United Nations.

Article 10

Every State has the duty to refrain from giving assistance to any State which is acting in violation of article 9, or against which the United Nations is taking preventive or enforcement action.

This text was derived from article 19 of the Panamanian draft. The second phrase follows closely the language employed in the latter part of Article 2 (5) of the Charter of the United Nations.

Article 11

Every State has the duty to refrain from recognizing any territorial acquisition by another State acting in violation of article 9.

This text was derived from article 18 of the Panamanian draft.

Article 12

Every State has the right of individual or collective self-defence against armed attack.

This text was derived from article 17 of the Panamanian draft. The language is based upon that employed in Article 51 of the Charter of the United Nations.

Article 13

Every State has the duty to carry out in good faith its obligations arising from treaties and other

¹ Report of Committee 1 to Commission I, Documents of the San Francisco Conference, VI, page 457.

sources of international law, and it may not invoke provisions in its constitution or its laws as an excuse for failure to perform this duty.

This text was derived from articles 11 and 12 of the Panamanian draft. The phrase "treaties and other sources of international law" was borrowed from the Preamble of the Charter of the United Nations. The first phrase is a re-statement of the fundamental principle *pacta sunt servanda*. The concluding phrase reproduces the substance of a well-known pronouncement by the Permanent Court of International Justice.¹

Article 14

Every State has the duty to conduct its relations with other States in accordance with international law and with the principle that the sovereignty of each State is subject to the supremacy of international law.

This text was derived from article 13 of the Panamanian draft.

GUIDING CONSIDERATIONS

47. During the preparation of the foregoing draft Declaration, the Commission took into account certain guiding considerations. It was felt that the draft Declaration should be in harmony with the provisions of the Charter of the United Nations: that it should be applicable only to sovereign States; that it should envisage all the sovereign States of the world and not only the Members of the United Nations; and that it should embrace certain basic rights and duties of States.

SUMMARY OF CONTENTS

48. In conformity with these considerations, the Commission restricted the draft Declaration to the statement of four rights and ten duties of States. The rights are those of independence, comprehending the right of the State to exercise freely all its legal powers, including the choice of its form of government; of jurisdiction over State territory in accordance with international law; of equality in law; and of self-defence, individual or collective, against armed attack. The duties which are stated are of necessity expressed at greater length. They include the duty of the State to conduct its international relations in accordance with international law and to observe its legal obligations. They also include the duty to settle disputes by peaceful means and in accordance with law and justice, and to refrain from intervention and from resorting to war or other illegal use of force. The duties of refraining from assisting any State resorting to war or other illegal use of force, or any State against which the United Nations is taking preventive or enforcement action, and of refraining from recognizing any territorial acquisition resulting from war or other illegal use of force, are likewise stated as corollaries of the foregoing. And, finally, there are set out the duties of the State to refrain from fomenting civil strife in the territory of other States and to prevent the organized incitement thereof from within its own territory; to ensure in general that conditions in its territory do not menace international peace and order; and to treat all persons within its jurisdiction with due respect for

human rights and fundamental freedoms for all, without distinction as to race, sex, language, or religion.

OBSERVATIONS CONCERNING THE DRAFT DECLARATION

49. It will be noted that each of the fourteen articles of the Commission's draft was derived from an article in the Panamanian draft. Some of the twenty-four articles of the latter were not retained; some were combined with other articles; some were found to be unnecessary because their substance was contained in other articles. Two of the articles in the Panamanian draft which were not retained precipitated a lengthy discussion which it may be useful to review.

The Commission concluded that no useful purpose would be served by an effort to define the term "State", though this course had been suggested by the Governments of the United Kingdom and of India. In the Commission's draft, the term "State" is used in the sense commonly accepted in international practice. Nor did the Commission think that it was called upon to set forth in this draft Declaration the qualifications to be possessed by a community in order that it may become a State.

It was proposed that the draft Declaration should be introduced by an article providing that "Each State has the right to exist and to preserve its existence". This was urged as a mainspring for other rights to be declared, and its importance was thought to be underscored because the right had been denied and trampled upon by the Axis Powers in the last war. On the other hand, a majority of the members of the Commission deemed it to be tautological to say that an existing State has the right to exist; that right is in a sense a postulate or presupposition underlying the whole draft Declaration. They also thought it superfluous to declare the right of a State to preserve its existence in view of articles in the draft Declaration concerning self-defence and non-intervention by other States.

50. Another proposed article would have provided that "Each State has the right to have its existence recognized by other States". The supporters of this proposal took the view that, even before its recognition by other States, a State has certain rights in international law; and they urged that, when another State on an appraisal made in good faith considers that a political entity has fulfilled the requirements of statehood, it has a duty to recognize that political entity as a State; they appreciated, however, that, in the absence of an international authority with competence to effect collective recognition, each State would retain some freedom of appraisal until recognition had been effected by the great majority of States. On the other hand, a majority of the members of the Commission thought that the proposed article would go beyond generally accepted international law in so far as it applied to new-born States; and that in so far as it related to already established States the article would serve no useful purpose. The Commission concluded that the whole matter of recognition was too delicate and too fraught with political implications to be dealt with in a brief paragraph in this draft Declaration, and it noted that the topic was one of the fourteen topics the codification of which has been deemed by the Commission to be necessary or desirable.

¹ Permanent Court of International Justice, Series A/B, Judgments, Orders and Advisory Opinions, Fascicule No. 44, page 24.

51. After the draft Declaration was completed, Mr. Shuhs Hsu proposed the addition of an article on the duty of States to condition military necessity by the principle of humanity in the employment of armed forces, legitimate or illegitimate. Some members objected, holding that no reference to warfare should find a place in such a Declaration as drafted. The Commission did not accept the proposed addition.

52. In conclusion, it will be observed that the rights and duties set forth in the draft Declaration are formulated in general terms, without restriction or exception, as befits a declaration of basic rights and duties. The articles of the draft Declaration enunciate general principles of international law, the extent and the modalities of the application of which are to be determined by more precise rules. Article 14 of the draft Declaration is a recognition of this fact. It is, indeed, a global provision which dominates the whole draft and, in the view of the Commission, it appropriately serves as a key to other provisions of the draft Declaration in proclaiming "the supremacy of international law".

SUBMISSION OF THE DRAFT DECLARATION TO THE GENERAL ASSEMBLY

53. The Commission gave careful consideration to the question of the procedure to be followed with respect to the draft Declaration, and in particular to the question whether or not the latter should be submitted immediately to the General Assembly. In this connexion, the Commission was guided by the terms of General Assembly resolution 178 (II) and the relevant provisions of its own Statute. It also took into account the terms of a similar resolution, namely, resolution 260 (III) B of the General Assembly, whereunder it was assigned the special task of studying the question of an international criminal jurisdiction.

The Commission, with Mr. Vladimir M. Koretsky dissenting, came to the conclusion that its

function in relation to the draft Declaration fell within neither of the two principal duties laid upon it by its Statute, but constituted a special assignment from the General Assembly. It was within the competence of the Commission to adopt in relation to this task such a procedure as it might deem conducive to the effectiveness of its work. In this connexion, it was noted that the Panamanian draft, which had served as a basis of discussion, had, in pursuance of resolution 38 (I) adopted by the General Assembly on 11 December 1946, already been transmitted to the Governments of all Members of the United Nations with a request for comments and observations; it was also noted that this request had been reinforced by a circular letter issued by the Secretary-General in pursuance of General Assembly resolution 178 (II) adopted on 21 November 1947. All Governments had thus had ample opportunity to express their general views on the subject matter and, moreover, all Members of the United Nations would have another opportunity so to do when the General Assembly came to consider the draft Declaration.

The Commission therefore decided, by twelve votes to one, to submit the draft Declaration, through the Secretary-General, to the General Assembly immediately, and to place on record its conclusion that it was for the General Assembly to decide what further course of action should be taken in relation to the draft Declaration and, in particular, whether it should be transmitted to Member Governments for comments.

Mr. Vladimir M. Koretsky dissented from this view, expressing the opinion that articles 16 and 21 of the Statute of the Commission required the publication of any draft prepared by the Commission, together with such explanations and supporting material as the Commission might consider appropriate, and the circulation thereof to Governments with a request for observations to be made within a reasonable time, before the final submission of any document to the General Assembly.