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A/CN.4/SR.32

Summary record of the 32nd meeting

Topic:
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appreciated Mr. Koretsky's motives in referring to extra-territorial consular jurisdiction in China. He pointed out, however, that such jurisdiction was not based on custom but on Treaties, though the provisions of those Treaties had been somewhat expanded.

105. The CHAIRMAN remarked that the Secretariat had been confronted with a very difficult task. Although the document it had produced had certain limitations, he felt that the Secretariat deserved the Commission's congratulations.

The meeting rose at 6.10 p.m.

32nd MEETING

Thursday, 2 June 1949, at 3 p.m.

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

Present:

Members: Mr. Ricardo J. ALFARO, Mr. James L. BRIERLY, Mr. Roberto CÓRDOVA, Mr. J. P. A. FRANÇOIS, Mr. Shuhsi HSU, Mr. Vladimir M. KORETSKY, Sir Benegal 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.

Ways and Means of Making the Evidence of Customary International Law more Readily Available (A/CN.4/6) (*concluded*)

1. The CHAIRMAN re-opened the discussion of this item.

2. Mr. HSU wished to complete the remarks which he had made at the end of the preceding meeting. He had carefully perused both documents under discussion and had found them as good as could be expected under the circumstances. The work was still at a preliminary stage and could not therefore be complete, but it did not deserve the severe criticism and political accusations levelled against it by Mr. Koretsky.

3. The Secretariat paper had been prepared in a very scientific manner and had listed different methods by which the objective might be reached. Mr. Hsu therefore felt that the most effective method would be to instruct the Secretariat to prepare a systematic and comprehensive compilation of evidence of customary international law; the Secretariat would be the central organ for that work and would seek the co-operation of the governments, organizations and experts.

4. The Commission should base its discussion on the Secretariat working paper, starting with page 2, paragraph 2 (*b*). [1] He pointed out, in that connexion, that the document followed the outline of the Secretary-General's Memorandum containing a survey of compilations and digests of evidence of customary international law (A/CN.4/6). The working paper could thus be discussed paragraph by paragraph in conjunction with the corresponding sections of the survey.

5. The CHAIRMAN considered Mr. Hsu's suggestion useful He agreed that the different paragraphs of the working paper covered certain sections of the survey; thus paragraph 2 (*b*) (i), Digest of the Practice of States, covered part two, I, section B of the survey; paragraph 2 (*b*) (ii), Collections of International Decisions, covered sections D to H of the same part; paragraph 2 (*b*) (iii), Decisions of National Courts, covered sections I and J, and paragraph 2 (*b*) (iv) covered section K. He suggested that the Commission should follow Mr. Hsu's proposal and begin with the discussion of paragraph 2 (*b*) (i).

6. Mr. SCELLE thought that both Mr. Hsu's proposal and the proposal made by Mr. Spiropoulos at the preceding meeting were acceptable. It was a difficult question and its study would require much time. With regard to the survey which had been strongly criticized by Mr. Koretsky, he pointed out that every work was bound to contain some faults. Nevertheless, Mr. Scelle found that he had learned a great deal from the document.

7. Mr. Koretsky's vehement attack had been defeated by its own arguments. While there might be certain gaps in the survey, they were certainly not due to bad faith on the part of the Secretariat. Mr. Scelle also felt that the survey should be completed, but even in its existing form it was the most valuable study on the question extant.

8. Mr. Scelle therefore supported Mr. Spiropoulos' proposal that it should be taken as one of the major subjects for study and that a rapporteur should be appointed to complete the survey and consider how the evidence of customary law, which was as yet the main source of international law, could best be made available. In a sociological sense, international law was yet at an

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[1] See A/CN.4/SR.31, footnote 9.

early stage of development, and customary law was of great importance in that connexion.

9. Even in France, a country of written law, the influence of customary law was daily felt. He pointed out, with reference to conventional law, that treaties as a rule merely record customs in writing. Consequently, in international law customary law was relatively more important than conventional law.

10. Mr. KORETSKY thought that the discussion had shown not only divergent ideological approaches, but also differences in the evaluation of methods. In speaking of the "attacks" against the Secretariat paper, Mr. Scelle had simplified the Commission's task. It was a wrong approach which would ultimately be harmful to its work. Referring to an incident from his own experience, Mr. Koretsky stated that the thoroughness of his criticism was in proportion to his desire to help in any given work. He had not only the right, but the duty to point to any shortcomings in the Secretariat's work, and such criticism should not be taken personally.

11. With regard to Mr. Hsu's statement at the preceding meeting, Mr. Koretsky expressed disappointment at the fact that Mr. Hsu had defended the treaties which had been instrumental in imposing foreign domination on China and from which the latter was now freeing itself.

12. The inadequacy of the survey was due to ignorance of available material and a lack of desire to do further research. The Harvard Library contained many volumes of data on pre-revolutionary Russia as well as on the Union of Soviet Socialist Republics which had not been listed in the survey. The documents relating to the United States of America and the Latin American countries were well publicized and there was no need to concentrate on them. In the case of other countries, however, the material was less well known and the Secretariat had failed to carry out research where it was most needed. In view of those circumstances, his evaluation of the Secretariat's work had been necessarily critical. All facts tended to show that such work should not be entrusted to individual experts who might be guided by personal preferences.

13. Regarding the question of principle raised by Mr. Scelle, Mr. Koretsky noted that a number of members seemed to feel that customary law was the basic source of international law. That view was wrong. A correct study of the evolution of international law would show that customary law was bound by tradition, backward and always lagged behind social development. Conventional law, on the other hand, was progressive; in it were crystallized the new principles of law and thus it served to strengthen the development of international law. There were many new sources of conventional law; the Charter of the United Nations, for instance, which laid down many new principles of international law, was essentially a treaty which had been signed by all peace-loving nations in San Francisco. Consequently treaties, which were the expression of the sovereign will of sovereign States acting jointly, should be considered the principal source of international law and should be studied with a view to extracting the main principles which they embodied, as was being done in the of the principles of the Charter of the Nürnberg Tribunal and of the Tribunal's Judgment.

14. Customary law, however, was backward and belonged to the period of the "white man's burden", the period of the domination by a few powerful States who had disregarded the national sovereignty of weaker States. Mr. Scelle had correctly stressed the need to determine what should be considered a basic source of international law, but his conclusions had been wrong; conventional law, not customary law, was the basic source of international law.

15. The CHAIRMAN, stating his own view on the matter, did not think that it was for the Commission as a whole to judge the documents prepared by the Secretariat. Each member of the Commission had his own views regarding the quality of the work and there was no purpose in trying to arrive at a unanimous agreement on it.

16. In his opinion, the document could not possibly be complete in view of the tremendousness of the task involved. It was essentially a problem of finding persons equipped with technical and linguistic knowledge to carry out the work. The Division of the Legal Department which acted as Secretariat to the Commission, had once included a staff member from the Soviet Union, but he had not been able to complete his part of the work.

17. The Commission must observe article 24 of its Statute. In accordance with that article, the Secretariat had prepared a useful, if not complete, document. Mr. Koretsky's suggestion for a survey of current treaty law was interesting, and the Chairman hoped that such a survey might be carried out in the future. He himself had devoted many years of his life to a careful study of the League of Nations Treaty Series, and at one time had taken steps to ensure its continued publication in the two working languages. His interest in the matter, however, had not prevented him from criticizing it severely on different occasions.

18. Referring to his own experience in the United States, he pointed out that, being convinced that the difficulty of obtaining texts was one of the main obstacles to research work on international law he had carried on an unceasing campaign for the publication of relevant material. As a result of those efforts, the publications of the

State Department of the United States Government had been vastly improved, a series of multipartite international conventions had been published under the title *International Legislation* and the judgments, advisory opinions and orders of the Permanent Court of International Justice from 1922 to 1942 had been brought out in one series entitled *The World Court Reports*.

19. A study of the legislation of all countries on various subjects has been started at Harvard University, and he hoped that that as well as other studies by the Harvard Research might be brought up to date by the United Nations Secretariat.

20. In reply to the objection which had been raised that the survey did not deal with laws in Arab countries, he drew attention to page 61 of the survey containing a reference to Egypt. He recalled, in that connexion, his own experience in trying to collect customary laws pertaining to pearl fishing in the Persian Gulf. As no documents had been published on the matter, it had been necessary to send out research workers to interview pearl fishers on the existing customs in that region. He hoped that the research would further the knowledge of customary international law on the question. While the Secretariat could not be expected to carry out similar research, the incident was typical of the difficulties experienced.

21. In conclusion he suggested, with reference to the last paragraph on page 4 of the working document, that the United Nations might take steps to provide its Members with adequate material on international law as applied to meet current problems, with special reference to the United Nations and international co-operation in general. The material should cover all countries and be translated into the languages of the respective Member States to which it was circulated.

22. Mr. YEPES thanked the Chairman for his statement and suggested that he should be appointed Rapporteur on that subject.

23. Mr. SANDSTROM supported Mr. Spiropoulos' proposal made at the previous meeting that a rapporteur should be appointed, and thought that there was general agreement with Mr. Yepes' proposal.

24. The CHAIRMAN stated that he would be glad to help in the preparation of a report on the subject, but he did not think that, as Chairman, he should be appointed Rapporteur.

25. He then turned to paragraph 2 (*b*) of the working paper. He noted that the material available on paragraph (i), Digest of the Practice of States, was insufficient and should be supplemented. With regard to paragraph (ii), Collections of International Decisions, two excellent volumes of the International Arbitration Awards had been published, but new volumes were needed. In connexion with paragraph (iii), Decisions of National Courts, he said that the Annual Digest of Reports of Public International Law Cases, published in London, was very useful although not complete. With reference to paragraph (iv), National Legislation, he suggested that the Secretariat should publish collections of the national legislations of all countries, classifying them according to subjects.

Paragraph 2 (b) (*i*): *Digest of the practice of States*

26. The CHAIRMAN pointed out that some Governments supplied a great deal of material on certain questions, and experts would have to go over much of it in order to trace the development of particular subjects for simplified presentation in the Digest.

27. Mr. BRIERLY thought that such an undertaking would be impractical. He feared that there would be no response if Governments were asked to supply too extensive a documentation.

28. Mr. SPIROPOULOS suggested that the ministries of foreign affairs of Member Governments might be asked to transmit copies of their diplomatic correspondence.

29. The CHAIRMAN saw some difficulty in that suggestion as Governments would not be willing to supply the relevant documents without the consent of the other Governments involved and not until the issues discussed in the correspondence had been settled. The Commission might, however, request the Governments to prepare digests of their practices, although it was doubtful whether the latter would assume such an expensive and time-consuming function.

30. Mr. CORDOVA noted that the *Memoria* published in Mexico included the main documents pertaining to that country's diplomatic negotiations. The documents, however, were only published ten years after the negotiations had been completed.

31. Mr. SPIROPOULOS, reminding the Commission that it must present a report on the matter to the General Assembly, stated that the Commission should request Governments to prepare collections of documents similar to Moore's Digest.

32. Mr. AMADO suggested that the Chairman, who was an expert on the question, should prepare a working paper on the basis of which the Commission could formulate its instructions to the Rapporteur.

Paragraph 2 (b) (*ii*):
Collection of international decisions

33. The CHAIRMAN noted that a new volume of the *Reports of International Arbitral Awards* [2] had been prepared by the staff of the registry of the International Court of Justice. The material

[2] United Nations publication, Sales Number:1948-V. II.

contained in that volume was relevant, but its editing was defective. He drew attention to the *Grotius Annuaire*, a very useful collection of international decisions which had been published in The Hague.

34. As regards current international decisions, collections were being published. In the case of earlier international decisions, he had suggested to the Registrar of the International Court of Justice that the first series should start with 1920, the second series with 1820, and a third series with the eighteenth century.

35. Mr. BRIERLY asked the Chairman whether he thought the matter in question was adequately taken care of in the publications of the Permanent Court of International Justice, and whether there would be any overlapping of work if another body made a collection of international decisions.

36. The CHAIRMAN said that Mr. Brierly's first question could not be answered until ten years after the publications had been completed. Replying to the second question, he said there would be no overlapping of work if such a collection of decisions covered another period, and pointed out that two extremely useful works already existed, namely the *Recueil des Arbitrages Internationaux* by Lapradelle and Politis, and *the Recueil International des Traités du XX^e Siècle contenant l'ensemble du droit conventionnel entre les Etats et les sentences arbitraires* by Descamps and Renault.

37. The work of making the collection of decisions had been entrusted to the Registry of the International Court of Justice as it had the necessary staff and material to carry out such work.

38. Mr. BRIERLY felt that it would be a waste of time for Governments to supply the United Nations Secretariat with copies of all past arbitral awards in order that it might make a collection of international decisions, as suggested in the working paper of the Secretariat, if the Registry of the International Court of Justice was already doing that work.

39. Mr. SPIROPOULOS agreed that a great deal of work had already been carried out by the International Court of Justice in collating decisions, but felt that the Secretariat of the United Nations should be the central organ in view of the evident need for centralization.

40. Mr. LIANG (Secretary to the Commission) said that the series of publications entitled "Reports of International Arbitral Awards" was being prepared jointly by the Registry of the International Court of Justice and the Legal Department of the Secretariat of the United Nations. The main part of the work was being done at The Hague because of the accessibility of material and for other practical reasons. The work was being paid for out of United Nations funds. While the Reports referred to published awards given in the past, the suggestion made in paragraph 2 (*b*) (ii), of the working paper, referred to the preparation of collections of future arbitral awards. If the Commission decided that such work should be carried out, also by the Registry of the Court, the Secretariat would be glad to transmit to the International Court of Justice, copies of all arbitral awards made in the future which it received from Governments.

41. Replying to Mr. BRIERLY, the CHAIRMAN said that under The Hague Convention on the Pacific Settlement of International Disputes to which more than forty States were parties, signatory States had to forward to the Permanent Court of Arbitration all texts of arbitral awards. The Permanent Court of Arbitration had already published a number of volumes containing such texts.

Paragraph 2 (b):
(iii) Decisions of National Courts

42. The CHAIRMAN said that, as a general rule, national courts applied international law only in so far as it had been incorporated in national law. A collection of decisions was contained in the Annual Digest and Reports of Public International Law Cases, published in London. It would be useful if the Secretariat collaborated with individual experts, national scientific institutions and, in the case of some countries, with Governments, for the assembling of such decisions.

43. Mr. KORETSKY said that if such decisions were compiled and published by the United Nations, care should be taken that the full texts of the decisions of national courts were given. It was important that the Secretariat of the United Nations should do the work of compilation itself and should not co-operate with individual experts, as suggested in the working paper of the Secretariat. In many existing collections the decisions were reported in a mutilated form.

44. The CHAIRMAN agreed that the full texts of decisions of national courts should be published.

Paragraph 2 (b): *(iv) National Legislation*

45. The CHAIRMAN pointed out that in the working paper of the Secretariat it was suggested that Governments might possibly agree to communicate to the Secretariat of the United Nations in the future the relevant texts of national legislation. In most countries national legislation was published, and he presumed the Secretariat could make a collection of such legislation and determine what items were of international interest.

46. Mr. LIANG (Secretary to the Commission) said it was difficult to visualize a complete collection of national legislations as so many subjects were involved. He felt, therefore, that a collection should only be made of national legislations cover-

ing the topics chosen for codification by the Commission.

47. The CHAIRMAN said the Commission had completed a review of paragraphs 2 (*b*) (i), (ii), (iii) and (iv). He felt that the questions covered by paragraphs 2 (*c*), (*d*), (*e*) and (*f*) should be considered later.

Paragraphs 3 (i) and 3 (ii)

48. The CHAIRMAN said that paragraph 3 (i) which referred to the possibility of consultation with Governments for the granting of more easy access to national archives, might be of general interest to the United Nations. He was not sure whether such consultations should be initiated by the Commission or by a resolution of the General Assembly.

49. Mr. KORETSKY felt that the question whether Governments should grant more easy access to national archives was one of domestic jurisdiction. In the Union of Soviet Socialist Republics the archives could be consulted by all scientists. Referring to paragraph 3 (ii) he felt it was not necessary for the Commission to take any action regarding methods of promoting wider distribution of existing collections of evidence of international law.

50. The CHAIRMAN said the question might be drawn to the attention of the United Nations Educational, Scientific and Cultural Organization.

51. Mr. KORETSKY could not agree with the Chairman's suggestion, as UNESCO dealt only with educational problems.

52. The CHAIRMAN proposed that the matter should be referred to the second session of the International Law Commission.

53. Mr. YEPES suggested that the Chairman should prepare a working paper containing his views on the subject of ways and means for making the evidence of customary international law more readily available and that no Rapporteur should be appointed to deal with that question.

54. Mr. AMADO pointed out that, as he had made a similar proposal at a previous meeting, he would support Mr. Yepes' suggestion.

It was decided that no Rapporteur should be appointed to deal with the question of ways and means for making customary international law more readily available, but that a member of the Commission should prepare a working paper on that subject to be submitted to the second session of the International Law Commission.

General Directives Regarding the Commission's Report: Appointment of Rapporteurs

55. Mr. YEPES suggested that before the appointment of Rapporteurs for the three topics chosen by the Commission for codification, there should be a general discussion of those three subjects, namely the Law of Treaties, the Law of Arbitral Procedure, and the Régime of the High Seas, to determine what directives should be given to the Rapporteurs.

56. He suggested that the Commission might wish to choose another subject for codification in case any of the Rapporteurs appointed could not be present at the second session or was prevented from carrying out his work. It would be best for each member of the Commission to choose a subject in which he was interested and submit a paper to the second session, but he admitted that that was not practicable.

57. Listing the problems coming under the Law of Treaties, he said that each one of them was worthy of a special report, and that the Rapporteurs would have great difficulty in making such reports unless they had received directives from the Commission.

58. Referring to the Law of Arbitral Procedure, he considered that the Commission should give the Rapporteur clear directives whether he was to study arbitral procedure of the nineteenth century and the early part of the twentieth; or whether he should concentrate on modern arbitral procedure. He pointed out that at the ninth Pan-American Conference problems relating to the peaceful settlement of disputes had been carefully examined, and it had been decided that The Hague procedure was out of date in view of world legal evolution. That had resulted in a very advanced treaty on the subject.

59. The Régime of the High Seas was a problem on which the repercussions of contemporary events had been very profound. The Rapporteur should be given specific directives regarding the work to be carried out in that connexion. Mr. Yepes stated that revolutionary doctrines had exploded the classic conception of international law as regards the Régime of the High Seas, and referred to a declaration made at the Pan-American Conference of 1939 regarding the security belt of 300 nautical miles established around the western hemisphere. That declaration had already been incorporated in certain treaties of the American Republics. It was to be regretted, however, that it had been omitted from the North Atlantic Treaty.

60. President Truman had made an important declaration regarding the doctrine of the " continental shelf ". That " shelf " comprised a large area of the ocean which, in connexion with the exploitation of the riches of the sea, was to be considered as the exclusive property of the countries bordering it. Similar declarations had been made by the Presidents of Mexico, Chile, Argentina, Costa Rica and other States. In certain countries it had been decided that the " continental shelf " should be 200 nautical miles in radius.

61. An inquiry was being carried out by certain Latin American States regarding the possibility and desirability of concluding a convention between all American States with a view to settling the radius of the security belt which would protect the sovereignty of American States over a portion of the ocean formerly known as the " high seas ", as it was beyond the three-mile limit.

62. The CHAIRMAN agreed with Mr. Yepes' suggestion that there should be a general discussion on the three topics chosen for codification, but felt that only one Rapporteur should be appointed to deal with each topic.

63. Mr. KORETSKY could not agree with Mr. Yepes' proposal. As members of the Commission had already expressed their views on the various topics for codification, he felt that further discussion of those topics would not lead to any directives being given to the Rapporteurs. The latter should merely draw up working papers to be submitted to the second session of the Commission. Their work was not the same as that of Rapporteurs working on subjects which the General Assembly had already assigned to the International Law Commission.

64. Mr. SPIROPOULOS said he had drawn the Commission's attention at a previous meeting to the points which had now been raised by Mr. Yepes, and felt that the matter should be discussed further. The Rapporteurs appointed must be given directives, the Commission must adopt a plan of work in each case, and must decide how Governments should be approached and requested to furnish the texts of laws, decreed, judicial decisions, treaties, diplomatic correspondence and other documents relevant to the topic being studied in accordance with Article 19 of the Statute. The Commission should also decide what form its report to the General Assembly should take in the light of Article 20 of the Statute, and what subjects should be discussed at the second session.

65. Mr. YEPES proposed that the question of the recognition of States and Governments should be added to the list of topics already chosen for codification.

66. Mr. BRIERLY felt it would be impossible to discuss thoroughly even three subjects at the second session, and therefore disagreed with Mr. Yepes' proposal.

67. Mr. SCELLE suggested that at the following meeting the Commission's report to the General Assembly should be discussed. The directives to be given to the Rapporteurs should be considered, but they should not be given strictly determined terms of reference. It might be advisable to appoint a Rapporteur to deal with the problem of the recognition of States and Governments, which was one of the most important current political questions.

68. The CHAIRMAN said that the proposal submitted by Mr. Yepes would be considered at the following meeting. He agreed that the Commission should adopt a plan of work appropriate to each topic to be codified, but, in connexion with the suggestion that a new topic should be added, felt that the Commission should not undertake more work than it could carry out.

The meeting rose at 5.50 p.m.

33rd MEETING

Friday, 3 June 1949, at 10.30 a.m.

CONTENTS

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

Present:

Members: Mr. Ricardo J. ALFARO, Mr. James L. BRIERLY, Mr. R. CÓRDOVA, Mr. J. P. A. FRANÇOIS, Mr. Shuhsi HSU, Mr. Vladimir KORETSKY, Sir Benegal 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 of the Division for the Development and Codification of International Law, Secretary to the Commission.

Preparation of a Working Document on the Right of Political Asylum

1. The CHAIRMAN recalled that at the preceding meeting [1] Mr. Yepes had suggested that he might prepare for the following session a working paper on the recognition of States and Governments. In view of the importance of the question and the special difficulties connected with it, Mr. Yepes had agreed to give up that subject and to prepare instead a document on a topic of more limited scope, with which he was especially familiar: namely, that of the right of political asylum.

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[1] See A/CN.4/SR.32, para. 65.