

Document:-
A/CN.4/SR.33

Summary record of the 33rd meeting

Topic:
<multiple topics>

Extract from the Yearbook of the International Law Commission:-
1949 , vol. I

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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.

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Chairman: Mr. Manley O. HUDSON.

Rapporteur: Mr. Gilberto AMADO.

Present:

Members: Mr. Ricardo J. ALFARO, Mr. James L. BRIERLY, Mr. R. CORDOVA, 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 meeting¹ 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.

¹ See A/CN.4/SR.32, para. 65.

2. Mr. KORETSKY thought that the Commission should not increase the number of topics for codification to be studied in the interval between the two sessions. Priority had been granted to three questions, the examination of which would require a great deal of time, and which would probably occupy the whole of the Commission's time at the following session; the Commission might not even be able to complete the study of those priority questions. In those circumstances, it was better for the members of the Commission not to divert their attention and their efforts to other matters, such as the right of political asylum, which the Commission would probably not be able to approach for a considerable time: all efforts should be concentrated on the three priority topics for codification.

3. The CHAIRMAN explained that there was no question of diverting the attention of members from the three topics for codification to which the Commission itself had granted priority. Those problems should have precedence over all others, and the fact that some members were willing to prepare working papers on other issues did not mean that the Commission would have to examine their memoranda at the following session. Those documents would simply be held in reserve for any occasion when, for some reason such as the absence of a rapporteur, for example, the Commission might have the necessary time to consider them. In those circumstances, there was no reason why the Commission should not be glad to receive the voluntary offers of some of its members who wished to make good use of the interval between sessions by studying a topic for codification and preparing a working paper on that point.

4. Mr. SANDSTROM shared the Chairman's opinion that it would be useful to have in reserve, over and above the three topics for codification which had been granted priority, prepared studies on one or two other questions. The Commission could only express its gratitude to members who were willing to undertake that additional task.

5. The CHAIRMAN proposed that the Commission should invite Mr. Yepes to prepare for the following session a working paper on the right of political asylum, on the same conditions as the Chairman had accepted the task of preparing a document on ways and means of making the evidence of customary international law more readily available.

It was so decided.

General Directives on the Drafting of Reports (concluded)

6. The CHAIRMAN recalled that the Commission had decided at the previous meeting that the appointment of Rapporteurs to study the three priority topics for codification should be preceded

by a short discussion, during which the scope of each topic would be determined; from those discussions the Rapporteurs would be able to obtain directives for the preparation of the subject and drafting of the report. Mr. Yepes had already provided some most valuable guidance in that respect, to which little needed to be added.

7. The first question, that of treaties, embraced various familiar problems which the Rapporteur would naturally consider in the light of the existing documents, including the "Convention on Treaties" adopted in 1928 by the Havana Conference.

8. The question of arbitral procedure, which had been considered for the first time in 1875 by the Institute of International Law, had been amply dealt with in The Hague Conventions of 1899 and 1907 on the Pacific Settlement of International Disputes. Since that time the rules of arbitral procedure had been frequently applied; and the Rapporteur would find abundant practical documentation in the many cases of arbitration. In particular, he might make a thorough study of a question which had already arisen several times, in the case of the Hungarian optants, for example, as also before a Franco-Mexican claims commission and a German-American claims commission: namely, what were the powers of a commission made up of two members representing the two Powers concerned and one arbitrator, after the representative of one of the Powers had withdrawn?

9. The régime of the high seas should be considered more especially in its modern aspect. The Rapporteur should not waste time on the classic questions of *mare liberum* and *mare clausum*. He should, however, make a careful study of the new doctrine of the control of natural submarine resources, known as the "doctrine of the continental shelf". Certain subjects listed in paragraph 70 of the Secretariat's memorandum (A/CN.4/1/Rev. 1),² which came more within the field of private international law, could easily be left out of the report. The topic should clearly be restricted to the régime of the high seas, as the régime of territorial waters was in itself a tremendous question which would have to be considered separately.

10. No useful purpose would be served by giving limitative instructions to the Rapporteurs, who would themselves draw up the list of subjects to be studied under the items entrusted to them.

11. Mr. KORETSKY thought that the Commission should confine itself, for the time being, to specifying that the reports should contain, firstly, an adequately based draft recommendation concerning the choice of topics for codification,

² United Nations publication, Sales No.: 1948. V. I. (1).

which should be drawn up in accordance with the terms of paragraph 2 of article 18 of the Statute of the Commission, and secondly, a draft programme of the work envisaged in the first paragraph of article 19, including a list of the questions to be studied by the Commission after the choice of topics had been approved by the General Assembly.

12. Mr. YEPES agreed with the views expressed by the Chairman. He thought, however, that the régime of the high seas should logically be considered at the same time as the régime of territorial waters, as the two subjects were closely linked. It was only on account of the reasons of a practical nature which the Chairman had pointed out that he would not press for the two subjects to be dealt with in one and the same study.

13. Mr. SPIROPOULOS recalled that The Hague Conference of 1930 had dealt with the status of territorial waters without linking the topic to the problem of the régime of the high seas: there was therefore nothing unusual in the suggestion that the two questions should be dealt with separately.

Appointment of Rapporteurs

The following members were unanimously appointed Rapporteurs for the three priority topics for codification:

Mr. BRIERLY, for the question of treaties;

Mr. FRANÇOIS, for the question of the régime of the high seas;

Mr. SCELLE, for the question of arbitral procedure.

Mr. SPIROPOULOS was unanimously appointed Rapporteur for the preparation of a report on the formulation of the principles of international law recognized in the Charter of the Nurnberg Tribunal and in the Judgment of the Tribunal (General Assembly resolution 177 (II), paragraph (a)) and to draw up a working paper on the preparation of a draft code of offences against the peace and security of mankind (paragraph (b) of the same resolution).

Mr. ALFARO and Mr. SANDSTROM were appointed Rapporteurs for the preparation of a working paper on the question 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 would be conferred upon that organ by international conventions (General Assembly resolution 260 (III) (B)).

14. Mr. KORETSKY was opposed to the appointment of two Rapporteurs for that question, which was not worthy of special attention. One Rapporteur would be enough for that subject and in his opinion the establishment of the organ in question was neither opportune nor possible.

Application of the Procedure laid down in Article 19, Paragraph 2, of the Statute of the Commission

15. The CHAIRMAN opened the debate by pointing out that the matter of asking Governments to furnish information arose only in regard to the questions of arbitral procedure, the régime of the high seas, and treaties. It could, of course, be asserted that the Commission would not be in a position during the current year to address detailed requests to Governments. It should, however, request such information as soon as possible, since delay must be allowed for. If the Commission were to wait until the following year before submitting its requests, it might not receive the required information until 1951, since Governments would need time to collect the necessary material. The terms of reference of the members of the Commission expired in 1951, however, and the Commission might not have time to study those documents during its final session.

16. Another argument in favour of an immediate decision to that effect was that the Rapporteurs might need the texts of laws, decrees, judicial decisions and treaties on those three questions and that it would be to their advantage to receive them as soon as possible. He had therefore consulted Mr. Spiropoulos, who had a concrete proposal to make on that matter.

17. Mr. SPIROPOULOS suggested that the Commission should adopt the following procedure:

(a) To decide at once to request Governments to furnish the information mentioned in paragraph 2 of article 19;

(b) To instruct the Rapporteurs to decide, together with the Chairman of the Commission and the Secretary-General, what documents they would require;

(c) To instruct the Chairman to address requests, through the Secretary-General, to Governments for information.

18. Mr. KORETSKY opposed that proposal. The Commission should, he said, observe the programme of work laid down by the General Assembly. It should start by choosing the topics which, in its opinion, should be codified. It should then submit to the General Assembly its recommendations on that subject; only after the General Assembly had approved its recommendations could the Commission think of applying the method laid down in article 19, paragraph 2. If the Commission had been mistaken in deciding to meet once a year, it should not correct that error by a violation of its Statute.

19. Apart from that argument of principle, the Commission was not a research institute, free to do as it pleased and to ask Governments for any information it desired. Its programme of work must be sanctioned by the General Assembly

before the Commission could request Member States for information. Moreover, Government officials should not be asked for information on topics the codification of which had not yet been approved by the General Assembly.

20. Finally, the Commission had no right to delegate its powers in that matter to any one of its members, whether it were the Chairman or the Rapporteur. All decisions on the procedure laid down in article 19, paragraph 2, should be taken by the Commission as a whole.

21. For those reasons, he thought that it would be not only premature but also contrary to the Commission's Statute to adopt Mr. Spiropoulos' proposal. It would be useless to address requests to Governments at the existing stage of the work, since the Rapporteurs had been entrusted with the limited task of stating the reasons for the recommendations which the Commission intended to formulate and of drawing up a programme of work. The material which could be found in libraries would amply suffice for that task.

22. The CHAIRMAN reminded Mr. Koretsky that the Commission had already come to a decision³ on the question of principle and that the point at issue was to define the best method of applying article 19, paragraph 2. The report which the Commission was to submit to the General Assembly indicated that it had decided by 10 votes to 3 that "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. . ."⁴

23. Mr. KORETSKY rejoined that the Commission had not yet submitted any recommendations to the General Assembly and that the decision in question could not, therefore, be applied for the moment.

24. The CHAIRMAN said that without formulating precise recommendations the Commission had indicated in its first report what questions it intended to study first. Whether or not its choice was approved by the General Assembly, the appearance of those questions in the report was enough to justify a request to Governments for information.

25. Mr. CORDOVA also thought that the list of topics in the draft report could be considered as a recommendation, and that the Commission was therefore perfectly justified in putting its decision into effect forthwith.

26. Mr. KORETSKY did not agree. It would be a lack of respect to the General Assembly and the Sixth Committee to submit to them a mere list of questions in the report, instead of making

a formal recommendation. When a recommendation was submitted, reasons should be given for it; it was precisely that task which had been entrusted to the Rapporteurs. Until that had been done, it was impossible to speak of recommendations.

27. The CHAIRMAN put the following question to the vote:

"In view of the decision taken with regard to paragraph 2 of article 18, could the Commission adopt a procedure such as that proposed by Mr. Spiropoulos for paragraph 2 of article 19?"

By 12 votes to 1, the Commission replied to that question in the affirmative.

28. Mr. HSU stated that he had voted in the affirmative, although he had voted against the interpretation given by the majority of the Commission to paragraph 2 of article 18. In his opinion, that earlier decision bound the Commission with regard to the interpretation of paragraph 2 of article 19.

29. The CHAIRMAN put Mr. Spiropoulos' proposal to the vote.

The proposal was adopted by 9 votes to 1, with 3 abstentions.

30. The CHAIRMAN announced that Mr. Scelle, Mr. François and Mr. Brierly would be instructed to draft specific requests to be addressed to Governments through the Secretary-General.

31. The CHAIRMAN read the text which Mr. Amado, Rapporteur, had suggested for insertion in the Commission's report to the General Assembly.

32. A brief exchange of views followed.

*It was decided by 11 votes to 2 to insert that text in the report, subject to certain amendments of detail.*⁵

The meeting rose at 1 p.m.,

⁵ *Ibid.*, para. 42.

34th MEETING

Monday, 6 June 1949, at 3 p.m.

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³ See A/CN.4/4, para. 15.

⁴ See *Report of the International Law Commission covering its first session, 12 April—9 June 1949*, para. 12.