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**Summary record of the 39th meeting**

Topic:  
**Other topics**

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# INTERNATIONAL LAW COMMISSION

## SUMMARY RECORDS OF THE SECOND SESSION

### 39th MEETING

Monday, 5 June 1950, at 3 p.m.

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*Chairman:* Mr. Manley O. HUDSON; later Mr. Georges SCELLE.

#### *Present:*

*Members:* Mr. Gilberto AMADO, Mr. Ricardo J. ALFARO, Mr. James L. BRIERLY, Mr. Roberto CORDOVA, Mr. Shuhsi HSU, Mr. F. el-KHOURY, Mr. Vladimir K. KORETSKY, Mr. A. E. F. SANDSTRÖM, Mr. Jean SPIROPOULOS, Mr. Jesús María YEPES.

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

#### Opening of the session

1. The CHAIRMAN briefly welcomed the representatives, and suggested that the Commission add to the Agenda for the present meeting (A/CN.4/L.1)<sup>1</sup> the first two items on the provisional agenda for the session (A/CN.4/21).<sup>2</sup>

*It was so decided.*

#### Proposal by Mr. Koretsky concerning the presence of Mr. Hsu

2. Mr. KORETSKY said that the protest made by the Government of the Chinese People's Republic to the Secretary-General of the United Nations against participation in the work of United Nations organs by representatives of the vestiges of the Kuomintang reactionary clique applied equally to the International Law Commission. He read out articles 3 and 8 of the Commission's Statute.<sup>3</sup> All the members of the Commission had been nominated by their governments and should represent a particular legal system, so that all the main legal systems in the world would be repre-

sented in the Commission. Mr. Shuhsi Hsu had been elected following nomination by the former Kuomintang Government which he thus represented, and hence he had clearly ceased to represent the Chinese legal system.

3. He (Mr. Koretsky) supported the demand of the Government of the Chinese People's Republic and called on the Commission to stop Mr. Shuhsi Hsu from taking part in its work and, in accordance with article 11 of its Statute, to elect a representative of the legal system of the Chinese People's Republic. If his proposal were not accepted, he (Mr. Koretsky) would take no further part in the work of the International Law Commission; moreover, any decisions taken by the Commission with the participation of the Kuomintang representative could not be regarded as valid.

4. The CHAIRMAN took note of Mr. Koretsky's remarks. He had carefully studied the question and the precedents, and was ready to give his decision on the point of order. Afterwards, all the members of the Commission would be free to appeal to the Commission against his decision.

5. Mr. HSU argued that the question should not have been raised, since he was not sitting in the capacity of representative of his Government, but as a member elected by the General Assembly. He mentioned incidentally that he had been nominated by the Government of India also.

6. The CHAIRMAN read out his decision as follows: "The members of the Commission were elected in 1948 to serve for three years. They do not represent states or government; instead, they serve in a personal capacity as persons of 'recognized competence in International Law' (article 2 of the Statute). Being a creation of the General Assembly, the Commission is not competent to challenge the latter's application of article 8 of the Statute. Nor can it declare a 'casual vacancy' under article 11 in these circumstances. Mr. Koretsky's proposal is therefore out of order. This decision follows a precedent established by the Advisory Committee on Administrative and Budgetary Questions."

7. Mr. KORETSKY maintained that the Chairman had not given a direct reply to his proposal concerning Mr. Hsu.

8. The CHAIRMAN said he had stated that Mr. Koretsky's proposal was out of order.

9. Mr. KORETSKY replied that he had quoted an article of the Commission's Statute proving that his proposal was in order. He requested the Chairman to submit his proposal in the form in which he himself had submitted it.

10. The CHAIRMAN said that Mr. Koretsky's proposal would not be submitted to the Commission unless one of its members appealed against his decision, in which case that decision would be put to the vote.

<sup>1</sup> The agenda for the meeting read as follows:

"1. Opening of the session  
2. Election of officers  
3. Adoption of the provisional agenda for the second session (A/CN.4/21)."

<sup>2</sup> See footnote 4.

<sup>3</sup> United Nations publication, Sales No.: 1949.V.5.

11. Mr. KORETSKY thought that the members should answer the question he had raised, and that the Commission should not adopt a roundabout procedure. He protested against this procedure, and appealed to the Commission against the Chairman's decision.

12. Mr. SPIROPOULOS was surprised that the question had been raised in a Commission which was not a political body and where members had been elected on a personal basis. Reference had been made to article 8, but neither that article nor any other text called for representation in the Commission of all the legal systems of the world. As laid down in article 8, the principle legal systems "as a whole" were represented. Hence there was no reason why Mr. Hsu, who had been elected as an international law expert, should not sit on the Commission.

13. Mr. el-KHOURY was astonished that Mr. Koretsky should have raised such an objection, and recalled the method adopted by the General Assembly for the nomination of members of the Commission.

14. Mr. Hsu had been backed not only by China but also by India, and did not represent any government. He hoped that Mr. Koretsky would not persist in his objection.

15. Mr. SCELLE recalled that during the first session Mr. Koretsky had often emphasized that the International Law Commission was a General Assembly commission. It had in fact been set up by the General Assembly, and only the Assembly could lay down the conditions for the election of members to the Commission. The Commission itself had no competence to do so. He supported the view of Mr. el-Khoury, and hoped that Mr. Koretsky would withdraw his proposal.

16. Mr. ALFARO agreed with Mr. Spiropoulos, Mr. el-Khoury and Mr. Scelle. The terms of article 8 of the Statute had been complied with when the members of the Commission were elected, and the Commission was not at liberty to modify the results of that election. He supported the Chairman's decision.

17. Mr. CORDOVA thought there was some analogy between the election of members of the Commission and the election of members of the International Court at The Hague. The aim of that method of election was precisely, in his opinion, to avoid any influence exerted by political events which might occur after members had been elected. He too supported the Chairman's decision.

18. Mr. KORETSKY said that, since the Commission's task was to lay down rules of conduct for States, its members should represent actual governments; otherwise the rules they adopted would be illusory. He was quite familiar with the wording of article 8 of the Statute. He had never suggested that the appointment should be annulled, but that Mr. Hsu be suspended from the meetings, and the Chairman be instructed to report on the matter to the General Assembly.

*The Commission approved the President's decision by 10 votes to 1.*

19. The CHAIRMAN said that he would be sorry personally if this decision meant that Mr. Koretsky

could not continue to take part in the work of the Commission.

20. Mr. KORETSKY left the meeting.

### Election of officers

#### ELECTION OF CHAIRMAN

21. Mr. CORDOVA, speaking on behalf of other members of the Commission as well as himself, thanked Mr. Hudson for the zeal and efficiency with which he had carried out the onerous task of Chairman during this first year of the Commission's existence. He felt that all the members of the Commission should share the honours and responsibilities, and that it was desirable that the Commission's officers should be changed each year.

22. He proposed Mr. Scelle for the Chairmanship.

23. Mr. SPIROPOULOS and Mr. YEPES seconded the proposal.

*Mr. SCELLE was unanimously elected Chairman.*

24. Mr. SCELLE thanked the Commission and took the Chair.

#### ELECTION OF VICE-CHAIRMAN

*On a proposal of Mr. BRIERLY, seconded by Mr. HUDSON, Mr. SANDSTRÖM was unanimously elected First Vice-Chairman.*

25. Mr. HUDSON proposed Mr. el-Khoury as second Vice-Chairman.

26. Mr. CORDOVA proposed Mr. Hsu.

27. Mr. HSU thanked Mr. Córdova for the honour he had done him, but could not agree to stand.

*Mr. el-KHOURY was elected Vice-Chairman.*

#### ELECTION OF RAPPOREUR

28. On the proposal of Mr. HUDSON, seconded by Mr. el-KHOURY, Mr. SPIROPOULOS, Mr. AMADO and Mr. CORDOVA, *Mr. ALFARO was elected Rapporteur.*

### Provisional agenda of the second session

29. Mr. HUDSON suggested that the Commission merely take note of General Assembly Resolutions 373 (IV), 375 (IV) and 374 (IV) (items 1 and 2 of the provisional agenda).

<sup>4</sup> The provisional agenda (A/CN.4/21) read as follows:

1. (a) General Assembly resolution 373 (IV) of 6 December 1949: Approval of Part I of the report of the International Law Commission covering its first session.

(b) General Assembly resolution 375 (IV) of 6 December 1949: Draft Declaration on Rights and Duties of States.

2. General Assembly resolution 374 (IV) of 6 December 1949: Recommendation to the International Law Commission to include the regime of territorial waters in its list of topics to be given priority.

3. (a) Formulation of the principles of international law recognized in the Charter of the Nürnberg Tribunal and in the judgment of the Tribunal: report by Mr. Spiropoulos.

(b) Preparation of a draft code of offences against the peace and security of mankind: preliminary report by Mr. Spiropoulos (General Assembly resolution 177 (II) of 21 November 1947).

30. Mr. KERNO (Assistant Secretary-General) agreed with Mr. Hudson with regard to the first two of the resolutions; but he pointed out that Resolution 374 (IV) ended with a recommendation by the General Assembly to the International Law Commission, so that the Commission could not merely take note of it. The Commission should decide whether the item should be placed on the priority list.

31. Mr. HUDSON agreed.

32. The CHAIRMAN suggested that the Commission accept the General Assembly's recommendation. Replying to a question by Mr. Córdova, he explained that it would not be necessary to discuss the question of the Regime of Territorial Waters jointly with that of the Regime of the High Seas.

33. Mr. BRIERLY thought it would be difficult to take a decision on this matter in the absence of Mr. François, who had been asked to submit a report on the Regime of the High Seas. It would be advisable to have his opinion on the subject.

34. Mr. SANDSTRÖM thought the Commission might for the moment merely put the subject on the Commission's agenda.

35. Mr. KERNO (Assistant Secretary-General) said that the intention of the Assembly's Sixth Committee in making its recommendation on the Regime of Territorial Waters was to leave it to the International Law Commission to decide in what order it should study priority matters. The Assembly had merely recommended the Commission to include it on its priority list.

36. Mr. CORDOVA argued that by using the words "considering that the topics of the regime of the high seas and the regime of territorial waters are closely related", the Assembly wished them to be treated together.

37. Mr. SPIROPOULOS, Mr. HUDSON, and Mr. AMADO on the other hand thought there was no

obligation involved, and that the Commission was entirely at liberty to decide as it went along what method it should follow. It was sufficient at present to include the question of territorial waters in its priority list.

38. The CHAIRMAN agreed with Mr. Brierly that it would be well to await the arrival of the Rapporteur for the question of the Regime of the High Seas before taking a final decision; he suggested that item 2 of the provisional agenda be merely included in the priority list.

39. Mr. HUDSON hoped that the Commission could complete certain items at the present session, so as to report on them to the General Assembly. It should be possible to complete the study of items 3 (a), 4 and 8. Item 8 was less complicated than the other two and involved no controversial issue, so it could be dealt with first.

40. Mr. SPIROPOULOS supported this proposal.

41. Mr. el-KHOURY thought that item 8 should be dealt with before fixing the order for dealing with the other items.

42. This was not the view of the CHAIRMAN, who thought that the order of priority for the other two items in question should be fixed at once. The study of item 3 (a) was well advanced, and it might be decided to complete it at once after dealing with item 8, and then to pass on to item 4 which also could be dealt with fairly quickly. Only then would the other substantive questions come up and they certainly could not be completed at the present session.

43. Mr. AMADO and Mr. SPIROPOULOS favoured taking questions 8, 3 (a) and 4 at the beginning of the session, in that order.

44. Mr. el-KHOURY thought it would be better to postpone the study of item 4 until later as being the most difficult of all.

45. Mr. LIANG, (Secretary to the Commission) said that at its third session, the Sixth Committee, referring to the question of genocide, had given instructions to the International Law Commission with regard to item 4. Hence it would seem that the Assembly wished for a report from the Commission on that subject as early as possible. It was difficult to postpone the item, and the Commission should consider examining it following its study of items 8 and 3 (a), so as to be able to report to the next session of the General Assembly.

46. This view was shared by Mr. AMADO and Mr. HUDSON, who argued that the Commission need not make any statement on the principle involved, and would not have to draft any text.

47. Mr. CORDOVA said that the General Assembly had given the Commission instructions which it must carry out. The Assembly must know whether, for the prosecution of crimes against international law — a question at present under consideration — any international criminal jurisdiction was necessary or not.

48. The CHAIRMAN thought that when the provisional agenda was adopted, should any difficulty arise

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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: working papers by Messrs. Alfaro and Sandström (General Assembly resolution 260 (III) B of 9 December 1948).

5. Law of treaties: preliminary report by Mr. Brierly.

6. Arbitral procedure: preliminary report by Mr. Scelle.

7. Regime of the high seas: preliminary report by Mr. François.

8. Ways and means for making the evidence of customary international law more readily available: working paper by Mr. Hudson (Article 24 of the Statute of the International Law Commission).

9. The right of asylum: working paper by Mr. Yepes.

10. 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 International Law Commission).

11. Date and place of the third session.

as to the order in which items should be dealt with, it would always be possible to make alterations.

49. Mr. SANDSTRÖM thought there was a connexion between item 3 (a) and the preparation of a draft code under item 3 (b). These matters would require considerable study, and hence it would be a good thing to discuss item 4 before item 3.

50. Mr. SPIROPOULOS pointed out that it was impossible to discuss two subjects at once, and that item 3 (a) would have to be studied first, and then item 3 (b), which would thus become the fourth question on the agenda.

51. Mr. SANDSTRÖM was agreeable to this.

52. The CHAIRMAN thought that the Commission seemed to be unanimously in favour of considering the items in the following order: Items 8, 3 (a), 4 and 3 (b). It was not necessary at present to decide as to the other three larger issues: Arbitral Procedure, Regime of the High Seas, and the Law of Treaties.

*It was so decided.*

53. Mr. KERNO (Assistant Secretary-General) urged the Commission not to wait until the end of the session to deal with item 11 of the agenda, "Date and place of the Third Session". For financial reasons this would have to be decided at the latest by the end of June. Two sessions had been proposed for next year so as to be on the safe side. But the Commission would have to decide whether it really wanted to hold two sessions in 1951.

54. In reply to a question by Mr. el-KHOURY, Mr. KERNO (Assistant Secretary-General) said that no definite date had been fixed for the end of the present session, but that the maximum period authorized by the budget was 8 to 10 weeks. Hence the present session would be due to close about the end of July.

*The meeting rose at 5.20 p.m.*

## 40th MEETING

*Tuesday, 6 June 1950, at 10 a.m.*

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| Ways and means for making the evidence of customary international law more readily available: working paper by Mr. Hudson (article 24 of the Statute of the International Law Commission) and comments on Judge Hudson's working paper on article 24 of the Statute of the International Law Commission (item 8 of the Agenda) (A/CN.4/16 and Add. 1; A/CN.4/27) | 4    |

*Chairman:* Mr. Georges SCALLE.

*Rapporteur:* Mr. Ricardo J. ALFARO.

*Present:*

*Members:* Mr. Gilberto AMADO, Mr. James L. BRIERLY, Mr. Roberto CORDOVA, Mr. J. P. A. FRANÇOIS, Mr. Shuhsi Hsu, Mr. Manley O. HUDSON, Mr. Faris el-

KHOURY, Mr. A. E. F. SANDSTRÖM, Mr. Jesús María YEPES.

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

**Ways and means for making the evidence of customary international law more readily available: working paper by Mr. Hudson (article 24 of the Statute of the International Law Commission) and Comments on Judge Hudson's working paper on article 24 of the Statute of the International Law Commission (item 8 of the agenda) (A/CN.4/16 and Add.1; A/CN.4/27).**

1. Mr. HUDSON, introducing the Working Paper (A/CN.4/16) he had prepared, said that his study was necessarily incomplete, since he could not know every foreign language. He asked Mr. el-Khoury to forgive him for not having mentioned the literature of Islam.

*The Commission approved the manner in which its task was set forth in paragraph 5.*

2. Referring to paragraph 7, Mr. HUDSON pointed out that in article 38 of the Statute of the International Court of Justice, the judicial decisions and the teaching were actually made subordinate to other sources of law, since subheading (d) stated that they were a "subsidiary means for the determination of rules of law". He asked whether the Commission shared the view he had expressed in paragraph 8.

3. Mr. BRIERLY entirely agreed with Mr. Hudson.

4. The CHAIRMAN emphasized the importance of the connexion between conventional law and the customary law.

*The Commission approved the substance of paragraph 8.*

5. Mr. HUDSON thought that sub-heading (b) of article 38 of the Statute of the International Court of Justice was not very happily worded. It would be better to say "international practice, as evidence of a general custom etc." He had felt it would be useful to try to set down what should be understood by "customary international law". After giving in paragraph 10 a list of works published in various countries other than the United States, he had set forth in paragraph 11 a few guiding principles.

6. In the French text of sub-heading (a) he would prefer "*de manière concordante*" to "*manière identique*".

7. Nearly all the treatises on the subject were in agreement to accept the four elements enunciated in sub-headings (a), (b), (c) and (d).

8. The CHAIRMAN pointed out that practice was not enough. Some authors believed that the idea of international custom did not imply general acquiescence; he personally held the opposite view. He believed that *opinio juris necessitatis* was essential. He asked whether Mr. Hudson considered that the two sources