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Summary record of the 74th meeting

Topic:
Other topics

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arose. The tribunal must be complete before it could pronounce a decision. He did not favour the view that the arbitration tribunal itself could decide in the event of an objection. He would prefer that in such cases it should invariably be left to the International Court of Justice.

82. Mr. HUDSON hoped that the following week the Commission would have time to discuss so important a question again, so as to help the Rapporteur to summarize the members' views when he drew up his report a year hence. There were also all the other paragraphs of Mr. Scelle's draft report to be examined.

83. The CHAIRMAN ruled that the Commission begin discussion on Mr. Alfaro's general report on the following Monday morning, and continue if necessary into its Monday afternoon meeting. He hoped the discussion would not be unduly prolonged.

The meeting rose at 1.5 p.m.

74th MEETING

Monday, 24 July, 1950, at 10 a.m.

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Chairman: Mr. Georges SCELLE.

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. 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).

Commission's draft report covering the work of its second session

PART I: GENERAL (A/CN.4/R.7/ADD.1)¹

1. The CHAIRMAN said the Commission now had several parts of the report before it. Part I was a mere

¹ Mimeographed document only. Parts of the document that differ from the "Report" are reproduced in footnotes to the summary records. For other parts, see the "Report" in vol. II of the present publication.

factual summary. It began with Mr. Koretsky's speech, which was fully reported in paragraphs 4, 5, 6 and 7.

Paragraph 12²

2. Mr. YEPES recalled that the previous year he had been instructed to draw up a working paper on the right of asylum, but he had thought it better not to submit it during the current session on the grounds that a case involving the question was pending before the International Court of Justice. The paper was actually ready, and he would like it to be mentioned in the report.

3. Mr. HUDSON suggested that the end of the first sentence "in view of the fact that a case involving the right of asylum was pending before the International Court of Justice" should be deleted, so as to avoid the conclusion being drawn that the International Law Commission considered that it was no longer competent to study a problem once the Court took up a case involving that problem. Surely the reason why the topic had been deferred was that the paper had not been submitted; there was no point in going into detail.

4. Mr. YEPES could not agree to the deletion of the words. The reason why his report had not been submitted was that after some correspondence with the Secretariat he had felt it better to hold it up for the reason already given.

5. The CHAIRMAN suggested the wording: "Mr. Yepes stated that his report was ready, but in view of the fact that a case was pending before The Hague Court he preferred not to have his paper submitted to the Commission." That would avoid creating any precedent, since it would involve only Mr. Yepes' preference, and not a decision on the part of the Commission.

6. Mr. ALFARO suggested that in that case it would be better to recast the first sentence of paragraph 12.

7. Mr. YEPES accepted that suggestion.

8. Mr. SANDSTRÖM wondered whether the final sentence of paragraph 12 was really necessary. In any case the sentence struck him as inaccurate, since the Commission had gone into the possibility of consulting technical bodies.

9. Mr. KERNO (Assistant Secretary-General) said he had already expressed the opinion that the interval between the second and third sessions should not be allowed to go by without consulting certain bodies. The agenda had been adopted; the report should therefore indicate why the Commission had not felt it necessary to discuss item 10.

10. Mr. SANDSTRÖM pointed out that the Commission had not felt it necessary to discuss the item separately, and it would be sufficient to insert the word "separately" in the sentence in question.

² Paragraph 12 read as follows:

12. The Commission decided to adopt the foregoing agenda with the exception that consideration of the topic of "the right of asylum" should be postponed, in view of the fact that a case involving the right of asylum was pending before the International Court of Justice. As no question arose in regard to "co-operation with other bodies", the Commission did not find it necessary to consider that item at the session under review.

11. Mr. HUDSON suggested leaving out the sentence, since it was evident from the report, particularly from paragraph 9, that the Commission had actually held consultations and intended to hold further consultations.

12. Mr. ALFARO said that the Assistant Secretary-General and he had felt that if the report stated that the agenda had been adopted, it was impossible not to mention item 10. The statement that no question had arisen meant that there was nothing in the Statute against such consultations, and that the Commission had decided that they should take place whenever necessary. There had been no disagreement on the subject.

13. Mr. KERNO (Assistant Secretary-General) felt that paragraph 19 of the report dealt with a question which had come before the Commission under article 17 of the Statute, and not with the consultations referred to in articles 25 and 26.

14. Mr. CORDOVA observed that item 10 referred to co-operation, and that paragraph 19 also dealt with it—co-operation with the Economic and Social Council. Unless it were stated that item 10 applied to co-operation with other bodies, the layman would have the impression that there was some connexion between item 10 and paragraph 19.

15. Mr. KERNO (Assistant Secretary-General) recalled that item 10 had been taken over from the first agenda. He enumerated the measures for implementing chapter III of the Statute. In regard to the co-operation mentioned in article 17 of the Statute and paragraph 19 of the report, the initiative rested with the Members of the United Nations and others, whereas for the consultations referred to in articles 25 and 26, the initiative rested with the International Law Commission. The matter was of some importance, since it often happened that organizations approached the Secretariat to have their names placed on a list of organizations with a sort of advisory status with the Commission; but the Commission had no urgent reason to examine it.

16. Mr. HUDSON suggested that it be left to the Rapporteur to draft the paragraph.

17. The CHAIRMAN asked the Commission whether it felt that the sentence should be deleted, or that the example of the previous year's report, which contained a sixth chapter devoted to co-operation with other bodies, should be followed.

18. Mr. ALFARO said he thought the issue before the Commission was Mr. Hudson's proposal that the task of amending the paragraph be left to the Rapporteur.

Mr. Hudson's proposal was adopted.

Paragraphs 13 and 14:

"Items for the consideration of the General Assembly"

19. Mr. HUDSON suggested that the word "items" was unsuitable. The items were reports.

20. The CHAIRMAN also felt that it would be better to say "reports submitted . . . etc." They were the findings arising from the Commission's deliberations.

21. Mr. ALFARO explained that the word "items" meant "items of the agenda".

22. Mr. HUDSON pointed out that the General Assembly was not going to discuss the Commission's agenda. He suggested the phrase "Special reports to the General Assembly". With regard to the final sentence³ of paragraph 14, the Commission was not submitting its conclusions to the General Assembly "for such action as it may deem fit to take". It was submitting them in compliance with its request. He thought the Commission should say "in accordance with resolutions . . ." mentioning the resolutions in question.

23. Mr. BRIERLY pointed out that there was no General Assembly resolution on the question mentioned under paragraph 13 (1).

24. Mr. HUDSON concurred; actually the first of the reports had been submitted in accordance with article 24 of the Statute.

25. Mr. el-KHOURY thought it was unnecessary to say "for such action as it may deem fit to take". It would be sufficient to say, "These are submitted to the General Assembly" without giving the reason.

26. Mr. BRIERLY thought that the whole of the second sentence of paragraph 14 was unnecessary, since all the Commission's reports were submitted to the General Assembly.

27. Mr. ALFARO agreed to the deletion of the sentence.

It was so decided.

Paragraph 15: "Items on which the Commission will continue its study"

28. The CHAIRMAN thought the word "Items" could be kept in the heading.

Paragraph 20

29. Mr. FRANÇOIS felt that the last sentence, "It was understood that the foregoing decision would not preclude the Commission from initiating work on the subject at its session in 1951", was a truism. Of course, there was nothing to preclude it in the text adopted by the Commission. He therefore suggested the wording "The Commission will initiate its work on the subject at its session in 1951, if it be found possible to do so."

30. The CHAIRMAN agreed that it would be better to adopt a positive approach and to say "if it be found possible to do so". He was surprised to find the words "would not preclude".

31. Mr. ALFARO replied that he had decided on the negative form of words for reasons of caution, but he would be glad to modify his report on the lines suggested.

It was so decided.

³ Read as follows: "These are submitted to the General Assembly for such action as it may deem fit to take."

*Paragraphs 21 and 22*⁴

32. After an exchange of views, the Commission decided to insert in the report a paragraph on emoluments for members of the Commission.

PART II: WAYS AND MEANS FOR MAKING EVIDENCE OF CUSTOMARY INTERNATIONAL LAW MORE READILY AVAILABLE (A/CN.4/R.7)

33. The CHAIRMAN asked the Commission to turn to part II of the Commission's draft report, dealing with ways and means for making the evidence of customary international law more readily available. The Commission had already discussed Mr. Hudson's working paper (A/CN.4/16 and Add.1). The report submitted to the Commission contained the text of the working paper as revised by the Rapporteur in the light of the opinions expressed during the debates. To simplify and shorten the discussion he suggested that the Commission should merely make suggestions on specific points.

34. Mr. HUDSON said that the Rapporteur-General and he had re-examined the question and had recast as a report by the Commission the working paper which he himself had drawn up. For example, they had omitted the bibliography given in paragraph 10 of the working paper. He wished to draw the Commission's attention to the text of paragraph 9 of the report as modified in deference to Mr. Amado's observations. The Commission should give some considerable attention to that paragraph. The other paragraphs of the report contained nothing new, except for paragraphs 63 and 64, which were entirely new.

Paragraph 6 (Paragraph 29 of the "Report")

35. Mr. YEPES said he was sorry that he had found no mention in the report of one source of customary law, namely the multilateral conventions which had been signed but not ratified or brought into force. He had suggested the inclusion of that source.

36. Mr. HUDSON said he had no objection to the insertion in the paragraph of a sentence to the effect that "even multipartite conventions signed, but not brought into force, are frequently regarded as having value as indications of State practice".

37. Mr. YEPES agreed to Mr. Hudson's proposal.

⁴ These paragraphs read as follows:

21. At the seventy-first meeting of the Commission on 19 July 1950, reference was made to the action taken by the General Assembly at its fourth session in respect of the question of emoluments for members of the Commission. The view was reiterated by the Chairman and several other members that present emoluments are hardly sufficient to meet living expenses, and that new efforts should be made to have the matter reconsidered and adjusted in terms that will make service in the Commission less onerous financially.

22. The Commission decided to draw again the attention of the General Assembly to the inadequacy of the *per diem* allowances provided by article 13 of its Statute. The assimilation of its members to members of commission of experts of the Economic and Social Council fails to take account of the position of the International Law Commission which is endowed with a formal Statute. The assimilation is invidious, moreover, by reason of the larger allowances provided for members of the Administrative Tribunal of the United Nations.

*Paragraphs 8 and 9*⁵

38. Mr. AMADO said that paragraph 9 did not state quite accurately what he himself had said during the discussion in the Commission on 6 June. He had requested that the report should be slightly recast to bring it into line with the concept of customary law as constituting the rule. He disliked the expression "conception by the States engaged that the practice is not forbidden by prevailing international law". Custom must not necessarily be in harmony with pre-existing international law. He suggested replacing the words by "recognition of custom by State practice".

39. Mr. BRIERLY wondered whether it was desirable for the Commission to embark on a question of doctrine. He felt it would be difficult to find a formula on which all members of the Commission could agree. In place of a text going into a certain amount of detail, he would have preferred to formulate merely a very general statement. He also wondered whether the whole problem was of any concern to the General Assembly. Nothing stated in the report was dependent on the Commission's opinions as to what constituted customary international law. He therefore suggested that paragraphs 8 and 9 simply be deleted.

40. Mr. ALFARO said that when he had drafted paragraphs 8 and 9 his intention had been merely to give a very brief outline of the discussions and the views put forward by the various members of the Commission. He would have liked to suggest that, in view of the objections raised, the Commission should discuss those paragraphs sentence by sentence so as to crystallize them where necessary. Customary law was constantly developing, at a rate which today seemed to be getting faster and faster. He quoted the example of the law in relation to air navigation; that too had evolved at a rapid rate. Since Mr. Brierly had suggested the deletion of paragraphs 8 and 9, the first thing for the Commission to do was to decide whether the two paragraphs ought to be omitted.

41. Mr. HUDSON said that he had modified the text of paragraph 9 in deference to Mr. Amado's suggestions. Thus he had used the expressions "a . . . rule of customary international law is generally thought to require presence of the following elements" and "practice . . .

⁵ These paragraphs read as follows:

8. Before listing the various types of materials which serve as evidence of customary international law, the Commission deemed it appropriate to consider the elements which should be present before a principle or rule of customary international law can be said to have become established. A good measure of agreement seems to exist among authors of treatises as to what these elements are.

9. As a guide for determining the character of the evidence of customary international law which should be made more readily available, the Commission concluded that the emergence of a principle or rule of customary international law is generally thought to require presence of the following elements: concordant practice by a number of States with reference to a situation falling within the domain of international relations; continuation or repetition of the practice over some period of time; conception by the States engaged that the practice is not forbidden by prevailing international law; and general acquiescence in the practice by States other than those engaged.

not forbidden by prevailing international law". He thought paragraph 9 would arouse considerable interest in the scientific world. However, he had no objection to paragraphs 8 and 9 being deleted.

42. Mr. CORDOVA thought that a definition of the term "customary law" would be useful. But he agreed that such definition would be difficult. The Commission was in the same position as when it had had to examine the draft Declaration on rights and duties of States.

43. Mr. YEPES thought that all the reasons just raised in favour of deleting the two paragraphs should have been put forward at the beginning of the discussion. The report after all should be a reflection of the discussions. Since the Commission had adopted a general criterion, it could not now ignore that fact. It would be a serious omission if the Commission did not stipulate what it regarded as the elements of customary international law.

44. The CHAIRMAN said that when he had read paragraph 9, he had felt that Mr. Amado, whose opinion he shared, would be satisfied with the new version. The definition in paragraph 9 was correct, and he saw no objection to retaining it. He recognized, nevertheless, that it did not come under the agenda item.

45. Mr. KERNO (Assistant Secretary-General) thought that anyone studying or applying customary international law—e.g., the Legal Department of the United Nations Secretariat—would be glad to find guiding principles and data in the Commission's report. He was therefore in favour of retaining the two paragraphs.

46. Mr. BRIERLY thought it would have been useful, if it had been feasible, to state in the report what conclusions the Commission had reached in regard to customary law; paragraphs 8 and 9 merely gave a few of the opinions held in scientific circles. In the circumstances, he saw no object in retaining the two paragraphs.

47. The CHAIRMAN put to the vote the question of deleting paragraphs 8 and 9.

Paragraphs 8 and 9 were deleted, seven votes being cast for their deletion, and three for their retention.

48. Mr. YEPES said that his reason for voting for the retention of the paragraphs was that he felt that to delete them was contrary to the decision taken by the Commission at an earlier meeting.

49. Mr. CORDOVA and Mr. BRIERLY pointed out that no decision had been taken on that subject.

Paragraph 12 (Paragraph 33 of the "Report")

50. Mr. AMADO said that paragraph 12 spoke of "two admirable collections". He felt that the epithet was perhaps unduly subjective and unsuitable for use by a Commission whose duty it was to produce an objective study. He proposed therefore that the word "important" should be substituted for "admirable".

51. Mr. HUDSON replied that the two collections in question deserved the qualification of "admirable". When a compilation as thorough and scientific had gone

on for over one hundred and fifty years, it could not be described otherwise than as admirable.

52. Mr. ALFARO pointed out that in paragraph 27 (paragraph 48 of the "Report") other collections were spoken of as "notable efforts". The same description might be used in paragraph 12.

53. Mr. SPIROPOULOS did not agree with Mr. Hudson. He did not dispute the fact that the achievement of the two publications in question was an admirable one; but the Commission should adopt a more concrete and more objective attitude. He therefore wanted to see the word "admirable" replaced by some other word.

54. Mr. KERNO (Assistant Secretary-General) thought that the modification which Mr. Amado had proposed represented a compromise which Mr. Hudson might be willing to accept. He therefore seconded the proposal and called for the replacing of the word "admirable" by "important".

55. Mr. HUDSON agreed to the amendment.

*Paragraphs 63 and 64
(Paragraphs 84 and 85 of the "Report")*

56. The CHAIRMAN asked the Commission to examine paragraphs 63 and 64.

The paragraphs were accepted without comment.

Paragraph 68 (Paragraph 89 of the "Report")

57. Mr. BRIERLY observed that paragraph 68 listed a number of international law yearbooks.⁶ Yet apart from those yearbooks, there were international bulletins and reviews which were quite as important. In any case, the list of countries mentioned should certainly include Spain, Denmark and the United Kingdom.

58. Mr. YEPES thought it would be better not to mention the countries by name, but to state that such yearbooks were published in a number of countries. There was the danger of a list being incomplete, and even if additions were made, some countries might be left out.

59. The CHAIRMAN asked Mr. HUDSON whether he was agreeable to the names of the countries being deleted.

60. Mr. HUDSON thought it would be of interest to mention them.

61. Mr. LIANG (Secretary to the Commission) pointed out to Mr. Hudson that Germany was not mentioned.

62. The CHAIRMAN thought that either the list should be comprehensive, or else countries should not be mentioned by name. It would therefore be better to delete the list and to say merely "in a number of countries".

It was so decided.

⁶ ". . . notably in Czechoslovakia, Israel, Italy, Switzerland and Yugoslavia."

*Section V: "Specific ways and means
suggested by the Commission"*

63. Mr. KERNO (Assistant Secretary-General) wondered whether there was any point in mentioning in paragraph 1 of the section (paragraph 90 of the "Report") that the Commission attached special importance to the continuance of the multilingual system of the United Nations Treaty Series. He recalled the budgetary objections apt to be raised in regard to United Nations publications. It would be well to delete the word "multilingual" and to give an account of the system followed at present.

64. Another point should be made clear: The same paragraph stated that the Commission expressed the *voeu* "that the texts of international instruments registered or filed and recorded with the Secretariat, should be published with greater promptness". At the outset, there had been a delay of over a year between the date of issue of the texts and the date of their reproduction by the Secretariat. The delay had already been reduced; but it would be helpful if still greater promptness could be achieved. He therefore proposed that the words "as promptly as possible" should be substituted for "with greater promptness". Incidentally, General Assembly resolution 364 (IV) had made a similar recommendation.

65. Mr. HUDSON accepted Mr. Kerno's two suggestions, and went on to urge the Commission to read paragraph 2 (a) of the section (paragraph 91 (a) of the "Report") very carefully, as it contained a novel suggestion. It would be most useful if a publication in the form of a juridical yearbook as described in the paragraph in question could be prepared and published in the not too distant future. The same applied to paragraph 2 (b). A legislative series of the type mentioned would likewise be a most valuable publication.

66. Mr. LIANG (Secretary to the Commission) explained that the Secretariat was at present engaged on compiling works of that kind; publication had been authorized by the General Assembly. It was, for example, already collecting for publication legislative texts referring to the high seas; and some of them would be published.

67. Mr. HUDSON was most anxious that such compilations should be published.

68. Mr. KERNO (Assistant Secretary-General), referring to paragraph 2 (f), said that the Secretariat had in hand the publication of occasional index volumes of the United Nations Treaty Series.

69. Mr. LIANG (Secretary to the Commission) pointed out that the English text of paragraph 2 (g) should read, not "United Nations Organization", but merely "United Nations", the Organization's official title.

70. Mr. ALFARO said the official title was indeed "United Nations", though it was neither logical nor grammatical; but the Commission should keep to official titles and designations.

71. Mr. HUDSON said he would have preferred in English "Organization of the United Nations".

72. Mr. ALFARO accepted the suggestion provided that "organization" were written with a small letter.

73. Mr. KERNO (Assistant Secretary-General) said that the United States delegation had proposed at San Francisco that the term "United Nations" be adopted in memory of President Roosevelt who had introduced it and always used it.

The meeting rose at 12.55 p.m.

75th MEETING

Monday, 24 July 1950, at 3.30 p.m.

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Chairman: Mr. Georges SCELLE.

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. 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).

Commission's draft report covering the work of its second session (*continued*)

PART V: PREPARATION OF A DRAFT CODE OF OFFENCES (A/CN.4/R.7/ADD.2)¹ AGAINST THE PEACE AND SECURITY OF MANKIND

1. The CHAIRMAN reminded the Commission that it had received a request from the United Nations Educational, Scientific and Cultural Organization to include the destruction of monuments and works of art in its list of international crimes, but that it had not yet replied to that request. In order not to appear to neglect relations with other bodies, it would be desirable for the Commission to inform UNESCO that the Commission would reply to its request next year when it

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