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Summary record of the 78th meeting

Topic:
Other topics

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wished to recall the decision adopted by the Commission at its previous session with regard to its programme of work—namely, that it was competent only to formulate, but not to evaluate, principles. In a word, he wished to indicate that the Commission had accomplished its task. Since the Commission had decided to include the second of these three paragraphs among the introductory paragraphs to this part of the report, he asked the Commission whether it intended to retain the reference to the statement of the Tribunal which he had reproduced in the first of these three paragraphs. The statement in question was of considerable value.

112. Mr. AMADO opposed the retention in the last paragraph of the words “the text of its formulation stands before the world”. In his view, the phrase was rather pompous.

113. Mr. HUDSON said that he himself would hesitate to make such a statement. Since the General Assembly might still modify or amend the Principles, it was wrong to state that the texts in question now stood before the world. In addition, he disagreed with the Tribunal’s statement that the Charter was the expression of international law existing at the time of its creation.

114. Mr. CÓRDOVA considered that the inclusion of the quotation from the judgment of the Nürnberg Tribunal was wrong. That judgment was in fact a judgment rendered by conquerors, and it was not for the Commission to concern itself with the justifications which the Tribunal had found for its action. The quotation should not be included. Nor should it be stated that the Commission’s formulation was final. All formulations might be modified by the General Assembly.

115. Mr. KERNO (Assistant Secretary-General) thought it was of value to have a conclusion to the report. Accordingly, the text of the second paragraph could be retained with the addition of the introductory words “As had already been stated at the beginning of this part of the report”, and of the first sentence of the last paragraph. The last sentence of the last paragraph should be remodelled to show that the text submitted was the one which had been drafted by the Commission.

116. The CHAIRMAN supported the retention of the quotations from the judgment, which he regarded as a necessary reminder of the findings of the Tribunal. One phrase in the statement that was true was that the Charter was the expression of international law existing at the time of its creation. From the point of view of general legal ethics, the Tribunal had the power to formulate a new law or a new rule. So soon as ever the Tribunal stated that such a law or rule was customary,

constituted principles of international law. The conclusion of the Commission was that since the Nürnberg Principles had been affirmed by the General Assembly the task of the Commission was not to express any appreciation of these principles as principles of international law but merely to formulate them. This task the Commission has accomplished. The text of its formulation stands before the world as a set of principles affirmed by the United Nations with regard to crimes against peace, war crimes and crimes against humanity, the responsibility of those persons who are guilty of such crimes and the manner in which the responsibility must be determined.”

it actually became so. He would have liked the general impression created by the report to be corrected. He did not consider that the report as drafted truly represented the findings of the Commission and thought that it minimized both the scope of the discussions and of the findings.

116 a. The Commission had now accepted its responsibility; but, as he had already stated, he could not unreservedly accept this report concerning the formulation of the Nürnberg Principles, and wished to make the following reservation:

“Mr. Scelle regretted that he was unable to accept this part of the report on the grounds which he had already stated the previous year—namely, that the report did not enunciate the general legal principles on which the provisions of the Charter and the decisions of the Tribunal were based, and also because the final form of the report appeared not to represent exactly the findings adopted by the Commission during its preliminary discussions and to minimize their scope.”

He requested the Rapporteur to include this reservation in his report.

117. Mr. ALFARO thought that Mr. Scelle’s reservation should be discussed, and proposed that the discussion take place at the following meeting. As for the quotation from the judgment of the Tribunal, he had regretfully to state that, if the Commission decided to delete it, he himself would be obliged to add a reservation to that just made by Mr. Scelle.

The meeting rose at 1.10 p.m.

78th MEETING

Thursday, 27 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 CÓRDOVA, 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).

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

PART III: FORMULATION OF THE NÜRNBERG PRINCIPLES (A/CN.4/R.7/ADD.3)¹

B. THE CRIMES (concluded)

1. The CHAIRMAN reminded the Commission that it had to take a decision on the final wording of the last paragraphs² of part III. There was still a difference of opinion between members of the Commission regarding the penultimate paragraph.

2. Mr. SANDSTRÖM proposed that that paragraph should be inserted in the second paragraph of the comment on crimes against peace (paragraph 111 of the "Report") and begin with the following words: "Referring to the law of the Charter, the Tribunal concluded that the Charter . . ."

3. Mr. FRANÇOIS observed that that would be repeating what was already said. He proposed that the paragraph be deleted.

4. The CHAIRMAN pointed out that, in quoting those sentences, the Rapporteur-General had intended to state a general conclusion. He recalled that the first two sentences of the last paragraph of part III had been transferred to the beginning of that part of the report.³ He asked the Commission whether it wished to retain the words: "It is the expression of international law existing at the time of its creation; and to that extent is itself a contribution to international law."

5. Mr. YEPES did not approve of that quotation. The Commission should not support a statement of the Tribunal that was contradicted by history. He was in favour of deleting the words: "The Charter is not an arbitrary exercise of power on the part of the victorious nations."

6. Mr. el-KHOURY observed that, in reproducing those passages in that manner, the Commission took no responsibility.

7. Mr. AMADO said that it must not be forgotten that the Tribunal had had to apply law which had not been formulated. It had examined international law for authority to try war criminals. It was to satisfy its conscience that it had spoken of existing international law. The Tribunal had wished to bring out the legitimacy of its attitude. In ordinary cases, a judge had no need to state that he was applying existing law, since the text of the law was available. Consequently, he remained opposed to the insertion of any such passage.

8. Mr. HUDSON understood Mr. Amado to be pro-

¹ Mimeographed document only. Parts of that 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.

² See 77th meeting, footnote 11.

³ See 76th meeting, paras. 16-18.

posing the deletion of the whole paragraph; he supported that proposal.

9. Mr. FRANÇOIS recalled that Mr. Sandström and he had also suggested deleting that passage, since it already appeared in the report.

10. Mr. SANDSTRÖM said that he had proposed, as a compromise, that the paragraph should be inserted in the comment on Crime (a). If it was to be retained, that was the appropriate place.

11. The CHAIRMAN observed that there were three proposals. First, that the paragraph should be retained—or at least, the first sentence quoted; secondly, that the whole paragraph should be deleted; and thirdly, that it should be transferred to the commentary to Crime (a).

12. Mr. ALFARO considered that the paragraph related to the whole formulation of the Nürnberg Principles. The Commission could recall that, in delivering its judgment, the Tribunal had made that statement, and could reproduce it for what it was worth. The Commission must at least state what the Tribunal had said at the time when the principles were formulated. He wished he could reconcile the opposing views. He was prepared to accept a compromise solution, namely, that of transferring the quotation to the comment to Crime (a) although that comment only concerned crimes against peace. He supported Mr. Sandström's proposal.

13. Mr. HUDSON read out the paragraph of the judgment from which the quotation had been taken: "The making of the Charter was the exercise of the sovereign legislative power by the countries to which the German Reich unconditionally surrendered; and the undoubted right of these countries to legislate for the occupied territories has been recognized by the civilized world. The Charter is not an arbitrary exercise of power on the part of the victorious nations, but in the view of the Tribunal . . . it is the expression of international law existing at the time of its creation; and to that extent is itself a contribution to international law."⁴ It could be seen that the first and second sentences were completely contradictory. It followed from the first that the Charter had the force of law for the occupied countries. The second sentence stated that the Charter was not an arbitrary exercise of power. It would be a mistake to remove one of those two sentences from its context.

14. Mr. CÓRDOVA was opposed to the insertion of those quotations. The Tribunal had had its historic responsibility. If the Commission included in that part of the report the passage which justified the Tribunal's decision, it would in fact be adopting that passage and the reader would believe the Commission to be declaring that the state of international law had been as the Tribunal had formulated it, whether the passage was inserted at the end of Part III or in the commentary to Crime (a).

14 a. He believed that the Nürnberg Tribunal had created law, had established something that had been lacking, and that it was well that it had done so. But to state that the Nürnberg Principles represented the

⁴ See "The Charter and Judgment of the Nürnberg Tribunal", *op cit.*, p. 38.

law as it existed at the time was an error that the Commission must avoid. He would be sorry if the Commission appeared to approve a legal contradiction.

14 b. There was one point on which he had always felt concern. Although war had been outlawed at the time, the law had made no provision for the punishment of heads of States who had carried on an aggressive war. That was why he was opposed to the Commission appearing to adopt the Tribunal's statement. Progress in international law had been achieved with the creation of the Tribunal, and it was real progress.

15. The CHAIRMAN recalled the words of Poincaré: "Speeches only serve to sustain supporters of the same idea." He thought that every member of the Commission already knew how he would vote.

16. Mr. el-KHOURY thought that the Tribunal's statement should be inserted at that point even if it contained a contradiction, as Mr. Hudson had said, and that the Commission's opinion should be included with it. It would be advisable to state that the Commission did not share the view expressed by the Tribunal.

17. Mr. ALFARO explained that it was for the precise reason given by Mr. Córdova and Mr. el-Khoury that, in the penultimate paragraph immediately after the quotation, he had recalled the Commission's conclusion of the previous year. The Tribunal had stated that the Charter was the expression of international law existing at the time of its creation, and in 1949 the Commission had said that its task was not to express any appreciation of that statement, but merely to formulate the Nürnberg Principles.

18. Mr. AMADO asked why, if international law on that point had already existed in 1939, the Commission had been instructed to formulate it.

19. The CHAIRMAN observed that the Commission was adopting what it found acceptable in the Nürnberg Principles, and rejecting what it found unacceptable. He thought that certain members of the Commission did not wish the Tribunal's opinion to be reported. He reminded the Commission that there were three proposals before it.

20. Mr. HUDSON pointed out that there was a fourth proposal—namely, to retain the quotation and add the first sentence of the passage he had read out, so that it should be reported in full.

21. Mr. ALFARO was willing for the whole passage read out by Mr. Hudson to be quoted.

22. Mr. HUDSON said that he would prefer the penultimate paragraph of part III to be deleted.

The Commission decided by 7 votes to 3, with one abstention, to delete the penultimate paragraph of part III.

23. Mr. KERNO (Assistant Secretary-General) thought that the discussion preceding the vote could be summed up as follows: Certain members of the Commission held that the Charter and judgment of the Nürnberg Tribunal only constituted a declaratory precedent, whereas others considered them an original precedent. But he believed that all members of the Commission agreed that, whatever their nature, the Charter

and judgment, after their re-affirmation by the United Nations General Assembly, formed a part of existing international law.

24. The CHAIRMAN observed that the whole Commission agreed to that interpretation, but that with regard to creation of the law, the majority represented countries in which the system of "judge-made law" did not obtain.

25. Mr. HSU explained that he had voted for the deletion of the paragraph in question because he had thought that, if it were retained, the Commission might appear to be approving the Tribunal's statement. It would be better not to express any opinion. He proposed that the words "as principle of international law" in the sixth line of the last paragraph of part III should be deleted. He thought there was unnecessary repetition.

26. Mr. HUDSON reminded Mr. Hsu that those words appeared in the Commission's report on its first session. Their deletion would not effect any improvement. The words "appreciation of these principles as principles of international law" would be more easily understandable to the reader.

27. Mr. HSU considered that, by deleting those words, the Commission would not be committing itself so far.

28. Mr. ALFARO supported Mr. Hsu's proposal, since after the deletion of the preceding paragraph, there was no reason to include the words in question.

Mr. Hsu's proposal was rejected by 7 votes to 4.

29. The CHAIRMAN announced that the paragraph would remain unamended.

30. Mr. HUDSON reminded the Commission that it still had to take a decision on the titles to be given to Sections A and B of that part of the report.

31. Mr. ALFARO proposed two amendments to remove the inconsistency of the titles. First, to insert the wording used by the General Assembly: "The principles of international law recognized in the Charter of the Nürnberg Tribunal and in the judgment of the Tribunal." Secondly, to make no separate heading for the crimes, but to insert them as Principle VI, reading: "The crimes hereinafter set out are punishable as crimes under international law". An enumeration of the crimes would follow. A seventh principle would be included to cover complicity.

32. Mr. CÓRDOVA asked why the word "acts" was not used rather than "crimes".

33. Mr. ALFARO replied that he had wished to retain the terms of the formulation.

34. Mr. AMADO asked whether an enumeration of acts was a principle.

35. Mr. ALFARO explained that the principle was that those acts were crimes.

36. The PRESIDENT explained that Principle VI stated that the acts thereafter set out were crimes; it was certainly a principle, applying to the enumeration that followed.

The Commission adopted the wording proposed by Mr. Alfaro.

37. Mr. KERNO (Assistant Secretary-General) pointed

out that the Commission had decided at its 76th meeting to transfer to paragraph 2 of part III the first two sentences of the last paragraph of part III, and to delete the remainder of that paragraph.⁵

38. The CHAIRMAN announced that he considered that part of the report to have been adopted by the Commission as amended.

39. Mr. HUDSON pointed out that it was adopted subject to a second reading.

40. The CHAIRMAN observed that the decisions had been taken. He asked the Commission not to go back on them although, of course—as Mr. Hudson had very properly pointed out—all members had the right to make reservations. He personally wished to make a reservation regarding the third part of the report, of which he could accept neither the viewpoint nor the conclusion. He asked the Rapporteur to indicate in a note or otherwise that he had made the following reservation:

“Mr. Georges Scelle said that he regretted that he could not accept the view taken by the Commission of its task in this part of the report, for the same reasons as those which he had stated the previous year. The report did not enunciate the general principles of law on which the provisions of the Charter and the decisions of the Tribunal were based, but merely summarized some of them, whereas the Tribunal itself had stated that the principles it had adopted were already a part of positive international law at the time when it was established. Moreover, he considered that the final text of the report did not seem to reflect accurately the conclusions reached by the Commission during its preliminary discussions, and restricted their scope.”

That was his view, and he wished it to be inserted in the general report.

41. Mr. HUDSON understood that the Chairman was explaining the negative vote he intended to cast.

42. The CHAIRMAN explained that it was an opposing vote, not an abstention. It was exactly what the Commission had done the previous year with regard to explanations of votes.

PART VI: PROGRESS OF WORK ON TOPICS SELECTED FOR CODIFICATION (A/CN.4/R.7/ADD.4)⁶

Paragraph 1 (paragraph 158 of the “Report”)

43. Mr. HUDSON wished to add to paragraph 1 the following sentence taken partly from paragraph 3: “The Commission, at its second session, considered reports on these three subjects and reached certain tentative decisions which were not intended to have a definite and binding character, but to serve for the guidance of the special rapporteurs in their future work.” The sentence would thus apply to all reports by special rapporteurs, and not only to the report on treaties.

44. The CHAIRMAN supported Mr. Hudson’s proposal.

45. Mr. ALFARO indicated that that statement applied to all the reports.

46. Mr. HUDSON thought it would be preferable to insert the sentence at the beginning of part VI.

47. The CHAIRMAN proposed that it should be inserted before chapter I, and that paragraph 3 should be deleted.

48. Mr. ALFARO accepted that proposal.

The Commission decided to insert the sentence proposed by Mr. Hudson after paragraph 1.

CHAPTER I: LAW OF TREATIES

49. Mr. YEPES stated that when all the reports had been considered, it had been agreed that the discussion should be reopened to permit members of the Commission to state their views. He had intended to submit an important proposal regarding the law of treaties, and wished to indicate its nature.

49 a. The discussion that had taken place had been limited to the purely formal aspects of the matter. The Commission had considered the following problems: written form, capacity, signature and ratification; that was the framework of treaties. The validity of treaties depended on their subject matter. The Commission had forgotten to say that States were not entitled to conclude treaties on every subject. It had forgotten the purpose of treaties. It was essential that treaties should have a lawful purpose, and that must be expressly stated. He was well aware that his was like the voice of one crying in the wilderness, but he belonged to a school of thought that did not accept the will of the State as a source of law and must respect it. Moral law was above the State. In diplomatic history, there were many examples of treaties with unlawful purposes—for example, the partitions of Poland which had been the subject of treaties accepted by all States, the Clayton-Bulwer treaty by which the United States and Great Britain had disposed of the rights of a small State without even informing it of the fact, the treaties for the partition of China, the declarations of Yalta, Teheran, Moscow and Potsdam, by which the fate of countries had been decided without consulting them.

49 b. Article 2, paragraph 2 of the Charter had made good faith the supreme rule of international life. The Commission must have the courage to draw all the possible conclusions from that principle. Good faith clearly required that treaties should have a lawful purpose. If they had not, they could not be valid. One difficulty might arise: Who was to say that a treaty had an unlawful purpose? In his opinion, it should be the United Nations itself. In order to be valid, even a treaty should be registered. The Secretary-General of the United Nations should be given powers to decide that a treaty was unlawful, and that consequently he would not register it. He might also be required to obtain an advisory opinion from the Court on that matter.

49 c. The article he had intended to propose would have been drafted as follows:

“In order to be valid, a treaty, as understood in

⁵ See 76th meeting, paras. 16-18.

⁶ See footnote 1.

this Convention, must have a lawful purpose according to international law. In case of any dispute regarding the lawfulness of a treaty, the International Court of Justice shall state its opinion on the matter at the request of any State directly or indirectly interested, or of the United Nations.

“A treaty with an unlawful object may not be registered with the Secretariat of the United Nations. Whenever the lawfulness of a treaty submitted for registration is in doubt, the Secretary-General of the United Nations shall ask the International Court of Justice for an advisory opinion.”

50. The CHAIRMAN said that Mr. Yepes was probably aware that many members of the Commission were in agreement with his remarks, but that his proposal could not be included in the report, which was devoted to the questions that had been discussed. Nevertheless, he could request that the problem of the intrinsic validity of treaties should be discussed at the beginning of the next session.

51. Mr. YEPES asked that the Rapporteur-General should take the article into consideration.

52. Mr. BRIERLY said that the question raised by Mr. Yepes would not be omitted, but for the moment he did not claim that his report was complete.

Paragraphs 2 and 3 (paragraph 160 of the “Report”)

53. Mr. BRIERLY thought that, since the second sentence to paragraph 3 had been transferred,⁷ the first sentence of that paragraph should be added to paragraph 2.

Paragraph 4 (paragraph 161 of the “Report”)

54. Mr. HUDSON did not approve of the first sentence of paragraph 4.⁸ He proposed the following wording: “In discussing the scope of the term ‘treaty’, it was decided by a majority of the Commission that the draft should include exchange of notes. . . .”

⁷ See para. 43, *supra*. The second sentence read as follows:

“It was the understanding of the Commission that the decisions reached were not of a definitive and binding character, but would serve merely for the guidance of the Rapporteur, and would be considered again at the next session of the Commission.”

⁸ Paragraph 4 read as follows:

4. In discussing the term “treaty” as used in the draft by the Rapporteur it was decided that the draft should include exchange of notes, but that this provisional decision should not prejudice the question whether an agreement reached by an exchange of notes could properly be covered by the term “treaty”. A majority of the Commission were also in favour of including agreements to which an international organization is a party in their study. The Commission also discussed whether it was desirable, in explaining the use of the word “Treaty”, to place the primary emphasis upon the idea of agreement or upon the formal instrument embodying the agreement. The majority of the Commission favoured the expression “formal instrument” over the expression “agreement recorded in writing”. Mention was made by certain Members of the Commission of the desirability of emphasizing the obligatory character of the relation under international law established by a treaty, and of making it clear that a treaty not only establish a relation, but may modify, abrogate, or regulate it.

55. Mr. BRIERLY saw no objection to that proposal.

56. Mr. HUDSON thought that the Commission might delete the second part of the last sentence beginning with “. . . and of making it clear”. Its subtlety would not be understood.

57. Mr. AMADO supported Mr. Hudson’s proposal.

58. Mr. ALFARO recalled that he had drawn attention to the fact that, in the definition of treaties, it was only stated that they established relations, whereas treaties could modify, abrogate or regulate a relation; the latter definition was to be found in numerous works on international law. Since the time of Fiore and Bluntschli it had been recognized that treaties could modify, abrogate or regulate legal relations.

59. Mr. HUDSON was inclined to support Mr. Alfaro on that point, but thought it useless to insert such a subtlety in the general report.

60. There followed a discussion in which the CHAIRMAN, Mr. AMADO and Mr. SANDSTRÖM took part, regarding the value of the words “making it clear” in the sentence under consideration. They considered it perfectly obvious that a legal relation could not only be established but could also be modified, abrogated or regulated. To mention “the desirability of making it clear” that that was the case might suggest to the reader that there was some doubt on the matter.

61. Mr. ALFARO explained that that part of the report had been drafted by Mr. Brierly. He had found it excellent, and although he might not have drafted the passage in that way himself, as he had inserted it he must now support it. There were good reasons for retaining the passage. If it were deleted there might be criticism, since it would be pointed out that nothing was established by an abrogation.

62. Mr. BRIERLY agreed to the deletion of the words, which he considered to be of no great importance.

63. The CHAIRMAN suggested that the words “of the relation under international law established by a treaty” should be replaced by the words “of the situation established by a treaty”.

64. Mr. HUDSON proposed the words “the binding character under international law of an obligation established by a treaty”.

65. The CHAIRMAN thought that the last part of the sentence “and of making it clear” might be deleted.

It was so decided.

66. Mr. AMADO was glad to note that the third and fourth sentences of the paragraph were extremely clear. For the Commission, a treaty should be of a formal character. The discussions and conclusions of the Commission were very well rendered in that passage.

67. The CHAIRMAN thought that there was a contradiction between the Commission’s decisions regarding exchange of notes and the importance of a formal instrument.

68. Mr. HUDSON agreed that that passage in the report was in conflict with the decision taken by the Commission regarding agreements concluded by exchange of notes.

69. Mr. AMADO and Mr. CÓRDOVA did not agree. The Commission had merely decided to consider the question of exchanges of notes when it examined the report to be submitted the following year by the special rapporteur.

70. The CHAIRMAN confirmed that the Commission had made a reservation and that its decision regarding exchanges of notes was entirely provisional.

71. Mr. BRIERLY considered that that was a serious matter. The report accurately recorded the conclusions reached by the Commission after a long discussion. But it might perhaps be difficult to explain the exact position to the General Assembly.

72. Mr. AMADO thought that the importance of the question lay in the necessity to prevent every exchange of notes being considered as a treaty requiring formal ratification procedure.

73. The CHAIRMAN said that, in spite of the explanations given, he did not find the passage very clear. He thought that after the words "The majority of the Commission favoured the expression 'formal instrument' over the expression 'agreement recorded in writing'", it would be advisable to add some such phrase as the following: "but mention was made of the binding character of treaties".

74. Mr. ALFARO thought that a slight amendment to the beginning of paragraph 4 would make it sufficiently clear. He recalled that during the discussion the Chairman had called for a vote on whether the Commission wished to deal with exchanges of notes. The Commission had decided in favour of that proposal by 6 votes to 5.⁹ Subsequently, the Chairman had asked the Commission whether it preferred the definition advocated by Mr. Brierly (agreement recorded in writing) or that formulated in the Harvard draft (formal instrument). The Commission had decided in favour of the Harvard draft by 6 votes to 4 with 1 abstention.¹⁰ It was in the light of those two votes that he had drafted his text. But as he had already said, he thought that the difficulty confronting the Commission could be overcome by a minor drafting amendment to the beginning of paragraph 4.

75. Mr. HUDSON submitted a new text for paragraph 4, which he thought would solve the difficulty. His text read as follows: "The Commission devoted some time to a consideration of the scope of the subject to be covered in its study. Though it took a provisional decision that exchanges of notes should be covered, it did not undertake to say what position should be given to them by the Rapporteur. A majority of the Commission favoured the explanation of the term treaty as a 'formal instrument' rather than as an 'agreement recorded in writing'. Mention was frequently made by members of the Commission of the desirability of emphasizing the binding character of the obligations under international law established by a treaty."

76. Mr. ALFARO agreed to the substance of Mr. Hudson's proposal. He said that he would insert it in

his report in place of the existing text of paragraph 4.

77. Mr. BRIERLY, as rapporteur on the law of treaties, also accepted Mr. Hudson's proposal, which simplified the issue.

Paragraph 5

(paragraphs 162 and 163 of the "Report")¹¹

78. Mr. HUDSON proposed that the words "The Commission briefly discussed the use of the term 'international organization'", at the beginning of paragraph 5, should be deleted and replaced by the following sentence taken from paragraph 4: "A majority of the Commission were also in favour of including in their study agreements to which an international organization is a party." He was surprised to see it stated in the second sentence of the paragraph that the Commission had also discussed the capacity of States to enter into treaties. He did not think that the Commission had done so, and in his opinion the words "States and" should be deleted.

79. Mr. FRANÇOIS and Mr. AMADO observed that no one had questioned the capacity of States to enter into treaties and that it was therefore incorrect to mention tentative agreement by the Commission on that subject.

80. Mr. LIANG also remarked that the Commission had not discussed the capacity of States to enter into treaties and that it was only the capacity of international organizations that was in doubt.

81. The CHAIRMAN observed that Mr. Hudson's proposal to amend the beginning of paragraph 5 by inserting the second sentence of paragraph 4 would undoubtedly improve the text. Moreover, he saw no reason why the whole of the second sentence of paragraph 5 should not be deleted. On the other hand, the last sentence of that paragraph should be retained.

82. Mr. HUDSON said that he would prefer the last sentence to form a separate paragraph 6. By that arrangement, all the material dealt with in the draft submitted by Mr. Alfaro would be grouped in a more logical manner. Paragraph 4 would relate to the question of treaties, paragraph 5 to international organizations having the capacity to conclude treaties, and paragraph 6 to constitutional provisions as to the exercise of capacity to make treaties.

83. Mr. KERNO (Assistant Secretary-General) approved of Mr. Hudson's proposal to regroup those two paragraphs. But he thought that under the new arrangement the question of international organizations might not be very clear to the reader. He thought that a slight drafting amendment was necessary to show that the Commission agreed that certain international organizations such as the United Nations had the capacity to

¹¹ The first two sentences of paragraph 5 read as follows:

5. The Commission briefly discussed the use of the term "international organization" and there was general agreement that determination of the organizations which possess a capacity for making "treaties" would need further consideration. It also discussed and reached tentative agreement concerning the capacity of States and international organizations to enter into treaties.

⁹ See 51st meeting, para. 38.

¹⁰ See 52nd meeting, para. 17.

enter into treaties, and that there had been general agreement that it was the determination of what other organizations had that capacity which required fuller study.

84. The CHAIRMAN thought that the Commission could accept Mr. Kerno's proposal, though no mention should be made of the United Nations or of any specialized agency.

85. Mr. HUDSON read out the amended text of paragraph 5, which he thought should be drafted as follows:

"A majority of the Commission was also in favour of including in its study agreements to which international organizations are parties. There was general agreement that, while the treaty-making power of certain organizations is clear, the determination of the other organizations which possess capacity for making treaties would need further consideration."

86. Mr. ALFARO again read out the draft of paragraph 4 proposed by Mr. Hudson. He added that after that text would come the new text of paragraph 5 read by Mr. Hudson and then paragraph 6, which would consist of the last sentence of the former paragraph 5. He considered that the words "and no decision was reached" should be retained, because that had in fact been the case.

87. The CHAIRMAN thought that those words could be retained since they were in accordance with the facts.

88. Mr. AMADO said that he would not object, although he was averse to mentioning the negative aspects of a question.

89. Mr. HUDSON asked that the words "on this topic" be added after the words "general principles" in the second sentence of paragraph 6. He thought that in the same sentence the words "is part of the agreement between the parties and therefore" should be deleted. He pointed out that the Commission had considered the possibility that the parties must also consent to reservations. Speaking frankly, he would prefer that the whole of the second part of the second sentence should be deleted, since it gave the impression that the Commission had not been in agreement on certain points. Though that was a fact, he was averse to mentioning points on which there had not been agreement.

90. Mr. KERNO (Assistant Secretary-General) thought he must remind the Commission that, during the discussion on certain points in Mr. Brierly's report, all members had agreed that in the case of a treaty already in force a reservation was only effective if all the parties consented to it. But there had been no such agreement in the Commission regarding the entry into force of a reservation to a treaty that was not yet in force, nor regarding the question whether a reservation to a treaty already in force required the consent of the States which had signed the treaty but not yet ratified it.¹² If Mr. Hudson's proposal to delete the last part of the second sentence were adopted, it was probable that

the General Assembly would wonder what significance to attach to the first part of that sentence which, taken without its complement, was somewhat cryptic. In order to facilitate his task in the General Assembly, something should be inserted to replace the words deleted. On the whole, he thought that the sentence should be retained.

91. Mr. YEPES said that the report accurately summarized the discussion on that subject and that the words to which Mr. Hudson was opposed should not be omitted.

92. Mr. HUDSON thought that if those words were retained, the reader would conclude that consent of the parties was sufficient. He would accept the proposal that the words "at least" should be inserted before the words "the consent of all parties", in order to prevent that conclusion from being drawn. He again urged that the words "is part of the agreement between the parties and therefore" should be deleted.

The Commission decided to adopt the wording of the last sentence of paragraph 5 for a new paragraph 6 (paragraph 163 of the "Report")

Paragraph 6 (paragraph 164 of the "Report")

The original paragraph 6 was adopted without discussion.

Paragraph 7

93. *Paragraph 7 (last sentence of paragraph 159 of the "Report") was adopted without discussion*, it being understood that it would be inserted immediately after paragraph 3 (which had itself been inserted after paragraph 1), and amended to apply to all special reports.

94. Mr. YEPES stated that he approved that chapter of the report in the hope that at its next session the Commission would give priority to what he considered the essential question of the subject matter of international treaties which, in his opinion, could not be valid or be registered unless they had a lawful purpose under international law.

CHAPTER III: REGIME OF THE HIGH SEAS

(A/CN.4/R.7/ADD.5)¹³

Paragraph 3 (paragraph 184 of the "Report")

95. Mr. HUDSON wished to make the following amendments to paragraph 3: In the first sentence he considered that the words "thought it necessary to" were too strong, and should be replaced by the words "thought that it could"; in the second sentence, the word "regulation" should be replaced by the word "study". The Commission had not, in fact, carried out any regulation, but had made a study. Finally, in the last sentence he would prefer that the word "dropped" should be replaced by the words "set aside".

¹² See 53rd meeting, paras. 86 *et seq.*

¹³ Mimeographed document only. See footnote 1.

96. Mr. LIANG (Secretary to the Commission) thought that a reference should be made in that paragraph to document A/CN.4/30, which had been submitted to the Commission by the Secretariat. He also asked that the words "other United Nations bodies" in the first sentence should be supplemented by the addition of the words "or by the specialized agencies".

Those proposals were adopted.

Paragraph 4 (paragraphs 185 and 186 of the "Report")

97. The CHAIRMAN proposed that in the first sentence the word "instructed" should be replaced by the word "invited" and that at the end of the second sentence the words "and can have one flag only" should be amended to read "and one flag only".

98. Mr. HUDSON proposed that the last sentence should be deleted. Contrary to what was stated, the Commission had reached a conclusion; that conclusion was stated in the preceding sentence.

99. The CHAIRMAN thought that the sentence could be retained. It would be sufficient to say "no other specific conclusions" instead of "no specific conclusions".

100. Mr. BRIERLY proposed the deletion of the small letters in the sub-headings preceding the various paragraphs after paragraph 3, and inserting the sub-headings between the paragraph number and the beginning of the text.

Those proposals were adopted.

Paragraph 5 (paragraph 187 of the "Report")

101. Mr. HUDSON thought that the Rapporteur had given that paragraph too wide a scope. The Commission had not wished to determine which court was competent in all cases of collision. It had confined itself to collisions involving questions of criminal law. Consequently, he thought that the first sentence should be amended to read "... which court is competent in criminal cases arising out of collision" instead of "competent in cases of collision". He also proposed that in the second sentence the passage "a positive principle which could supplement the negative opinion ordered by the Permanent Court of International Justice" should be deleted, and the words "a proposal" inserted after the word "submit".

102. Mr. BRIERLY suggested that the final sentence of paragraph 5 should be transferred to the beginning of that paragraph.

103. The CHAIRMAN said that in the French text the words "saurait demeurer silencieuse à ce sujet" at the end of the first sentence should be amended to read "pouvait passer ce sujet sous silence".

104. *Those amendments were adopted and the paragraph re-drafted.*

Paragraph 6 (paragraphs 188 and 189 of the "Report")

105. Mr. HUDSON thought that the first sentence of paragraph 6, as it stood, would only be understandable to persons well versed in maritime affairs. The passage relating to the adoption of the London Regulations of

1948 by all governments should be deleted. That passage went too far; the regulations of 1889 had been adopted by a large number of States and those of 1929 by a smaller number. It was by no means certain that there would be a large number of accessions to the revised text of 1948.

106. Mr. KERNO (Assistant Secretary-General) observed that the Commission intended to submit the report to the General Assembly for information only, and that a final report would be submitted later. The report stated that the Commission considered that the adoption of the 1948 regulations by all governments would represent a great step forward in that field. Did the Commission mean by those words that it invited the General Assembly to appeal to governments to adopt the 1948 regulations? He did not think that that was the Commission's intention and therefore believed that he could support Mr. Hudson's proposal to delete the passage in question.

107. Mr. FRANÇOIS agreed to the deletion but observed that he had inserted the passage to satisfy Mr. Hudson who had strongly urged, at the sixty-fourth meeting (para. 86), that all governments should ratify the revised text of 1948.

108. The CHAIRMAN said that in the second sentence of paragraph 6 the words "a principle" should be replaced by the word "principles".

Those proposals were adopted.

109. Mr. HUDSON proposed adding a few lines to the second sub-paragraph (paragraph 189 of the "Report")¹⁴ to explain the provisions of article 11 of the Brussels Convention of 1910 for the unification of certain rules relating to assistance and salvage at sea, and of article 8 of the Convention of the same date for the unification of certain rules relating to collision.

110. Mr. FRANÇOIS agreed to that proposal, in order to clarify the text for the reader.

*Paragraphs 7 and 8
(paragraphs 190 and 191 of the "Report")*

111. Mr. AMADO asked whether paragraph 8 was necessary, since the Commission had not considered the slave trade.

112. The CHAIRMAN proposed that the word "engaged" should be replaced by the words "which might engage".

Paragraphs 7 and 8 were adopted with the amendment proposed by the Chairman.

The meeting rose at 1 p.m.

¹⁴ That sub-paragraph read as follows:

It was the Commission's view that principles could be formulated on the basis of article 11 of the Brussels Convention of 23 September 1910 for the Unification of Certain Rules with respect to Assistance and Salvage at Sea, and of article 8 of the Convention for the Unifications of Certain Rules with respect to Collisions between Vessels, also dated 23 September 1910.