

Document:-
A/CN.4/SR.80

Summary record of the 80th meeting

Topic:
Other topics

Extract from the Yearbook of the International Law Commission:-
1950 , vol. I

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Paragraph 11 was accepted with the alterations suggested by Mr. Hudson.

Paragraph 12 (paragraph 139 of the "Report")

127. Mr. HUDSON felt that paragraph 12 was out of place, as it gave Mr. Alfaro's opinion.

128. Mr. ALFARO replied that the paragraph expressed not only his own views but those of other members of the Commission. Hence he suggested keeping the paragraph, and altering the beginning to read "It was pointed out by some members . . ." instead of "by Mr. Alfaro". The words "Finally Mr. Alfaro stated his view that" in line 4 would be deleted, the sentence to begin "Even if it were found that . . .".

The paragraph was accepted with the above alterations.

Paragraph 13 (paragraph 140 of the "Report")

129. Mr. BRIERLY suggested that the word "thorough" at the beginning of the English text of the paragraph be replaced by the word "extended".

It was so decided.

*Paragraphs 14 - 17
(paragraphs 141 - 144 of the "Report")*

130. *Paragraph 14 was accepted with a slight alteration to the English text, the word "it" in the first line being deleted.*

131. *Paragraph 15 was accepted with a slight alteration to the English text, the word "necessitated" to read "would necessitate".*

*Paragraphs 16 and 17 were accepted without modification.*¹²

*Paragraph 18 (paragraph 145 of the "Report")*¹³

132. Mr. HUDSON pointed out that the decision quoted in the paragraph had been taken to cater for the opinions expressed during the discussion, but it was not advisable to reproduce the text in the report. The paragraph might read: "After an exchange of opinions on the problem, the Commission decided that the establishment of a Criminal Chamber of the International Court of Justice was possible by amendment of the Court's Statute, but it did not recommend it."

¹² However, the text read as follows:

"16. Mr. Alfaro stated in his report that with this proviso the creation of such a Criminal Chamber was possible. At the opening of the discussion of this part of his report he stated that such a view did not mean that he favoured the creation of a Criminal Chamber of the International Court of Justice.
"17. Mr. Sandström stated his agreement with views expressed by some members of the Commission against the creation of a Criminal Chamber of the International Court of Justice."

¹³ Paragraph 18 read as follows:

"18. After an exchange of opinions on different aspects of the problem the following decision was taken:

"In making the foregoing answers to the question which the Commission was invited to study, the Commission has paid attention to the possibility of establishing a Criminal Chamber of the International Court of Justice. That course is possible by amendment of the Court's Statute, but the Commission does not recommend it."

133. Mr. ALFARO accepted the text as an improvement on his own. But it must be remembered that the Commission had been invited to study the question. Hence the text of the paragraph should surely state that it had taken the decision in compliance with the request. He would try to combine Mr. Hudson's proposal and his own for the final report.

Mr. Alfaro's proposal was accepted.

The meeting rose at 1 p.m.

80th MEETING

Friday, 28 July 1950, at 3.30 p.m.

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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. 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 VI: PROGRESS OF WORK ON TOPICS SELECTED FOR CODIFICATION (*concluded*)

CHAPTER II: ARBITRAL PROCEDURE

(A/CN.4/R.7/ADD.6)¹

Paragraph 1 (paragraphs 165 - 166 of the "Report")

1. Mr. HUDSON wondered whether it was necessary in the first paragraph to say "a discussion of the first three of these paragraphs".

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. The CHAIRMAN thought the statement could be deleted, since it was repeated in paragraph 4. Clearly, Mr. Hudson did not wish to advertise the fact that the Commission's work had been so restricted.

3. Mr. el-KHOURY pointed out that the report discussed only three paragraphs out of sixteen. Hence, it was clear that the Commission's work had been confined to the three paragraphs.

4. The CHAIRMAN thought it should be stated that the Commission had examined only the three paragraphs in question.

Paragraph 3 (paragraph 168 of the "Report")

5. The CHAIRMAN felt that the first line of the paragraph should read "the Rapporteur's thesis was as follows".

6. Mr. BRIERLY pointed out that the League of Nations had had nothing to do with the 1949 revision of the General Act. The reference was to the General Act of 1928, revised in 1949.

7. The CHAIRMAN suggested "... (General Act of 1928, revised by the General Assembly of the United Nations in 1949)."

8. Mr. HUDSON questioned whether the first sentence of the third sub-paragraph was not too categorical. It would be better to say "it sometimes happens" instead of "it often happens"; it was, after all, exceptional.

9. The CHAIRMAN agreed to the change.

10. Mr. BRIERLY submitted that the English text should read "close those loopholes" instead of "eliminate those loopholes".

11. Mr. AMADO wondered whether it was not going too far to speak of "loopholes".

12. The CHAIRMAN did not think so.

13. Mr. HUDSON did not think the International Court of Justice could intervene to appoint national arbitrators.

14. The CHAIRMAN recalled that the 1907 Convention stated that the tribunal could draw up the *compromis*: this would allow the International Court to intervene. Admittedly, his sentence was ambiguous. The words "In the absence of agreement, provision has to be made for intervention by an international authority whose decisions will be binding on the parties" were intended to cover every kind of omission. The international authority would intervene to lay down procedure, or to grant time for the production of documents. In some cases, that authority would be the tribunal, in others the International Court of Justice. The Commission had adopted article 23 of the General Act of Arbitration, where it was stated that the International Court of Justice would appoint the arbitrators. Hence, the two authorities which could intervene to fill the gaps were either the arbitral tribunal, or the Court; but that merely expressed the fundamental idea behind his report. The idea was not attributed to the Commission.

14 a. He suggested, "In some cases that authority would be the arbitral Tribunal itself, and, in other cases, the International Court of Justice." If the parties agreed, they would set up a tribunal; if they did not agree, the tribunal would be set up in accordance with article 23 of the General Act of Arbitration. He mentioned that his report was based on the 1907 Convention and the General Act of Arbitration.

15. Mr. AMADO observed that the General Act of Arbitration had received only a very small number of accessions.

16. The CHAIRMAN said that twenty-two States were parties to the General Act; that was the important point, not the fact that the Act had not been ratified. Even the 1907 Convention provided that the tribunal should set up the *compromis*.

Paragraph 4 (paragraph 169 of the "Report")²

17. Mr. el-KHOURY thought that the reason why the Commission had confined itself to a study of the first three paragraphs of Mr. Scelle's report only—namely, lack of time—should be stated.

18. Mr. HUDSON suggested that paragraph 4 be deleted, so as not to repeat what was already mentioned in paragraph 1.

19. Mr. LIANG (Secretary to the Commission) asked whether it was advisable to state that lack of time had prevented the Commission from making more progress; it had not exhausted the period set aside for the session. The same might be said of the reports by Mr. Brierly and Mr. François.

20. The CHAIRMAN suggested deleting the mention of the first three paragraphs.

21. Mr. HUDSON again suggested that paragraph 4 be deleted, and that paragraph 1 should read "This report concluded with a draft which was considered by the Commission in its...".

22. Mr. KERNO (Assistant Secretary-General) pointed out that the Commission had not examined the entire report, and he suggested, "The Commission devoted its 70th, 71st, 72nd and 73rd meetings to a general discussion of the report and a detailed discussion of the first three paragraphs of the draft."

23. The CHAIRMAN suggested for paragraph 4 the wording, "The Commission examined in detail the following paragraphs."

Paragraph 5 (paragraphs 170 - 173 of the "Report")³

24. Mr. HUDSON did not think it necessary to re-

² Paragraph 4 read as follows: "As stated in paragraph 1 the Commission confined itself to a study of the first three paragraphs." (See Summary Records A/CN.4/SR.70, 72, 73.)

³ The Commentary to paragraph 1 of the draft read as follows:

The Rapporteur stated his view that the essential task is to prevent States which have undertaken to resort to arbitration from evading their obligation through the lack of a procedure for solving the difficulties that may arise in the course of arbitration.

In the first place, in the event of dispute as to whether an issue exists or as to whether or not it falls within the terms

produce paragraph 1 of Mr. Scelle's report. It would be better to continue with an outline of the general principle. Actually, the text provisionally adopted by the Commission was different from the text of paragraph 1 proposed by the special rapporteur. There was no point in stressing the differences.

25. Mr. AMADO wondered why the Rapporteur's opinion should be reproduced at that point, whereas on other matters the provisional conclusions reached by the Commission had not been given in full. The Commission's provisional conclusions were given in the special report, but it had been decided not to transmit provisional decisions to the General Assembly.

26. The CHAIRMAN said that the text of paragraph 1 of his report had been inserted in the general report for greater clarity; and he feared that if it were decided to delete it, a summary would have to be given.

27. Mr. HUDSON thought a commentary would be sufficient.

28. The CHAIRMAN was prepared to let a commentary suffice, if the Commission agreed. The first sub-paragraph of the commentary could be deleted, as it had been introduced to link up the draft article which it had been decided to suppress, and the commentary. In the second sub-paragraph of the commentary, the parenthesis "(article 29 of the Statute)" might be omitted.

29. Mr. HUDSON preferred "the issue should be" to "the issue must be".

30. The CHAIRMAN disagreed. The expression "must be" should be kept. The Commission had discussed the question and he had been under the impression that a decision had been taken. He read out the passage quoted at the end of paragraph 5, adding that it would be better to say "... failing agreement the issue must ...".

31. Mr. HUDSON preferred the form: "These questions ought ... to be brought before, etc." There were, after all, two questions. In the same passage he suggested inserting the words "by any party" after the words "be brought", and eliminating the words "proposed by Mr. Manley Hudson" (in paragraph 173) after the words "accepted the following text". It was not a proposal he had made himself, but a text he had drafted to express the opinions of the other members.

32. The CHAIRMAN agreed.

33. Mr. BRIERLY pointed out that, in the English

of the obligation to arbitrate, the issue must be referred to a judicial authority for final decision. That authority could be the International Court of Justice pronouncing judgment in a chamber of summary procedure (article 29 of the Statute).

The Rapporteur proposed in the second place that the Court should be able to issue *interim measures* of protection in accordance with article 41 of its Statute, a proposal which gave rise to debate. It was pointed out, on the one hand, that, if called upon to pass judgment, the Court would apply its Statute as a whole, including article 41, without any need to refer to that article, and, on the other hand, that the application of the interim measures of protection should not cease when the Court pronounced its verdict, but should remain in force until the arbitral award was given.

The Commission, in agreement with the Rapporteur, accepted the following text proposed by Mr. Manley Hudson. (See text in the "report".

text, the word "verdict" (in paragraph 172) would not do. Only a jury could pronounce a verdict. He felt that the passage could not be understood if it were not read along with the summary record.

34. Mr. SANDSTRÖM recalled that Mr. Córdova had advocated mentioning that the measures of protection would apply equally after the judgment had been proclaimed.

35. Mr. BRIERLY considered that article 41 of the Statute of the International Court of Justice was insufficient.

36. Mr. HUDSON said that the Court could not take a decision such as Mr. Cordova advocated.

37. Mr. CORDOVA thought the provisions or article 41 should be extended by means of a convention.

38. Mr. LIANG (Secretary to the Commission) thought there should be some connexion between the third sub-paragraph of the commentary and the preceding one. It might be worded: "the Rapporteur proposed that in order to implement the decision an agreement should be reached whereby the Court ..."

39. Mr. CORDOVA thought that such measures of protection should remain in force until the arbitral award was given, but this should be stated explicitly in the convention.

40. The CHAIRMAN agreed to alter the third sub-paragraph of the commentary.

41. Mr. HUDSON suggested adding at the end of the first sentence: "and that such measures should continue to be applied after ...". It was important to make it clear, first of all, that the Court should be able to issue interim measures; and secondly, that such measures should continue to be applied after the judgment on the arbitrability of the dispute. In the present state of the Statute, the interim measures would cease to apply once the Court had pronounced judgment.

42. Mr. KERNO (Assistant Secretary-General) thought Mr. Hudson's text was satisfactory, but did not go far enough. It had been recognized that the question how such measures could remain in force after the judgment on the arbitrability of the dispute should be further examined by the Rapporteur.

43. The CHAIRMAN suggested stipulating in the sub-paragraph in question that the measures of protection under article 41 would cease to apply as soon as the Court had passed judgment, but would apply until the arbitration award was made.

44. The final sub-paragraph of paragraph 5 was deleted, Mr. HUDSON pointing out that it was self-evident.⁴

After an exchange of views on the question whether the deletion of the paragraphs of Mr. Scelle's preliminary report would not make that part of the report incomprehensible, it was decided not to delete them. Some members expressed regret that chapter II of part VI of the report was presented so very differently from the

⁴ It read as follows: "It was further agreed that the Rapporteur would take into consideration in his report for next year the suggestions made during discussion."

other topic on which discussion was not yet completed.

Paragraph 6 (paragraphs 174 and 175 of the "Report")

46. The CHAIRMAN read out the commentary (paragraph 175 of the Report) on paragraph II of his report. The French text of the second sub-paragraph should read "...l'expression 'délai raisonnable'..." He then read the first sentence of the third sub-paragraph, and said the sub-paragraph should stop there. It was an actual text. He had kept the reference to articles 22 and 23 of the General Act of Arbitration as clothing his idea perfectly; but admittedly his wording was defective. The Commission had voted in accordance with paragraph 3 of article 23, and had agreed to the insertion of articles 22 and 23.

47. Mr. HUDSON said he had the text of the summary record in front of him, and noted that he had raised an objection to the insertion of those articles.

48. The CHAIRMAN pointed out that articles 22 and 23 were already mentioned in the second sub-paragraph of paragraph II.

49. Mr. HUDSON did not see why the most diligent party should be mentioned, since article 22 had the words "by common agreement..." How could that procedure be instituted unless there was agreement? It would be better not to mention article 22. He read out the third sub-paragraph of paragraph II, where only paragraph 3 of article 23 was referred to.

50. Mr. YEPES mentioned, apropos of the fifth sub-paragraph (para. 175, fifth sentence)⁵ of the commentary on paragraph II, that during the discussion on arbitration procedure he had drawn the Commission's attention to the fact that it seemed advisable not to allow heads of States to be arbitrators in a suit. Heads of States frequently based their decisions on political considerations; and that was precisely what should be avoided in arbitration.

51. Mr. KERNO (Assistant Secretary-General) said that the sub-paragraph in question merely reproduced the opinions expressed during the discussion. He would have liked the Rapporteur to deduce some conclusion from them.

52. The CHAIRMAN suggested altering the sub-paragraph in view of Mr. Yepes' remark. It might read as follows:

"With regard to the *fourth and fifth sub-paragraphs*, some members of the Commission said that it was unnecessary to elaborate the qualifications required of the arbitrators, and that arbitration by heads of States should not be excluded. On this latter point other members of the Commission were of a different opinion, observing that the intervention of heads of State was likely to introduce political factors into the

arbitration. Moreover, some members of the Commission observed that it would not be necessary to have an arbitral tribunal composed of five members except in the case of important international disputes."

It was so decided.

53. The CHAIRMAN read out the sixth sub-paragraph (last sentence of para. 175) of the commentary on paragraph II.

54. Mr. HUDSON pointed out that it was incorrect to say at the beginning of the sub-paragraph, "The Commission decided to delete". The Commission had not taken a vote on the text. He proposed, instead, "It was suggested that... should be deleted".

It was so decided.

Paragraph 7 (paragraphs 176-180 of the "Report")

55. The CHAIRMAN read out the commentaries on paragraph III, and suggested that the second sentence of the second sub-paragraph should read:

"They pointed out that the character of the arbitrators appointed by the parties was to a certain extent special⁶ and that, in accordance with established practice, governments should be given wide latitude⁷ in the choice of such arbitrators and allowed, if need be,⁸ to appoint legal experts in their service."

It was so decided.

56. Mr. HUDSON asked whether the word "disqualification" used in the English text of the fourth sub-paragraph (para. 179, first sentence) of the commentary corresponded exactly to the French word "*récusation*".

57. Mr. ALFARO suggested "challenge" instead of "disqualification".

58. Mr. BRIERLY thought the word "disqualification" should be kept in the English text, as the same word was used in other parts of the report and in Mr. Scelle's original report. At the same time, he thought it well to point out that the English word "disqualification" was not entirely appropriate. A footnote might be added to the effect that the French word "*recusation*" would be better rendered in English by "challenge" than by "disqualification".

It was so decided.

59. The CHAIRMAN said he would like to make some changes in the wording of the sixth sub-paragraph (para. 179, fourth sentence), making it read:

"The Rapporteur said that disqualification is possible only where a new fact,⁹ such as the insanity or venality of a judge, has come to light after the appointment of the tribunal."

It was so decided.

60. After a short discussion, the CHAIRMAN suggested the following wording for the eleventh sub-paragraph (para. 180, fifth to seventh sentences).

⁶ Instead of "was somewhat special".

⁷ Instead of "fairly wide latitude".

⁸ Instead of "allowed to appoint".

⁹ Instead of "must be possible where a new fact".

⁵ The fifth sub-paragraph read as follows:

With regard to the *fourth and fifth sub-paragraphs*, members of the Commission said that it was unnecessary to enlarge on the qualifications required of the judges, that allowance should be made for arbitration by heads of States, and that an arbitral tribunal composed of five members would be unnecessary, except in the case of important international disputes.

"Some members of the Commission thought this proposal went too far, since arbitration differed from judicial settlement of disputes in that its procedure was more flexible; consequently, various questions must be left to the agreement between the parties. It would discourage governments to impose unduly strict rules on them."¹⁰

61. Mr. HUDSON referred to the English text of the next to the last sub-paragraph, which read "... that the new convention proposed should prevent..." He thought the word "proposed" was incorrect, and should be replaced by the word "envisaged",¹¹ which incidentally would correspond to the French text. He also thought that the word "convention" should be replaced in both languages by the word "code".

It was so decided.

62. The CHAIRMAN said he would put before the Commission the second drafts of the various parts of the general report; and he asked the Commission to try not to dwell on points of detail.

63. Mr. HUDSON pointed out that the members of the Commission had not had the time to read their documents; but he suggested passing them page by page.

It was so decided.

SECOND READING

PART I: GENERAL (A/CN.4/R.7/ADD.1/REV.1)¹²

64. Mr. HUDSON was surprised at the wording of paragraph 3. It was not correct to state at that point that Mr. Koretsky had been absent from the second session. All mention of Mr. Koretsky should be omitted; in any case, paragraphs 4 - 7 referred to him.

65. Mr. KERNO (Assistant Secretary-General) thought it might merely be said that Sir Benegal Narsing Rau and Mr. Jaroslav Zourek had not taken part in the session.

66. After a short discussion, in which Mr. Brierly, Mr. Alfaro and Mr. Yepes took part, Mr. CORDOVA suggested that paragraph 3 should read:

"3. Sir Benegal Narsing Rau and Mr. Jaroslav Zourek did not attend the session. Mr. Vladimir M. Koretsky withdrew at the opening meeting."¹³

It was so decided.

67. Mr. HUDSON proposed that at the end of the third sentence of paragraph 7 the words "and has since absented himself from the meetings of the Commission" be deleted.

It was so decided.

68. Mr. HUDSON suggested fusing the two sub-paragraphs of paragraph 12 into one.

¹⁰ Instead of "was more flexible, so that various questions must be settled by agreement between the parties. It would be offensive to Governments to attempt to impose unduly strict rules on them."

¹¹ Later changed to "essential".

¹² Mimeographed document only. See footnote 1.

¹³ Later redrafted for the printed text of the "Report".

69. Mr. YEPES suggested the insertion of the words, "which was ready" after "his working paper" in paragraph 12.

It was so decided.

70. Mr. BRIERLY suggested that the heading "Time and Place of the Third Session" given in the French text should be added in the English version before paragraph 22.

It was so decided.

*Part I was adopted.*¹⁴

PART II: WAYS AND MEANS FOR MAKING THE EVIDENCE OF CUSTOMARY INTERNATIONAL LAW MORE READILY AVAILABLE (A/CN.4/R.7/REV.1)¹⁵

71. Mr. YEPES said he would like to propose just one slight modification to paragraph 29. In line 8, "evidence of customary law" should be substituted for "indications of state practice".

It was so decided.

Part II was adopted.

PART VI: PROGRESS OF WORK ON TOPICS SELECTED FOR CODIFICATION

CHAPTER I: THE LAW OF TREATIES

(A/CN.4/R.7/ADD.4/REV.1)¹⁶

72. Mr. BRIERLY suggested that the words "and the Rapporteur was asked to revise his draft" at the end of paragraph 7 (paragraph 164 of the "Report") be omitted.

It was so decided.

Part VI, Chapter I, was adopted.

The meeting rose at 6 p.m.

81st MEETING

Saturday, 29 July 1950, at 9.30 a.m.

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¹⁴ See 81st meeting, paras. 76-78.

¹⁵ Mimeographed document only. See footnote 1.

¹⁶ *Ibid.*

Chairman: Mr. Georges SCELLE.

Rapporteur: Mr. Ricardo J. ALFARO.

Present:

Members: Mr. Gilberto AMADO, Mr. James L. BRIERLY, Mr. J. P. A. FRANÇOIS, Mr. Manley O. HUDSON, Mr. Faris el-KHOURY, 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 (concluded)

SECOND READING

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

1. Mr. ALFARO recalled that Mr. HUDSON had made a reservation.

2. The CHAIRMAN added that he had made one also.

3. Mr. HUDSON read out the following reservation:

"In abstaining from the vote on this part of the report, Mr. Hudson stated that some confusion had existed as to the precise nature of the task entrusted to the Commission. In the report of the Commission covering its first session, which was approved by the General Assembly, the view was put forward that 'the task of the Commission was not to express any appreciation of these principles (namely the Nürnberg Principles) as principles of international law, but merely to formulate them'. In his opinion, however, the Commission had not altogether adhered to that view in its later work, with the result that doubt subsisted as to the juridical character of the formulation adopted. Moreover, the formulation had not sufficiently taken into account the special character of the Charter and judgment of the International Military Tribunal and the *ad hoc* purpose which they served."

He asked his colleagues to be so good as to state their comments.

4. The CHAIRMAN did not think that members of the Commission were entitled to criticise a reservation.

5. Mr. AMADO, on the contrary, considered that the wording of the reservation should be examined.

6. The CHAIRMAN explained that he had meant that there was no question of adopting the reservation.

7. Mr. HUDSON thought that reservations should be examined by members of the Commission in the same way as dissenting opinions of judges of the Permanent Court of International Justice had been examined by

the other judges. He considered that although a member of the Commission could issue a dissentient opinion, he must nevertheless submit it to the Commission so that his colleagues could state their views. He would take the suggestions put forward into account.

8. Mr. ALFARO did not wish to ask Mr. Hudson to amend the text of his reservation, but he wished to know what confusion he was referring to when he said that "in abstaining from the vote on this part of the report Mr. Hudson stated that some confusion had existed as to the precise nature of the task entrusted to the Commission". He believed that if there had perhaps been some confusion at the first session, it had been removed by the decision taken the previous year to state that the Commission should merely formulate the Nürnberg Principles.

9. Mr. HUDSON considered that the confusion had not been removed and that no decision had been taken. The various members of the Commission had referred to existing international law on that point. Doubts subsisted as to the juridical character of the formulation adopted. He did not think that he was injuring the Commission's prestige by submitting that text.

10. Mr. AMADO suggested that it might be better to say "some doubt" rather than "some confusion".

11. Mr. HUDSON observed that he used the word "doubt" later on, but that he was prepared to say "uncertainty".

12. The CHAIRMAN agreed with Mr. Hudson that members of the Commission held conflicting views and that in any case they were not unanimous.

13. Mr. AMADO observed that Mr. Hudson's reservation was in conflict with that of the Chairman.

14. The CHAIRMAN said that in his reservation he was indeed expressing a contrary view. He considered that the Nürnberg Principles constituted positive international law and even that they had done so before the judgment.

14 a. He read out his reservation, which was as follows:

"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."

14 b. He might have added that the General Assembly had itself adopted those principles, but he was uncertain whether it had done so because they were principles of international law or merely because it accepted them. He had added the words "Moreover, he con-

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.

sidered that the final text of the report did not seem to reflect accurately . . .” because it was his impression that during its discussions the Commission had adopted a more positive attitude than was reflected in the report.

15. Mr. HUDSON observed that each of the two reservations made the other clearer.

16. The CHAIRMAN thought that that should help to remove what Mr. Hudson had described as confusion; there was no confusion, but rather opposition.

17. Mr. AMADO asked how the Rapporteur was going to insert the reservations. Would he include in the report a paragraph similar to paragraph 27 of the previous year's report?

18. Mr. HUDSON thought that his statement could appear as a footnote to the second sentence of paragraph 97 of the report.

19. The CHAIRMAN agreed; the statement he had made the previous year had appeared in the body of the report and also in a footnote.

20. Mr. ALFARO also had a short reservation for inclusion as a footnote. His reservation was as follows:

“Mr. Ricardo J. Alfaro declared that he voted in favour of Part III of the report with a reservation as to paragraph 96, because he believed that the reference therein contained regarding the task of formulating the Nürnberg Principles should have been inserted in the report together with a quotation of the passage in the judgment of the Nürnberg Tribunal in which the Tribunal asserted that the Charter ‘is the expression of international law existing at the time of its creation and to that extent is itself a contribution to international law.’”

20 a. He thought that the two opinions should be included and the choice left to the reader. He did not propose that the Commission should approve the Tribunal's opinion, but that it should say what the Tribunal had stated. He did not think it fair to the Tribunal to include only that part of the decision which cast doubt on its juridical basis and did not show that the Tribunal believed that those principles were a part of international law. He did not approve of paragraph 96.

21. Mr. HUDSON pointed out that Mr. Alfaro was only objecting to a small part of paragraph 96. His reservation merely applied to the fact that the Commission was recalling its conclusions of the previous year in that part of the report.

22. Mr. ALFARO explained that he objected to a restatement of those conclusions in any part of the report.

23. Mr. HUDSON proposed that in that case the Commission should recall its decision without stating the opinion of the Tribunal.

24. Mr. ALFARO considered that the Commission was called upon to formulate what it considered to be international law. That was why he found it unjust to delete the whole paragraph, but thought it advisable to delete that part which cast doubt on the legal validity of the Tribunal's opinion. He would not have made any reservation if the Commission had not decided to omit the Tribunal's opinion.

25. Mr. HUDSON thought that Mr. Alfaro was right in making that reservation. The three reservations should appear in the form of a footnote, but he asked to what passage it should refer. He proposed that it should refer to the title of Part III.

25 a. He suggested that at the beginning of paragraph 98 the words “The above principle” should be replaced by the words “This principle”. In footnote 16, referring to paragraph 119, he asked that the word “taking” should be underlined.² He thought that the reference to the Geneva Convention contained in that footnote was not sufficiently clear since the provision was included in the four Conventions of 1949. He proposed the following wording: “took note of the fact that the four Geneva Conventions interdict . . .”.³ He said that in the English text he would prefer the word “interdict” to the word “prohibit”.

26. Mr. ALFARO accepted that amendment. He explained that Mr. Hsu preferred that article 34 of the Convention Relative to the Protection of Civilian Persons in Time of War should be referred to, since that was the most appropriate reference for the question of hostages. He proposed the following wording: “Took note of the fact that the Geneva Conventions of 1949, and more specifically Article 34 of the Convention etc.”

It was so decided.

PART IV: QUESTION OF INTERNATIONAL CRIMINAL JURISDICTION (A/CN.4/R.7/ADD.7/REV.1)⁴

27. Mr. HUDSON thought that paragraph 18 (paragraph 145 of the “Report”) had been somewhat unduly truncated. The Commission did not state the reason why it did not recommend the establishment of a Criminal Chamber of the International Court of Justice. He would prefer the words “does not recommend it because of its possible prejudicial effect on the Court's discharge of its function of judging disputes between States”. There was no doubt that several members of the Commission had taken that view. He thought the General Assembly would be glad to know the reason why the Commission did not recommend that the Statute of the Court should be amended.

28. Mr. KERNO (Assistant Secretary-General) had the same impression, but he did not think that the text proposed by Mr. Hudson should include the word “prejudicial”.

29. Mr. HUDSON withdrew that word.

30. Mr. BRIERLY proposed the words “its functions under the present Statute”. The new duties assigned to the Court would be very different.

31. Mr. KERNO (Assistant Secretary-General) thought that the most serious objection to the establishment of a Criminal Chamber was that its functions would be so different from those of the Court under the

² Footnote 19 of the “Report”.

³ Instead of “the fact that Article 34 of the Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949 prohibits . . .”

⁴ Mimeographed document only. See footnote 1.