

Document:-  
**A/CN.4/L.42**

**Additional Item Proposed by Mr. Zourek - Provision for the Expression of Dissenting Opinions  
in the Commission's Final Report on the Work of Each Session - Explanatory Note -  
incorporated in the summary record of the 195th meeting, footnote 1**

Topic:  
**Other topics**

Extract from the Yearbook of the International Law Commission:-  
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## 195th MEETING

Tuesday, 16 June 1953, at 9.30 a.m.

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Chairman: Mr. J. P. A. FRANÇOIS;

later: Mr. Gilberto AMADO, *First Vice-Chairman*.

*Rapporteur*: Mr. H. LAUTERPACHT.

## Present:

*Members*: Mr. Ricardo J. ALFARO, Mr. Shuhsi HSU, Faris Bey el-KHOURI, Mr. F. I. KOZHEVNIKOV, Mr. Radhabinod PAL, Mr. A. E. F. SANDSTRÖM, Mr. Georges SCELLE, Mr. Jean SPIROPOULOS, Mr. J. M. YEPES, Mr. Jaroslav ZOUREK.

*Secretariat*: Mr. Yuen-li LIANG, Director of the Division for the Development and Codification of International Law, and Secretary to the Commission.

**Mr. Zourek's proposal concerning provision for the expression of dissenting opinions in the Commission's final report on the work of each session (additional item) (A/CN.4/L.42, A/CN.4/L.43 and A/CN.4/L.44)**

1. The CHAIRMAN invited the Commission to take up Mr. Zourek's proposal (A/CN.4/L.42)<sup>1</sup> concerning the expression of dissenting opinions in the Com-

<sup>1</sup> Document A/CN.4/L.42 read as follows:

**"PROVISION FOR THE EXPRESSION OF DISSENTING OPINIONS IN THE COMMISSION'S FINAL REPORT ON THE WORK OF EACH SESSION"**

*"Explanatory Note"*

"There are several reasons why it is necessary for the Commission's final report on the work of each session to include all the views of its members, particularly those on draft rules of international law and on questions of primary importance. In the first place, the Commission was set up as an auxiliary organ of the United Nations General Assembly and its members, while elected by the General Assembly in a personal capacity, should represent the main forms of civilization and the principal legal systems of the world (General Assembly resolution No. 174 (II) of 21 November 1947). It is therefore important that the opinions of members of the Commission, if not expressed in a decision, should find expression in its final report whenever they concern draft rules of international law or questions of principle. Moreover, the particular nature of the Commission's work

mission's reports, which it had been decided at the 184th meeting should be added to the agenda for the present session.<sup>2</sup> Two related proposals had also been submitted by Mr. Lauterpacht (A/CN.4/L.43)<sup>3</sup> and Mr. Pal (A/CN.4/L.44).<sup>4</sup>

2. Referring to the fourth paragraph of Mr. Zourek's note, he said that he was unable to understand the meaning of the assertion that it was essential to settle "once and for all" the manner in which dissenting members could express their opinions. At its third session, the Commission had adopted a rule applicable to the report on that and future sessions.<sup>5</sup> The decision had been challenged at the fourth session, but had been upheld.<sup>6</sup> If Mr. Zourek's intention was that the Commission should, just before the expiry of its members' term of office, take a decision which would be binding upon the new members to be elected, he must first explain why the earlier decision should no longer be regarded as valid.

3. Mr. ZOUREK said that he was not unaware of the decision taken by the Commission at its third session. Unless he was mistaken, however, that decision as formulated during the Commission's discussion only referred to cases in which a member of the Commission disapproved of a particular passage in the final report and not to cases in which a member wished to submit comments on complete drafts of international conventions. The words in his proposal referred to by the Chairman meant that the decision taken should remain in effect as long as no change was dictated by practical considerations. Since the Commission was a permanent body, its decisions must be binding upon future members unless they decided otherwise.

4. The need to express dissenting opinions in the final report which the Commission submitted annually to the General Assembly on the work done at each session had made itself felt since the beginning of the Commission's work. Each year, there were lengthy discussions on the question whether, and in what form, dissenting opinions should be expressed in the final report. The question arose in a particularly acute form in connexion with the preparation of draft rules of international law and votes

makes it necessary to give a complete account of the opinions expressed and the arguments put forward in the Commission. The decisions taken by the Commission are, in fact, only proposals which in certain cases must be published as Commission documents (article 16, paragraph (g) of the Statute of the Commission) and must in all cases be presented to governments (article 16, paragraph (h) and article 21) and submitted to the General Assembly for a decision (article 16, paragraph (j), article 18, paragraph 2, article 20 and article 22). Finally, when preparing drafts on the codification of international law, the Commission is required, under its Statute, to submit with the draft articles, *inter alia*, conclusions relevant to: 'the extent of agreement on each point in the practice of States and in doctrine' and 'divergencies and disagreements which exist, as well as arguments invoked in favour of one or another solution' (article 20, paragraph (b)).

"It appears from the foregoing that the views of members of the Commission who are unable to concur in the majority opinion when a vote is taken should be expressed in the

on questions of principle. For the sake of convenience he used that expression to mean any question concerning a controversial point of international law or any question of procedure likely to be of decisive importance for the progress of the Commission's work.

5. He went on to explain why the question of dissenting opinions arose in the Commission each year in such an acute form. It was, first, because of the purpose and special nature of the work of the Commission, which had been set up to encourage the progressive development of international law and its codification. That type of work required long and careful preparation, including the collection and comparison of all opinions expressed in international doctrine and practice. It was for that reason, also, that the Statute of the Commission prescribed consultation with governments, with the organs of the United Nations and even with non-governmental organizations.

6. The composition of the Commission also explained the need for allowing dissenting opinions. The Commission was made up, not of government representatives, but of persons elected by the General Assembly for their competence in international law and representing, as a whole, the main forms of civilization and the principal legal systems of the world. The Commission was thus a scientific body as well as a subsidiary organ of the General Assembly.

7. The expression of dissenting opinions in the final report was further justified by the Commission's method of work. The drafts prepared by the Commission and the decisions taken by it were not final. The drafts had to be published as Commission documents, submitted to governments (article 16(h) and article 21 of the Statute), reconsidered in the light of the comments of governments (article 16(i) and article 22) and submitted to the General Assembly for a decision (article 16(j), article 18, paragraph 2, article 20 and article 22 of the Statute). The decision on such drafts rested with the General Assembly. If it did not consider that it could recommend a draft to members with a view to the conclusion of a convention, it was free to convoke an international conference for that purpose and might also refer the draft back to the Commission for recon-

sideration or redrafting. That being so, it was of the highest importance that governments, the General Assembly and all other parties concerned should have at their disposal reports giving a complete and faithful account of the opinions expressed in the Commission.

8. Lastly, under its own Statute the International Law Commission was required to express dissenting opinions in certain cases, precisely because of the special nature of the work of codification. When the Commission prepared draft articles for submission to the General Assembly it was required, under article 20 of its Statute, to submit such articles with conclusions relevant to "the extent of agreement on each point in the practice of States and in doctrine" and "divergencies and disagreements which exist, as well as arguments invoked in favour of one or another solution". That provision could in no way be interpreted as rendering the expression of dissenting opinions unnecessary. It applied only to draft rules of international law and then only to drafts submitted to the General Assembly. Even if the provisions of article 20 were observed, it might easily happen that a member of the Commission did not consider the account of disagreements and arguments to be sufficiently complete or accurate.

9. The need to express dissenting opinions being sufficiently justified, the next question was how the opinions of those who had been unable to support the majority view should be expressed. He proposed, as the only practical means of settling the question, that the Commission should recognize:

(a) That every member had the right to attach a statement of his dissenting opinion to any decision taken by the Commission on draft rules of international law, if all or part of that decision did not express the unanimous opinion of members of the Commission;

(b) That every dissenting member had the right to give a brief explanation of his views in a footnote if, in cases other than those he had referred to, a decision had been taken on a question of principle.

10. In the case of draft rules of international law, dissenting opinions should be attached to the text. In the case of decisions on questions of principle affecting the Commission's work, a brief explanatory footnote

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final report, which should give a complete and accurate account of the debate. Thus, it is only necessary to work out an appropriate procedure for including dissenting opinions in the final report.

"Unlike the International Court of Justice, in which the question of dissenting and individual opinions has been settled and appears to present no difficulty, the International Law Commission has not yet found a satisfactory solution for the same problem. With a few rare exceptions, the practice followed so far has been to include in the final report on each session only the majority decision and the arguments in favour of it, while almost entirely omitting the arguments of other members, many of whom have often been unable to concur in the majority opinion.

"To meet the need described above, it is essential to settle, once and for all, by a formal provision, the manner in which dissenting members can express their opinions on the whole or part of a draft prepared by the Commission or on a question of principle examined by it.

"How then can this object be achieved? Considerations

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arising from the scientific and special character of the Commission's work, as well as practical arguments, militate in favour of recognizing the right of members who dissent from the Commission's decision in the cases mentioned above:

"(a) To attach a statement of their dissenting opinion on a draft rule of international law if the whole or part of the Commission's decision does not express the unanimous opinion of members;

"(b) To give a brief explanation of their views in a footnote if, in cases other than those referred to above, a decision has been taken on a question of principle affecting the Commission's work.

"The proposed solution would have undoubted advantages, for the expression of dissenting opinions by those who hold them would in no way commit the Commission as such, since the dissenting opinions could be attached as an annex. Furthermore, such a procedure would:

"(1) Be much more consistent with the Commission's aims;

would be sufficient. It was for purely practical reasons that he suggested using two different systems. In the case of well defined and separate questions it was much more convenient for the reader to be able to refer to footnotes, rather than be obliged to look for the dissenting opinion in another part of the report.

11. He reminded the Commission that the right to attach dissenting opinions had been fully recognized in international law on arbitration. Examples were provided by the provisions to that effect contained in Article 57 of the Statute of the International Court of Justice and in Articles 74, paragraph 2, and 84, paragraph 2, of the Rules of the Court. The Commission itself had just adopted article 25 of the draft on Arbitral Procedure, authorizing any member of an arbitral tribunal to attach a separate or dissenting opinion. He referred to arbitration in that connexion, although well aware that the activities were entirely different, because the history of international arbitration provided many lessons on that very point. There, too, there had been some hesitation, which was understandable when it was considered that the arbitral award was obligatory and must provide a final settlement of an international dispute. Thus article 52, paragraph 2, of the Convention of 1899 on the Pacific Settlement of International Disputes provided that members of a tribunal who were in the minority might record their dissent. On the other hand, there was no such provision in the Convention of

1907 on the same subject or in the conventions on arbitration and prize courts. It had been maintained at the time that the expression of dissenting opinions should not be permitted, so as not to raise doubts on the merits of the award or undermine the confidence of nations in arbitration.

12. The same hesitation had been noticeable in the preparation of the Statute of the Permanent Court of International Justice. The drafting committee of the Advisory Committee of Jurists had made provision for the insertion of dissenting opinions with reasons, except those held by judges of the same nationality as the parties. The Advisory Committee itself, not wishing to create inequality between the judges, had provided in its draft only for the possibility of recording opposition and reservations but without any explanation. The League of Nations Council had amended the draft, however, giving judges the right to attach their dissenting opinions to the decision and the first Assembly of the League of Nations had retained the text adopted by the Council. Later, when advisory functions had been assigned to the Court, dissenting opinions had also been permitted under the procedure adopted.

13. The main argument which had brought about that change of attitude after the initial hesitations, in spite of the solid arguments advanced against the admission of dissenting opinions in arbitration, had been the great

"(2) Facilitate the examination of drafts by governments and by the Assembly;

"(3) Obviate the need for useless and sometimes laborious discussions in future;

"(4) Enhance the scientific value of the Commission's final reports, and lastly,

"(5) Conform to the provisions of the Commission's Statute which require it to give an account, in its commentaries, of the divergencies and disagreements which exist in the practice of States and in doctrine, as well as arguments invoked in favour of one or another solution (Article 20, paragraph (b) of the Commission's Statute).

"In view of the foregoing, it is proposed that the resolution annexed hereto be adopted.

#### " ANNEX

#### " PROVISION FOR THE EXPRESSION OF DISSENTING OPINIONS IN THE FINAL REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF EACH SESSION

" *The International Law Commission,*

" *Considering* that it was set up with the object of promoting the progressive development of international law and its codification (article 1 of the Statute of the Commission);

" *Considering* that it is composed of legal experts selected to represent the chief forms of civilization and the basic legal systems of the world;

" *Considering* it essential that documents submitted to governments by the Commission should give a complete and accurate account of the various views expressed in the Commission and the main arguments invoked in favour of one or another solution;

" *Considering* that the General Assembly, to which drafts are submitted for examination and decision, is entitled to be informed of the divergencies and disagreements which exist in the Commission and of the arguments invoked on either side;

" *Considering*, therefore, that the final report submitted to the General Assembly on the work of each session should express the views of all members, particularly with regard to draft rules of international law and questions of principle;

" *Recognizes*

"(a) that any member of the Commission may attach a statement of his dissenting opinion to any decision by the Commission, on draft rules of international law, if the whole or part of the said decision does not express the unanimous opinion of the members of the Commission;

"(b) that any dissenting member may briefly explain his views in a footnote if, in cases other than those covered by sub-paragraph (a) above, a decision has been taken on a question of principle affecting the work of the Commission."

<sup>2</sup> See *supra*, 184th meeting, paras. 34-41.

<sup>3</sup> Document A/CN.4/L.43 read as follows:

" *Proposal by Mr. Lauterpacht*

" Members of the Commission are entitled to record, in footnote, their dissent from any report adopted by the Commission or any part thereof. They are also entitled to append to their dissent a brief statement of reasons at a length agreed to by the President of the Commission. They may appeal from the decision of the President to the Bureau whose decision shall be final."

<sup>4</sup> Document A/CN.4/L.44 read as follows:

" *Proposal by Mr. Pal*

" Members of the Commission are entitled to append to the report adopted by the Commission their dissent, if any, with a brief statement of reasons therefor."

<sup>5</sup> See *Yearbook of the International Law Commission, 1951*, vol. I, 128th meeting, para. 56.

<sup>6</sup> See *Yearbook of the International Law Commission, 1952*, vol. I, 181st meeting, paras. 62 and 85.