

Document:-
A/CN.4/L.44

Provision for the Expression of Dissenting Opinions in the Commission's Final Report on the Work of Each Session - Proposal by Mr. Pal - incorporated in the summary record of the 195th meeting, footnote 4

Topic:
Other topics

Extract from the Yearbook of the International Law Commission:-
1953, vol. I

*Downloaded from the web site of the International Law Commission
(<http://www.un.org/law/ilc/index.htm>)*

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."

² See *supra*, 184th meeting, paras. 34-41.

³ 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."

⁴ 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."

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

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