Document:-
A/CN.4/SR.448

Summary record of the 448th meeting

Topic:
<multiple topics>

Extract from the Yearbook of the International Law Commission:-
1958 , **vol. I**

Mr. El-Erian's proposal was adopted by 13 votes to 1, with 3 abstentions, subject to drafting changes.

ADDITIONAL ARTICLE PROPOSED BY MR. BARTOS

67. Mr. BARTOS said that according to current practice all the documents relating to an arbitral tribunal's proceedings remained with the president of the tribunal. That practice could give rise to difficulties. In the first place, those documents might be required later for the purpose of an application for the annulment or for the revision of the award. In the second place, the records of the proceedings were of interest to the international community and to jurists.

68. He therefore proposed that an additional article be introduced relating to the deposit of the documents relating to the tribunal's proceedings. Subject to final drafting by the Drafting Committee, he proposed that the new article should be drafted along the following lines.

69. A first paragraph would state that if, after the expiry of the time-limit prescribed in article 35, paragraph 1, the arbitral tribunal had not received a request for interpretation, or, having received such a request, had given a decision thereon, the said tribunal would deposit all its documents with the Permanent Court of Arbitration, except where the parties had by agreement designated another depositary.

70. A second paragraph would state that the president of the tribunal would be responsible for carrying out the provisions of the previous paragraph.

71. Lastly, provision could also be made for the agreement of the parties concerning the disclosure or non-diclosure of the proceedings to third parties.

72. Sir Gerald FITZMAURICE said that the proposal made by Mr. Bartos was in principle an excellent one. It was also desirable that arbitration proceedings should be accessible to persons who might wish to inspect them for purposes of study. There might, however, be cases in which the parties wished to keep the proceedings private and it was therefore desirable to include some provision to cover that situation.

73. Mr. FRANÇOIS said that the fact that the documents relating to arbitral proceedings were deposited with the archives of the Permanent Court of Arbitration did not in any way imply that they would be made available to persons wishing to inspect them. In fact, whenever in his capacity as Secretary-General of that Court he received a request for the inspection of arbitral proceedings kept in those archives, he would transmit the request to the president of the arbitral tribunal concerned or to the parties.

74. The parties to a dispute were, of course, free to agree that the documents relating to the arbitration should remain secret after they had been deposited with the Permanent Court of Arbitration, and the Court would naturally respect the agreement of the parties in that regard.

75. Mr. LIANG, Secretary to the Commission, said that if the parties agreed to deposit the documents relating to the proceedings with the Permanent Court of Arbitration, it was desirable to make those documents available for publication. The publication of contemporary awards would help to enrich the contents of the *Reports of International Arbitral Awards*, the first six volumes of which had already been published by the United Nations. The seventh volume was being printed.

76. With regard to the additional article proposed by Mr. Bartos, he said it was perhaps desirable that it should be drafted in terms which did not suggest that there was any obligation to deposit the documents with the Permanent Court of Arbitration, or indeed with any third party. The parties to a case might feel that the documents relating to it were of an absolutely confidential character and hence might not wish to deposit them with a third party at all.

77. Mr. SANDSTRÖM said that the proper context for the article proposed by Mr. Bartos might be the second, or optional, part of article 2, where it could be stated that the parties could, if they so desired, include a provision in the *compromis* referring to the deposit of the documents relating to the proceedings and their publication or non-publication.

78. Mr. BARTOS said that he would submit at the next meeting a formal proposal taking into consideration the suggestions made by Sir Gerald Fitzmaurice and the Secretary to the Commission. His only purpose was to include a provision concerning the custody of the documents relating to arbitral proceedings.

The meeting rose at 1 p.m.

448th MEETING

Thursday, 22 May 1958, at 9.45 a.m.

Chairman: Mr. Radhabinod PAL.

Arbitral procedure: General Assembly resolution 989 (X) (A/CN.4/113) *(continued)*

CONSIDERATION OF THE MODEL DRAFT ON ARBITRAL PROCEDURE (A/CN.4/113, ANNEX) *(continued)*

ADDITIONAL ARTICLE PROPOSED BY MR. BARTOS *(continued)*

1. Mr. BARTOS introduced the following draft of the additional article proposed by him (447th meeting, paras. 68-72):

> "If, after the expiry of the time limit prescribed in article 35, paragraph 1, the arbitral tribunal has not received a request for interpretation, or, having received such a request, has given a decision thereon, the said tribunal shall, with the consent of the parties, deposit all its documents with the registry of the Permanent Court of Arbitration, unless the parties have by agreement designated another depositary.

"The president of the tribunal shall be responsible for taking the necessary steps with a view to the deposit of the documents with the Permanent Court of Arbitration or with the depositary designated."

The additional article proposed by Mr. Bartos was adopted unanimously, subject to drafting changes.

2. The CHAIRMAN said that the Commission would resume consideration of articles 36 and 37 of the model draft on arbitral procedure when the Special Rapporteur was able to attend its meetings.

Diplomatic intercourse and immunities (A/3623, A/CN.4/114 and Add.1-5, A/CN.4/116 and Add.1, A/CN.4/L.72)

[Agenda item 3]

3. The CHAIRMAN invited the Commission to consider the subject of diplomatic intercourse and immunities.

4. Mr. SANDSTRÖM, Special Rapporteur, introduced his report containing a summary of observations received from Governments on the draft articles prepared by the Commission at its ninth session (A/3623, para. 16), together with his conclusions (A/CN.4/116). The observations by the Governments of Finland (A/CN.4/114/Add.2), Italy (A/CN.4/114/Add.3), China (A/CN.4/114/Add.4) and Yugoslavia (A/CN.4/114/Add.5) had been received too late to be taken into account in that summary.

5. The revised versions proposed by him for the draft articles were contained in document A/CN.4/116/Add.1.

6. Government comments had been generally favourable to the draft as a whole. Some Governments, including that of Chile, had conveyed their congratulations to the Commission. The Chilean Government had added that the draft embodied fundamentally the same principles as those stated in the Havana Convention[1] with modifications to adapt them to new conditions; that remark was particularly significant in view of the criticism expressed by certain Latin American delegations in the Sixth Committee of the General Assembly that the draft did not take sufficiently into account Latin American practice and in particular the Havana Convention. In fact, the only important Latin American practice not covered in the draft was that of the right of asylum in an embassy.

7. With regard to the form of the codification, the United States Government had, unlike other Governments, expressed opposition to the suggestion that the draft articles be submitted to the General Assembly in the form of a convention. In that connexion, he drew attention to the various objections to the draft formulated by the United States Government and to his reply to those objections (see A/CN.4/116).

8. He would be glad to hear the views of the other members of the Commission in the course of the general discussion.

9. Mr. TUNKIN said that there were a number of general questions suitable for discussion at that stage. The first question was whether the codification would take the form of a convention or some other form. Another was the question of the application of the articles in time of war, and a third was that of reprisals. Those questions had been raised by Governments in their observations, or had been left undecided by the Commission in its discussions at the ninth session.

10. He suggested that the Commission should discuss those general problems one by one and adopt decisions on each of them. In that way, the work of the Commission could be conducted speedily and fruitfully.

11. Mr. SANDSTRÖM, Special Rapporteur, said that he agreed with the views expressed by Mr. Tunkin.

12. The form which the codification would take was undoubtedly the first of the outstanding general questions to be discussed.

Final form of the draft

13. The CHAIRMAN recalled that, at its ninth session, the Commission had prepared the draft on the provisional assumption that it would form the basis of a convention and had stated in its report that a final decision as to the form in which it would be submitted to the General Assembly would be taken in the light of the comments received from Governments (A/3623, para. 15).

14. The General Assembly, by its resolution 685 (VII) of 5 December 1952, had requested the Commission to undertake, as soon as it considered it possible, the codification of "diplomatic intercourse and immunities" and article 15 of the Commission's statute defined the expression "codification of international law" as meaning the more precise formulation and systematization of rules of international law in fields where there had already been extensive State practice, precedent and doctrine.

15. There had been considerable discussion during the ninth session as to whether the codification should be limited to the recording of existing rules. Some members of the Commission had taken a narrow view of the Commission's task, while others had considered that, in its task of codification, the Commission was not prevented from formulating certain new rules. The Commission had taken no definite decision on that point, which could be decided at the same time as the question of the form in which the draft would be presented.

16. Mr. GARCÍA AMADOR said that if the Commission were to take an early decision on the form of the codification, it might find it easier to draft the detailed provisions, since the form, and to some extent the content, of those provisions would necessarily depend on the type of instrument in which they would be embodied.

[1] Convention regarding Diplomatic Officers, signed at Havana on 20 February 1928. See League of Nations, *Treaty Series*, vol. CLV, 1934-1935, No. 3581.

17. The experience of the recent United Nations Conference on the Law of the Sea had, however, shown that only after the final adoption of a set of articles was it possible to see more clearly in what type of instrument they could best be included.

18. Without prejudging the Commission's decisions concerning the planning of future work in the light of the proposals made by Mr. Zourek (A/CN.4/L.76), he wished to make some observations concerning the method of work to be followed in dealing with the subject of diplomatic intercourse and immunities.

19. At its ninth session, the Commission had reached an advanced stage of its work on the subject of diplomatic intercourse and immunities, so that it was now already in a position to consider the final draft which it would submit to the General Assembly in the light of the observations by Governments. Inasmuch as, in general, those observations were not likely to lead to any important changes in the draft, he suggested that the task of redrafting the articles on the basis of those observations should be entrusted to a committee composed of the Special Rapporteur and those members who, at the previous session of the Commission, had shown a special interest in the subject.

20. The method of work which he proposed would enable the Commission to devote a few meetings of the current session to the subject of the law of treaties, while the committee dealt with the subject of diplomatic intercourse and immunities.

21. Mr. AMADO said that the Commission should adopt methods of work which would enable it to transmit texts to the General Assembly as speedily as possible. On the whole, he agreed with Mr. García Amador's remarks.

22. It was important that the Commission should take an early decision on the type of instrument in which the draft on the subject of diplomatic intercourse and immunities would be embodied. For his part, he considered that that subject was particularly suited to regulation by international convention.

23. Mr. VERDROSS said that he agreed with Mr. Amado. In order to carry out its task, under article 1 of its statute, of promoting the progressive development of international law and its codification, the Commission should do everything in its power to promote the conclusion of a multilateral treaty on the subject of diplomatic intercourse and immunities.

24. When the Commission had submitted its draft to the General Assembly, it would be for the Assembly to decide whether it was necessary to convene an international conference of plenipotentiaries. Whereas the Commission's draft on arbitral procedure had taken the form of a model, he thought it particularly desirable that the draft on diplomatic intercourse and immunities should take the form of a draft convention.

25. Sir Gerald FITZMAURICE said that there were sometimes more effective methods of codifying international law than the negotiation of multilateral treaties. For his part, he considered that it would be regrettable if the General Assembly were to convene a diplomatic conference to deal with the subject of diplomatic intercourse and immunities. The method of convening a diplomatic conference was suitable for a subject like the law of the sea in which there were at least two important questions, those of conservation and the continental shelf, which were comparatively new to general international law. In the case of diplomatic intercourse and immunities the position was completely different; it was a subject with which Governments were eminently familiar and one in which there had been State practice for centuries.

26. The Commission could of course prepare its draft in the form of a convention, but it was undesirable that the draft should be submitted to an international conference. The General Assembly could simply recommend it to Member States for signature.

27. With regard to the method of work to be adopted by the Commission, he feared that the membership of the proposed committee would to some extent conflict with that of the Drafting Committee, since the latter was composed of no less than nine members of the Commission; that could lead to practical difficulties in the work of both committees.

28. The text of the articles on diplomatic intercourse and immunities was much shorter than the model draft on arbitral procedure. In addition, the points to be dealt with were less numerous and not so difficult. The Commission could itself deal with the articles on diplomatic intercourse and immunities on the basis of the excellent summary prepared by the Special Rapporteur (A/CN.4/116).

29. Mr. LIANG, Secretary to the Commission, suggested that there should be no detailed discussion of Mr. Zourek's proposals (A/CN.4/L.76) concerning the planning of the Commission's work until the document was available in all the working languages. In any case the proposals should, he thought, be discussed in their entirety and in the light of their full implications and not merely considered in connexion with the setting up of a committee to deal with the draft articles on diplomatic intercourse and immunity. The establishment of a committee was, of course, a possible solution. Mr. Zourek's idea, however, was that the system should come into effect at the eleventh session, with full interpretation and other services, which could not, for budgetary reasons, be provided at the current session.

30. The question whether the draft should take the form of a convention was one of primary importance which, as Mr. Amado had rightly said, should be settled at the outset. He was not quite clear what were the implications of the statement by the United States Government that it was opposed to the suggestion that the draft articles be submitted to the General Assembly in the form of a convention (A/CN.4/114). There was a difference between the submission of a text in the form of a convention and the submission of a text with a recommendation that the General Assembly take steps to convene a conference with a view to concluding a convention. It would be recalled that the methods and

manner of presentation of the work of the Harvard Law School (Harvard Research) had loomed large in the discussions of the Committee which had prepared the establishment of the Commission and had had no small influence on the drafting of parts of the statute of the commission. Now, the Harvard Research was a scientific institution and the drafts it prepared were not produced with a view to being laid before an international conference. Nevertheless, all its sets of draft articles were couched in the form of conventions, and, indeed, he could not see in what other form they could be put. Then again, it was clearly specified in article 20 of the Commission's statute that the Commission "shall prepare its drafts in the form of articles". And it might well be asked of what such articles should form part if not of a draft convention. The preparation of the draft in the form of a convention in no way implied that a convention would necessarily be concluded. The General Assembly might be content simply to adopt the draft, considering that it had sufficient scientific and moral authority as it stood.

31. It was really immaterial whether the term "draft convention" were applied or not to the draft articles the Commission prepared. The Commission could simply submit its work in the form of draft articles, leaving it to the General Assembly or to a conference convened by the General Assembly to decide whether a convention should be concluded on the basis of the draft articles. That course had been adopted on a number of occasions in the past. At its fifth session, for instance, the Commission had decided not to submit its articles on the continental shelf in the form of a convention, though it was to be noted that the United Nations Conference on the Law of the Sea, using the Commission's draft as a basis, had adopted a convention on the subject.

32. The CHAIRMAN pointed out that it was not necessary for the Commission to recommend that a conference be convened to conclude a convention on the subject. Both sub-paragraph (*c*) and sub-paragraph (*d*) of article 23, paragraph 1, of its statute implied that the text would be drafted in the form of a convention.

33. Mr. YOKOTA considered that the Commission should decide provisionally to prepare the draft articles in the form of a convention, though the ultimate decision as to form naturally lay with the General Assembly. According to the report of the Special Rapporteur (A/CN.4/116), many States had explicitly declared themselves in favour of a convention. In fact, the only Government that thought otherwise was that of the United States of America. None of the five reasons it gave was, in his opinion, sufficiently convincing to warrant the Commission's reversing its original decision. The reasons put forward, particularly the argument that a convention "would tend to freeze the *status quo*", applied equally well to other branches of international law, and could apply to the law of the sea.

34. The discussions of the Second Committee of the United Nations Conference on the Law of the Sea were of some relevance to the question under consideration. Various representatives on that Committee had suggested that, since the general régime of the high seas consisted mainly of generally accepted rules of law, the form of a declaration would be more appropriate than a convention, which could be reserved for the other, less well-established aspects of the law of the sea. Yet the Committee had finally decided to embody the results of its work in a convention, because a convention would bind States.

35. Mr. AGO also considered that a decision on the form of the draft should be taken at that stage, since experience had shown that the question whether a draft should take the form of a convention sometimes affected not only the form but even the substance of the articles themselves. Generally speaking, he did not consider that the Commission should invariably work with the conclusion of a convention in mind no matter what the subject under consideration might be. In the case of many of the topics on its list, other methods might better serve its fundamental purpose of consolidating and developing international law. In certain fields of international law which were going through a phase of development the conclusion of a convention might merely arrest that development; an enunciation of rules and principles carrying the full authority of the Commission, however, might influence not only the conduct of Governments but, what was more important, the decisions of arbitral tribunals and international judicial bodies in general and could thus have a far more favourable influence on the evolution of international law than the conclusion of a collective agreement — especially when one considered the hazards with regard to signature, ratification and reservations to which such agreements were subject. Furthermore, in view of the conservative trends that tended to emerge at diplomatic conferences, there was sometimes a danger that the conclusion of a convention might prove to be a step backwards rather than forwards, as far as the international law on the particular subject was concerned. In the case of so mature a subject as diplomatic intercourse and immunities, which had been thoroughly elaborated both in practice and theory, he was, however, in favour of working with the conclusion of a convention in view, though he would not consider it a setback for the Commission if the General Assembly decided not to adopt a convention on the subject.

36. Of the courses outlined in sub-paragraphs (*c*) and (*d*) of article 23, paragraph 1, of the Commission's statute, he preferred the former. While, in the case of the law of the sea in which many of the subjects were comparatively new, a diplomatic conference had been necessary, there was no need to hold a diplomatic conference on the question of diplomatic intercourse and immunities.

37. Commenting on the question of the planning of the Commission's work, he said that, though he appreciated the arguments in favour of establishing a committee to expedite the work of the Commission, the more he reflected on the idea the more he was opposed to it.

There were, first of all, the material difficulties; if no additional services could be provided, the committee could meet only at times when the Commission itself was not sitting. Secondly, almost half the Commission's members were members of the Drafting Committee, which had a heavy task before it, including the preparation of new texts merely on the basis of general instructions. Lastly, there was the disappointing experience with the committee on arbitral procedure at the ninth session. And the Commission should have no illusions on the idea of the representation of the principal legal systems in the committee. There were as many opinions as there were members of the Commission, and the discussion on arbitral procedure had shown that the divisions of opinion were rarely on a regional basis. In his opinion the delegation of work to a committee would simply lead to a duplication of discussion.

38. Mr. AMADO declared that Mr. Ago had convinced him of the unadvisability of establishing a committee.

39. Mr. BARTOS said that in the case of the draft on diplomatic intercourse and immunities, he was, for technical reasons, in favour of the course indicated in sub-paragraph (*c*) of article 23, paragraph 1, of the Commission's statute. It was the practice of the General Assembly to convene conferences of plenipotentiaries only for those conventions which required special technical preparation. The others, and they were many, were elaborated in the Sixth Committee and adopted by the General Assembly. Such a procedure, though taking up a considerable amount of the Sixth Committee's time, had been found more economical in the long run than diplomatic conferences at which political considerations tended to carry more weight than technical or scientific ones. The Convention on the Privileges and Immunities of the United Nations, which bore much similarity to the draft under discussion, had been prepared in the Sixth Committee.

40. On the question of establishing a committee, he entirely agreed with Mr. Ago. The idea of a "representative committee" was a pure play upon words. Though chosen with due regard to representation of the principal legal systems of the world, the members of the Commission were elected in an individual capacity as persons of recognized competence in international law. Accordingly, any question of substance must be discussed in the plenary Commission, and only questions of drafting could be entrusted to a committee. Serious account must, furthermore, be taken of the material difficulties referred to by the Secretary. The ideal was to keep the discussions as brief as possible. Though not in favour of limiting the time for speakers, he thought that much time could be saved if all exercised self-discipline and refrained from dwelling on the obvious. To delegate work to a committee would mean a discussion in three stages; preliminary debate in the Commission, detailed debate in the committee and a reopening of the discussion when the committee reported to the Commission.

41. Mr. SANDSTRÖM, agreeing with Mr. Ago, added that the question whether the draft on diplomatic intercourse and immunities should take the form of a convention depended largely on the content of the text. If the articles showed a liberal trend, he thought they should take the form of a convention, but if they showed the opposite trend the conclusion of a convention based on them would not be desirable.

42. He, too, was opposed to the idea of delegating work to a committee, in view of disappointing experience in the past. The establishment of a committee in addition to the Drafting Committee would place an intolerable strain on the members of the Commission and was, moreover, unnecessary. Many of the questions raised by Governments were minor points of drafting which could be rapidly reviewed by the Commission and referred to the Drafting Committee.

43. Mr. ZOUREK considered that the Commission should frame its drafts in the form of a convention, since international conventions had proved to be the only effective way of achieving progress in international law. No subject could be said to lend itself more to the conclusion of a convention than diplomatic — and, incidentally, consular — intercourse and immunities, for the rules of diplomatic intercourse were based on ancient practice. The prospects for the conclusion of a convention were very good. The provisional draft on the subject had, in general, met with a very favourable reception in the Sixth Committee and in the comments by Governments. The only Government opposed to a convention was so opposed for reasons which, like other speakers, he found unconvincing and in any case applicable to any codification.

44. The question whether to recommend the conclusion of a convention or the convening of a conference for that purpose was of secondary importance; whatever the Commission recommended, the ultimate decision lay with the General Assembly. He personally preferred the second course as being more rapid. For example, it had taken the Sixth Committee two months at the third session of the General Assembly in 1948 to prepare the comparatively short Convention on the Prevention and Punishment of the Crime of Genocide.

45. The discussion of the planning of the Commission's work was effected by two conflicting factors: personal preferences and the inescapable facts. Like other members, he, too, would like an opportunity of taking part in all the work of the Commission. But the fact remained that the General Assembly expected a final draft on diplomatic privileges and immunities to be submitted at its thirteenth session. After allowance was made for other matters, the Commission had only four weeks left in which to perfect the draft and to hold a general discussion on the law of treaties and, perhaps, on consular intercourse and immunities. And it had taken four weeks to complete the model draft on the already exhaustively discussed topic of arbitral procedure. He could not see how the work could be completed without recourse to a committee. After all, owing to the nature of the tasks referred to it, the existing Drafting Committee had become more a

committee of the type envisaged than a drafting committee proper.

46. Since the Drafting Committee had no technical services, the committee could use those of the Commission when the latter was not sitting. The objection that the Commission was too small to man the Drafting Committee and another committee at the same time merely strengthened the argument for a rational division of labour. If the committee did its work thoroughly, further consideration of the draft by the Drafting Committee would be practically unnecessary. Nor was there any greater force in the objection that the creation of a committee would necessitate a discussion in three stages, for that need not in any way delay the preparation of the draft. When the committee reported back to the full Commission, some changes in the texts prepared by the former would probably be prepared by the members of the Commission in certain cases, but the basic work completed by the committee would be maintained and only the finishing touches would remain to be added. Thus, even a three-stage debate might be more time-saving than discussion of minor drafting changes by a body of twenty-one members. If the Commission made a rapid review of the comments of Governments, taking decisions on major points and leaving the details to the committee, its output should rise without any increase in its work load.

47. Mr. EL-ERIAN agreed that the Commission should abide by the provisional decision it had taken at the previous session (A/3623, para. 15) that the draft articles on diplomatic intercourse and immunities should form the basis of a convention. As the Special Rapporteur had pointed out, that decision seemed to meet with the approval of most Governments, and he fully associated himself with what Mr. Sandström had said in his new report (A/CN.4/116) regarding the views expressed by the United States Government.

48. He shared the view expressed by the Egyptian and other delegations in the General Assembly that there was no reason why the Commission should not send the draft to the General Assembly for action without waiting to complete its work on *ad hoc* diplomacy and consular intercourse and immunities, though the position would have been otherwise if it had taken up consular intercourse and immunities first.

49. So far as the method of work was concerned, he thought it would be wise to deal with the general question of the planning of the Commission's work separately. In the case of the present draft, he was in favour of discussion in the Commission itself.

50. Mr. HSU said he thought all the members of the Commission would agree that when the Commission was engaged in codification pure and simple, it was sufficient for it to embody its work in a draft of which the General Assembly would merely take note, but that when its work came under the heading of the development of international law, it should be cast in the form of a convention, to which States would be free to accede or not. The views expressed by the United States Government were not, therefore, basically at variance with the Commission's own; for the reason why it was not in favour of a convention was that it considered that in the case in point the Commission should confine itself to formulating the rules and principles already accepted by the international community, in other words to codification pure and simple. He shared that point of view, and felt that the Commission should not be in too much of a hurry. For one thing, the prevailing political atmosphere was not conducive to innovations in international law. For another, many new States had recently come into being; once they had acquired more experience of diplomatic intercourse, it might become apparent that their needs in the matter were different, in respects which the Commission could not now foresee, from those experienced by older States.

51. With regard to the method of work, he said he was strongly in favour of examining the draft in the Commission itself, for the reasons already given and also because it would be difficult to arrange for two subordinate bodies to work concurrently.

52. Mr. FRANÇOIS said he shared the view that the work done by the Commission could be of great importance to international law even if it did not take the form of a convention. He was not even sure that a convention was necessarily the best form. Those who held the opposite view might point to the results achieved by the recent United Nations Conference on the Law of the Sea. It was true that the Conference had produced instruments which had been signed by a large number of States; but signatures were not ratifications, and even ratifications were often accompanied by reservations on important points of substance. The problem of reservations had not been settled by the Conference in a satisfactory manner.

53. However, in his view, it was not in the present case necessary for the Commission to decide what form the draft should finally take. A decision on that point would not vitally affect the text of the articles themselves, and might well be left to the General Assembly itself.

54. With regard to the method of work, he felt that recent experience in the Conference on the Law of the Sea had shown that it was inefficient to set up committees unless they were provided with facilities for simultaneous interpretation and summary records. He understood that it would not be possible to provide such facilities for a committee meeting during the current session, and he was therefore opposed to the appointment of a committee. Provided that the Commission did not allow itself to be held up by questions of translation and the like, and provided that all members exercised the utmost restraint in their statements, he was confident that the Commission could complete the drafts on arbitral procedure and diplomatic intercourse and immunities at its current session. As long as the General Assembly limited the length of the Commission's sessions to nine or ten weeks and made it impossible for the Secretariat to provide committees with the necessary facilities, it was impossible to expect more.

55. Mr. TUNKIN agreed with Mr. El-Erian that the

Commission should submit its draft on diplomatic intercourse and immunities to the General Assembly at its thirteenth session: there was no reason why its draft articles on consular intercourse and immunities and any articles it decided to submit on *ad hoc* diplomacy should not be in separate documents; in any case they could not be submitted for another two years at the earliest.

56. The Commission, having drafted the articles on diplomatic intercourse and immunities, was itself best qualified to decide what form they should finally take, and should therefore make a recommendation to the General Assembly in that respect. In his view, it should adhere to the provisional decision it had taken at the ninth session and recommend that they form the basis of a convention — and should take that decision without further delay, for the reasons indicated by the Special Rapporteur. In recent years international treaties had become the most important means of developing international law. He could not agree that conventions tended to "freeze the *status quo*" and so to hamper further progress in international law, for there was nothing to prevent the signatory States from agreeing on more liberal provisions. A treaty would have a binding force; by contrast, the preparation of a set of rules was of value in doctrine only. Whenever possible, therefore, the Commission should aim at the conclusion of conventions.

57. Mr. AMADO agreed with Mr. Tunkin. Until the Commission decided to recommend that the results of its work on any subject be embodied in a convention, he felt he did not really know where its efforts were tending. He realized that custom was the common law of international relations, but for him international law consisted essentially in written texts. Model rules and the like might prove useful to theorists and students of international law, but what mattered to States was the force of conventional obligations.

58. He fully agreed with what Mr. García Amador had said regarding procedure. Though he admitted the force of the arguments against the appointment of committees in general, he still felt, however, that it might be useful in the present case for a small committee to prepare an analysis of the Special Rapporteur's draft, showing which provisions merely reflected universal practice and which concerned matters that were still in doubt.

59. Mr. PADILLA NERVO said he did not think that the text of the draft articles would be greatly affected by whatever decision was taken on the final form of the draft; that decision could therefore be deferred until the articles themselves had been examined in the light of the comments submitted by Governments and such other comments as members of the Commission had to make. He agreed that such examination should take place in the Commission itself; it might be useful to have an analysis of the kind suggested by Mr. Amado, but that could well be prepared by the Secretariat.

60. Mr. EDMONDS said that he shared the view of those who thought the first question to be decided was that of the final form of the draft. He had been impressed by the argument that if there was any field of international law where the rules had been generally accepted and applied for generations, it was the field of diplomatic intercourse and immunities. But there were other, practical considerations which were also relevant. The Commission must be guided to some extent by the form of the request made to it by the General Assembly in resolution 685 (VII); he would not say that the form of that request precluded the presentation of the draft articles in the form of a convention, but it could not be denied that it spoke only of "codification". The Commission's aim should surely be to produce work that was not only of high academic value in itself but that would also bear fruit in practice; its drafts should therefore be in a form in which they were likely to be acceptable to as large a number of States as possible.

61. So far as the method of work was concerned, he agreed that practical considerations made the establishment of a committee inappropriate.

62. Sir Gerald FITZMAURICE said he was strongly in favour of postponing any decision on the final form of the draft; indeed, he agreed with Mr. François that it was not necessary for the Commission to make any recommendations to the General Assembly in that repect, save in exceptional circumstances.

63. If the Commission nevertheless took a vote on the question of the final form of the draft, he thought he would probably vote in favour of a convention, but that did not mean that he shared the view of those who considered that all its drafts should be in that form. In that connexion, he fully agreed with the remarks of Mr. Ago and Mr. François; there were many subjects on the Commission's programme which were quite unsuitable for treatment in the form of a convention and several of the drafts it had submitted earlier had not taken that form. The major part of international law did not consist of treaty law but of customary rules, and expressions of opinion by the International Law Commission as to what the customary law was carried their own authority. Though he considered that in the present case the conclusion of a convention would be appropriate, he agreed with much of the United States Government's criticism of conventions which merely embodied the customary law. For it might then be thought that States which did not accede to such conventions were not bound by the rules they contained, whereas in fact they were, since those conventions merely reflected customary law.

64. Mr. SANDSTRÖM, Special Rapporteur, proposed that the Commission should defer any decision on the final form of the draft until it had completed consideration of the articles themselves, but that it should proceed to such consideration on the assumption that the draft would take the form of a convention.

The proposal was adopted by 12 votes to 2, with 2 abstentions.

The meeting rose at 1.10 p.m.