

Document:-
A/CN.4/SR.477

Summary record of the 477th meeting

Topic:
Other topics

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

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

taxes on their emoluments. Paragraph (12) of the commentary was misleading, in that it implied that they did not enjoy those immunities as of right.

94. Mr. SANDSTRÖM, Special Rapporteur, said that that objection could be met if the words "However, it thought that except in the case of nationals of the receiving State, these persons should enjoy" were omitted from the second sentence and the first sentence were joined to the rest of the second sentence by the words "except for".

95. In response to an observation of Mr. AGO, Sir Gerald FITZMAURICE, Rapporteur, suggested that in the last sentence of paragraph (13) the words "just as absence from the list did not constitute conclusive proof that the person concerned was not so entitled" should be added.

96. Mr. SANDSTRÖM, Special Rapporteur, accepted the amendments suggested. He added that the reference to the 1957 draft in paragraph (1) could be dispensed with.

The commentary on article 35, as amended, was adopted by 12 votes to none, with 2 abstentions.

ARTICLE 36

Article 36 was adopted unanimously.

COMMENTARY ON ARTICLE 36

97. Mr. TUNKIN suggested that the words "at the time when it agrees to his appointment" be deleted from paragraph (4) of the commentary to article 36, for the *agrément* of the receiving State might be obtained later.

98. Sir Gerald FITZMAURICE, Rapporteur, said that article 36 did not specify any time limit, but it would be undesirable that the receiving State could grant privileges and immunities or take them away at any time. In other words, it should not be able, on the appointment of a diplomatic agent who was one of its nationals, to grant him certain privileges and immunities, only to curtail them or take them away a year or two later. He would not oppose Mr. Tunkin's proposal, but he thought that the position should be made quite clear.

99. Mr. SANDSTRÖM, Special Rapporteur, accepted Mr. Tunkin's amendment.

100. Mr. AGO pointed out that neither article 36 nor the commentary appeared to safeguard the inviolability of a diplomatic agent who was a national of the receiving State.

101. Mr. TUNKIN said that the Drafting Committee had altered article 36 at Mr. Ago's suggestion.

102. Mr. BARTOS said that he opposed the appointment of nationals of the receiving State as foreign diplomatic agents, but if they were appointed as such they should be given all the privileges and immunities

necessary for the performance of their functions. Accordingly, they should be granted inviolability.

The meeting rose at 1.10 p.m.

477th MEETING

Thursday, 3 July 1958, at 9.45 a.m.

Chairman: Mr. Radhabinod PAL.

Consideration of the Commission's draft report covering the work of its tenth session (A/CN.4/L.78 and Add.1-4) (continued)

CHAPTER III: DIPLOMATIC INTERCOURSE AND IMMUNITIES (A/CN.4/L.79/Add.2) (continued)

II. TEXT OF THE DRAFT (continued)

COMMENTARY ON ARTICLE 36 (continued)

1. Mr. AGO proposed that the words "inviolability and" should be inserted before the words "immunity from jurisdiction" both in article 36, paragraph 1, and in paragraph (3) of the commentary.

2. Mr. SANDSTRÖM, Special Rapporteur, accepted Mr. Ago's proposal.

Mr. Ago's proposal was adopted unanimously.

The commentary on article 36, as amended, was adopted unanimously.

ARTICLE 37

Article 37 was adopted unanimously.

COMMENTARY ON ARTICLE 37

3. Mr. SANDSTRÖM, Special Rapporteur, said that the words "one Government raised the question" in paragraph (2) of the commentary and the words "In response to an observation received from one Government" in paragraph (3) should be omitted. The beginning of paragraph (2) would be redrafted.

4. Mr. TUNKIN pointed out that the Government referred to in paragraph (2), the Belgian Government, in its comments on article 31, paragraph 2, of the 1957 draft (see ACN.4/114), had suggested that exemption from import duties should cease on the termination of functions, whereas paragraph (2) of the commentary spoke of customs duties. The Commission had defined customs duties in paragraph (5) of the commentary on article 33 as covering both import and export duties: consequently an amendment was required.

5. Mr. YOKOTA expressed the view that paragraph (3) of the commentary should be deleted, on the ground that it merely repeated the text of article 37, paragraph 3.

6. Mr. SANDSTRÖM, Special Rapporteur, demurred; paragraph (3) was essential because it showed that an additional provision had been inserted.

7. He agreed to amend the text of paragraph (2) of the commentary in accordance with the Belgian Government's observation.

The commentary on article 37, as amended, was adopted unanimously.

ARTICLE 38

8. Mr. TUNKIN said that the Drafting Committee had drawn the Commission's attention to article 38, paragraph 2, about which it had doubts. States should not hinder the passage of ordinary citizens without good reason, and there did not appear to be sufficient justification for stipulating expressly that they should not hinder the passage of members of the subordinate staff of a mission. He himself adhered to the view that paragraph 2 was unnecessary and accordingly proposed its deletion.

9. In reply to the CHAIRMAN, he said that the phrase used in the discussion by the Commission ("the facilities required to ensure their transit") (464th meeting, para. 2) had been rejected by the Drafting Committee on the grounds that it could be interpreted to mean that third States would be obliged to take positive steps as, for example, by the provision of tickets, to facilitate the passage of the administrative and other staff of the mission.

10. Mr. YOKOTA thought that the Drafting Committee was in general right in its view. On the other hand, some reference to passage through third States should appear, and the provision proposed seemed appropriate. He was in favour of its retention.

11. Sir Gerald FITZMAURICE, Rapporteur of the Commission, also agreed that Mr. Tunkin's view was strictly correct. On the other hand, the provision did no harm, and it might conceivably be of value. He thought that it might be retained.

Mr. Tunkin's proposal was rejected by 4 votes to 1, with 3 abstentions.

Article 38 was adopted unanimously.

COMMENTARY ON ARTICLE 38

12. Mr. SANDSTRÖM, Special Rapporteur, said that he would delete paragraph (5) of the commentary on article 38, as it did not appear to be necessary.

13. Mr. AGO said he did not understand what problem was referred to in paragraph (2) of the commentary.

14. Mr. TUNKIN agreed that the last sentence of paragraph (2) was undesirable, for it was universally agreed that a State was entitled to regulate the admission of aliens. There was consequently no problem, and the last sentence was misleading. He thought that it should be deleted.

15. Sir Gerald FITZMAURICE, Rapporteur, said that the intention of paragraph (2) was not to deal with the problem whether third States were obliged to grant passage, but whether, if such passage was in fact granted, immunities should be given to the diplomatic agent. The paragraph did not deal with the question whether a third State would be justified in refusing admission to aliens in the case of foreign diplomatic agents and their staffs, although the problem existed, especially in cases where the only reasonable access to the State of destination was across that third State. The deletion of the last sentence of paragraph (2) might leave the implication that the Commission had in fact resolved that problem.

16. Mr. TUNKIN still felt that there was no problem to resolve. It was self-evident that a State could regulate the admission of aliens. To retain the last sentence of paragraph (2) would inevitably give a wrong impression to the reader.

17. Mr. AGO thought that some explanation, on the lines of Sir Gerald Fitzmaurice's remarks, should be added. In any case, the problem of passage across a third State was not rare, but common.

18. Sir Gerald FITZMAURICE suggested that the last sentence should read "The Commission did not think it necessary to go further into this matter."

19. Mr. ALFARO thought that no problem should be referred to in terms which could be misinterpreted. Perhaps the commentary might say simply that the Commission had resolved the problem of free passage along the lines of article 38.

20. Mr. YOKOTA contested Mr. Tunkin's view that a third State was entitled to regulate the admission of all foreigners to its territory. Some members of the Commission had maintained that diplomatic agents had a right of free passage. The Commission had not come to any decision on the problem, which was therefore not resolved; and to that extent the last sentence of paragraph (2) was correct. He was, however, prepared to accept Sir Gerald Fitzmaurice's amendment.

21. Mr. SANDSTRÖM, Special Rapporteur, and Mr. TUNKIN accepted Sir Gerald Fitzmaurice's amendment.

22. Mr. AGO also accepted that amendment, but still thought it might be advisable to give the Commission's reasons for not going further into the problem. One reason might be that the problem did not in practice give rise to difficulties.

23. Sir Gerald FITZMAURICE, Rapporteur, considered it better not to state any reasons in the context.

The commentary on article 38, as amended, was adopted unanimously.

ARTICLE 39

Article 39 was adopted unanimously.

COMMENTARY ON ARTICLE 39

24. Mr. GARCIA AMADOR said that the last sentence of paragraph (2) of the commentary on article 39 was open to misinterpretation. He proposed that the words "in accordance with international law" be inserted after the word "nationals".

25. Mr. TUNKIN pointed out that the treaties referred to in the last sentence of paragraph (4) must necessarily be observed; it was superfluous to make such an obvious comment. He suggested therefore that the sentence be deleted.

26. Sir Gerald FITZMAURICE, Rapporteur, suggested, in the light of Mr. Tunkin's remark, that the words "Such treaties must be observed" in paragraph (4) should be deleted and the previous sentence joined to the last sentence by the words "which are valid as between the parties".

27. Mr. LIANG, Secretary to the Commission, thought that perhaps the second sentence of paragraph (2) put undue emphasis on participation in political campaigns by persons enjoying diplomatic privileges and immunities. They might interfere in the internal affairs of a State in much more serious ways as, for example, in fomenting civil war. The words "In particular" therefore, if not the whole sentence, seemed to be out of place.

28. Sir Gerald FITZMAURICE, Rapporteur, suggested that the words "In particular" in paragraph (2) of the commentary be deleted, and the sentence be linked with the first sentence by the words "for example,".

29. Mr. SANDSTRÖM, Special Rapporteur, accepted the amendments suggested.

The commentary on article 39, as amended, was adopted unanimously.

ARTICLE 40

30. Mr. TUNKIN thought that the word "diplomatic" should be inserted before the word "mission" in article 40, sub-paragraph (d). Otherwise, the sub-paragraph might be interpreted to mean the termination of an *ad hoc* mission.

31. Mr. AGO noted that the Drafting Committee had made a radical change in sub-paragraph (d), as "the termination of the mission" had been substituted for "the death of the diplomatic agent". It seemed to him that the word "termination" was extremely ambiguous, in that it did not make it clear whether it was a temporary or a definitive termination.

32. Sir Gerald FITZMAURICE, Rapporteur, pointed out that relations between States could be broken off, and might or might not be resumed; but it could not be said in advance whether they would or would not be resumed. Few cases existed where States had agreed beforehand to interrupt diplomatic relations temporarily or for a specified period. In any case the word "termination" covered both what might eventually prove to be a mere interruption or else a final rupture.

33. Mr. ZOUREK thought that sub-paragraph (d) required clarification, for a mission could be recalled temporarily without a rupture of diplomatic relations necessarily taking place.

34. Mr. LIANG, Secretary to the Commission, said that the word "mission" was used in several senses, both concrete and abstract, in the draft. For example, the inviolability of the mission meant the inviolability of the mission premises. In sub-paragraph (d), on the other hand, the word was used in a purely abstract sense, and, moreover, appeared to be used in the sense of a particular mission instead of in the sense of diplomatic missions in general.

35. Mr. AGO suggested that sub-paragraph (d) should be deleted and replaced by the words: "In the case of rupture of diplomatic relations between the receiving State and the sending State".

36. Mr. ALFARO supported Mr. Ago's suggestion.

37. Mr. TUNKIN said he could not accept Mr. Ago's suggestion, for it did not correspond to reality. Diplomatic relations between States might be broken, and lead to termination of the mission, but a mission might also be recalled without a severance of diplomatic relations. He thought the word "recall" was preferable to the word "termination", since on the recall of the mission the function of the diplomatic agent ended.

38. Faris Bey EL-KHOURI pointed out that the title of article 40 was "Modes of termination", whereas sub-paragraph (d) listed the termination of the mission as one such mode. It was absurd that the termination of the mission should be a mode of termination.

39. Mr. ALFARO said he could not agree with Mr. Tunkin, as a mission could be terminated or suspended for reasons other than the rupture of diplomatic relations. There should, therefore, be a specific mention of rupture of diplomatic relations as well.

40. Mr. YOKOTA observed that the intention of the Commission had been to mention both the rupture of diplomatic relations and the termination of the diplomatic mission in article 40. That was clear from article 2, which differentiated between diplomatic relations and diplomatic missions. He proposed, therefore, that sub-paragraph (d) should read: "On the rupture of diplomatic relations or on the termination of the diplomatic mission".

41. Mr. EDMONDS expressed the view that all modes of termination were covered by sub-paragraphs (a) to (c).

42. Sir Gerald FITZMAURICE, Rapporteur, said that sub-paragraphs (a) to (c) dealt with occasions personal to the diplomatic agent, whereas sub-paragraph (d) dealt with the mission as a whole. On the other hand, the article was not meant to be exhaustive, as was clear from the words "*inter alia*". He recalled the Commission's decision to omit the provision stating that a diplomatic agent's function came to an end on his death,

because it stated a self-evident truth. In the same way, it was self-evident that his function would come to an end when the mission terminated. For those reasons the simplest course might be for sub-paragraph (d) to be deleted.

It was so agreed.

Article 40, as amended, was adopted by 12 votes to none, with 2 abstentions.

COMMENTARY ON ARTICLE 40

The commentary on article 40 was adopted unanimously, subject to changes necessitated by the decision to omit article 40, sub-paragraph (d).

ARTICLE 41

Article 41 was adopted unanimously.

COMMENTARY ON ARTICLE 41

43. Mr. SANDSTRÖM, Special Rapporteur, said that he wished to delete the first sentence of the commentary.

The commentary, as amended, was adopted unanimously.

ARTICLE 42 AND COMMENTARY

Article 42 and commentary were adopted unanimously.

ARTICLE 43

Article 43 was adopted by 13 votes to none, with 1 abstention.

COMMENTARY ON ARTICLE 43

44. Mr. SANDSTRÖM, Special Rapporteur, submitted the following text as the commentary on article 43:

“(1) It is stipulated in the draft that certain of its rules are to be applied without discrimination as between States (article 10, paragraph 2; article 16, paragraph 1) or uniformly (article 17). It should not be inferred that these are the only cases in which the rule of non-discrimination is applicable. On the contrary, this is a general rule which follows from the equality of States. Article 43, which is new, lays down the rule expressly.

“(2) In the article laying down the rule, the Commission was, however, at pains to refer to two cases in which, although an inequality of treatment is implied, no discrimination occurs, inasmuch as the treatment in question is justified by the rule of reciprocity which is very generally applicable in the matter of diplomatic relations.

“(3) The first of these cases is that in which the receiving State applies restrictively one of the rules of the draft because the rule is so applied to its own mission in the sending State. It is assumed that the restrictive application in the sending State concerned is in keeping with the strict terms of the rule in question, and within the limits allowed by the rule;

otherwise, there is an infringement of the rule and the action of the receiving State becomes an act of reprisal.

“(4) The second case is that in which the receiving State grants, subject to reciprocity, privileges and immunities more extensive than those prescribed by the rules of the draft. It is only natural that the receiving State should be free, as regards the grant of benefits greater than those which it is obliged to grant, to make such grant conditional on receiving reciprocal treatment.”

The commentary was adopted unanimously.

ARTICLE 44

Article 44 was adopted by 11 votes to 3.

COMMENTARY ON ARTICLE 44

45. Mr. SANDSTRÖM, Special Rapporteur, said that he wished to delete the words “that the Commission’s task was limited to codifying existing law and” in the third sentence of the commentary on article 44.

46. Mr. FRANÇOIS said that he would regret the deletion of the words in question, since some members, including himself, had in effect expressed the view that the Commission’s task was mainly to codify international law and that it was not concerned with the question of implementation.

47. After a discussion in which Mr. GARCÍA AMADOR, Mr. TUNKIN, Sir Gerald FITZMAURICE and Mr. LIANG, Secretary of the Commission, took part, Mr. SANDSTRÖM, Special Rapporteur, accepted the following amended version of the third sentence:

“Some members considered that where, as in the present case, the Commission’s task had consisted in codifying substantive rules of international law, it was unnecessary to deal with the question of implementation.”

48. On the proposal of Mr. YOKOTA, he agreed to replace the words “Others, again,” by the words “A majority of the Commission, however,” in order more faithfully to reflect the course of the discussion.

49. On the proposal of Mr. LIANG, Secretary, and Sir Gerald FITZMAURICE, he agreed to delete the words “at the request of one of the parties” in the fifth sentence and to replace the words “has been modified in that sense” in the last sentence by the words “has been clarified by the addition of the stipulation that this can be done at the request of one of the parties”.

The commentary, as amended, was adopted by 12 votes to none, with 2 abstentions.

ADDITIONAL ARTICLE ON EXEMPTION FROM SOCIAL SECURITY LEGISLATION (*continued*)

50. Sir Gerald FITZMAURICE, speaking on behalf of several members of the Commission, inquired whether it would be in order to reconsider the text of the new article on exemption from social security legislation

adopted at the previous meeting (476th meeting, para. 53), since it failed to deal with a point which was more likely to arise than any other.

51. The CHAIRMAN ruled that, in the absence of any objection, the text of the article might be reconsidered.

52. Sir Gerald FITZMAURICE observed that it was the general practice for diplomatic agents to pay the employer's contribution to social security schemes in respect of any of their servants or employees who were nationals of the receiving State. He accordingly proposed the following amended version of the new article :

"The members of the mission and the members of their families who form part of their households, not being nationals of the receiving State, shall be exempt from the social security legislation in force in the receiving State, except in respect of their servants and employees who are themselves nationals of the receiving State."

53. Mr. SANDSTRÖM, Special Rapporteur, said that he had not dealt with the point in the article because he regarded it as one which could be settled in the contract of employment between the diplomatic agent and his employee.

54. Mr. BARTOS suggested that provisions should also be made in the article for cases where diplomatic agents waived or renounced their exemption from the social security legislation of the receiving State and participated in social security schemes with the consent of that State. It would be sufficient to add the statement "This shall not exclude voluntary participation".

55. Mr. TUNKIN said that it should be made clear in the amendment proposed by Mr. Bartos that the receiving State was not bound to permit foreign diplomatic agents to participate in its social security schemes.

56. The CHAIRMAN observed that the whole article was based on the assumption that the social security legislation of the receiving State was comprehensive enough to include members of foreign diplomatic missions.

57. Sir Gerald FITZMAURICE suggested adding to Mr. Bartos' proposal the proviso "in so far as is permitted by local law".

58. Mr. SANDSTRÖM, Special Rapporteur, accepted Sir Gerald Fitzmaurice's proposal and Mr. Bartos' proposal as amended by Sir Gerald Fitzmaurice.

59. After further discussion, he said he would submit a revised text of the new article at the next meeting.

COMMENTARY ON THE ADDITIONAL ARTICLE

60. Mr. SANDSTRÖM, Special Rapporteur, submitted the following draft commentary on the new article concerning exemption from social security legislation :

"National social security legislation grants substantial benefits, often in the form of insurance,

to persons living in the country, in consideration, however, of the payment of annual premiums by the beneficiary or his employer (old-age pensions, industrial accident and sickness insurance, unemployment insurance, etc.). Whereas members of a mission and members of their families who are nationals of the receiving State would naturally be subject to such legislation, the case of foreign nationals is different, for the latter may conceivably be entitled to similar benefits in their own country and in any case it is uncertain whether they will remain long enough in the receiving State to qualify for the benefit of that State's legislation. Under the present article, which is new, such persons are exempt from the receiving State's social security legislation."

61. Mr. TUNKIN remarked that the second reason given in the second sentence of the commentary for describing the case of foreign nationals as different was hardly cogent. A diplomatic agent might remain twenty years in the receiving State and still not qualify for the benefit of that State's legislation.

62. Mr. SANDSTRÖM, Special Rapporteur, thought that it was one reason which could be cited, but it was not necessary to include it.

63. Mr. AGO observed that the first reason given was not very convincing either. He proposed that the passage stating the two reasons should be omitted and that the words "the case of foreign nationals is different" should be amended to read "this is not necessarily the case when they have foreign nationality".

64. Mr. SANDSTRÖM, Special Rapporteur, accepted Mr. Ago's two proposals.

The commentary on the additional article, as amended, was adopted unanimously.

CHAPTER IV : PROGRESS OF WORK ON OTHER SUBJECTS UNDER STUDY BY THE COMMISSION (A/CN.4/L.78/ADD.3)

65. The CHAIRMAN put to the vote chapter IV of the draft report (A/CN.4/L.78/Add.3).

Chapter IV was adopted unanimously.

CHAPTER V : OTHER DECISIONS OF THE COMMISSION (A/CN.4/L.78/ADD.4)

66. Sir Gerald FITZMAURICE, Rapporteur, observed that the first part of chapter V of the draft report described the Commission's plans for the eleventh session and gave an account of the debate on Mr. Zourek's paper concerning methods of work (A/CN.4/L.76). Paragraphs 12 and 13, which were not specifically related to Mr. Zourek's paper or to the concrete proposals made therein, dealt with certain general points concerning the work of the Commission to which it had been felt desirable to draw attention.

67. Mr. TUNKIN said he thought chapter V gave a very full and accurate account of the discussion. He thought, however, that the part of the chapter dealing

with methods of work was so elaborate that it might give the mistaken impression that there was something wrong, or that a big problem of organization was involved. Some passages sounded almost like an attempt on the Commission's part to justify itself, or to prove a case. Such an impression would be unfortunate, because, although the Commission's work was not free from defects, there was nothing radically wrong with the way in which the Commission was discharging its task.

68. Mr. ZOUREK asked the Rapporteur whether he would be willing to amend the second and third sentences of paragraph 3 to read: "After examining in this paper the various methods by which the Commission's work might be accelerated, Mr. Zourek thought it possible to rely on only one of them as constituting a method that could be followed by the Commission. . . . This consisted in a reorganization. . . ."

69. With reference to paragraph 7, he said that paragraph 26, sub-paragraph (d), of his paper (A/CN.4/L.76) had suggested that the facilities provided for sub-commissions should include simultaneous interpretation and summary records. Whilst he was prepared to admit that the observations in paragraph 7 might be justified so far as summary records were concerned, they should not apply to simultaneous interpretation, which in his opinion should be provided even for meetings of the Drafting Committee. Simultaneous interpretation had been provided for the Drafting Committee established by the United Nations Conference on the Law of the Sea, even though that Committee had been concerned with drafting matters alone, whereas the Commission's Drafting Committee often had to deal with questions of substance. It was true that in practice the members of the Drafting Committee were often able to dispense with simultaneous interpretation because they all had a sufficient knowledge of the language used, but that might not always be the case, and simultaneous interpretation should certainly be provided for sub-commissions. He therefore asked the Rapporteur whether he would be prepared to modify paragraph 7, and also the reference to paragraph 26, sub-paragraph (d), of his paper in paragraph 8, so as to allow for the provision of simultaneous interpretation.

70. He asked the Rapporteur if he would agree to the insertion of the word "approximately" before the words "40 per cent increase" in paragraph 10, since the words used in paragraph 22 (b) of his paper had been "in roughly the same proportion".

71. He wondered whether the footnote to the same sentence (footnote 7 a) was necessary or desirable. At the current session the circumstances of the Commission's work had been somewhat peculiar. For example, the Commission had spent much of its time on the reading of the draft on arbitral procedure, which had already been given two readings at earlier sessions, and consequently the Commission had been able to proceed much more expeditiously than would normally be the case. Furthermore, though the Commission's membership had been increased to twenty-one, he

doubted whether the average attendance during the session had been more than eighteen.

72. Paragraphs 12 and 13 were, he thought, fully justifiable in view of the criticisms expressed concerning the Commission's work in the Sixth Committee of the General Assembly and also because in the report on its ninth session (A/3623, para. 29) the Commission had undertaken to deal with the subject. The paragraphs in question would show that the Commission had given the matter very serious consideration. They might, however, be shortened considerably.

73. Sir Gerald FITZMAURICE, Rapporteur, said he had no objection to the amendment to paragraph 3 requested by Mr. Zourek.

74. He also had no objection to the insertion of the word "approximately" in paragraph 10, though he felt that footnote 7 a should be retained, possibly in a modified form. He certainly had the impression that several members of the Commission had expressed the view that the increase in membership had not tended to lengthen debate appreciably. Since the presumed additional length of its discussions had been one of the main grounds on which it had been suggested that the Commission ought to alter its methods of work, it would be desirable to deal with the matter in the report.

75. He could not agree with Mr. Zourek's views concerning simultaneous interpretation in the Drafting Committee. If the Committee were provided with that service—a step which would naturally have budgetary implications—the atmosphere in which its work was conducted would be changed completely. A bigger room would be needed, debate would be more formal and it would no longer be possible to achieve the rapid solution of difficulties which a more colloquial approach did so much to facilitate. If on occasion members of the Drafting Committee were hampered by linguistic difficulties, the assistance of an interpreter could always be obtained.

76. Referring to Mr. Tunkin's remarks, he said that paragraphs 12 and 13 were not too much in the nature of an apologia, since in the General Assembly the Commission had been criticized for its supposedly low output. The paragraphs might be shortened, but in principle he thought the report should contain some passages along those lines.

77. Mr. LIANG, Secretary to the Commission, said that ever since the Drafting Committee had been established, it had been the custom to provide consecutive interpretation if required. If the Commission considered it necessary that simultaneous interpretation should be provided, the matter would have to be studied by the Secretariat in the light of United Nations practice as a whole. A sentence would have to be inserted in the report requesting the Secretariat to study the matter and provide whatever help it could to facilitate the Commission's work. Simultaneous interpretation was not usually provided for drafting committees.

78. In view of the criticisms which had been expressed in the Sixth Committee, and of the undertaking given by Mr. Zourek at the twelfth session of the General

Assembly, in his capacity as Chairman of the Commission, that he would bring those criticisms to the attention of the members of the Commission and study the question in detail, it was reasonable that the Commission's report should give adequate treatment to the subject. A detailed statement was called for, especially since the General Assembly expected the Commission to provide a survey of its working methods from time to time. In that connexion he recalled that at its sixth session the General Assembly had discussed the Commission's recommendation that its members should devote the whole of their time to its work, but had decided, in its resolution 600(VI), not to take any action in the matter until it had acquired further experience of the functioning of the Commission.

79. It was desirable that the subject should be fully dealt with in the Commission's report, since the summary records, as printed in the *Yearbook*, were given only limited circulation, owing to the expense of producing the *Yearbook*, whereas the Commission's report was widely distributed as a General Assembly document. To most representatives at the General Assembly, the Commission's report was in fact the most easily accessible account of the Commission's work and it would therefore be a mistake to attempt to make it too concise.

80. Mr. ALFARO expressed the opinion that paragraphs 12 and 13 should not be abbreviated or deleted. They contained a judicious and exhaustive account of the Commission's activities. They also showed that the work was proceeding satisfactorily and that nothing would be gained by undue haste. In view of the unfair criticisms which had been voiced in the Sixth Committee and elsewhere, it was very desirable that the subject should be given full treatment in the Commission's report.

81. Mr. GARCÍA AMADOR said he was substantially in agreement with Mr. Alfaro. In reply to Mr. Tunkin, he pointed out that in printed form the report would look much shorter than in mimeographed form. It was necessary to give the Assembly an accurate account of the Commission's work, and the paragraphs in question served that purpose admirably. Paragraph 13, which expressed the Commission's awareness of the need for speed, and its determination to proceed as expeditiously as possible, was particularly important.

82. Mr. SANDSTRÖM said he was also of the opinion that paragraphs 12 and 13 should be retained in substance. There was, however, something in Mr. Tunkin's remark that they might be regarded as an attempt at self-justification. Accordingly, they might perhaps be dissociated from the context of the criticisms which had been levelled against the Commission and presented as an account of the Commission's accomplishment during the first ten years of its existence.

83. Mr. FRANÇOIS said he shared the opinion that paragraphs 12 and 13 would be useful, though he agreed with Mr. Tunkin that it would be wrong to present the account too much in the form of an apology. Because, however, there was much misunderstanding

concerning the Commission's work, not only in the Sixth Committee but also in other organs of the General Assembly, and because non-jurists should be given an idea of what the Commission was doing, he was inclined to think that chapter V of the draft report should be adopted in its entirety.

84. So far as the provision of technical services was concerned, he said a distinction should be made between sub-commissions and the Drafting Committee. He agreed with Sir Gerald Fitzmaurice that simultaneous interpretation was not necessary in the Drafting Committee, though even there linguistic difficulties occasionally made it difficult for some members to participate fully in the discussions; but in sub-commissions simultaneous interpretation would be a necessity, and if proposals for the establishment of sub-commissions were made in the General Assembly, the Assembly's attention should be drawn to the budgetary implications. He was not in favour of sub-commissions in general but realized that they might sometimes have to be established. The budgetary implications of such action might, he thought, be stressed even more strongly in the report.

85. Sir Gerald FITZMAURICE, Rapporteur, said that a paragraph covering the point raised by Mr. François could be added without difficulty.

86. He welcomed Mr. Sandström's suggestion to dissociate paragraphs 12 and 13 from the rest of the chapter, and he suggested that they be presented in the form of a survey of the Commission's work during the first ten years of its existence. The portion of the report under discussion would then fall into two sections, one being entitled "Planning of future work of the Commission" and the other "Review of the Commission's work during its first ten sessions". A number of consequential changes would be needed, especially in the introduction to paragraph 12.

87. Mr. AGO expressed approval of the suggested rearrangement.

88. He suggested that in paragraph 12(a) greater emphasis should be placed on the Commission's opinion that slow progress in codification work was not necessarily bad in itself.

89. Mr. ZOUREK, reverting to the question of simultaneous interpretation in the Drafting Committee, emphasized that that committee was no longer concerned exclusively with drafting questions but often had to deal with questions of substance. If no request for simultaneous interpretation were made in advance, that service, even in cases where it was needed, could not be provided in time for the Committee's meetings.

90. He asked the Rapporteur whether he would be willing to include in the report a paragraph drawing attention to the fact that, as mentioned in paragraph 23 of his paper (A/CN.4/L.76), the splitting up of the Commission into two or more sub-commissions working on different subjects along parallel lines would not provide an adequate solution to the problem of expediting the Commission's work.

91. Sir Gerald FITZMAURICE, Rapporteur, said he would be prepared to insert such a paragraph.

92. So far as the Drafting Committee was concerned, he thought its status and functions were sufficiently indicated in paragraph 9 of the draft report (A/CN.4/L.78/Add.4) and that a reference to simultaneous interpretation was unnecessary, since it was generally agreed that the Committee would lose much of its utility if its proceedings were formalized. He could, however, include a paragraph stating that if the Commission began to use sub-commissions to a greater extent, or for different purposes, the question of simultaneous interpretation would arise and decisions by the Secretariat and the General Assembly would be required.

93. Mr. LIANG, Secretary to the Commission, said that the first two sentences of paragraph 14 should be corrected to read:

“The Commission also had before it a communication received from the Asian-African Legal Consultative Committee informing the Commission of the holding of its second session at Colombo, Ceylon, from 14 to 26 July 1958, during which session the Committee proposed to consider certain items also of interest to the Commission. In view of the closeness of the date, the Commission was unable to consider the sending of an observer to this session.”

94. The CHAIRMAN suggested that the Rapporteur should be empowered to introduce into the report the changes which had been agreed upon.

It was so decided.

Subject to those changes, chapter V (A/CN.4/L.78/Add.4) was adopted by 13 votes to none, with 1 abstention.

The meeting rose at 1.15 p.m.

478th MEETING

Friday, 4 July 1958, at 9.45 a.m.

Chairman: Mr. Radhabinod PAL.

Consideration of the Commission's draft report covering the work of its tenth session (A/CN.4/L.78 and Add.1-4) (continued)

CHAPTER III: DIPLOMATIC INTERCOURSE AND IMMUNITIES (A/CN.4/L.78/ADD.2) (continued)

1. Mr. SANDSTRÖM, Special Rapporteur, submitted a draft introductory commentary describing the historical background of diplomatic intercourse.

2. After several members of the Commission had suggested that an introductory commentary was superfluous, Mr. SANDSTRÖM withdrew the draft commentary.

3. Mr. SANDSTRÖM, Special Rapporteur, submitted a draft commentary describing the various theories which had been propounded by learned authors as the basis of diplomatic privileges and immunities.

4. The CHAIRMAN observed that the Commission had refrained from discussing the theoretical basis of diplomatic privileges and immunities, and that consequently no introductory commentary of that kind was required.

5. Sir Gerald FITZMAURICE pointed out that the theoretical basis of diplomatic privileges had been discussed at the Commission's ninth session and that some reference to the matter in the report might be appropriate.

6. Mr. GARCÍA AMADOR observed that the theories concerning the basis of diplomatic privileges were not settled and hence any commentary on those theories prepared by the Commission might be misleading. In particular, there was a danger of confusion between “functional necessity” and the “functional protection” which the International Court of Justice had decided should be extended to the staffs of international organizations.

7. Mr. YOKOTA said he would be prepared to accept the Special Rapporteur's draft commentary subject to some minor amendments.

8. Mr. TUNKIN and Mr. AGO expressed the view that the Commission should not concern itself with questions of theory when concerned with codifying international law.

9. Mr. SANDSTRÖM, Special Rapporteur, withdrew the introductory commentary.

10. Sir Gerald FITZMAURICE said he did not share the views expressed by Mr. Tunkin and Mr. Ago. It would be deplorable if the Commission were habitually to refrain from expressing any views as to the theoretical basis of its work. Even in the case of the draft on diplomatic privileges and immunities, although a familiar subject, the Commission might be open to some criticism if it failed to include in the commentary some paragraphs of the kind now proposed by the Special Rapporteur. The question what was the real basis of diplomatic privileges and immunities had arisen repeatedly, and the “functional necessity” theory, for instance, had proved of great value as a guide in overcoming difficulties of detail, interpretation and application.

11. The CHAIRMAN said that no member of the Commission would deny that the study of theory was useful. In codification work, however, any attempt to indicate the theoretical basis of the rules might impair their value.

12. Mr. LIANG, Secretary to the Commission, suggested that since the Special Rapporteur had withdrawn his draft commentary, the Commission should reintroduce the introductory commentary to section II which