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Summary record of the 478th meeting

Topic:
Other topics

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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

it had included in its report covering the work of its ninth session (A/3623, para. 16, section II).

The suggestion was adopted unanimously.

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

13. Sir Gerald FITZMAURICE, Rapporteur of the Commission, submitted the text of the new article as amended at the 477th meeting, in the following terms:

"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 that State except in respect of their servants and employees who are themselves nationals of the receiving State. This shall not exclude voluntary participation in social security schemes in so far as this is permitted by the legislation of the receiving State."

14. Mr. EDMONDS pointed out that the phrase "not being nationals of the receiving State" was ambiguous; it might be taken to mean "because they are necessarily not nationals of the receiving State", which was clearly not the intended meaning. Perhaps the ambiguity might be removed if the words "not being" were replaced by the words "and who are not".

15. The CHAIRMAN said that, if the passage were amended in the way suggested by Mr. Edmonds, the relative clause would refer back only to the antecedent of the preceding clause, "the members of their families", whereas it should refer also to the members of the mission themselves.

16. Sir Gerald FITZMAURICE, Rapporteur, thought if the comma were retained after the word "households", the clause "and who are not nationals of the receiving State" would relate both to members of the mission and to members of their families.

17. Mr. SANDSTRÖM, Special Rapporteur, thought that the proposed text of the new article did not distinguish clearly enough between the two aspects of participation in social insurance: the payment of contributions and the enjoyment of benefits. Thus, while the exemption from the receiving State's legislation would cover both aspects so far as members of the mission and members of their families were concerned, it would, so far as servants and employees were concerned, cover only the payment of contributions.

18. In order to bring out the distinction more clearly, he proposed the following amended text:

"1. Members of the mission and the members of their families who form part of their households shall, so far as they personally are concerned, be exempt from the social security legislation in force in the receiving State, provided that they are not nationals of that State and unless by virtue of a Special agreement between the States or between the mission and the receiving State the said legislation is applicable to them.

"2. In any case where the members of the mission or their private employees or servants are subject to the legislation in question, the contributions payable in pursuance thereof shall, if the legislation so provides, be chargeable to the employer."

19. Sir Gerald FITZMAURICE, Rapporteur, said that he had no great objection to the Special Rapporteur's draft, although the last part of paragraph 2 was not absolutely clear to him. He could not, however, see any real difference in substance between the Special Rapporteur's text and his own.

20. Mr. SANDSTRÖM, Special Rapporteur, said that his draft dealt separately with the two aspects to which he had referred, and therefore appeared to him to be clearer. There was no difference in substance between the two drafts.

21. Mr. TUNKIN suggested that, for the sake of clarity, the words "of the receiving State" be added after the words "if the legislation" at the end of paragraph 2 of the Special Rapporteur's text.

22. He objected to the use of the word "employees" in the same paragraph. That word had not been defined in the definitions clause, nor had it been used previously in the draft convention. He suggested therefore that the word be deleted.

23. Mr. ZOUREK thought that the Special Rapporteur's new article bore the signs of hasty drafting, inasmuch as it used the word "employees", which had not been used in any other part of the draft convention. The end of paragraph 1 also appeared to him to be rather obscure in meaning, and he suggested therefore that the words "and unless by virtue of a special agreement..." to the end of the paragraph be omitted and the last sentence of Sir Gerald Fitzmaurice's text be inserted in their place.

24. Mr. AGO said that the Special Rapporteur's text should not refer to special agreements between States; nor should it state that the members of the mission might be subject to the legislation of the receiving State. He felt that the article should be redrafted in simpler and more appropriate language.

25. Sir Gerald FITZMAURICE, Rapporteur, thought that his text met Mr. Ago's objections.

26. With regard to the word "employees", he said that the new article was intended to cover such cases as the employment by the ambassador's wife of a secretary who was a national of the receiving State. Such a secretary was neither a member of the mission, nor a private servant, and he could think of no better term to describe the secretary than "employee", which was in no way ambiguous.

27. Mr. ZOUREK thought that the discussion disclosed the inadequacy of the term "private servant" in the definitions clause. A term of less restricted scope would be "private staff", which would cover the case mentioned by Sir Gerald Fitzmaurice.

28. Mr. YOKOTA said that if the word "employee" was used, the question would then arise what privileges and immunities such a person should enjoy. For that reason it was undesirable to use the word.

29. Mr. AGO said that there was no question, in the article, of granting an employee any diplomatic privileges and immunities. In the new article, the term was perfectly intelligible, and in the context the term "employee" could not possibly be construed to mean a person eligible for privileges and immunities.

30. Sir Gerald FITZMAURICE, Rapporteur, agreed with Mr. Ago. As far as privileges and immunities were concerned, all persons enjoying them were covered by the definitions clause. The new article had nothing to do with privileges and immunities, but merely defined certain forms of exemption from local legislation. The term "employee" was so well-known and so universally used that he could not see how difficulties could arise about its interpretation.

31. The CHAIRMAN thought that the best way of dealing with the situation was to call for a vote on each draft. He accordingly put Sir Gerald Fitzmaurice's text to the vote.

Sir Gerald Fitzmaurice's text of the additional article, as amended, was adopted by 8 votes to none, with 6 abstentions.

Chapter III (A/CN.4/L.78/Add.2) as a whole, as amended, was adopted unanimously.

CHAPTER I: ORGANIZATION OF THE SESSION (A/CN.4/L.78)

32. The CHAIRMAN put to the vote chapter I of the draft report (A/CN.4/L.78).

Chapter I was adopted unanimously.

33. Mr. ZOUREK recalled that at the 432nd meeting he had reported to the Commission that during the twelfth session of the General Assembly, which he had attended in his capacity as Chairman of the Commission, he had been approached by the Permanent Observer of Switzerland to the United Nations, who had communicated the Swiss Government's request for an opportunity to send observations on drafts prepared by the Commission (432nd meeting, para. 11). He had conveyed the Swiss Government's request to the Commission, and members would recall that Mr. Stavropoulos, the representative of the Secretary-General, had at the same meeting informed the Commission that the Secretary-General had received a similar request in writing from the Swiss Government (*ibid.*, para. 12). He had expected the Commission to consider the Swiss Government's request and he had understood that the matter would be referred to in a passage in the Commission's report on its tenth session.

34. In his opinion, the Swiss Government's request called for reply. It was so manifestly desirable that the request should receive favourable consideration that

he hardly thought any prolonged discussion was necessary. He proposed accordingly that the Commission should accede to the Swiss Government's request in the sense that in future the Commission's drafts would be sent to that Government for observations. He proposed in addition that the report should contain a reference to the matter.

35. Mr. LIANG, Secretary to the Commission, referring to Mr. Zourek's remarks, said that the matter which the latter had raised had formed the subject of further consultations between the Secretariat and the Swiss authorities.

36. He added that any request from the Swiss Government for copies of drafts prepared by the Commission would receive the attention of the Secretariat of the United Nations, and such copies would be communicated officially to the Swiss Government, as had been done in the case of the draft on diplomatic privileges and immunities. The Commission had taken account, during its discussions at the current session, of the comments submitted on that draft by the Government of Switzerland (A/CN.4/114).

37. Sir Gerald FITZMAURICE doubted whether a reference to the matter raised by Mr. Zourek could appropriately be inserted in the report. The Commission had not officially considered the Swiss Government's request, and hence he would prefer no reference to it to appear in the report.

38. The CHAIRMAN thought that the matter referred to by Mr. Zourek was one with which the Commission should not concern itself; it was more properly a matter for the Secretary-General. Accordingly, he thought it was unnecessary to mention it in the report.

Closure of the session

39. Mr. EDMONDS, on behalf of members of the Commission, paid a tribute to the Chairman for his unflinching courtesy and for his efficient conduct of the proceedings throughout the session. Under Mr. Pal's capable chairmanship, and with the aid of the devoted efforts of the Vice-Chairman, Rapporteurs and Secretariat, the Commission had succeeded in doing a great deal of valuable work.

40. Mr. ALFARO, Mr. ZOUREK and Mr. MATINE-DAFTARY associated themselves with the tribute that had been paid.

41. The CHAIRMAN thanked the members for their kind remarks, and expressed his appreciation of the help he had received from the other officers, from the Rapporteurs and from all the members of the Secretariat.

42. He declared the tenth session of the International Law Commission closed.

The meeting rose at 11.45 a.m.