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# Summary record of the 520th meeting

Topic:
**Other topics**

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nexion. He suggested that the word "class" should be replaced by the word "number".

*It was so agreed.*

47. Mr. LIANG, Secretary to the Commission, suggested that footnote 24 to paragraph (7) unnecessarily opened a debate concerning the drafting and implications of an article of the Charter. He suggested that footnote 24 should be omitted.

*It was so agreed.*

48. Mr. FRANÇOIS, referring to the fifth sentence of paragraph (8),* pointed out that technically the legislature did not ratify a treaty but approved ratification by the executive.

49. Mr. BARTOŠ said that that was not always the case. The constitutions of a number of East European States provided for ratification by the legislature.

50. Mr. AGO suggested that the words "require ratification by the legislature" should be replaced by the words "require that ratification shall be given or authorized by the legislature".

*It was so agreed.*

51. Mr. TUNKIN suggested that the words "considerations of general law" in paragraph (8) *bis* (*b*) and again in paragraph (9) should be replaced by the words "general principles of international law".

*It was so agreed.*

52. Mr. TUNKIN suggested that, in the fourth sentence of paragraph (8) *bis* (*b*) the words "for the purposes of the present Code" should be inserted between the words "could not" and the words "be treated".

*It was so agreed.*

COMMENTARY ON ARTICLE 2

53. Mr. AGO, referring to paragraph (1), doubted whether the word "defined" was appropriate.

54. The CHAIRMAN suggested that the word should be replaced by the word "used".

*It was so agreed.*

55. Mr. AGO observed that the play on the word "international" in the sentence "An agreement between States . . . is no doubt an 'international' agreement", in paragraph (3), might be difficult to follow. He suggested that the sentence should be deleted and that the beginning of the following sentence should be amended to read: "Is an agreement between States always . . .".

*It was so agreed.*

56. Mr. LIANG, Secretary to the Commission, referring to the words "customary international law (a part of treaty law, but also transcending it)", observed that the reverse was also true: the law of treaties was a part of international law.

57. The CHAIRMAN agreed and suggested that the words in parenthesis should be deleted.

*It was so agreed.*

58. Mr. TUNKIN suggested that the last two sentences of paragraph (3) should be deleted. The illustration cited related to the question of State responsibility, the codification of which was part of the future work of the Commission.

59. Mr. GARCIA AMADOR, Special Rapporteur on the subject of State responsibility, supported the suggestion.

60. Mr. LIANG, Secretary to the Commission, drew attention to the possibility that the sentences might be quoted out of context by a student of international law.

*Mr. Tunkin's suggestion was adopted.*

The meeting rose at 1.5 p.m.

## 520th MEETING

*Monday, 22 June 1959 at 3 p.m.*

*Chairman*: Sir Gerald FITZMAURICE

**Consideration of the Commission's draft report covering the work of its eleventh session (A/CN.4/L.83 and Corr.1, A/CN.4/L.83/Add.1) (*continued*)**

CHAPTER II: LAW OF TREATIES (A/CN.4/L.83/ADD.1) (*continued*)

II. TEXT OF DRAFT ARTICLES AND COMMENTARY (*continued*)

1. Mr. EDMONDS, referring to the procedure employed, said that in the past the Commission's practice had always been to vote on an article and on the amendments to it, refer it to the Drafting Committee and then discuss further and vote on the text submitted by the Drafting Committee. At the current session, the Commission had taken almost no votes. It was an innovation for an article prepared by the Special Rapporteur to be referred to the Drafting Committee with amendments but without a vote. As a result, the report would contain articles which the Commission had not in fact approved. He appreciated the procedural difficulties which had beset the session; nevertheless, he considered that the report should state frankly that the text of the articles was that originally presented by the Special Rapporteur, as revised by the Drafting Committee, but had not been approved by the Commission as a whole.

2. The CHAIRMAN explained that he had been proposing to put the text to the vote in due course. Any member was free to raise any point he wished in connexion with the articles or the commentary. He had not yet put the articles to the vote because considerations arising out of the commentaries might lead to a change in the text of an article. After the discussion of the commentary he had been intending to ask whether any member wished the vote to be taken on any article or on any part of any article, and if no such wish was expressed, to regard the article as unanimously approved. He now agreed that a vote was necessary, subject to the understanding that the draft at that stage was provisional and that all the articles would have to be reviewed in the light of further work.

3. Mr. BARTOŠ, associating himself with the criticism of the procedure, said that, unless all members of the Commission had an opportunity of discussing the texts prepared by the Drafting Committee, the report would not be a true account of what had actually occurred.

4. Mr. TUNKIN said that, although the criticisms by Mr. Edmonds and Mr. Bartoš were justified, the procedure followed by the Commission did not differ greatly from the procedure it would have adopted if

* Owing to a typographical error there were two paragraphs numbered "(8)" in the draft report. For the sake of clarity, the first will in this summary record be referred to as "(8)" and the second as "(8) *bis*".

it had had more time. The articles in the draft report were those prepared by the Drafting Committee, not by the Special Rapporteur, who was responsible only for the commentaries. Any observations on the draft report would be in effect observations on the Drafting Committee's text.

5. Mr. LIANG, Secretary to the Commission, said that Mr. Edmonds was quite correct about the usual procedure adopted by the Commission, but at the present session processes had had to be telescoped. The only difference from the usual procedure was that the Drafting Committee's text had been presented together with a lengthy commentary. If the Commission wished to revert to the former procedure, it could adopt the articles and then consider the commentary.

6. Mr. AGO thought that the Special Rapporteur should be congratulated on preparing the commentary before the text of the articles had been formally adopted by the Commission. Mr. Edmonds and Mr. Bartoš were, however, quite right; the articles should be put to the vote, and the commentary on each should be discussed immediately after.

7. Mr. BARTOŠ agreed with Mr. Ago. Certainly the Special Rapporteur's work should not be wasted, but as jurists the Commission should be procedurally correct and should first discuss the Drafting Committee's texts. If it did not do so, members of the Commission who had not been members of the Drafting Committee would be at a disadvantage. It was not likely that any great changes would be needed in the commentary as a result of the votes on the articles.

8. Mr. ALFARO said that, although the principles of the articles had been amply discussed, he agreed that the correct procedure would be to put the text as contained in the draft report to the vote.

9. The CHAIRMAN said that in view of the debate concerning procedure he would put the articles to the vote in the order in which they appeared in the draft report.

ARTICLE 1 (*continued*)

10. The CHAIRMAN recalled that at the previous meeting Mr. García Amador had suggested that in paragraph 4 of the article the word "instruments" should be replaced by the word "acts", an amendment which had been agreed to.

*Article 1, as amended, was adopted by 17 votes to none, with 1 abstention.*

11. Mr. BARTOŠ explained that he had abstained from voting, not because he objected to the substance of the article, but because it did not take into account his earlier suggestion that the article should specify that the only fundamental condition of a treaty was that it should not constitute a written instrument, but evidence in writing of the will of the parties (*ad probendum*) to enter into an agreement.

ARTICLE 2

12. The CHAIRMAN called for a vote on article 2.

*Article 2 was adopted by 15 votes to none, with 3 abstentions.*

13. Mr. BARTOŠ explained that, though not opposed to the article as such, he had abstained from voting for reasons similar to those accounting for his abtention on article 1.

14. Mr. ZOUREK said that he had abstained because he objected to the phrase "governed by international law"; it was not conceivable that an international agreement between two or more States should not be governed by international law.

COMMENTARY ON ARTICLE 2 (*continued*)

15. Mr. TUNKIN said that his objection to parts of paragraph (4) of the commentary would explain his abstention from voting on the text of article 2. The phrase "analogous legal considerations" was too vague and sweeping and might have undesirable implications. He suggested that the whole passage "or, to some extent, . . . legal considerations" should be deleted.

16. Mr. AGO suggested that the phrase "governed by international law" should be inserted after the word "agreement" in the second sentence of paragraph (4). The French text of the second sentence should be brought into line with the English.

17. The CHAIRMAN agreed to the amendments suggested by Mr. Ago and Mr. Tunkin.

18. After some discussion concerning the last sentence, the CHAIRMAN suggested that he should submit a redraft for the Commission's consideration.

*It was so agreed.*

19. Mr. EL-KHOURI, referring to paragraph (5) of the commentary, thought that protected States had at least the capacity to conclude treaties with the protecting State concerning their protection, unless they were placed under protection by some international organization.

20. Mr. AGO thought that the wording of the latter part of the paragraph was too complicated.

21. Mr. TUNKIN said that the paragraph as it stood might have serious implications. All States had the treaty-making capacity under general international law since they were subjects of international law, but there might be constitutional impediments for the members of a federal union. Those were internal restrictions affecting the treaty-making capacity, but, from the point of view of international law, there was no restriction, in so far as they were sovereign States. For example, the Byelorussian Soviet Socialist Republic and the Ukrainian Soviet Socialist Republic were members of the Soviet Union but also Members of the United Nations and parties to many international agreements. As the text of the article itself did not refer to federal unions, it might be preferable not to raise such a topic in the commentary.

22. Mr. LIANG, Secretary to the Commission, suggested that, in view of the misgivings expressed by certain members of the Commission, it might be undesirable to summarize the whole subject of treaty-making capacity in a few sentences, especially as the subject was dealt with in the Special Rapporteur's third report (A/CN.4/115). It might be best to retain only the first sentence of the paragraph, and to state that the Commission would take up the question what States possessed the treaty-making capacity at a later session, for which the Special Rapporteur had already prepared a report.

23. Mr. BARTOŠ said that the Commission had not examined the controversial question of the treaty-making capacity of States of a federal union. In Switzerland, for example, the Cantons had the capacity, by virtue of powers delegated by the Confederation, to conclude certain international agreements concerning frontier matters. In Yugoslavia, the Federal Republic had no treaty-making capacity. In nineteenth-century Germany,

the members of the Germanic Federation had been empowered to conclude concordats with the Holy See, which were not subject to ratification by the central Parliament, but only by the Parliament of the member States concerned. Even in the United States of America it was possible that the individual states might conclude treaties, subject to the consent of the federal authority. In his opinion, the question could not be settled in a few sentences, precisely because it was so controversial.

24. The CHAIRMAN proposed that the Secretary's suggestion should be accepted, since that solution would dispose of the objections raised by Mr. Bartoš and Mr. Tunkin. Only the first sentence should be retained, and another sentence should be added stating that the Commission had not examined the question of the treaty-making capacity of members of a federal union, which it would consider later in connexion with the third report on the law of treaties (A/CN.4/115).

*It was so agreed.*

25. Referring to paragraph (6) of the commentary, the CHAIRMAN suggested that the word "by", in the passage "treaties concluded by, with or between international organizations", in the fifth sentence, was redundant and could be omitted.

*It was so agreed.*

26. Mr. TUNKIN said that he was unable to endorse paragraph 7 of the commentary.

27. Mr. FRANÇOIS, referring to the sentence beginning "A treaty of friendship . . .", in paragraph 8 (*b*) of the commentary, said that he could not agree that all treaties ceding territory or demarcating a frontier did not provide for continuing obligations or relationships.

28. The CHAIRMAN agreed with Mr. François so far as some treaties ceding territory were concerned. However, treaties demarcating a frontier only fixed the frontier; the obligation not to violate the frontier was imposed by the general principles of international law.

29. Mr. YOKOTA felt that there might be obligations for a certain period and that would be dangerous to generalize. He suggested that the passage in question should be omitted.

30. The CHAIRMAN observed that Mr. Yokota's suggestion would require the deletion of three sentences, beginning with the words "A treaty of friendship" and ending with the words "such instruments were treaties".

*It was agreed that the three sentences indicated by the Chairman would be omitted.*

ARTICLE 3

31. Mr. LIANG, Secretary to the Commission, wondered whether the word "aspects", in paragraph 1, was the best word for describing the three types of validity, in view of the clause "all of which must be present". "Aspects" were always present; what might be absent would be one or more of the three types of validity: formal, substantial, or temporal.

32. The CHAIRMAN said that after discussion the Drafting Committee had decided not to refer to three different types of validity but to three aspects of a single concept of validity.

33. Mr. MATINE-DAFTARY wondered whether paragraph 1 was really necessary in the text of the article. The wording appeared to be in the nature of a discussion of doctrine and might be more suitable for inclusion in the commentary.

34. Mr. SCELLE saw no serious objection to the paragraph. What it said was that in order to be valid a treaty had to fulfil certain conditions of form, substance and time.

35. Mr. MATINE-DAFTARY considered Mr. Scelle's statement a better formulation than that contained in paragraph 1.

36. Mr. SCELLE said that paragraph 1 was acceptable as it stood.

*Article 3 was adopted by 14 votes to 1, with 1 abstention.*

ARTICLE 4

*Article 4 was adopted unanimously.*

COMMENTARY ON ARTICLES 3 AND 4

37. Mr. LIANG, Secretary to the Commission, felt that the commentary should have indicated more explicitly the way in which the three "aspects" of validity were present in respect of the parties.

38. Mr. TUNKIN pointed out that the third sentence of paragraph (1) of the commentary, which indicated that a valid treaty might not be obligatory because it had not yet come into force, was not consistent with article 3, paragraph 4.

39. The CHAIRMAN agreed and suggested that the third and fourth sentences should be combined and amended to read: "For instance, a treaty may be valid in every respect but may, for the time being, not be operative because its operation is subject to some suspensive condition, or is dependent on an event yet to occur."

*It was so agreed.*

40. Mr. SCELLE said that the words "*force exécutoire*" had a more specific meaning in French than the word "operative" in English. A treaty could not have *force exécutoire* unless a judgment had intervened.

41. Mr. AMADO suggested that in the French text the words "*qu'il n'a pas effectivement force exécutoire*" should be replaced by the words *qu'il n'a pas effectivement produit ses effets.*

*It was so agreed.*

42. Mr. BARTOŠ pointed out that in article 3 there were references to "Part I" of the chapter in paragraph 2, to "Part II" in paragraph 3 and to "Part III" in paragraph 4. He suggested that some reference to the various parts of the first chapter should be inserted in paragraph (1) of the commentary.

*It was so agreed.*

43. Mr. BARTOŠ suggested that a reference should be included at the end of paragraph (2) to the case of a party which no longer considered itself bound by a multilateral treaty that was still valid.

44. The CHAIRMAN suggested that Mr. Bartoš should prepare a suitable text.

ARTICLE 5

*Article 5 was adopted by 15 votes to none, with 1 abstention.*

45. Mr. TUNKIN explained that he had abstained for the reasons he had indicated during the discussion of the article.

COMMENTARY ON ARTICLE 5

46. Mr. LIANG, Secretary to the Commission, suggested that the word "metaphysically", in paragraph (1) of the commentary, was not self-explanatory and might be omitted.

*It was so agreed.*

The meeting rose at 6 p.m.

## 521st MEETING

*Tuesday, 23 June 1959, at 10.20 a.m.*

*Chairman*: Sir Gerald FITZMAURICE

### Consideration of the Commission's draft report covering the work of its eleventh session (A/CN.4/L.83 and Corr.1, A/CN.4/L.83/Add.1 and 2) (*continued*)

CHAPTER II: LAW OF TREATIES (A/CN.4/L.83/ADD.2) (*continued*)

II. TEXT OF DRAFT ARTICLES AND COMMENTARY (*continued*)

ARTICLE 6

1. Mr. SANDSTRÖM asked for an explanation of the reference to "meetings of representatives" in the first sentence of paragraph 1.

2. The CHAIRMAN explained that the process of negotiation in the case of bilateral treaties would normally take place either through the diplomatic or through some other convenient official channel; in the case of multilateral treaties, at an international conference; and in the case of plurilateral treaties—treaties between a small number of States—at a small conference which could best be described as "meetings of representatives".

*Article 6 was adopted by 14 votes to none, with 2 abstentions.*

COMMENTARY ON ARTICLE 6

3. Mr. EDMONDS asked, with reference to paragraph (2) of the commentary, whether in the case of a treaty negotiated by a person having apparent authority, but not inherent authority, the State that person had represented could sign and ratify the treaty, and if so, whether another party to the treaty could invoke that situation as grounds for considering the treaty void.

4. The CHAIRMAN replied to Mr. Edmonds's first question in the affirmative. As to his second question, he observed that all the Commission could do was to draw up the rules for treaty-making; it could not go into all the legal consequences resulting from failure to conform to those rules.

5. Mr. PAL drew attention to the problem which would arise if some of the voting representatives at an international conference at which decisions were taken by a simple majority were found not to have possessed authority to vote. However, he agreed that the Commission could not solve all the difficulties at the present stage; there would be another opportunity after the comments of Governments had been received.

6. The CHAIRMAN said that in the report it would not be necessary to consider the legal consequences of such eventualities since they would be governed by general principles of law.

7. Mr. AGO pointed out that the reference in one of the footnotes to paragraph (1) should be to the International Labour Organisation and not to the International Labour Office.

8. The CHAIRMAN agreed and drew attention to another typographical error in the English text of paragraph (3), where the sentence beginning with the words "In the case" should begin: "In this case".

9. Mr. AMADO said with reference to the final sentence of paragraph (3) that he wished to record his opposition to any implication that initialling a text and signing it *ad referendum* produced similar consequences. There was an essential difference between the two acts: signature *ad referendum* was a signature whereas initialling was not.

10. Mr. BARTOŠ agreed with Mr. Amado.

11. The CHAIRMAN pointed out that the text did not imply that initialling and signature *ad referendum* were equivalent. It simply said that in the circumstances described a representative could do either of two different things.

12. Mr. ZOUREK expressed some doubts concerning the validity of the analogy indicated in paragraph (5). The position of a permanent representative of a State to an international organization in negotiations with the organization was not comparable to that of a head of a diplomatic mission in negotiations with the State to which he was accredited.

13. Mr. AGO expressed similar doubts. In the case of conventions negotiated at International Labour Conferences, permanent representatives required special powers to participate in the work of the Conference. He suggested that the last three sentences of paragraph (5) beginning with the words "The same principle would apply to the Permanent Representatives of a State" should be deleted.

*It was so agreed.*

14. Mr. AGO suggested that in paragraph (6) the words "or otherwise" in the English text should not be translated by the words *"ou de toute autre façon"* in French.

15. Mr. FRANÇOIS suggested that in the first sentence of paragraph (8) the words "the second or third decade of the present century" should be replaced by the words "the First World War".

*It was so agreed.*

16. Mr. LIANG, Secretary to the Commission, referring to the term "treaty law" in paragraph (10) (*a*), suggested that the terminology should be standardized. The term "treaty law" might be understood as meaning conventional law, in other words, the law embodied in treaties. In order to avoid confusion, it would be better if the report consistently used the expression "law of treaties".

*It was so agreed.*

17. Mr. AGO pointed out that in paragraph (11), which in the English text was erroneously numbered paragraph (ii), there was again a reference to the International Labour Office instead of the International Labour Organisation.

18. Mr. TUNKIN, referring to the fifth sentence of paragraph (11), beginning with the words "Even where they do not . . .", said it should be stressed that the organ prescribing the voting rule in advance must have constitutional authority to do so. He sug-