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Summary record of the 521st meeting

Topic:
Other topics

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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-

gested that the sentence in question should be amended to read:

"However, the appropriate organ of the organization, if it is constitutionally empowered to do so, may, in deciding to hold or convene a conference, prescribe the voting rule in advance, as one of the conditions of holding or convening the conference."

It was so agreed.

19. Mr. LIANG, Secretary to the Commission, suggested that the sixth and seventh sentences of paragraph (11), reporting a statement made by him, would reflected his views better if they were combined into a single sentence beginning with the words:

"At the same time, it was pointed out by the Secretary of the Commission that when the General Assembly of the United Nations convened a conference, what normally occurred was that the Secretariat . . .".

It was so agreed.

ARTICLE 7

20. Mr. AGO suggested that in the French text of paragraph 2 the words *"ses buts"* should be replaced by the words *"son objet"*.

It was so agreed.

21. Mr. TUNKIN suggested that the word "objects" in the English text should be used in the singular, in order to indicate that it had the same meaning as the French word *"objet"*.

It was so agreed.

22. Mr. AGO suggested that in paragraph 2 of the French text the words *"dispositions relatives à sa date et à son mode d'entrée en vigueur"* should be replaced by the words *"dispositions relatives à la date et au mode de son entrée en vigueur"*.

It was so agreed.

23. Mr. MATINE-DAFTARY said that the words *"ces formalités doivent être remplies"* in the French text of paragraph 3 were a weak rendering of the corresponding passage in the English text.

24. Mr. SCELLE proposed that the words in question should be replaced by the words *"ces opérations doivent être accomplies"*.

It was so agreed.

25. Mr. AGO asked whether in paragraph 3 the omission of any reference to withdrawal from an international organization was intentional.

26. The CHAIRMAN recalled that the Commission had decided to reserve the question of treaties involving an international organization. In any case, withdrawal might be considered a form of denunciation, to which reference was made in the text of article 3.

27. Mr. YOKOTA observed that if withdrawal were mentioned, it would be necessary to include other processes, such as expulsion. In the context of the present draft it was not necessary to enter into so much detail.

28. Mr. LIANG, Secretary to the Commission, did not think the wording of article 7 would affect the situation resulting from the withdrawal of a State from the United Nations, for example, so far as the Charter was concerned. It was generally accepted that although the question of withdrawal was not mentioned in the Charter a Member State was free to withdraw from the Organization. There was a report on the subject[1] which formed an essential part of the work of the San Francisco Conference in 1945 and which recorded the understanding that withdrawal was a kind of inherent right and that if a State did withdraw, it would, of course, no longer be a party to the Charter. Thus, it might be said that the Charter contained an implied denunciation clause, in the event of withdrawal.

29. However, he agreed with the Chairman that it was not necessary to deal with such matters in the part of the draft under consideration.

Article 7, as amended, was adopted unanimously.

COMMENTARY ON ARTICLE 7

30. Mr. EDMONDS wondered whether the Commission should not be asked to vote on the commentaries.

31. The CHAIRMAN replied that the Commission had usually not voted on the commentaries, but had simply adopted the report as a whole.

32. Mr. PAL said that he could not find in the records of the proceedings at the ninth and tenth sessions any indication that the commentaries had been put to the vote.

33. The CHAIRMAN pointed out that any member was free to make a reservation on any point in the commentaries, which would be noted in the summary record, and to ask for a vote on any particular statement in the commentaries.

34. Mr. PAL and Mr. MATINE-DAFTARY questioned the expression "legal necessity" in paragraph (1).

35. Mr. SCELLE and Mr. AMADO thought that the expression was perfectly satisfactory.

36. The CHAIRMAN explained that the comment signified that, whereas the clauses referred to habitually appeared in treaties, it was strange that they were not required by any legal necessity for the purpose of the formal validity of a treaty. As opinions were divided, it might be preferable to retain the term.

It was so agreed.

37. Mr. AMADO said that the qualification "absolutely" weakened the word "essential" at the beginning of paragraph (1) and should be deleted.

It was so agrecd.

38. Mr. TUNKIN pointed out that it would be more correct to speak of the essential elements that must be found in the text of a treaty for the treaty to exist as such. He suggested that the words "the text of" should be inserted in the first sentence.

It was so agreed.

39. Mr. MATINE-DAFTARY suggested that the words "several lines" should be substituted for "six lines" in the third sentence of paragraph (1).

It was so agreed.

40. Mr. AGO suggested that the word "often" be inserted in the second sentence and that the word *"objet"* in the singular should be substituted for the plural in the first sentence in the French text.

41. The CHAIRMAN suggested that in the English text the word "objects" should be replaced by the word "purpose" and that that change in the commentary should also be reflected in article 7, paragraph 2.

It was so agreed.

[1] United Nations Conference on International Organization, document 1179, I/9(1).

42. Mr. TUNKIN thought that the last two sentences in paragraph (1) were too sweeping and that any confusion that might arise would not be entirely removed by the explanations in footnote 46.

43. The CHAIRMAN suggested that the last sentence and the footnote might be deleted.

It was so agreed.

44. Mr. AGO said that the second sentence of paragraph (2) and the latter half of the last sentence gave the impression that general supplementary rules of law existed by means of which gaps or deficiencies of the kind described in the comment could be filled. Surely, however, such defects were remedied by interpretation rather than by the application of any supplementary rule of law. If, for example, the parties failed to insert the date of a treaty's entry into force, an attempt might be made to infer the intended date by interpretation, but there was not a general rule of international law determining the date of a treaty's entry into force when the parties did not indicate a date.

45. The CHAIRMAN disagreed, for it was impossible to interpret a non-existent provision. In the case cited by Mr. Ago for illustration, the rule would be that the treaty entered into force on the date of signature.

46. Mr. AGO said he was not convinced. The Commission would find it dangerous to go deeply into the matter at that stage. Even if a rule of international law existed, it would be a rule of interpretation.

47. Mr. TUNKIN shared Mr. Ago's doubts about the existence of rules in international law for the purpose contemplated.

48. Mr. ZOUREK said that paragraph (2) referred to a question which was to be dealt with later. He doubted whether it would be correct to state categorically that any deficiencies of the kind mentioned in the commentary could be cured either by interpretation or by a rule of law.

49. The CHAIRMAN replied that some rules must be applied. If they did not exist, the Commission would have to propose them.

50. Mr. TUNKIN replied that, whereas under municipal law defects in a text might be remedied by the application of canons of construction, the position under international law was quite different. The parties were masters of the treaty, and if they had failed to state some particular, no one could state it on their behalf. The question was of great importance and had not been studied by the Commission. In any case, paragraph (2) did not follow from the text of article 7 and might well be deleted, with the possible exception of the first sentence.

51. The CHAIRMAN explained that if some formal clause were omitted from a treaty and a dispute arose concerning a question which should have been settled in the missing clause, there should be some rule which the International Court of Justice could apply.

52. Mr. TUNKIN said that the general principles of international law would of course apply, but the Commission had not yet considered whether they would remedy all gaps or deficiencies.

53. Mr. PAL suggested that it might not be necessary to raise the question discussed in paragraph (2) in connexion with article 7.

54. Mr. YOKOTA suggested that the commentary might state that it would be seen in the later parts of the draft that rules of interpretation were applied to fill gaps of the kind mentioned.

55. The CHAIRMAN suggested that, in view of what had been said, the second and third sentences and the latter part of the last sentence, after the word "recitals", might be deleted.

56. Mr. LIANG, Secretary to the Commission, said that the last sentence of paragraph (2), beginning "The matter might therefore . . .", was worded rather strongly. In any case, some obscurity remained both in that and in the first sentences, which raised but hardly solved the question. It might be more advisable to delete the last sentence and give examples of the rules on the basis of which such things as the date or method of entry into force of the treaty could be inferred.

57. The CHAIRMAN suggested that perhaps the phrase "the law will not permit them to escape from the consequences of that agreement" might be replaced by the words "they are not absolved from carrying it out".

58. Mr. TUNKIN thought that paragraph (2) should be omitted altogether.

59. Mr. PAL observed that article 7 did not relate to formal validity properly so called, but set forth the elements of the text. It would be quite enough merely to say in the commentary that the omission of those elements did not affect the validity of the treaty. Accordingly, it might be best to retain only the first sentence of paragraph (2), which stated that principle.

60. Mr. MATINE-DAFTARY said he could see no connexion between the first sentence of paragraph (2) and paragraph (1). Consent was a condition of substantive validity, according to article 3 as adopted at the previous meeting.

61. Mr. LIANG, Secretary to the Commission, pointed out that the first sentence of paragraph (2) was redundant, since the phrase "consent . . . in good and due form" was in effect a repetition of the words "duly consented to by the parties" in paragraph (1).

62. The CHAIRMAN observed that the consensus of the Commission seemed to be that paragraph (2) should be deleted.

It was agreed to delete paragraph (2) of the commentary.

63. Mr. AMADO thought that the word *"définir"* in the French text of the first sentence of paragraph (3) should be replaced by the word *"établir"*.

64. Mr. BARTOŠ reiterated his view that clauses relating to entry into force and accession were not formal, but substantive.

ARTICLE 8

65. Mr. PAL objected to the words "as finally drawn up" in paragraph 1. The text finally drawn up was in fact binding on the parties once it had been adopted. He proposed that the words should be omitted.

It was so decided.

66. Mr. YOKOTA strongly objected to the inference in paragraph 2 that there was any legal obligation under international law for States which had not signed a treaty to refrain from taking the action described.

67. The CHAIRMAN drew attention to paragraph (2) of the commentary where Mr. Yokota's views were described.

68. He called for a vote on article 8.

Article 8, as amended, was adopted by 13 votes to 1, with 2 abstentions.

COMMENTARY ON ARTICLE 8

69. Mr. TUNKIN, referring to the penultimate sentence of paragraph (1), said he could not accept the notion of the "conversion" of a text into an international agreement. He suggested that the words "has been converted from a mere text into" should be replaced by the words "becomes".

70. The CHAIRMAN said that Mr. Tunkin's point might be further stressed by replacing the word "treaty" by "text" and underlining the words "only as a text".

Those changes were approved.

71. Mr. PADILLA NERVO, referring to the fifth sentence of paragraph (2), thought it was not clear whether the negative obligation mentioned applied to negotiations at international conferences convened by the United Nations or the specialized agencies, as well as to bilateral negotiations and negotiations among a limited number of States. The illustration subsequently given seemed to apply to bilateral negotiation.

72. The CHAIRMAN said that the question was left open in paragraph 2 of the article. The obligation was general, although it was more likely to apply to bilateral negotiations than to international conferences.

73. Mr. SCELLE expressed regret that paragraph (2) had been drafted in its present terms. The fact that two or more States decided to negotiate an international instrument was evidence of their agreement that the question concerned was an issue between them. Accordingly, by virtue of agreeing to negotiate they were estopped from taking any action detrimental to the purpose of the negotiation. Failure to make that clear in paragraph (2) represented a retrograde step in the development of international law.

74. Mr. TUNKIN suggested that the word "international" should be inserted before "law" in the last sentence of paragraph (5).

It was so agreed.

ARTICLE 9

75. The CHAIRMAN called for a vote on article 9.

Article 9 was adopted by 15 votes to none, with 1 abstention.

76. Mr. BARTOŠ explained that he had abstained from voting on the article for the reasons, connected with the mention of signature *ad referendum* in paragraph 2, which he had expressed during the debate.

COMMENTARY ON ARTICLE 9

77. Mr. LIANG, Secretary to the Commission, said he had received some authoritative information from the Legal Counsel of the United Nations which had a bearing on the article and might be inserted in the commentary. With regard to initialling, as a matter of practice (not based on any doctrinal position), the older custom of initialling had never been used in the United Nations in the establishment of texts of multilateral conventions. In a sense, the very purpose of initialling —that of authentication—had been supplanted in the more institutionalized treaty-making processes of the United Nations by such standard machinery as the recorded vote, the adopting resolution, or the final act. Nor had it ever occurred that a representative had asked to initial a text of an instrument deposited with the Secretary-General. It might be concluded, therefore, and stated in the commentary that the use of initialling was practically confined to bilateral treaties.

78. The CHAIRMAN thought that, while the information was interesting, it was scarcely relevant to the commentary, since the number of treaties concluded under United Nations auspices was very small compared to that of other international instruments drawn up every year.

79. Mr. LIANG, Secretary to the Commission, could not agree with the Chairman's view. Moreover, the Legal Counsel of the United Nations had stated in his communication that it must be recognized that a draft code of treaties could not leave out of account, much less specifically contradict, the practice of the largest treaty-making organization in the world.

80. The CHAIRMAN remarked that, although the United Nations was undoubtedly the largest international organization in the world, the number of treaties it produced was small.

81. Mr. BARTOŠ supported the Secretary's remarks. The practice of the United Nations reflected a concerted effort to promote international co-operation. Accordingly, the Commission, as a United Nations organ, should respect United Nations practice in its work of codification.

82. The CHAIRMAN suggested that the Secretary might draft a paragraph for insertion in either the commentary to article 9 or, preferably, the commentary on article 10.

83. Mr. LIANG, Secretary to the Commission, said that he intended to suggest some changes in the commentary to article 10 and would prefer his statement to be included in the commentary to article 9.

84. Mr. PADILLA NERVO objected to the last two sentences of paragraph (1). He doubted whether it was true that decisions adopted by a majority vote at an international conference were not "susceptible of alteration"; if a large minority had voted against such decisions, the question might be reopened in order to obtain a larger number of accessions.

85. The CHAIRMAN drew Mr. Padilla Nervo's attention to paragraph (4), and particularly to the last sentence, which stated that any subsequent alteration would result in a new text, itself requiring authentication.

ARTICLE 10

86. Mr. AMADO reiterated his view that signature *ad referendum* was in the practice of the United Nations considered as a definitive signature by the State. In his opinion, every signature was *ad referendum*, in the sense that it transferred the treaty from the international to the constitutional field of States. Moreover, it was not usual when representatives at international conferences signed the instruments drawn up to require the confirmation of their Governments for such signature.

87. The CHAIRMAN called for a vote on article 10.

Article 10 was adopted by 15 votes to none, with 1 abstention.

The meeting rose at 1 p.m.