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522nd MEETING

Wednesday, 24 June 1959, at 9.45 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.1-4) (*continued*)

CHAPTER II: LAW OF TREATIES (A/CN.4/L.83/ADD.2 AND 3) (*continued*)

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

COMMENTARY ON ARTICLE 10

1. The CHAIRMAN, speaking as the Special Rapporteur, suggested that, in order to take into account the views expressed by Mr. Amado at the preceding meeting, paragraph (1) of the commentary should be supplemented by the following passage:

"However, according to one opinion expressed in the Commission, there was only a difference of form and not of substance between outright signature and signature *ad referendum*. This opinion was based on the view that every signature was always and necessarily '*ad referendum*'. Thus, even a signature without the addition of the words *ad referendum* must be understood as if those words had in fact been added. For these reasons, signature *ad referendum* was in all respects equivalent to a full and definitive signature. The Commission took note of this point of view, while not being able to agree with it."

2. Mr. AMADO stated that he did not think it necessary to insert such a passage in the report.

3. Mr. TUNKIN observed that the words *"sans réserve"* in the French text of paragraph (1) might be confused with reservations to a treaty. He suggested that the expression *"sans condition"* should be used.

It was so agreed.

4. Mr. TUNKIN thought that the case referred to in the second sentence of paragraph (4) was rare in modern times, for communications had become easy and governmental instructions could be obtained without delay. The case in the third sentence, however, was common in current practice and should be emphasized.

5. The CHAIRMAN, supported by Mr. ALFARO, thought that the reference to the case of the representative who initialled a text on his own initiative should be retained, because such cases still occurred in practice.

6. Mr. AGO thought that the second sentence of paragraph (4) gave the impression that the negotiator had no authorization to sign. It was well known, however, that initialling was often used, not because no authorization had been given, but because the State did not wish to go beyond a certain stage in the negotiations. He hoped that the sentence might be redrafted accordingly.

7. The CHAIRMAN suggested that the order of the two sentences might be reversed, in order to emphasize that the cases referred to in the third sentence were most common, and that Mr. Ago's point should be taken into account.

It was so agreed.

8. Mr. AMADO said that the process of confirmation of a signature *ad referendum*, referred to throughout the commentary, was not at all clear to him. Indeed, he knew of no cases where such confirmation had been given.

9. The CHAIRMAN thought that Mr. Amado was confusing signature *ad referendum* with signature *ad ratificandum*; the latter was used when the treaty contained no ratification clause. There was no technical difficulty with regard to confirmation; confirmation was communicated either through the diplomatic channel or, in the case of treaty-making international conferences, through the host Government or the secretariat of the conference.

10. Mr. LIANG, Secretary to the Commission, stated that the system described by the Chairman was in use but other systems were also prevalent. In United Nations practice confirmation of signatures *ad referendum* did not exist. He also drew attention to the notes (A/CN.4/121) on the practice of the United Nations Secretariat in relation to certain questions raised in connexion with the articles on the law of treaties, a document which he had just caused to be circulated to members of the Commission. The practice of the Secretariat with regard to signature *ad referendum* was briefly stated in that document, and, although the Secretariat was not a law-making institution, that practice had been accepted by States without demur and, to that extent, consolidated.

11. The basis of United Nations practice in that matter was simplicity. The procedure followed, according to that practice, was, besides being entirely correct, convenient for delegates to international conferences, who usually had to work under pressure. The simple process of signature, followed by ratification where the treaty was subject to ratification, was preferred by States. In practice States rarely signed *ad referendum* and, when they did, used that formula as equivalent to "subject to ratification". Moreover, only two instances had been found by the Secretariat of States expressly "confirming" a signature *ad referendum*, and both were cases where States became parties to the instruments in question by signature only.

12. In the draft report, however, various steps, such as initialling, signature *ad referendum*, confirmation, full signature and ratification were envisaged. At least in the United Nations practice, they would be thought to be cumbersome and unnecessarily complicated. The Commission might ask Governments to comment on the extent to which the system of signature *ad referendum* was used.

13. Mr. YOKOTA thought that the Commission should be very cautious in dealing with that point and, in particular, should avoid stating that any practice was incorrect or undesirable. In that connexion, he referred specifically to the last sentence of paragraph (4) and to paragraph (5).

14. Mr. TUNKIN thought that the point of view reflected in the commentary envisaged two different cases. In a case in which but for the addition of the words *ad referendum* a treaty would come into force on signature, signature *ad referendum* meant that the Government concerned hesitated to complete the final act of the treaty-making process. On the other hand, when the treaty contained a ratification clause, signature *ad referendum*, if not subsequently confirmed, had no logical meaning, since it could not be regarded as signa-

ture *ad ratificandum* in view of the existence of a ratification clause. Nevertheless, it seemed to be unwise to condemn a practice which might have constitutional meaning for certain States. Paragraph (5) (*c*) of the commentary in effect stated that ratification covered confirmation. He could not, therefore, agree with the statement that ratification covering confirmation of a signature *ad referendum* placed the Government in the position of ratifying a treaty it had never really signed. In his opinion, there was no harm in covering confirmation by ratification, particularly as certain States might be constitutionally obliged to sign *ad referendum.*

15. The CHAIRMAN said that he was prepared to delete from the commentary passages condemning certain practices, but pointed out that a certain condemnation was implicit in the description of the practices in question. Moreover, the practice which was peculiar to the United Nations covered a very small field of treaty law. Refusal to allow signature *ad referendum* without full powers was incorrect, since it was tantamount to treating signature *ad referendum* as full signature, although in fact signature *ad referendum* did not commit the Government concerned. Finally, he could not agree with Mr. Tunkin that there was no harm in the practice of covering confirmation of signature *ad referendum* by ratification; in such cases, the treaty was never really signed.

16. Mr. AGO thought that the difference between the two schools of thought might not be as great as it appeared. In fact, the Secretariat in its notes went rather too far, for it said virtually (A/CN.4/121, section A, para. 2) that full signature and signature *ad referendum* were identical. That might be true in practice, but it was not true in theory. So far as practice was concerned, however, he agreed with Mr. Tunkin that, if a State accepted a treaty it had signed *ad referendum,* confirmation logically followed from the act of ratification. If the State did not intend to ratify the treaty, it naturally would not confirm its signature *ad referendum.* There was no reason to approve or condemn the practice, but it should be noted in the commentary.

17. Mr. LIANG, Secretary to the Commission, referring to the question of the requirement of full powers for a signature *ad referendum,* observed that the question was largely a technical one, in the practice of international conferences. The credentials committees of such conferences received the credentials of representatives and decided whether full powers to sign had indeed been granted. Those committees were not in a position to know whether signature would be unconditional or *ad referendum*; the matter was for the representatives to decide. He drew attention to paragraph 3 of section A of the Secretariat's notes. The point of view advanced in the commentary differed from the practice which had evolved in the United Nations, but it had not been suggested in the Commission that that practice was incorrect. He appreciated the Chairman's concession in agreeing to omit paragraph (5), and pointed out that the fact that the General Assembly had no firm attitude to the question made it the more important to describe both the existing systems.

18. Mr. MATINE-DAFTARY agreed with speakers who had urged that the United Nations practice in the matter should not be condemned, but he thought that the difference between full signature and signature *ad referendum* existed not only in theory, but in practice, since signature *ad referendum,* unlike signature, could be withdrawn.

19. The CHAIRMAN suggested that, since there would be no time to redraft paragraph (5), it would be best to omit the last sentence of paragraph (4) and the whole of paragraph (5).

It was so agreed.

20. The CHAIRMAN invited the Commission to consider the articles and commentaries in part I, section B. He explained that the first text was article 14, because the Commission had decided to transpose three articles which it had not yet considered from section C to section B.

ARTICLE 14

21. Mr. AGO asked whether the effects of provisional signature would be dealt with in a subsequent article.

22. The CHAIRMAN answered in the affirmative. He called for a vote on article 14.

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

ARTICLE 15

23. Mr. BARTOŠ said he could not accept either paragraph 2 or paragraph 4. In practice only a person "qualified to sign" could sign *ad referendum*; in other words, he had to have a full power to sign, and if he signed *ad referendum,* he did so only in order to give the State he represented an opportunity to reconsider. With reference to paragraph 4, he restated his view that an uncorroborated statement by a representative that he possessed full powers could not be taken into consideration even provisionally.

24. If the article was put to the vote paragraph by paragraph, he would vote for paragraphs 1 and 3, and against paragraphs 2 and 4.

25. Mr. AMADO said that he would vote against paragraph 2 for the reasons he had explained when the article had been discussed earlier; he drew attention to section B of the Secretariat's notes on the practice of the United Nations Secretariat (A/CN.4/121).

26. Mr. AGO did not think that paragraph 4 should imply any duty to include in the text of the treaty a statement of recital concerning the authority to sign.

27. He also pointed out that at some later stage the draft would have to deal with the question of the validity of the signature of a person without full powers to sign affixed to a treaty that was later ratified by the State concerned.

28. The CHAIRMAN suggested that paragraph 4 should not form part of the article but should, with appropriate amendments, be inserted in the commentary.

It was so agreed.

29. The CHAIRMAN said, with regard to paragraph 2, that the requirement of full powers for a signature *ad referendum* was juridically illogical, for such a signature did not commit the signer's Government in any way, not even provisionally. He thought that if there was an unnecessary practice in certain cases, the Commission would not wish to consecrate it.

30. Mr. FRANÇOIS pointed out that the requirement of full powers for signature *ad referendum* did serve a useful purpose. In the absence of such a stipulation, anyone could come forward and say that he wished to sign a treaty *ad referendum* on behalf of a particular Government.

31. The CHAIRMAN observed that a signature *ad referendum* was normally effected by a person who had been authorized to negotiate. If at the stage of signature some new person presented himself he would of course have to show some evidence that he was an authorized representative of his Government. The case was not different from that of initialling.

32. Mr. MATINE-DAFTARY agreed with Mr. François. The practice of the United Nations of requiring full powers for a signature *ad referendum* was logical. When such a signature was later confirmed, it was confirmed with retroactive effect. Such a confirmation presupposed that the signature had been in good and due form; in other words, that it had been affixed by a qualified person. Therefore, a signature *ad referendum* did have some legal effects, though quite different from those of full signature.

33. The case of initialling was distinguishable. Initialling was used by a negotiator simply in order to authenticate what had been negotiated, but it had no legal effects.

34. The CHAIRMAN suggested that paragraph 2 should be deleted, since it did not express the view of the Commission, and that a paragraph should be inserted in the commentary indicating that opinion in the Commission was divided about the effects of signature *ad referendum* and the question whether full powers were necessary to effect it, but that as the Commission had been unable to come to any final conclusion on the matter at the current session, the point would be taken up when the law of treaties was again considered.

It was so agreed.

35. The CHAIRMAN pointed out that all that remained of article 15 was paragraph 1, minus the opening words "Except in the case mentioned in paragraph 2 below" and paragraph 3.

Article 15, as amended, was adopted by 14 votes to none, with 2 abstentions.

COMMENTARY ON ARTICLES 14 AND 15

36. The CHAIRMAN pointed out that the commentary would be affected by the deletions from article 15. Paragraphs (4) and (9) would have to be deleted; a new paragraph on the lines he had just suggested would be added; and paragraph (7) could be retained with the deletion of the words *"Paragraph 4"*.

The changes outlined by the Chairman were agreed to.

37. Mr. LIANG, Secretary to the Commission, remarked that the footnote to paragraph (6), footnote 58, was no longer relevant and could be deleted.

It was so agreed.

38. Mr. AGO suggested that the words "to the validity of the treaty" at the end of the first sentence of paragraph (8) should be deleted.

It was so agreed.

39. Mr. BARTOŠ said that he wished to draw attention, for the purposes of the Commission's future work on the law of treaties, to the theory, borrowed from the sphere of commercial law by certain German writers and applied in particular during the period of the Nazi régime, that an employee acting within the sphere of his responsibility committed his employer. That theory had been used to justify the practice of State functionaries signing agreements without full powers. It was a dangerous practice, which jeopardized democratic procedure in international relations.

ARTICLE 16

40. Mr. TUNKIN doubted whether the condition in the first sentence of article 16 was sufficiently broad. The parties to the treaty might have some special understanding concerning the time and place of signature without any reference to that special understanding appearing in the text of the treaty.

41. The CHAIRMAN suggested the insertion, immediately after the conditional clause, of the words "or in the absence of any special agreement between the parties".

It was so agreed.

Article 16, as amended, was adopted by 14 votes to none, with 1 abstention.

COMMENTARY ON ARTICLE 16

42. Mr. TUNKIN drew attention to a typographical error in paragraph (2): the word "unilateral" should real "multilateral".

43. Mr. LIANG, Secretary to the Commission, suggested that the footnote to paragraph 1, footnote 60, should be amended to read "The Commission had not reached this part of the work at the end of the present session."

It was so agreed.

ARTICLE 17

44. The CHAIRMAN asked the Commission to consider article 17. Recalling an earlier decision (see 519th meeting, para. 46), he pointed out that the word "number" should be substituted for the word "class" in paragraph 1 and that, in keeping with an earlier suggestion by Mr. Ago, the phrase "or to the States of the region or group, as the case may be" should be inserted after "negotiating States".

45. Mr. LIANG, Secretary to the Commission, suggested that the word "rules" be substituted for "considerations" in paragraph 2.

Those changes were agreed to.

46. Mr. BARTOŠ said that he accepted the text of article 17, because it was a good provision *de lege ferenda.*

47. Mr. ERIM said that he would abstain from the vote on the article because he agreed with those members who thought that a treaty of the kind referred to in paragraph 2 (*c*) should be open to any State without the requirement of the consent of a two-thirds majority.

Article 17 was adopted by 10 votes to none, with 4 abstentions.

48. Mr. TUNKIN explained that he had abstained for the reasons he had indicated in the general discussion.

49. Mr. MATINE-DAFTARY said that he had abstained because he could not accept the idea that States which had not participated in the negotiation might be subsequently admitted to the treaty.

COMMENTARY ON ARTICLE 17

50. Mr. TUNKIN objected to the phrase "of a norm creating character" in paragraph (1) on the grounds that other treaties besides general multilateral treaties created norms.

51. The CHAIRMAN pointed out that Mr. Tunkin himself had first used the expression; he suggested that the phrase "which create norms of general international law" be substituted.

It was so agreed.

52. Mr. TUNKIN said that the fifth sentence in paragraph (1) did not quite accurately express his view. He suggested that the latter part of the sentence should read: "would state the general principles governing the question of participation in multilateral treaties of a general character".

It was so agreed.

53. Mr. LIANG, Secretary to the Commission, referring to the ninth sentence in paragraph (1), wondered whether it was necessary to introduce the idea of forfeiture, which might imply the question of prescription.

54. The CHAIRMAN suggested that the word "forgo" should be substituted for the word "forfeit" in paragraph (1) and the words "or forfeited" be deleted in paragraph (3).

It was so agreed.

55. Mr. TUNKIN suggested that the words "or intended to create norms of international law" be substituted for "norm creating character" in paragraph (5).

It was so agreed.

56. Mr. TUNKIN pointed out, in connexion with paragraph (7), that participation in the conference was not essentially a political problem, but might also be a legal one.

57. The CHAIRMAN, speaking as Special Rapporteur, said that the point had in fact been made during the discussion, but he would suggest that the words "this was essentially a political, not a legal problem, because" and the words "on the political level" be deleted in paragraph (7).

It was so agreed.

58. The CHAIRMAN said that he wished to add at the end of the commentary a paragraph stating that the section on signature remained to be completed by one or more articles on the legal effects of signature, which the Commission had been unable to consider at the current session.

It was so agreed.

59. Mr. LIANG, Secretary to the Commission, said that he had thought that the Special Rapporteur had agreed to introduce a paragraph relating to the practice of the United Nations, based on the document submitted by the Secretariat (A/CN.4/121).

60. The CHAIRMAN replied that to do so would upset the balance, because it would be stated that opinions had been divided and the Commission had thought it better to revert to the question later. The Secretariat paper would of course remain in the Commission's records, but should not at that stage form part of the report.

It was so agreed.

CHAPTER IV: OTHER DECISIONS OF THE COMMISSION (A/CN.4/L.83/ADD.4)

61. The CHAIRMAN invited the Commission to consider the chapter of its draft report entitled "Other decisions of the Commission".

62. In section I he would prefer the phrase "may, however, be affected by" to be substituted for "will, however, depend in large measure upon", which was too strong.

It was so agreed.

Chapter IV of the Commission's draft report (A/CN.4/L.83/Add.4), as so amended, was adopted.

The meeting rose at 12.40 p.m.

523rd MEETING

Thursday, 25 June 1959, at 9.50 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.1-7, A/CN.4/L.84) (*continued*)

CHAPTER III: CONSULAR INTERCOURSE AND IMMUNITIES (A/CN.4/L.83/ADD.5-7, A/CN.4/L.84)

III. TEXT OF DRAFT ARTICLES AND COMMENTARY

1. The CHAIRMAN asked the Commission to discuss and vote on the articles on consular intercourse and immunities submitted by the Drafting Committee (A/CN.4/L.84); he added that, as the full draft would be discussed at the twelfth session, the adoption of any text at the current session should be regarded as provisional.

2. Mr. EDMONDS said that he had consistently abstained from voting on texts which he had not had sufficient time to study. He had abstained in the votes on most of the draft articles concerning the law of treaties (A/CN.4/L.83/Add.1 to 3) for that reason, and would abstain from voting on the articles on consular intercourse and immunities.

DEFINITIONS ARTICLE

3. The CHAIRMAN observed that the definitions article had not been discussed by the Commission, but the Special Rapporteur's initial draft (A/CN.4/108) had been examined and amended by the Drafting Committee.

4. Mr. ZOUREK, Special Rapporteur, explained that the definitions article must necessarily be provisional, since a uniform terminology would have to be derived from the articles when they were examined as a whole at the next session.

5. Mr. YOKOTA said that it would be premature to vote even provisionally on an article which had never been discussed by the Commission. Certain definitions such as those of "consul" and "consular officials", were not wholly acceptable.

6. Mr. ZOUREK, Special Rapporteur, said that he would explain in the commentary that the definitions had been adopted purely provisionally and that the Commission would decide when it had considered all the articles whether some of the definitions might be simplified, whether any further definitions should be added, or whether any should be deleted. He would also explain that certain terms, such as those mentioned by Mr. Yokota, might need revision.

7. Mr. TUNKIN said that, if that explanation were placed in the commentary, the Commission could vote on the article.