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Summary record of the 369th meeting

Topic:
Law of Treaties

Extract from the Yearbook of the International Law Commission:-
1956, vol. I

asked the Commission required an answer so that he would be able to continue his work.

68. The question whether a codification of the law of treaties should take the form of a convention or of a code was a thorny one. In all cases up to the present the Commission had presented texts in conventional form and had always recommended to the General Assembly what action to take, whether to take note, to accept the text, or, as in the case of the law of the sea, to convene an international conference. In the case of the law of treaties, the Commission had hitherto had a convention in view, as the rules has been drafted in that form. Sir Gerald Fitzmaurice had quite rightly asked the question, since the way in which he drafted the articles would depend on the Commission's decision. The idea of a code was not unacceptable, as a code would not require approval, but might be regarded as a scientific work for States and those concerned with international law to use in interpreting treaties. As the conventions drafted by the Commission were very rarely accepted, the idea of a code of treaty law was to be welcomed.

69. With regard to the second question, he agreed that the Commission might well go further than it had, and that detailed articles might be useful. The Special Rapporteur's report [26] reminded him of an excellent work by Bittner,[27] which went into great detail on the law of treaties and had thus proved extremely useful. The detail introduced by the Special Rapporteur, particularly the definitions in article 13, would provide a very valuable practical guide to the framing and conclusion of treaties. There was not always complete agreement on the terms defined in that article.

70. It was very hard to decide whether the absolutely fundamental principles of treaty law should be set out at the beginning of the code. That might perhaps be useful, but, if it was subsequently found unnecessary, the general principles might be included in the appropriate place.

71. With regard to the fourth question, he did not think that a combination of the methods suggested would be wise at the outset. As Mr. Amado had observed, there was a radical difference between treaties proper and exchanges of notes. The two topics were better separated, at least in the early stages of the work, and the Commission might subsequently decide whether they could be combined.

72. The Commission had already decided for the time being not to deal with treaties made by and with international organizations. Some attention should undoubtedly be given to the topic, but the matter of main importance was that of treaties between States, which should be dealt with first. The position of treaties by international organizations was not yet wholly clear, and so should be examined separately. It should not, of course, be discarded altogether, since the purpose was to draft a complete code covering all existing institutions.

The meeting rose at 1.05 p.m.

[26] A/CN.4/101.

[27] L. Bittner: *Die Lehre von den Völkerrechtlichen Vertragsurkunden*, 1924.

369th MEETING

Monday, 18 June 1956, at 3 p.m.

CONTENTS

Chairman: Mr. F. V. GARCÍA-AMADOR.
Rapporteur: Mr. J. P. A. FRANÇOIS.

Present:

Members: Mr. Gilberto AMADO, Mr. Douglas L. EDMONDS, Sir Gerald FITZMAURICE, Mr. Shuhsi HSU, Faris Bey el-KHOURI, Mr. S. B. KRYLOV, Mr. Radhabinod PAL, Mr. Carlos SALAMANCA, Mr. A. E. F. SANDSTRÖM, Mr. Georges SCELLE, Mr. Jean SPIROPOULOS, Mr. Jaroslav ZOUREK.

Secretariat: Mr. LIANG, Secretary to the Commission.

The law of treaties (item 3 of the agenda) (A/CN.4/101) (*continued*)

1. The CHAIRMAN invited the Commission to resume its discussion of the Special Rapporteur's report on the Law of Treaties (A/CN.4/101) in the light of the questions he (the Special Rapporteur) had put to the Commission at the previous meeting.[1]

2. Mr. KRYLOV said that he would not so much reply to the Special Rapporteur's questions as express his general feelings about the points raised in them.

3. He entirely agreed both that the codification of the law of treaties should take the form not of a convention, but of a code, which could better express the conclusions reached, and that the code should be presented in the form of a study of the successive stages in treaty-making.

4. He also agreed that a statement of certain fundamental principles of treaty law, such as those set out in articles 4-9, should precede the remainder. He had, however, some doubts with regard to the emphasis laid on executive acts in article 9 and the undue distinction drawn between the rules of international and of constitutional law. Acts of the cabinet or of the Head of State would always have to be consistent with constitutional law.

5. He agreed with the proposal that the code should be drafted in language such as to cover all kinds of treaties, including exchanges of notes and agreed memoranda.

6. With regard to the fifth question, he believed that Sir Hersch Lauterpacht had acted wisely in deciding to depart from the Commission's decision at its third session and in including, not only treaties between States, but also treaties made by and with international organizations.[2] The United Nations had already reached that point, as might be seen from the fact that it included such treaties in the United Nations Treaty Series. He, himself, in compiling the six volumes of the treaty series of the

[1] A/CN.4/SR.368, para. 47.

[2] A/CN.4/L.55.

Union of Soviet Republics had even included *communiqués*, which were not treaties in the strict sense, but lay somewhere between treaties and declarations, as they were usually couched in very abstract terms. He had, of course, placed them in a separate section of the series. The inclusion of every possible relevant international document was necessary in order to give a full and accurate picture of the contemporary situation with regard to international instruments.

7. His main misgiving with regard to the Special Rapporteur's report was the undue detail. The Special Rapporteur had drafted forty-two articles, whereas the Harvard Draft Convention had only thirty-six, the Havana Draft only twenty, and Sir Hersch Lauterpacht's draft only eighteen. The Special Rapporteur's five articles dealing with the absolutely fundamental principles of treaty law were necessary and extremely well drafted, but thirty more articles dealing merely with the conclusion of treaties was too many. Indeed, the Special Rapporteur's second question suggested that he had not yet decided how many there would be. True, he was drafting a code, not a convention, and domestic codes often contained a vast number of articles; for example, the French Civil Code had some 2,200. But what the Special Rapporteur had in mind was an international code.

8. One example of unnecessary detail was to be found in article 10—definition of validity. No doubt such detail useful in a textbook for law students, but chanceries and diplomats would not appreciate the subtleties of the distinction between formal validity, essential validity and temporal validity, as they were far more interested in the political aspects. He was aware that English jurisprudence was fond of definitions, but to continental jurists such complex definitions seemed too cumbersome.

9. The Special Rapporteur had brought up an intricate question in dealing with reservations. Reservations had caused many differences of opinion, and the International Court of Justice had taken up a position which differed considerably from that adopted by the International Law Commission. The Commission's view had been somewhat rigid, as it had been dealing with reservations in the abstract, whereas the Court had had to deal with them in practice. The United Nations Secretariat had studied the questions of reservations and had followed the practice of the League of Nations, whereas many legal experts and many representatives to the United Nations defended the practice of the Pan-American Union, which was more liberal and tended towards universality. The question, of course, applied only to multilateral treaties; reservations to bilateral treaties were too rare to matter.

10. The Special Rapporteur's report showed a great advance on that of Sir Hersch Lauterpacht, who, in his insistence on such matters as the capacity of the parties and of their agents,[3] had simply been repeating matters with which all jurists had been fully familiar ever since the Peace of Campoformio. The Special Rapporteur should, therefore, concentrate on the five main principles, but not go into great detail. He should try to follow the example of Leo Tolstoi and condense his articles as much as possible.

11. Mr. PAL was somewhat reluctant to answer the questions asked by the Special Rapporteur, because it seemed undesirable to impose a programme on him. There might be a danger of the programme superseding the Rapporteur's personal methods.

12. He entirely agreed with the suggestion in the Special Rapporteur's first question. Although a treaty by its very nature appeared to be the creature of the will of the parties, the very fact that a product of such will could be regarded as having binding force on the parties independently of any continuing support from that will meant that its binding force must be recognized as being based on something higher than the mere will of the agreeing parties—i.e., on some higher principle, whose formal source of strength was accepted as founded, in the last resort, on a precept imposed from outside. Even if the view was inescapable that such principles themselves had once been created by the will of the people, they continued in force independently of the will of the subject of the law which they sustained. The form proposed by the Special Rapporteur would have the particular merit of bringing out the play of some such higher principle.

13. He agreed with the Special Rapporteur that the law on the subject should be formulated in more detail in the articles rather than in the comments. Footnotes, interpretations and reinterpretations very often had the effect of diluting the intended force of the law. True, no formulation of law could do full justice to the complexities of motive which often came into play. Comments might therefore become unavoidable. When formulating rules, however, it was always preferable to try to visualize the entire field to be covered and to make the rule as precise as it could be made if the whole field was to be covered, without, of course, sacrificing the requisite elasticity. He therefore agreed with the Special Rapporteur's second suggestion.

14. He also believed that the formulation of fundamental principles of treaty law was essential and would not detract from the presentation, if placed early in the draft. The consideration of those principles at an early stage would be of great help to the Commission in its discussion of the remainder of the code.

15. The method proposed of drafting the articles in such language as to cover all kinds of treaties by one and the same form of words would be acceptable, provided the treaties to be covered were clearly defined.

16. With regard to treaties made by and with international organizations, the view taken by the Commission at its third session might well be maintained.

17. In considering the way in which the Commission's work on the subject should be presented for acceptance by Member States, article 23 of the Commission's Statute would be relevant. Sub-paragraphs 1 (*b*) and 1 (*c*) would give the only possible methods—namely, to take note of or adopt the report by resolution, or to recommend the draft to Members with a view to the conclusion of a convention. The latter might require adoption by a majority vote, but the Commission's findings might not

[3] A/CN.4/63, Section I.

be acceptable to all States in the form proposed. Unanimity would, however, be desirable.

18. Although detailed comment on the articles would not be proper at that stage, he wondered whether article 8—Classification of treaties—was appropriately placed among fundamental principles; it might be better placed in part I, section A. He would reserve any further criticism of detail until the Commission came to consider the articles separately.

19. Mr. SALAMANCA observed that all members of the Commission appeared to agree that the methods proposed by the Special Rapporteur would enhance the prestige of the Commission's work, inasmuch as it would show a general harmony of views among representatives of the different legal systems. The Special Rapporteur had drafted his first three questions extremely well and should be given a certain amount of latitude as to the best way of presenting his material for discussion.

20. The use of language such as to cover all kinds of treaties by one and the same form of words might give rise to difficulties. To establish general rules for all kinds of diplomatic instruments would be very difficult. For example, the so-called Monroe Doctrine had been given a fresh interpretation by each succeeding United States Secretary of State; its scope was uncertain and it did not in any case have the validity of a treaty.

21. He was not sure whether the rules for bilateral treaties could be extended to other treaties. One of the main problems in connexion with bilateral treaties that had arisen in recent years was their excessive number; many chanceries no longer knew precisely what their obligations were.

22. The Commission would have to reconsider its decision [4] at its third session to leave aside treaties made by and with international organizations, although Sir Hersch Lauterpacht had later included them in his report.[5] It was a moot point whether multilateral treaties made by and with international organizations should be included. Some of those organizations had their own specific characteristics and might be placed under appropriate rules. When the articles came to be discussed in detail, the Latin American members would undoubtedly bear in mind the Havana Draft Convention.

23. Mr. HSU said that the Special Rapporteur's first and second questions really concerned a matter of style on which he should exercise his personal taste. The particular point at issue would probably dictate whether an article should be concise or detailed. He himself preferred precise and concise drafting, but the text might perhaps be made rather fuller in its draft form, since it was always easier to cut down a text than to expand it. The only decision required was whether treaties made by and with international organizations should be included. Sir Hersch Lauterpacht had rightly included them, despite the Commission's previous adverse decision. Since international organizations existed as entities and had treaty-making capacity, provision should be made for them, even though there was not as yet very much upon which to base rules of customary law. Such rules might, however, be developed on the basis of the principles governing the relations between States. The Special Rapporteur had rightly pointed out that entities that did not possess treaty-making capacity should be excluded.[6]

24. Mr. FRANÇOIS did not entirely agree with Mr. Krylov that the report was too detailed. Mr. Krylov had argued that articles should always be as concise as possible; but he himself wondered whether that principle should be applied to the present report and whether the articles should be limited to a statement of general principles. The experience of the Institut de droit international was a case in point. In 1955 and 1956 its rapporteurs dealing with the interpretation of treaties had begun by proposing that fairly detailed rules should be adopted. Only one or two general principles, which met universal acceptance, had, however, been adopted and those principles were so general that they were of no real value. Misgivings had been expressed that if the Institut continued along such lines, its prestige would suffer, since its work would make little contribution to the development of international law. The Commission's real duty was to codify international law, not to lay down principles of international law which had already been accepted. For codification considerable detail was required, and if the Commission failed to go into detail, it would not be fulfilling the task given it.

25. There was almost unanimous acceptance of the matters raised by the Special Rapporteur in his first, second and third questions. In his fourth question, the Special Rapporteur had asked whether the articles should cover only treaties or also exchanges of notes and agreed memoranda. He himself was strongly in favour of considering forms of arrangements other than treaties in the strict sense, since they took the same form as treaties, except that they did not need to be ratified. Those other forms had been adopted mainly in order to avoid the need for parliamentary approval.

26. A case in point was embodied in the Netherlands Constitution. Until 1920, only treaties dealing with certain matters had required parliamentary approval. A democratic trend had set in in that year and the government had proposed that all conventions, regardless of their form, should be submitted to the States-General. The States-General had rejected the proposal because they had feared that they would be overburdened with minor details if called upon to approve all such arrangements. The bill had therefore been amended so that only treaties *stricto sensu* had to be submitted to the States-General for approval and others would merely be communicated to them. The result had been that whenever the Government had not wished to submit an arrangement to the States-General, that arrangement had been concluded in the form of a protocol or an exchange of notes. When the Constitution had been revised in 1952, it had been generally recognized that that situation was intolerable. Under the new Constitution all arrangements had

[4] A/CN.4/SR.85, para. 10.

[5] A/CN.4/87.

[6] A/CN.4/101, p. 44, para. 3.

to be submitted to the States-General. Fresh difficulties had arisen, which would undoubtedly also plague the Special Rapporteur. Owing to the number of arrangements in writing intended to have binding force, but which could not be regarded as treaties, such as the acceptance of a diplomatic agent or the request by aw arship to enter a port and the reply thereto, it was evident that some distinction had to be made; but so far it had proved impossible to discover a definition which would exclude such instruments, and in practice each particular case had been dealt with on its merits. It was to be hoped that the Special Rapporteur would be able to find some way to delimit those arrangements which should be assimilated to treaties.

27. He had some doubts about the inclusion in the proposed code of treaties made by and with international organizations, not because he did not think that the question was not a very important one, but because the question of their treaty-making capacity was only at the beginning of its development. International organizations such as the United Nations, supra-national bodies such as the European Coal and Steel Community, and specialized agencies such as the United Nations Educational, Scientific and Cultural Organization had in fact concluded treaties, and it seemed very probable that that development would still continue.

28. There was too, the question of the arrangements concluded with governments by great international trading corporations. They were hardly contracts in civil law, but must be considered as something intermediate between a contract and a convention. It was becoming almost impossible to continue to regard such large corporations as private institutions. Indeed it had been recognized that they had a right to appear, at least before arbitral tribunals, as *personae stantes in judicio,* even if they were not yet entitled to appear before the International Court of Justice. If they wished to appear before that Court, at least from the formal point of view, the State was the party to the suit, but there had already been several cases in which States in effect had considered that that was a mere formality and that the large corporation, not the State, was *dominus litis.* The Permanent Court of Arbitration had already drawn the necessary conclusions from that development and had recognized that disputes between States and such corporations might be heard before it. That was a new form of international institution, although it could not yet be said to be on quite the same footing as a State, and its new status would undoubtedly be reflected in legislation also. It might therefore be inopportune for the Commission to consider at that stage whether international organizations should be covered by the code from the outset. It would be more advisable to confine the code to relations between States and, when it had been completed, to consider whether the rules might be extended to international organizations. Provisionally the code should deal with relations between States only, and therefore the question of whether it should cover treaties made by and with international organizations should be left aside for the moment.

29. Faris Bey el-KHOURI agreed with the Special Rapporteur that, in general, codification should take the form, not of a convention, but of a code. Draft articles dealing with the law of treaties should fall into two sections, the first dealing with procedural matters and the second—of greater importance—with the topic of validity; i.e., it should be a study of the conditions necessary for ensuring the validity of treaties and, in particular, the avoidance of any defects that might give rise to subsequent difficulties of interpretation. In order to facilitate the task of the International Court of Justice, which was the competent court of appeal in such matters, the Commission's draft should be based on fundamental considerations. Unless that were done, the Court might well be obliged to declare void a treaty concluded along the lines recommended by the Commission.

30. Further, on the analogy with contracts between individuals in private law, which must be concluded between majors, inter-State treaties should be concluded between equal and independent States and not between such a State and, for instance, a Protectorate. History contained numerous examples of treaties concluded between powerful States and weaker States which were in practical subjection to them. There was also the case of agreements between two States for the division of the territory of a third State into zones of influence, which they would share, without the State concerned being aware of the matter. That, too, should be covered; it should be a basic principle that rights under treaties should be confined to the parties.

31. Again, in some countries it was the practice that treaties must be ratified by Parliament. There was also, however, the possible case of a ruler enjoying power *de facto* but not *de jure* concluding a treaty which, on his fall from power, might be denounced. In view of the changed world situation all those points must be borne in mind. The world looked to the Commission to safeguard the rights of mankind, in particular of subject peoples and under-developed countries. There should be no question of any possible imposition of treaties by one State on another.

32. He was opposed to the application of the proposed code to international organizations if only for the reason that, whereas the validity of treaties could be decided by the International Court of Justice, no such provisions existed in respect of agreements to which international organizations were parties; no judicial court existed for such a purpose.

33. The CHAIRMAN, speaking as a member of the Commission, said that the Special Rapporteur's first proposal that a codification of the law of treaties should take the form of a code *stricto sensu* was fully justifiable. In preparing such a code, the Commission would be called upon to establish and define certain general principles regulating the law of treaties in a manner analogous to the General Part of any international treaty.

34. Two points in particular called for attention. The first was the question of the validity of treaties, in particular of multilateral treaties in respect of third parties. Under the League of Nations, the binding force of certain instruments of an administrative nature had been recognized in respect of non-parties, and, theoretically at least, article 2 of the United Nations Charter had recog-

nized a similar extension of the binding force of the principles contained in the Charter.

35. The second point was the desirability of including the counterpart of paragraph (7) of article 5 of the draft, the principle of *rebus sic stantibus*. There would almost certainly be opposition from countries which regarded such a question as taboo. Nevertheless, in view of the provisions of Article 14 of the Charter, the enunciation of such a principle would be fully in harmony with the trend of contemporary opinion.

36. With regard to the scope of the code, the question was linked with the problem that arose in respect of State responsibility—namely, the type of instrument to which the code would apply, bearing in mind the evolution of juridical concepts. For that reason it would be essential to select a method that would keep the whole picture in focus.

37. With regard to treaties between States, he supported Mr. François's opinion that the draft code should apply not only to formal treaties and conventions but also to other written instruments [7] in so far as they expressed the will of the States concerned. The latter category, of course, formed a very much larger group than the former.

38. The question of the application of the code to international organizations would have to be considered in due course. In respect of treaty-making, international organizations constituted an ill-defined category. There were not many examples of international agreements concluded by such organizations, but he had in mind the 1947 Geneva draft charter for the International Trade Organization to which entities not having the status of States had been signatories without the intervention of the metropolitan power; the General Agreement on Tariffs and Trade (GATT) was a similar instrument. Such agreements would be regarded as valid, subject to the recognition of the authority to sign of the entities concerned. Such variations of the classical form of international treaty must certainly be borne in mind.

39. There still remained, however, the case mentioned by Mr. François of entities that were neither States nor international organizations as commonly understood. To the best of his belief, under the League of Nations, a European railway company had signed an agreement with a number of States which contained a provision to the effect that registration of the agreement should take place at the Secretariat of the League of Nations. If his recollection was correct, that implied that, although one of the parties concluding an agreement was a private legal person, the agreement was registered by the League of Nations as an international convention.

40. Mr. EDMONDS, giving his first impression of the report on the law of treaties, said that he was in entire agreement with the Special Rapporteur's suggestion that the draft should take the form of a code rather than a convention. His (the Special Rapporteur's) analysis of the question represented an advance on the approach of his predecessors.

41. The third question raised by the Special Rapporteur was merely a matter of arrangement. He would favour giving an early place to fundamental principles of treaty law in respect of conclusion.

42. Mr. François' interesting comments on the development of the situation in the Netherlands indicated that it was the reverse of that in the United States, where for political reasons the Senate had adopted the firm policy that every agreement that was in any way binding upon the United States should be submitted to that body for approval. Admittedly, a strict interpretation of that doctrine would lead to an impossible situation.

43. So far as was possible, the Commission's draft should be applicable to whatever form an obligation might take; that was better than attempting to distinguish between the different kinds of treaty. He was in favour of a thorough study of a comparatively restricted field. The subject itself was a very large one, and it would be inadvisable to consider at the outset agreements made by and with international organizations. To cover adequately the subject of agreements between States would be a considerable enough task; if, subsequently, it were possible to extend the study to other bodies, that would be all to the good.

44. Mr. SANDSTRÖM said that the Special Rapporteur's choice of the code form was undoubtedly wise. Despite the fact that certain questions could be appropriately dealt with in a convention, generally speaking, the subject lent itself better to code form.

45. Agreement on that question to a great extent provided the answer to the Special Rapporteur's second question with regard to the detailed treatment of the draft articles. A much more important issue was that of the degree of expansion: on that, he was inclined to share Mr. François' view that the draft should not be confined to general principles.

46. While accepting the idea that a code on the law of treaties should take as its starting point the topic of conclusion, he doubted the wisdom of inserting basic principles at the beginning, especially those dealt with in articles 4-7. Those aspects would in any case be touched upon subsequently when considering the effects of treaties, and would be better dealt with at that stage. The natural place for article 8—Classification of Treaties, and article 9—The Exercise of the Treaty-making Power, was certainly at the beginning of the code.

47. The Special Rapporteur's fourth question could be resolved more easily when the draft had been studied as a whole and the treatment to be given to the different types of instrument could be better appreciated.

48. As to the fifth question, he would endorse Mr. François' viewpoint. The evolution of agreements made by and with international organizations was so uncertain that it would be wise to assess more positively the trend of events before attempting to make a definite pronouncement. It would certainly be premature to include such agreements in a general law of treaties. A final decision as to whether international organizations should be covered should, however, be taken later.

49. Mr. ZOUREK said that it was a pleasure to see in the report on the laws of treaties such a promising

[7] See para. 26 above.

approach to a subject that hitherto the Commission, through no fault of its own, had been obliged very largely to neglect. He was hopeful that that approach would provide a satisfactory solution to the different problems.

50. With regard to the first question raised by the Special Rapporteur, the Commission could choose between a re-statement of the practice of States, irrespective of the General Assembly's approval of its conclusions, and codification of the law of treaties in the form of draft articles. The latter course would be more in accordance with the Commission's terms of reference; moreover, the question of approval by the General Assembly was of importance in view of the desirability of subsequent approval in the form of an international convention. Otherwise, the practical value of the code would be diminished. However, even approval by the General Assembly without the conclusions of an international convention would represent progress.

51. On a point of terminology, he would prefer the more flexible title " rules " rather than " code " which, with its implication of obligation, seemed to promise more than the Commission could guarantee. There were, moreover, precedents in international practice for the use of the word " rules ".

52. With regard to the second question, he would suggest that the draft might be shortened by transferring definitions or discussion of certain points of principle to the comment. That, however, was a question of final presentation.

53. The third question called for a positive answer, for the solution of the problem of the fundamental principles of treaty law would at least affect to some extent the whole aspect of the validity of treaties. The articles dealing with those principles could be usefully completed by a provision referring to the voiding of treaties in cases of acts the commission of which entailed conflict with the fundamental principles of international law, as was contained in the draft reports of Sir Hersch Lauterpacht.[8] Admittedly the validity of treaties would be dealt with in a subsequent report; it would, nevertheless, be valuable to include in the articles dealing with fundamental principles an expression of the will of the parties concerned, and the use of violence or threats of violence against a State as a basis for voiding a treaty should certainly be retained.

54. With regard to the fourth question, he would favour a combination of the methods of covering all kinds of treaties by one and the same form of words and devoting special sections to certain particular classes of instruments. The first method alone raised too many difficulties, whereas restriction to the second would lead to duplication. There would be an advantage in grouping in one part provisions of general scope and in separate subdivisions rules in respect of the different types of treaty.

55. Mr. François had referred to the difficulty of restricting the scope of the title " treaties"; it was admittedly a difficult task, but one that must be tackled. He recalled that after the Second World War some international agreements were expressed in the form of *communiqués* rather than formulated with all the paraphernalia of a solemn convention. That was the type of case that Mr. Krylov had in mind.[9] *Communiqués*, although usually descriptive or declaratory, might also contain certain elements of international agreement.

56. Oral agreements should probably be disregarded for the time being. The problem was a delicate one and difficulties had arisen in the past and would probably occur in future. The case he had in mind was the precise juridical value of an oral agreement made on some subject of minor importance by, say, an ambassador and a Foreign Minister.

57. With regard to the fifth question, the issue was not only one of principle, but also one of scope. In that respect, the Commission's attention should be concentrated first on treaties between States. The question of treaties made by and with international organizations could be considered later when the whole subject came to be examined more fully.

58. Reference had been made during the discussion to treaties concluded between States and large commercial or industrial undertakings. Whatever might be the size of the interests involved, such agreements did not fall within the domain of public international law. There were many possibilities that could be covered by such agreements, such as the delivery of arms to a State, the construction of fortifications or the renting of a free zone in a port; but such agreements could not be taken out of their proper field of international private law. Reference to such problems could conveniently be made in the comment.

59. The subject, as defined by the Special Rapporteur, was a vast one and raised a number of highly controversial issues. One such issue, already referred to by Mr. Krylov, was that of constitutional limitations on the exercise of the treaty-making power.[10] According to the Special Rapporteur, treaty-making was, on the international plane, an executive act.[11] Whatever legislative processes had to be gone through to make such an act effective on the domestic plane, on the international plane the act was authentic. In other words, a treaty, even though irregularly concluded from the constitutional standpoint, would be valid internationally. Such a theory, though enjoying the support of a number of distinguished workers, was, in his opinion, out of tune with the needs of present-day international life and had never been the accepted opinion on the matter. A treaty concluded in violation of constitutional requirements should be regarded as internationally invalid. The distinction drawn in the report between constitutional and international law which, in that matter, went back to constitutional law, was, as Mr. Krylov had said, too rigid.

60. The question of reservations to multilateral treaties was another controversial point. It had to be borne in mind that treaties were frequently based on drafts pre-

[8] A/CN.4/63, A/CN.4/87.

[9] See para. 6, above.

[10] See para. 4 above.

[11] A/CN.4/101, article 9, page 18.

pared and adopted by assemblies on the principle of the majority will and not, as in the past, on that of unanimity. Thus the States in a minority had no other choice but to enter reservations. A solution to that difficult problem might be found on the lines of the advisory opinion given by the International Court of Justice on reservations to the Convention on the Prevention and Punishment of the Crime of Genocide.[12] The practice of the Organization of American States in that respect was to be preferred to the former practice of the League of Nations.

61. A further question, already mentioned by the Chairman, was that of the doctrine of *rebus sic stantibus*, without which it was impossible to account for the fact that certain treaties which had never been denounced or annulled were, none the less, no longer regarded as valid by the parties to them. The very abuse which had been made of the doctrine was a further reason for regulating the conditions under which it might be applied.

62. Mr. SPIROPOULOS said that, while adhering to the views he had expressed at the previous meeting,[13] he wished to raise a question relating to the Commission's method of work. He fully agreed that the work on the Law of Treaties should take the form of a code, that was, something more on the lines of a domestic code and going into greater detail than a draft convention. A code of that kind need not be accepted by States in so many words. Under article 23 of its Statute, the Commission might recommend that the General Assembly merely take note of the code or even take no action at all, the document having already been published.

63. The preparation of a code was, however, something entirely new for the Commission, which had hitherto been concerned with the preparation of draft conventions. Like Mr. Krylov, therefore, he thought it dangerous to enter too far into theoretical questions and attempt to define in too great detail. Though the Special Rapporteur could undoubtedly produce a masterly treatise on treaties, it would be another thing to obtain the approval of all fifteen members of the Commission for every detail in that work. Was it really wise, or necessary, for instance, to go into a detailed definition of a State, to raise the question of subjects of international law or to go into detail regarding validity, full powers, participation and accession? He wondered in fact whether a definition such as that of validity was even given in the law governing contracts in domestic civil codes. Such codes did not generally seek to define everything. They assumed a certain amount of knowledge and left a great deal to case law. He accordingly felt it inadvisable for the Commission to go farther than the average domestic code and plunge into the general theory of law. Detailed matters of definition could, if necessary, be dealt with in the commentary on the articles.

64. Mr. LIANG, Secretary to the Commission, said that the drafting of a code such as that suggested by the Special Rapporteur would mark a turning-point in the work of the Commission, which had hitherto been largely concerned with the preparation of draft conventions for submission to the Assembly. The question was not so much one of form, since the Commission, though bound under article 20 of its Statute to prepare its drafts in the form of articles, was perfectly free to entitle a set of articles " code ". The question was the action to be taken with regard to the code. The division of the work of the Commission into two sections, codification and development, which the Secretariat was, he believed, the first to recommend in 1947, now showed itself to be justified. One of the considerations prompting that division had been that there was no point in submitting draft conventions to governments on subjects which were of no immediate interest to them. Very few governments, for instance, would be interested in signing or ratifying a convention on the theory and procedure of treaty-making. Presumably the Special Rapporteur was thinking on those lines, for, without explicitly saying so, he appeared anxious to avoid submitting a text in the form of a convention for adoption by States and thought it would be more useful to produce a code or set of rules which could be consulted by States and contribute to the development of international law.

65. On the question whether the code should enter into details, he found the views of Mr. Krylov and Mr. Spiropoulos difficult to accept. If the code was not to be submitted for ultimate adoption in the form of a draft convention, Mr. Spiropoulos' objections to entering into detail would appear to be unjustified. Judging from the material in existence on the subject, a code would be of practically no use unless it went into detail. Bittner's work,[14] for example, which was frequently consulted by governments, was highly detailed. The twenty articles of the Havana Convention of 1928, on the other hand, were so general that, from his own experience, they would not stand up to close analysis. That was perhaps why States had had no difficulty in adopting them and had found little use for them since. The Harvard Draft Convention of 1935 was useful, not so much for the actual articles as for the wealth of material that it contained. The text produced by the Institut de droit international, which had condensed the whole question into three articles, failed to cover the whole field of treaty-making—a field so wide that it might be said to include not one, but a number of subjects. The interpretation of treaties, for example, might well be as vast a problem as the responsibility of States, and the operation and termination of treaties were also very extensive subjects. If the Commission's object was the progressive development of the question, there would be no objection to taking each part separately and in detail.

66. The question whether the code should also cover treaty-making by international organizations was one in which the Secretariat was naturally very interested. He fully agreed with Mr. Zourek that the principle could not be open to question. International organizations were a part of international life and should be covered by the code. The only question was how to include them. He was not much in favour of the formula adopted by the previous Special Rapporteur of referring to " States,

[12] I.C.J. Reports 1951, pp. 15-69.

[13] A/CN.4/SR.368, paras. 67-72.

[14] L. Bittner, *Die Lehre von den Völkerrechtlichen Vertragsurkunden.*

including international organizations" or "States, including organizations of States". The two entities could not be dealt with as if they were exactly the same thing. It would prove extremely difficult to draft and discuss articles with the twofold application to States and international organizations in mind, and the results of such a procedure might be rather unfortunate. Perhaps the best course would be to draft the articles with reference to treaties between States and then see what changes were required in order to apply them to treaties to which international organizations were parties. A special section might even be set aside for international organizations.

67. Mr. SPIROPOULOS explained that he was in full agreement with the idea of drafting a detailed code. He had merely questioned the advisability, from the standpoint of the Commission's work, of including certain detailed and theoretical definitions.

The meeting rose at 6.25 p.m.

370th MEETING

Tuesday, 19 June 1956, at 9.30 a.m.

CONTENTS

Chairman: Mr. F. V. GARCÍA-AMADOR.
Rapporteur: Mr. J. P. A. FRANÇOIS.

Present:

Members: Mr. Gilberto AMADO, Mr. Douglas L. EDMONDS, Sir Gerald FITZMAURICE, Mr. Shuhsi HSU, Faris Bey el-KHOURI, Mr. S. B. KRYLOV, Mr. Radhabinod PAL, Mr. Carlos SALAMANCA, Mr. A. E. F. SANDSTRÖM, Mr. Georges SCELLE, Mr. Jean SPIROPOULOS, Mr. Jaroslav ZOUREK.

Secretariat: Mr. LIANG, Secretary to the Commission.

The law of treaties (item 3 of the agenda) (A/CN.4/101) (*continued*)

1. The CHAIRMAN invited the Special Rapporteur to reply to the observations by members on his questions [1] and proposals.

2. Sir Gerald FITZMAURICE, Special Rapporteur, said that the Commission appeared to be generally agreed that codification of the law of treaties should not take the form of a convention. His own views on the matter coincided with those of the Secretariat.

3. As regards his second question he was again in general agreement with the Secretariat. While sympathizing with those who had expressed a preference for something precise and short, he thought that, if the Commission was to do more than draft a few very general articles, there was really no alternative but to go into some detail, since significance was bound to be attached to whatever was omitted. He was, however, conscious of the fact that the set of articles was perhaps too long and that there were ways in which it might be condensed.

4. The desirability of including definitions was a point on which he had thought of requesting the views of members of the Commission. He regarded it as a matter of expediency rather than of principle. Some terms which occurred frequently would need to be defined in order to avoid wearisome repetition of certain qualifications in the articles. Other definitions, however, might prove on further examination to be unnecessary. In one sense, he agreed with those who held that the term "State" did not require definition. However, the view put forward by Faris Bey el-Khouri [2] that semi-sovereign and protected entities had no treaty-making capacity rather suggested that it did. He was afraid that he could not agree with that view. In the interests of semi-sovereign entities it was most desirable that they should be free to enter into treaty relations with other countries. And to make that possible, the doctrine that such entities could repudiate past agreements on changing their status must be rejected; otherwise States would be reluctant to conclude treaties with them.

5. The definitions of ratification and accession might be omitted, but in that case certain ideas they contained must be brought into the articles in some other form. The definition of accession had been included to make clear a fact that was not always realized—namely, that it was a course open only to States not signatories to a treaty. Similarly, the definition of ratification had been included to make clear that it was a process gone through only when a treaty had previously been signed. It was not the treaty that was ratified, but the signature.

6. His third question was largely a matter of presentation, on which no final decision need be taken until the work was much more advanced. He was inclined, after hearing the discussion, to omit the articles in question and leave the fundamental principles of treaty law to be elaborated later; otherwise, as some speakers had pointed out, the Commission would certainly be asked why it had not included other principles regarded as equally fundamental.

7. It appeared to be generally agreed that the code should cover every kind of genuine treaty instrument and international agreement, including exchanges of notes and agreed memoranda. Indeed, it would be a great mistake to omit what were now the most frequent forms of agreement, particularly in bilateral negotiations. The only problem was that the language of the articles might be somewhat strained in the endeavour to make them apply to such diverse forms of agreement. It was, in fact, for that reason that he had envisaged devoting a special section to particular classes of instrument. The two approaches might, however, be combined. Since, as

[1] A/CN.4/SR.368, para. 47.

[2] A/CN.4/SR.369, para. 30.