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Summary record of the 480th meeting

Topic:
Law of Treaties

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480th MEETING

Tuesday, 21 April 1959, at 9.45 a.m.

Chairman: Sir Gerald FITZMAURICE

Law of treaties (A/CN.4/101)

[Agenda item 3]

1. The CHAIRMAN said that during its eleventh session the Commission would probably not have much time to spend on item 3 (*Law of treaties*), as it would have to devote most of its time to item 2 (*Consular intercourse and immunities*) and some to item 4 (*State responsibility*). The Special Rapporteur on State responsibility had indicated that he had prepared a fourth report dealing with a particular aspect of the subject which was self-contained and on which agreement might be reached within two or three weeks.

2. He thought the Commission might either deal with articles 37 to 40, concerning reservations, in the first report on the law of treaties (A/CN.4/101) or else consider the articles in their numerical sequence, with the possible omission of articles 4 to 13, which might be held over until later.

3. Mr. SANDSTRÖM proposed that all the time not taken up by the discussion of item 2 be devoted to item 3, since that topic of the law of treaties had been on the Commission's agenda since its establishment.

4. Mr. PAL and Mr. MATINE-DAFTARY agreed with Mr. Sandström.

5. Mr. YOKOTA also agreed, particularly as members elected in 1956 had never participated in the discussion of the law of treaties. They would welcome some general discussion on the scope of the code.

6. Mr. BARTOŠ suggested that most of the available time be given to one of the main subjects on the Commission's agenda, namely the law of treaties. A rapid examination should be given to all the articles, as the composition of the Committee had changed since the subject had last been discussed. He personally was prepared to endorse the earlier majority decisions in almost all cases, but the newer members should be enabled to express an opinion, even on those articles which, it had been suggested, should be held over temporarily. Any divergencies of opinion on such matters should be expressed, since, otherwise, the newer members would have to assume the responsibility for decisions taken before they had become members of the Commission. He did not expect any particular difficulties, since the codification in the report had been done efficiently.

ARTICLES 1 and 2

7. The CHAIRMAN suggested that it would be undesirable to take a decision on the discussion of item 4 (*State responsibility*) until the Special Rapporteur on that topic was present, especially as the Commission had decided, after considerable discussion at its previous session, to place both State responsibility and the law of treaties on its agenda for the current session. He had not suggested that decisions previously taken should be endorsed automatically. He had pointed out, as the Special Rapporteur, when a general discussion had taken place on the first report on the law of treaties, that articles 4 to 9 did not strictly belong to the opening part of the code, but had been included there because the subjects dealt with in them were so important that it might well be thought that they should be placed at the beginning of a codification of the law of treaties. The Commission had decided that they should preferably be dealt with in the proper place. His own feeling that the discussion of articles 4-9 should be deferred was reinforced by the fact that a great deal of material relating to them had been embodied in his fourth report on the effects of treaties (A/CN.4/120). That decision might be taken when the Commission reached article 4.

8. Speaking as Special Rapporteur, he referred to the text of the draft code which he had prepared (A/CN.4/101). He explained that article 1 was intended to indicate the scope of the report. It was not specially concerned with the conclusion of treaties, but with the code as a whole and contained a definition of the term "treaty".

9. Article 1, paragraph 3, might be left aside for the present. The subject of the application of the code to international organizations had been considered fairly carefully by the Commission in connexion with one of the reports by Mr. Brierly. It had been felt that the law of treaties was in itself sufficiently complicated in so far as it dealt with States and that codification would become far too complicated if it also tried to embrace treaties between international organizations or between such organizations and States. It had been decided to discuss, first, the code as it applied to relations strictly between States and to discuss subsequently what modifications or additions to the code would be needed to cover treaties to which international organizations were parties. Questions of drafting might be left until the substance had been thoroughly debated.

10. He had included the proviso that the code did not apply to international agreements not in written form, because Mr. Brierly and Sir Hersch Lauterpacht had held that a code of treaty law could apply only to treaties drawn up in written form. That did not, of course, imply that international agreements could never be concluded verbally. Instances were rare, but had occurred; notably, in the case concerning the Legal Status of Eastern Greenland (1933)[1] the Permanent Court of International Justice had held that international agreements might be made verbally. It would be difficult, however, to frame a precise set of rules for international agreements to which the procedures of signature and ratification did not apply. The Commission might agree that a treaty meant an instrument in writing, without prejudice to the validity of oral agreements.

11. The reference in article 1, paragraph 1, to the two paragraphs of article 2 indicated the two forms of treaties, namely the single instrument, howsoever designated, which was signed by participating countries, and the international agreement embodied in a series of instruments, the most familiar of which was the exchange of notes. Article 1, paragraph 2, had been included in order to remove any doubt about the application of the code to instruments which, although in fact treaties, were not called treaties. The term "treaty" had, in fact, been used in its most compendious sense. True, it would be possible to use the term "international agreements", but that was rather cumbrous and "the law of treaties" was the traditional

[1] Publications of the Permanent Court of International Justice, *Judgments, Orders and Advisory Opinions*, series A/B, No. 53.

name for the subject. The great majority of agreements were now concluded by an exchange of notes rather than by a single instrument.

12. Article 2, paragraphs 1 and 2 (*Definition of "treaty"*) elaborated the ideas set out in article 1, but certain additional phrases had been incorporated and were discussed in the commentary.

13. Mr. BARTOŠ agreed that oral agreements, although not constituting a formal treaty, could exist *ad probandum*. Exchanges of notes, memoranda and the like were now the most usual form of international agreement. Modern practice tended to discard the formal instruments fashionable in the past. The codification of treaty law should certainly correspond to present practice. However, the phrase "international agreements not in written form" (article 1, paragraph 1) seemed somewhat too compressed and might well be redrafted. The validity of agreements not in written form might be left to be determined by judicial or arbitral decision. What was meant in article 1, paragraph 1, was certainly clear from the commentary, but, taken in isolation, that paragraph might not seem flexible enough.

14. Mr. PAL said he found some difficulty in discussing articles 1 and 2, since he was not clear whether the Commission was purporting to state the law which would apply to and affect the existing treaties. If it was, he was not sure whether the Commission intended merely to compile the existing regulations or might in any way depart from them in subsequent articles. If it did so, the validity of existing treaties thought at present valid might be jeopardized and affected injuriously. He would like that to not happen.

15. Mr. ALFARO agreed with the Special Rapporteur's definition of the term "treaty", but thought the reference to international agreements not in written form might be unnecessary and the last sentence in article 1, paragraph 1, might therefore be omitted. That sentence introduced an element of doubt: What was the law applicable to such agreement not in written form? The Commission might consider the advisability of including a special article defining such international agreements after it had completed its work on the code as a whole.

16. Mr. SCELLE agreed with Mr. Alfaro concerning the difficulties of including a reference to international agreements not in writing.

17. In his opinion, the title of the code was inaccurate. From the point of view of continental jurists, "treaties" meant documents drawn up in specific forms and with due solemnity and subject to ratification. It was not clear enough merely to state that all possible international agreements could be included under that title. For example, the word "treaty" could not apply to an exchange of notes; such an exchange constituted an international agreement, but not a treaty properly so called. He would therefore be inclined to alter the title to "Law of Treaties and International Agreements". Moreover, it was equivocal even to ask the question whether an oral agreement could be regarded as a treaty. Such an agreement might be legally valid, but could in no case constitute a treaty in the traditional sense.

18. He further considered there was some unnecessary duplication in the first two articles; article 2, paragraphs 1 and 2, reproduced a number of the provisions of article 1. The fundamental condition of a contractual instrument was reciprocal agreement between the contracting Governments; nevertheless, having reached agreement, the Governments concerned were free to choose the form in which they wished to set forth the instrument. It was possible, moreover, that a code be more suitable than a convention for embodying the law of treaties.

19. Mr. TUNKIN observed that the question whether the law of treaties should be embodied in a code or in a convention had been discussed before in the Commission. The question would undoubtedly arise again, but should not be examined at the present juncture; he therefore reserved his opinion on the subject.

20. With regard to the title of the provisions, he considered that the "law of treaties" was the best that could be found. The addition of a reference to international agreements would not clarify the situation.

21. Mr. Scelle had advanced some interesting arguments, which involved important questions of constitutional law; but the Commission should approach its work from the point of view of international law, on the assumption that constitutional provisions would not be affected. The general title, in which treaties meant agreements between States, was satisfactory from the point of view of international law alone.

22. He agreed with the Special Rapporteur that it was advisable to deal only with agreements between States which were in written form. Oral agreements were very rare in modern times and hence should be disregarded in the discussion, since the drafting of regulations to cover them would only complicate an already complex matter.

23. He doubted whether it was advisable to delete the last sentence of article 1, paragraph 1, as Mr. Alfaro had suggested. The final decision on that point might be reached later, after various other articles had been discussed. It would be useful, however, to retain the sentence for the time being, since otherwise there might be some doubt as to the Commission's attitude towards international agreements not in written form.

24. Mr. PAL did not think a change in the title of the code advisable. The Commission had been instructed to study "the law of treaties", and had undertaken that study. The term "treaty" either did or did not include any international agreement. If it did, then "law of treaties" would embrace it. If it did not, such an agreement would remain outside its scope. In either case, no change in title was called for.

25. He considered that Mr. Alfaro's suggestion to delete the second sentence of article 1, paragraph 1, and Mr. Scelle's suggestion to combine article 1 and article 2, paragraphs 1 and 2, were both drafting points, which should not be dealt with for the time being.

26. Mr. SCELLE said that he maintained his position with regard to the title. The Special Rapporteur himself had stated that treaties properly so called were much rarer than other international agreements; and yet the title "law of treaties" implied that the Commission should deal only with that specific and exceptional form of international agreement. The title should correspond to the actual subject of the code; it might be more satisfactory to use the title "law of international agreements, including treaties".

27. Mr. BARTOŠ said he opposed the deletion of the last sentence of article 1, paragraph 1, since it provides a solution for a difficult problem.

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28. With regard to the title of the code, he observed that the question had been discussed for many years and should not be raised again in detail. Moreover, he was not sure that modern continental practice in the matter of ratification and validity in constitutional law was as rigid as Mr. Scelle seemed to assume. Only recently, the Yugoslav and French Ministries of Foreign Affairs had exchanged instruments ratifying an agreement concerning settlement of debts. The agreement related to the rights of French nationals abroad and its only legal basis was the French Civil Code; nevertheless, the heads of the Yugoslav and French delegations had decided that the agreement and its annexes should enter into force after ratification or approval by the competent authorities of both parties under constitutional provisions. According to Mirkine-Guetzevich, certain new constitutions expressly enumerated the types of treaties and international agreements which required ratification. Under Yugoslav law, which was analogous to that of some western countries, treaties and other international agreements of a military or political character as well as those which involved some amendment to municipal law were ratified by the National Assembly whereas the other treaties and international agreements were ratified by the Federal Executive Council. Thus, it was usually for government authorities to decide whether a particular instrument had to be ratified or not, and the decisive criterion was generally whether or not the international instrument in question affected matters within the domestic jurisdiction.

29. Accordingly, although Mr. Scelle was right in saying that treaties were solemnly concluded and must always be ratified, the same might be true in practice of other international agreements. The fact that the words "treaties and other international agreements" were used in many constitutions did not affect the Commission. The Sixth Committee of the United Nations General Assembly, in making rules for registration of treaties, had not construed the word "treaty" restrictively. Similarly, the Special Rapporteur had used the formula "law of treaties" to mean any instrument by which the States concerned undertook international contractual obligations.

30. Mr. LIANG, Secretary to the Commission, drew attention to Article 102 of the Charter of the United Nations concerning the registration of treaties, which referred to "every treaty and every international agreement . . .". He did not think that the word "treaty" had the same background in international law and in constitutional law; the distinction was further borne out by the reference to "treaties and other sources of international law" in the Preamble to the Charter, for those words were certainly not used in the strict sense in which the word "treaties" was understood in constitutional law. The same was true also of the reference to "the interpretation of a treaty" in Article 36 of the Statute of the International Court of Justice and of the reference to "international conventions, whether general or particular" in Article 38 of the Statute. Accordingly, there were many precedents for the use of the word "treaty" in the generic sense; application of the specific, or constitutional meaning might cause difficulties.

31. Mr. HSU considered that the title should be left in its present form for the time being. While he appreciated Mr. Scelle's difficulty, which was not peculiar to continental jurists, he agreed with the Secretary to the Commission that there was authority for using the word "treaty" in a generic sense.

32. He also believed that it would be unwise to delete the last sentence of article 1, paragraph 1.

33. Mr. YOKOTA agreed that the second sentence of article 1, paragraph 1, should be retained. The validity of international agreements not in written form was not prejudiced by article 1; that seemed to be the correct approach, in view of the Eastern Greenland case, in which the validity of a verbal agreement had been doubted, but had been upheld by the Permanent Court of International Justice.

34. Mr. TUNKIN observed, with regard to the title of the code, that the nomenclature of international agreements was becoming less and less important. The same type of agreement was often given a different title, as might be seen from the United Nations Treaty Series. Moreover, the USSR had recently concluded a consular treaty with Austria, which was analogous to consular conventions concluded with other countries. The simplest solution would be to assume that the term "treaty" comprised all forms of international agreements, or more precisely, all forms of express agreements between States embodied in formal instruments. The alternative would be to entitle the code "law of international agreements", which would avoid possible difficulties with respect to the constitutional law of some States. Personally, however, he would prefer to retain the original title.

The meeting was suspended at 11.25 a.m. and resumed at 11.50 a.m.

35. Mr. AMADO thought that, although the text of the second sentence of article 1, paragraph 1, was generally clear, the use of the word "validity" might give rise to doubts, in view of the many different aspects of the concept of validity. It might be better to say that the obligatory force of such agreements would not be prejudiced.

36. The CHAIRMAN, speaking as Special Rapporteur, summarized the views that had been expressed on article 1 and article 2, paragraphs 1 and 2.

37. The consensus of the Commission seemed to be that the code should apply only to international instruments in written form. Some differences of opinion had, however, arisen on the question whether or not to refer at all to international agreements not in written form. Although the question was primarily one of drafting, he believed that, if the article merely stated that the code related only to agreements in writing, the impression might be created that agreements not in writing were necessarily not valid. The drafting of the sentence might be improved later, but it was important to stress that the code would not affect the situation of unwritten agreements, dependent on general legal principles outside the scope of the code. He agreed with Mr. Amado that the word "validity" might be changed to "obligatory force".

38. In reply to Mr. Pal's question whether the code would apply to existing treaties or only to future treaties, he observed that the point was not peculiar to the subject of treaties. Whatever subject was taken up for codification, the rules codified might or might not apply to existing situations. In the present case, the Commission was concerned with codifying the existing law of treaties, on which treaties already concluded were supposed to be based. The subject was a general one and there was no intention of modifying the effect of the provisions of specific instruments.

39. He appreciated Mr. Scelle's difficulties with regard to nomenclature and had drawn attention to those complications in paragraph 10 of his introduction. It might be possible to change the title to "law of treaties and other international agreements"; that would be better than the words "treaties and international agreements" used in the Charter, which implied that a treaty was not an international agreement. But even if the title were changed, the difficulty of the words to be used in each article would remain, since the use of the whole new phrase would lead to drafting complications; a comprehensive term to cover different types of agreement was essential.

40. He agreed with the speakers who had pointed out that the word "treaty" had both a generic and a specific meaning, the generic meaning being understood to cover international agreements of all kinds. That was yet another reason why the concepts could not be separated. Mr. Scelle had pointed out that a treaty was a particular type of instrument, solemnly concluded and always subject to ratification; those formalities, however, applied only to the conclusion of a treaty, while in other respects, such as termination, operation and effects, certain legal forms applied indiscriminately to all international agreements. Since only in the matter of conclusion was there a clear-cut distinction between a treaty and another international agreement, it was desirable to deal comprehensively with the instruments concerned. The title might, however, be altered, provided it was made quite clear that the change would be for the sake of convenience only. The last sentence of article 2, paragraph 2, moreover, had been included expressly in order to introduce a distinction between treaties properly so called and other agreements.

41. Mr. Scelle had also suggested that article 1 and article 2, paragraphs 1 and 2, might be combined. That could be done, provided that the technical distinction between the scope of the code and the definition of "treaty" was recognized and maintained. He would redraft those paragraphs along the lines suggested and would submit them to the Commission for further discussion in the near future. In that connexion, he drew attention to article 2, paragraph 4, which made it clear that the question whether or not an instrument ranked as a treaty under international law did not affect its status for the purposes of constitutional law. In other words, the fact that the code dealt with instruments which were not actually called treaties did not mean that instruments such as executive agreements should become treaties for national purposes; such agreements were governed entirely by national law. Only international legal principles were dealt with in the code.

42. Referring to article 2, paragraph 3, and to the relevant commentary, he observed that he had felt it desirable to include the paragraph because confusion had sometimes arisen between a treaty and a unilateral declaration which gave rise to an international obligation. The latter, if truly unilateral, could not be considered a treaty or international agreement because the very idea of a treaty implied two or more parties. He had considered it advisable to bring out the distinction in the code, of course without prejudice to the international effect of the unilateral declaration. That, he recalled, had also been the position of Sir Hersch Lauterpacht.

43. Mr. AMADO considered article 2, paragraph 3, somewhat redundant in view of the definition contained in paragraphs 1 and 2, which referred to instruments made between "entities", the plural word clearly excluding a unilateral instrument or declaration.

44. Mr. LIANG, Secretary to the Commission, pointed out the connexion between the present discussion and the declaration accepting jurisdiction mentioned in Article 36 of the Statute of the International Court of Justice. Some writers tended to classify that declaration as an agreement while others viewed it as a form of accession to an existing agreement or treaty rather than as a new agreement.

45. Mr. BARTOŠ observed that there were different kinds of unilateral declarations. There were declarations *urbi et orbi,* and there were declarations addressed to particular States containing an offer accepted by the beneficiaries, for example, declarations made by former suzerain States on the occasion of the accession to independence of dependent territories. Whether such a declaration constituted an international agreement was still controversial and it was a question which the Commission might wish to discuss without necessarily referring to it in the code.

46. Mr. PAL expressed the view that a treaty itself might contain an open offer which, when accepted, would constitute a distinct treaty. The acceptance would in form be unilateral, but it would not be so in substance. He felt that the members of the Commission were agreed in principle and that the difficulty was essentially a matter of drafting.

47. Mr. EL-KHOURI did not think that the International Court of Justice would consider a unilateral declaration binding unless it was accepted by the party to which it had been addressed. As an example, he cited the Joint Declaration by the United States, the United Kingdom and France regarding the frontiers of countries in the Middle East (25 May 1950). He did not think that any international obligation had arisen from that declaration in the absence of a response from the parties in the region concerned.

48. Mr. TUNKIN considered that a unilateral declaration or instrument gave rise to international obligations if there was an express or tacit agreement to which the declaration referred. However, the subject had many ramifications which would be difficult to deal with in a brief paragraph. As the scope of the code was already sufficiently defined in article 1, paragraphs 1 and 2, he did not consider it indispensable to mention unilateral instruments and declarations, especially as the code was to be limited to express agreements. Accordingly, he agreed with Mr. Amado that article 2, paragraph 3, could be omitted.

49. Mr. ALFARO said that he agreed with the substance of the first sentence of paragraph 3, which would cover not only an exchange of notes but also a form of agreement resulting from separate unilateral declarations.

50. He recalled that in 1904 a dispute had arisen between the Governments of Panama and the United States of America regarding the interpretation of the Convention for the Construction of a Ship Canal of 1903. The United States Secretary of War, Mr. Taft, had then proceeded to negotiate an agreement with the Government of Panama, which took the form of an executive order issued by the President of the United States and a decree issued by the Government of Panama. In that case the two instruments, representing a concurrence of wills, had formed the "integral whole" referred to in the first sentence of paragraph 3.

51. The example he had cited showed that a unilateral instrument was capable of constituting a treaty, and therefore it seemed to him that the second sentence of paragraph 3 might be amended to read:

"A unilateral instrument, declaration or affirmation may be binding internationally and may be equivalent to a treaty if it amounts to, or constitutes, an adherence to a treaty or acceptance of a treaty or other international obligation."

52. Mr. AMADO disagreed. There might have been a concurrence of wills in the case cited by Mr. Alfaro, but there had been no treaty in the sense of the single formal instrument described in article 2, paragraph 1.

53. Mr. HSU considered the second sentence of paragraph 3 somewhat contradictory. It seemed to him that an instrument, declaration or affirmation which was binding internationally had to be considered a treaty, even if it was unilateral, though possibly the Special Rapporteur had intended the word "binding" to mean morally binding. The question could not be excluded from a codification of the law of treaties simply because it was difficult. At least some reference to it would have to be made.

54. The CHAIRMAN, speaking as Special Rapporteur, agreed that there were unilateral declarations which, if taken in conjunction with other declarations, created international obligations. That was the case in the examples cited by Mr. Liang, Mr. Bartoš and Mr. Alfaro. The first sentence of paragraph 3 had been drafted with a view to covering such cases, but there might be room for improvement in the drafting.

55. The case he had had in mind in drafting the second sentence of paragraph 3 was that of a purely unilateral declaration, which, although without response, might be deemed internationally binding. If State A made a unilateral statement of its intentions, and States B and C, without formally accepting or recognizing the statement, subsequently acted in a way in which they would not have acted but for the statement of State A, it might be found that State A had assumed certain obligations. It was that case that he had sought to exclude in the second sentence of paragraph 3.

56. He agreed with Mr. Pal that there was agreement in principle, and indicated that he would prepare a new draft in the light of the discussion, either making certain drafting changes in article 2, paragraph 3, or possibly, so amending paragraph 1, as to permit the omission of paragraph 3.

57. Mr. SANDSTRÖM said that a unilateral declaration could not be internationally binding unless it presented an offer to assume obligations towards other States; it could not be binding simply because other States thought that it was binding. The same applied to the acts or announcements of a Government directed to its own citizens.

58. The CHAIRMAN, speaking as Special Rapporteur, said that the word "binding" in paragraph 3 denoted a legal obligation. Treaties were not the only source of international obligations.

59. Mr. TUNKIN observed that the Commission could hardly expect States to accept theoretical formulations of what constituted international obligations. He failed to see the need after positively defining a treaty for specifying what was not a treaty.

The meeting rose at 1.5 p.m.

481st MEETING

Wednesday, 22 April 1959, at 9.45 a.m.

Chairman: Sir Gerald FITZMAURICE

Welcoming statement on behalf of the Director-General of the International Labour Office

1. The CHAIRMAN said that, as members of the Commission were aware, arrangements had been made for the Commission to meet for the remainder of the eleventh session at the International Labour Office in order to facilitate the holding of the Foreign Ministers' Conference at the Palais des Nations.

2. Mr. JENKS, Deputy Director-General of the International Labour Office, welcoming the Commission on behalf of the Director-General, said the International Labour Organisation (ILO) was happy to extend the hospitality of its premises to the Commission firstly because in doing so it would be facilitating arrangements for the Foreign Ministers' Conference on the outcome of which the future of peace and of law in the years immediately ahead might in a significant measure depend, secondly because of the long-standing arrangements whereby in times of stress the United Nations and the International Labour Office pooled their conference facilities at Geneva for the common good, thirdly because of the presence in the Commission of so many old friends of the ILO, and finally because of the International Law Commission's special mandate from the General Assembly to promote the progressive development of international law and its codification.

3. Those who worked for the International Labour Organisation took a certain pride in having made a distinctive contribution to the progressive development of international law. The ILO administered a body of treaty obligations which was perhaps unparalleled in scope and complexity, comprising 111 conventions, 92 of them already in force, which had received 1,892 ratifications and 1,382 declarations of application in respect of non-metropolitan territories, covering 76 countries and 94 territories. It was not too much to say that that body of obligations had had in the course of a generation an impact on the social legislation and social policy of the world which, if it proved to be enduring as the ILO believed it would, would in time be regarded as comparable to that of Justinian's codification on the development of civil law.

4. The ILO had followed with the closest interest the work of the International Law Commission in its bearing of its deliberations on the activities of the ILO. In a number of connexions it had found the Commission's conclusions, notably with respect to reservations to conventions and certain aspects of the law of the sea, of substantial value in its own work. It had every confidence that in future work on such matters as the law of treaties and problems relating to the legal status of international organizations the Commission would keep the special problems of the ILO in mind. For its part, the ILO would be happy to supply any information which might facilitate the Commission's task.

5. The ILO hoped that its facilities would contribute to the success of the session and had no doubt that the Commission's deliberations would constitute a contribution of lasting value to the development of international law.