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Summary record of the 481st meeting

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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, if 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.

6. The CHAIRMAN asked Mr. Jenks to convey the Commission's gratitude to the Director-General of the International Labour Office, and thanked him for his interesting statement on the contribution of the ILO to international law, in particular the law of treaties. By coincidence, the law of treaties was at present the subject of the Commission's substantive discussion. The Commission would be happy in due course to bear in mind the points to which Mr. Jenks had alluded.

7. Mr. LIANG, Secretary to the Commission, speaking on behalf of the Secretary-General of the United Nations, asked Mr. Jenks to convey a message of thanks to the Director-General of the International Labour Office.

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

[Agenda item 3]

ARTICLE 2 (*continued*)

8. Mr. YOKOTA said that the views expressed by some members at the end of the last meeting compelled him to make a contribution to the discussion on unilateral declarations, to which reference was made in article 2, paragraph 3, of the draft code prepared by the Special Rapporteur.

9. At the 480th meeting, the Special Rapporteur had suggested (para. 54) that the examples of unilateral declarations cited by Mr. Liang, Mr. Bartoš and Mr. Alfaro were treaties in the sense of the draft code. Mr. Yokota was not quite satisfied with that position. While he was inclined to accept the view of many writers who considered a declaration under Article 36 of the Statute of the International Court of Justice, in conjunction with other similar declarations, as an international agreement, it should not be forgotten that there were some scholars who did not share that opinion.

10. As to the example cited by Mr. Alfaro at the 480th meeting (para. 50), it was doubtful in his view whether the Executive Order and the Decree issued by the United States of America and the Republic of Panama respectively constituted a treaty. All that could be said was that there had been an agreement between the two States—an agreement that could not be qualified as a treaty in the sense of the draft code because it had not been embodied in written form—and that the Executive Order and Decree had been issued in pursuance of that agreement. However, they were not themselves elements of the agreement. What was beyond doubt was that neither the Executive Order of the United States nor the Decree of Panama was governed by international law. On the contrary, each was governed by the municipal law of the respective States, and that was the most convincing evidence that neither was part of a treaty. The fact that the rescinding of the Executive Order by the United States Government had given rise to an international controversy changed nothing, for the controversy, from the strictly legal point of view, was due not to the rescinding of the Order but to non-compliance with the agreement which had given rise to the Order The situation was comparable to that which would exist if a State party to a treaty repealed legislation or regulations enacted in pursuance of a treaty. The State in question would be responsible, not for having repealed its own enactments, but for having failed to comply with the terms of the treaty.

11. However, he did not wish to insist on the question of unilateral declarations, a question which was complex and controversial and which remained to be decided in further practice. He suggested that the Commission should refrain from formulating any provision on the subject and agreed with Mr. Amado (480th meeting, para. 43) and Mr. Tunkin (*ibid.*, para. 48) that paragraph 3, or at least the second sentence of that paragraph, could be omitted.

12. Mr. BARTOŠ said that his remarks at the previous meeting concerning unilateral declarations or instruments had been made in order that the official record might show that the Commission had discussed a question on which international legal opinion was still divided and which for that reason could not be codified. In view of the discussion that had since taken place, he had some further remarks to make on the question, again not with a view to its inclusion in the code.

13. Among the different kinds of unilateral declarations and instruments was the unilateral declaration which constituted an additional agreement to a basic treaty. Such was the case of a declaration accepting the jurisdiction of the International Court of Justice, to which reference had been made by the Secretary of the Commission. The Statute of the Court was the basic treaty and declarations under article 36 of the Statute constituted acceptance of that treaty under certain conditions. There had even been a case in which the Court itself had held that a combination of such declarations, by the Governments of Norway and France in the case concerned, had created a contractual relationship in respect of the Court's jurisdiction.

14. On the contrary, there were unilateral declarations independent from the existing agreements. In his lectures and writings he had always taken the view, based on a careful study of the practice, that, if a unilateral declaration was followed by certain international negotiations designed to give effect to the offer made and if the declaration was referred to in the international agreement arrived at, then the declaration constituted an international contractual obligation by reason of the fulfilment of obligations under the agreement. It was equally true that a unilateral declaration made by one government to another government with a view to acceptance by the latter for the purpose of regulating their international relations certainly would contain contractual elements if the declaration was accepted.

15. He was bound to say that neither theory nor practice offered a clear-cut solution to cases of the kind alluded to by Mr. Yokota. Opinions varied as to whether in such cases making a declaration or issuing a decree or revocation were wholly matters of domestic jurisdiction or whether there had been a clear contractual obligation. Practice had shown that in most cases the relationship could be considered a mixture of a *modus vivendi* and a contractual relationship.

16. The whole question was not so much a question of legal doctrine, a question that could be regulated in a general way, but a practical question that called for separate examination in each particular case. Since it was a problem which had not found a universal solution and which had to be left to be further developed by practice, the Commission could in good conscience not attempt to codify it.

17. The Commission must be careful not to view unilateral declarations, even those specifically addressed to other governments, as a matter of protecting *droits acquis* or as a matter of stipulations which could be invoked by others, because stipulations were made not in unilateral declarations but in agreement actually concluded *inter alios*. Above all, the Commission should

do nothing that recognized the contractual character of unilateral declarations and instruments. That was a matter which had to be decided in each particular case.

18. Mr. EL-KHOURI said that, if the second sentence of paragraph 3 was retained, it would be necessary to make clear that where a unilateral instrument or declaration concerned, or was addressed to, more than one State it could not be binding unless accepted by all the States concerned and not just by one of them.

19. Mr. EDMONDS said that he would favour the retention of the second sentence of paragraph 3 because it explained why unilateral instruments and declarations were omitted from the code. All it said was that a unilateral declaration or instrument might or might not be binding, depending upon the particular conditions of the case.

20. Mr. AMADO recalled that it was he who had originally suggested (480th meeting, para. 43) the omission of paragraph 3. He had done so on the ground of economy in drafting. Paragraph 1 defined a treaty of the classical type, while paragraph 2 alluded to other forms of international agreement equivalent to treaties. The second sentence of paragraph 3 was a kind of observation, a reflection, which really had no place in a code.

21. Mr. SANDSTRÖM saw no reason for retaining even the first sentence of paragraph 3. It did not say anything that was not already included in paragraphs 1 and 2.

22. Mr. ALFARO suggested that, before continuing the discussion of article 2, the Commission might wish to hear what the Special Rapporteur had to say concerning his plans for redrafting the article.

23. The CHAIRMAN, speaking as Special Rapporteur, said he still felt that there was not too much difference among the members of the Commission on the substance of the question and that the problem was really a matter of finding the right words. The remarks of his colleagues had been very interesting and he would like to think about the problem a little longer before submitting a new draft for article 2.

ARTICLE 1 (*continued*)

24. Mr. YOKOTA asked for an explanation of the status of article 1, paragraph 3. At the 480th meeting, the Special Rapporteur had explained (para. 9) that the Commission had decided not to consider treaties between international organizations or between them and States, but the commentary on that paragraph (A/CN.4/101) gave the impression that the Commission had decided to include such a clause, albeit provisionally. He himself was in favour of restricting the code for the time being to relations between States.

25. The CHAIRMAN, speaking as Special Rapporteur, said that in the commentary he had based his view on what he believed to have been the decision taken by the Commission some years previously. The Commission had initially decided to include international organizations on a provisional basis, but later had felt that, without ruling out international organizations, it should begin by restricting the code to treaties between States and then see what additions or alterations might be necessary to cover international organizations as well.

26. Mr. LIANG, Secretary to the Commission, said that a summary of the Commission's initial views on the subject appeared in the Commission's report for 1950.[1] The last time the Commission had discussed the matter had been in 1956, when the present Special Rapporteur's summary of the Commission's views had been confirmed by the Chairman.

27. The CHAIRMAN, speaking as Special Rapporteur, said that he was certainly under the impression that, at one stage, a few articles containing references to international organizations had been adopted on a preliminary basis. In 1956, at any rate, the Commission had entertained no doubts that international organizations such as the United Nations possessed treaty-making capacity, an advisory opinion which had been confirmed by the International Court of Justice in the case concerning the reparation for injuries suffered in the service of the United Nations[2] and had agreed that they should be covered by the code. Complications would, however, be introduced if an attempt were made to deal simultaneously both with treaties between States and with treaties between international organizations. It had therefore been thought preferable that the code should be drafted in the first place to cover treaties between States and that subsequently the Commission might see whether the code would apply, with some modifications, to international organizations or whether they must be dealt with in a separate section. Article 2, paragraph 1 as it stood would cover both matters, since the reference to the State had been deliberately omitted, though many articles might not readily cover both cases in the form of words.

28. Mr. TUNKIN, supported by Mr. YOKOTA, proposed that the Commission decide first to deal with treaties among States and then to examine to what extent the articles were applicable to treaties concluded between international organizations and between them and States.

It was so agreed.

ARTICLES 3 TO 9

29. The CHAIRMAN, speaking as Special Rapporteur and referring to article 3 (*Certain related definitions*), said that when he had drafted his first report it had occurred to him that it might be useful to include a definition of the State, but he had since concluded that that was not really necessary and that indeed, it might be unwise to spend time trying to attempt such a definition. The concept was not peculiar to treaty law but was common to the whole field. There was, however, one aspect which concerned treaty law, namely, treaty-making capacity, which must be dealt with in the code. The proper stage to do so would, however, be in connexion with essential validity, the subject of his third report. Article 3 might therefore be left in abeyance for the moment.

30. Article 4 (*Ex consensu advenit vinculum*) and article 5 (*Pacta sunt servanda*) might also be left in abeyance. They concerned fundamental principles of treaty law, but as he had stated in the commentary on articles 4 to 9 he had some doubts whether they were appropriate in that place. The question whether they should be included at that point in the code or further on had led to some discussion in 1956 and the Commission had felt it might be better if they were inserted where they strictly belonged, in the section on the effects of treaties. They had therefore been

[1] *Official Records of the General Assembly, Fifth Session, Supplement No. 12,* para. 162.

[2] *I.C.J. Reports 1949,* p. 174.

treated very much more fully in his fourth report (A/CN.4/120). The Commission would eventually have to decide the order of the articles when it had completed the code.

31. The same was true of article 6 (*Res inter alios acta*), which was a very complex question and with which he hoped to deal in his next report.

32. Article 7 (*The law governing treaties*) might be considered at the present session, including the question whether it should be inserted at all; as might article 8 (*Classification of treaties*), which might not be essential but bulked prominently in legal textbooks.

33. Article 9 (*The exercise of the treaty-making power*) might be rather more appropriate in the section on essential validity. What was involved was the reality of the consent given by States. It might be said that, in some cases, that consent was not real because the necessary constitutional processes had not been carried out. He suggested that the Commission discuss the substance of articles 7 and 8 and the allied question whether to include articles on those subjects in the code and, if so, where they should be placed.

34. Mr. SCELLE, referring to the Special Rapporteur's suggestion that consideration of article 3 be deferred, said it should be stated as early as possible in the code that States were responsible for treaties. The definition in article 3 (*a*) (i) of the term "State" as "an entity consisting of a people inhabiting a defined territory" was very interesting, since the people was the essential element in the personality of a State. Some authors foolishly suggested that a State was the government, but there could be no government if there were no people. Since the Charter of the United Nations had recognized the right of peoples to self-determination, the concept of the people participating in the conclusion of treaties had gained ground. More important, however, was to state at the outset that treaties were concluded by States, whatever their components. A definition of the State need not necessarily be included in the draft code, but there should be a statement that the State was the personality responsible for the ratification and execution of treaties.

35. Another point to which the Commission should revert, perhaps in connexion with the fourth report, was the problem how far a treaty, whether constitutional or non-constitutional, was valid or not. In his opinion, a treaty could modify constitutional law. Admittedly, that was a controversial point and need not be settled in the early articles.

36. Article 4 was essential. The foundation of the treaty obligation was consent. That should be stated at the very beginning of the code. A treaty was an obligation assumed, not by one, but by two or more peoples and was an essential beginning of federalism and, hence, of an international community.

37. Article 5 might be left in abeyance, since some treaties were *servanda* whereas others need not be, since they could not be valid indefinitely. Article 6 might also be deferred.

38. Mr. TUNKIN supported the Special Rapporteur's suggestions. The definition of the State in article 3 might reasonably be omitted, on the principle *omnis definitio periculosa est.* It was not that the Commission should shirk complicated subjects, but definitions were not always essential in such instruments, especially if they were to be accepted by States. No definition or concept which purported to be a scientific definition rather than a norm of conduct should be inserted in any draft code. There was no reason to expect that States would agree on certain concepts of a scientific nature. Furthermore, he agreed that the consideration of articles 4, 5, 6 and 9 might be deferred until the fourth report was discussed. Such a decision would not involve any question of the placing of the articles, which could be discussed when the Commission saw all the articles before it.

39. Mr. YOKOTA agreed that article 3 might be omitted. The definition of a State was not peculiar to treaty law. The pertinent question was the capacity of a State to assume rights and duties. To include a definition of the State in every code would be otiose. When the Commission had discussed diplomatic intercourse and immunities at its previous session and the question had arisen what States had the right to establish diplomatic intercourse, the Commission had merely stated its view in the commentary on the relevant article. In connexion with the law of treaties it might also be preferable to use the term "State" without defining it and, if necessary, place a similar explanation in the commentary. The discussion on articles 4 to 9 might well be deferred, but as they dealt with fundamental principles of treaty law, he agreed with Mr. Scelle that they should be placed at the beginning of the code.

40. Mr. EL-KHOURI observed that the first sentence in article 3 (*a*) (i) was very important but might be better discussed in connexion with the capacity to conclude treaties and undertake international obligations. That topic would include the question of superintendent States and subordinate States. A State might create a government for a small portion of its territory and then set up treaty relations with the government established by itself. In his opinion, a superintendent State should not be permitted to conclude a treaty with a subordinate government, such as one under trust or mandate, nor to impose international obligations on such a government *vis-à-vis* itself. That point, which raised very difficult problems, should preferably be discussed separately.

41. Mr. BARTOŠ supported the Special Rapporteur's suggestions. He agreed that *omnis definitio periculosa est,* but treaties did sometimes require certain explanations, which were rather definitions for the purpose of execution than scientific definitions, and such definitions, by virtue of their use and extension, did in practice affect scientific definitions. There was danger, however, in linking the personality of a State as a subject of international law too closely with its treaty-making capacity, since two separate questions were involved.

42. Although he accepted the suggestion that the discussion of certain articles be deferred, he must say with regard to article 5, paragraph 7, that the point of view on *rebus sic stantibus* hardly squared with his view of juridical science. The question arose what was in law a profound change in conditions. If it was a new state of fact and law, it would be for the State concerned to request the revision or extinction of the treaty, since no person could be judge in his own cause. If revision brought no satisfaction, extinction might have to be granted. There is a controversy in the doctrine whether a State would be obliged to carry out the obligation until the end of such procedure and until the changed conditions had been established as a legal fact or whether the change in conditions gave *ipso facto* the right to modifications the existence of which would only be established by an assertive decision

of arbitration. He entirely agreed with the Special Rapporteur's basic assumption that a State could not unilaterally declare that it was not bound to comply with a treaty. It must take legal steps, such as arbitration, and request the recognition of the fact that conditions had changed. A State could put forward a plea, but could not claim a right, to avail itself of changed conditions. The latter part of the sentence in article 5, paragraph 7, might be changed to embody the concept that only in exceptional circumstances could *rebus sic stantibus* give rise to a situation which might determine the revision or extinction of a treaty.

43. Mr. MATINE-DAFTARY wished to make some general remarks on the spirit in which the articles concerned had been drafted. In his opinion, they were unduly rigid. They had been drafted on the basis of work done by eminent British jurists; it should be borne in mind, however, that the United Kingdom had a well-established Parliamentary and constitutional system, while many new States had no such tradition and were subject to *coups d'état* and the emergence of *de facto* governments. The situation of such States must be taken into account, particularly in respect of article 3, paragraphs (*a*) (i) and (ii); if the government was constitutionally established, the provision would stand, but exceptional circumstances should be taken into consideration.

44. Mr. Bartoš's argument concerning *rebus sic stantibus* seemed to be cogent and Article 14 of the United Nations Charter should also be borne in mind. It was difficult to state absolutely that a treaty was an administrative act. He therefore appealed to the Special Rapporteur to take into account the need for flexibility, in view of the difficulties that such rigid provisions might create for certain States.

45. Mr. PAL thought the Commission was not discussing the merits of the articles, but only the question whether they should be omitted or retained. He agreed that article 3, with its definition of the State, and articles 4 to 6 should be omitted for the time being. If in definition there really lay danger, there lay greater danger in an attempt to define the State in the case at issue, especially since the Statute of the International Court of Justice and the United Nations Charter referred to States without any definition. Everyone was aware of the meaning of the word and a definition in a specific case might unwittingly limit or widen the general concept of that entity as already adopted in the basic Charter. As regards articles 4 to 6, he still held to his views expressed in 1956 and believed that the formulation of these fundamental principles of treaty law was not out of place and would not in any way detract from the utility or the elegance of presentation of that law if placed early in the draft. He, however, agreed to the postponement of their discussion for the time being.

46. Mr. HSU thought that the general opinion favoured the omission of article 3, despite Mr. Scelle's attempt to retain it. That omission had been a foregone conclusion, since international legal bodies had consistently failed to approve a satisfactory article on the definition of the State.

47. On the other hand, it would be wise to state somewhere in the code who would represent States entering into treaty relations.

48. The CHAIRMAN, speaking as Special Rapporteur, agreed with Mr. Hsu that the general opinion favoured the omission of article 3. While the Commission seemed to agree with Mr. Scelle on what the definition should be, it considered it inappropriate to provide such a definition only in one branch of international law, since it affected all aspects. As Mr. Pal had said, there was some danger that a definition might affect the status of certain entities regarded as States and even the status of international organizations. The Commission could, however, give effect to Mr. Scelle's suggestion by including a reference to the State as a treaty-making entity in the revised draft of article 2.

49. He had proposed that consideration of articles 4, 5 and 6 should be deferred; there had been no objection to that course, but Mr. Scelle had said that article 4 should be placed near the beginning of any code on treaties. The substance of article 4 was dealt with in greater detail in his fourth report; when the Commission came to study that report, it might also consider where to place article 4, but its examination should be deferred for the time being.

50. He believed that article 9, paragraph 1, although somewhat controversial, would meet the point just made by Mr. Hsu, and agreed that the code should include some reference to the treaty-making power and constitutional processes. Article 9 might have to be considerably revised in the light of Mr. Matine-Daftary's remarks, but he did not think that it should be omitted. The point related less to formal validity than to the reality of consent, in the light of the question whether, when a government purported to give its consent, the necessary constitutional processes had been carried out and, if those processes had not been carried out, what the international effect would be and whether or not true consent could be assumed. The question was dealt with in detail in his third report, on essential validity.

51. That left the Commission with articles 7 and 8, which were essentially preliminary and, if retained, should be placed at the beginning of the code.

52. In connexion with article 7, he drew attention to paragraph 17 of his commentary on the articles, to the effect that the article was possibly redundant, or even slightly inconsistent, but that something of the kind seemed desirable. It might be asked whether a treaty could be governed by anything else than international law and even whether it was wise to suggest such a possibility. Of course, the way in which a State dealt with treaties was governed by municipal law, but on the international plane the matter must be governed by international law. In some cases, international law would have regard to situations existing under municipal law, but that effect in itself derived from a principle of international law, and not because any municipal law had a direct effect on an international instrument. In view of that argument, it might be desirable to include a provision on the lines of article 7, but the Commission might feel that the whole question was so self-evident that it was unnecessary to set it forth.

53. Mr. SCELLE agreed with the Special Rapporteur's interpretation, but pointed out that the competent national treaty-making authorities must respect the constitution of the contracting State; otherwise, it might be argued that the treaty was null and void. The reason for that, however, was that international law provided that the representatives of States must respect their constitution, since it was that constitution which authorized them to conclude the treaty. Thus, national treaty-making agents acted in a double capacity, under both international and municipal law.

54. Article 7 was accurate in a sense, but it should be specified that from a certain point of view all questions relating to treaty-making were also governed to some extent by constitutional law, because the delegation of international law to national representatives meant that treaties must be made in accordance with the constitutional law of the contracting State. Thus, the last phrase of the article, stating that all questions relating to the conclusion, application and execution of a treaty were governed by international law, might lead to some confusion. It would be wise to be more explicit and to state that, although representatives acted under international law, the rules of that law delegated to the constitution of a State competence to instruct certain organs and representatives to conclude and execute treaties.

55. Mr. BARTOŠ pointed out that, under international law, no rule of municipal law should prevent the execution of a treaty. Mr. Scelle had apparently raised the question of the capacity of the representatives to conclude treaties and, hence, the consequent validity of the treaty. But even after the treaty had been concluded under valid conditions, from the point of view of the capacity of the State representatives, there still might be cases where international law would have regard to situations existing under municipal law. He agreed with the Special Rapporteur's interpretation and thought that such cases would be covered by the words "will be governed by international law". Thus, the question that Mr. Scelle had raised, which seemed to apply to the capacity of State representatives to make treaties, was no longer involved once the treaty had been concluded under valid conditions. If limited to the acceptance of obligations, the argument was sound, but it could not be applied to changing obligations, including cases where constitutional law ran counter to international law.

56. Mr. TUNKIN said he was in favour of the Special Rapporteur's alternative suggestion. The article seemed to be redundant, since it was self-evident that problems relating to treaties between States were governed by international law.

57. Moreover, the wording of the article was not quite accurate, since some questions on the domestic plane were governed by the municipal law of States.

58. The code should not lay down the monistic or any other point of view as valid; it would be enough to state the undeniable fact that treaties between States were governed by international law. The Commission should not complicate an already very complicated task; it should not include in the code any provisions which were not absolutely indispensable and should lay down rules of conduct, although some definitions might be required.

59. Mr. SCELLE said that, in principle, a treaty was applicable in a given country in accordance with the law of that country, unless specific provisions were made to the contrary. The point to be borne in mind, however, was that, if it proved impossible to apply the provisions of the treaty in accordance with municipal law, the treaty took precedence and the law had to be modified. That was the hierarchy between the rules of international law and those of municipal law. Accordingly, the list of questions relating to treaty-making in article 7 was too broad; when necessary, those functions were governed by international law, but when States were capable of executing treaties in accordance with their municipal law, there was no need to allude to international law.

60. Mr. MATINE-DAFTARY considered that a distinction should be made between constitutional and ordinary law, under the general heading of municipal law, especially in the case of States with new constitutions. A treaty had priority over municipal law, but the national constitution was the basis of all treaty-making capacity. Accordingly, it might be advisable to state that international law must take into account the constitutions of contracting States, especially in the matter of concluding treaties.

61. Mr. SCELLE said that he could not agree with that thesis. A treaty, when constitutionally concluded, could oblige a State to change its constitution.

62. Mr. BARTOŠ fully agreed with Mr. Scelle. For example, some States failed to execute their international obligations, invoking separation of powers and asserting that their courts were bound by their constitution, and not by international treaties. Municipal law could never be invoked to prevent the application of international law.

The meeting rose at 1.5 p.m.

482nd MEETING

Thursday, 23 April 1959, at 9.45 a.m.

Chairman: Sir Gerald FITZMAURICE

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

[Agenda item 3]

ARTICLE 7 (*continued*)

1. Mr. MATINE-DAFTARY pointed out, with reference to the debate at the end of the previous meeting, that there had been some misunderstanding concerning his position. He had merely wished to make it clear that all treaties must conform with the provisions of the constitutions of the contracting States in force at the time of their conclusion.

2. Mr. PAL agreed with Mr. Tunkin—though for different reasons—that the article as it now stood should be omitted. All the questions relating to treaty-making enumerated in article 7 were already dealt with in the Special Rapporteur's reports. Thus, conclusion was dealt with in the first report (A/CN.4/101), validity in the second (A/CN.4/107) and the third (A/CN.4/115), force in the first report, effect in the fourth report (A/CN.4/120), application, execution and interpretation in the third and fourth reports and termination in the second and fourth reports. The provision in article 7 was to the effect that those questions would be governed by international law. But the relevant provisions of the said international law should be embodied in whatever final draft the Commission prepared concerning the law of treaties; the article as it stood might convey the mistaken impression that the international law governing those questions might be found elsewhere. The proper way of expressing the intent of that article perhaps would be to refer to those subsequent provisions of the draft as the governing rules.

3. Furthermore, the "unless" clause at the beginning of article 7 was not strictly accurate, for at least some of the provisions to be prepared by the Commission would certainly be applicable in all circumstances. Accordingly,