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A/CN.4/SR.491

Summary record of the 491st meeting

Topic:
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Extract from the Yearbook of the International Law Commission:-
1959 , **vol. I**

491st MEETING

Monday, 11 May 1959, at 3.10 p.m.

Chairman: Sir Gerald FITZMAURICE

Programme of work

1. The CHAIRMAN announced that he had received a telegram from Mr. Erim, thanking the Commission for the honour it had done him in electing him as a member (see 486th meeting, para. 77) and expressing regret that a previous engagement prevented him from coming to Geneva before the early part of June.

2. He announced further that Mr. Zourek, the Special Rapporteur on item 2 (*Consular intercourse and immunities*), had been detained by his duties at the International Court of Justice. Accordingly, it became necessary for the Commission to consider how to plan the work of its present session, and he invited comments.

3. After a procedural discussion, Mr. LIANG, Secretary to the Commission, said he did not consider that the Commission could disregard the necessity of completing its work on consular intercourse and immunities at the current session. If Mr. Zourek could be expected to arrive by 19 May, the Commission would undoubtedly make every effort to complete its work on the subject. It was quite likely that Mr. Zourek would respond to an urgent message from the Commission, but in the contrary case he believed that the Commission should begin its work on the subject on 18 May.

4. He drew attention to chapter V of the Commission's report on its tenth session,[1] in which it had not only undertaken to complete the preliminary draft on the subject of consular intercourse and immunities, but had established a schedule of work. It was stated in paragraph 64 of the report that members should come to the session prepared to put their principal amendments in writing within a week, or at most ten days, of the opening of the session. Of course, Mr. Zourek's absence had somewhat changed the situation.

5. After further discussion, the CHAIRMAN, summing up, observed that the subject of consular intercourse and immunities held no great theoretical difficulties and that it was fairly familiar to the Commission, in view of its affinity to the subject of diplomatic intercourse and immunities. He was therefore inclined to think that a useful discussion of the matter could be held even in the absence of the Special Rapporteur. Accordingly, he thought it advisable that a telegram should be sent to Mr. Zourek stating that the Commission considered it important to start its debate on the subject on 18 May if the first draft to be submitted to Governments were to be completed during the current session; that it hoped that Mr. Zourek would be able to come to Geneva before then, even if he were obliged to return to The Hague for a few days; and that, in any case, the Commission would be grateful if he would indicate the points which he would like to be reserved until he could be present.

6. He suggested that he should be authorized to draft a telegram to Mr. Zourek along those lines.

It was so agreed.

[1] *Official Records of the General Assembly, Thirteenth Session, Supplement No. 9*, p. 29.

Appointment of a drafting committee

7. The CHAIRMAN proposed that the Commission's Drafting Committee should have the following membership: Mr. Hsu as Chairman, Mr. Alfaro as Vice-Chairman, Mr. François, Mr. Ago, Mr. Tunkin, Mr. Yokota, and each of the Special Rapporteurs when his subject was under consideration by the Drafting Committee. In addition, though not a member of the Committee, he would be prepared to go through the English text purely for questions of style and form. He also proposed that if a member of the Drafting Committee could not attend a particular meeting, he should be replaced by an alternate of the same language or from the same geographical region.

It was so agreed.

8. The CHAIRMAN announced that the Drafting Committee would hold its first meeting on Thursday, 14 May 1959.

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

[Agenda item 3]

NEW ARTICLE 6 (FORMERLY ARTICLE 15) (*continued*)*

9. The CHAIRMAN recalled that while the Commission had taken a decision with respect to paragraph 4, sub-paragraph (ii), of the redraft of article 15 (new article 6) it had not formulated any final instruction for the Drafting Committee regarding sub-paragraphs (i) and (iii).

10. Mr. AGO recalled his observation regarding sub-paragraph (i) (see 488th meeting, para. 52). He recommended that the Drafting Committee should be asked to divide sub-paragraph (i) into two sentences, separating the case of bilateral treaties from that of treaties negotiated "between a restricted group of States". In the former case, the text should speak of "mutual consent", and in the latter, of "unanimity".

It was so agreed.

11. The CHAIRMAN recalled, with reference to sub-paragraph (iii), the suggestion put forward (490th meeting, para. 15) that provision should be made for the case in which an international organization prescribed in advance the voting rule by which a multilateral conference convened by it was to adopt the text of a convention. He suggested that the Drafting Committee should be asked to prepare a provision along the lines he had indicated at the previous meeting.

It was so agreed.

12. In reply to a question from Mr. Khoman, the CHAIRMAN suggested that the final sentence of paragraph 4 should be omitted unless the Commission decided not to retain article 17, paragraph 1 (see 490th meeting, para. 4).

It was so agreed.

ARTICLE 16

13. The CHAIRMAN, speaking as Special Rapporteur, introduced article 16 (*Certain essentials of the text*). He observed that the content of a treaty could not be governed by precise rules of law, apart from those rules which related to the possibility or legality of the object of the treaty; in other words, a treaty could not require the performance of an act which was incapable of performance or which was contrary to the

* Resumed from the 490th meeting.

rules of international law. Apart from those limitations, the parties were free to adopt any text they pleased, and that remark applied even to the formal clauses relating to duration, termination and so forth.

14. Nevertheless, the text had to contain certain elements, elements that were essential to formal validity. Again, there were elements which, although not essential to formal validity, should be included in order to avoid future difficulties. For example, the fact that a treaty was silent on the question of its duration did not deprive it of formal validity. The Commission might consider it advisable to provide certain residual rules for such cases.

15. Under paragraph 2 it was essential to the formal validity of a treaty that it should indicate the States on whose behalf the treaty was initially drawn up. Patently, without such an indication, the treaty would be incomplete. The word "initially" had reference to multilateral treaties, in other words, treaties to which States other than the original parties might subsequently accede. The original parties could be indicated by one or more of the three ways described in the second sentence of paragraph 2. While it was now comparatively rare to find treaties in which the parties were indicated only by the nationality of their signers, there were many historical examples of that practice.

16. Paragraph 3 was still necessary in spite of the fact that more and more territories were attaining independence. It might be that the provision did not go far enough and that it should require that both the State making the treaty and the dependent territory, or protected or semi-sovereign State on whose behalf it was made, should be indicated.

17. He suggested that the beginning of paragraph 4 should be amended to read "It is not essential to the formal validity of a treaty, but it is desirable that it should provide . . .". In his opinion, a treaty was not invalidated by the absence of any mention of the date on which it was to come into force; that date could be decided by a separate arrangement between the States parties, or it could be inferred from the text of the treaty. For example, if the treaty stated that it was subject to ratification, then, in the absence of any other indication, the date of entry into force would be the date of the last ratification. If the text did not refer to ratification and contained no other provision from which an inference could be drawn, then the date of entry into force would have to be presumed to be the date of signature.

18. Paragraph 5 contained the residual rule to be applied in cases, especially with regard to entry into force, where no special provision was made in a treaty. The paragraph might not be strictly necessary, as the same point arose again in later articles. If the treaty itself was silent about entry into force and no inference could be drawn from its terms, it seemed impossible to infer any date for entry into force other than the date of signature when the treaty would *ipso facto* become binding on the signatory States. A contrary inference might, however, be possible. If a treaty was expressly stated to be subject to ratification, it might well be inferred that it would not come into force with respect to any particular party until that party had ratified it and might not come into force with respect to the parties as a whole until they had all ratified it.

19. Another question covered in paragraph 5 was participation by other States. It was a rule of international law that the parties which drew up a treaty were alone competent to decide what other States might participate in it; non-signatories had no general right to become parties to any particular treaty. They must be authorized to become parties or must belong to a category of States which were so authorized. In multilateral conventions, at least, it was almost invariably specified either that they were open to accession by States in a certain category, or by any State, or else nothing was said. In the many cases in which multilateral treaties failed to provide for accession, the inevitable inference was that the parties had not intended that any other State should be a participant in an agreement where such participation might upset the intended balance. The inference was in fact that if other States had been meant to participate, the initial parties would have inserted an accession clause, which they could in any case always add by a separate instrument.

20. With regard to duration and termination, the residual rule would necessarily be very rarely invoked, as the vast majority of treaties provided for specific or indefinite duration, but almost always with a provision entitling the parties to give notice of termination. If a treaty made no mention whatever of termination and allowed for no reasonable inference concerning termination, the only possible conclusion was that the parties had intended indefinite duration and termination by mutual consent. The only exception occurred in the case of treaties where a contrary inference was possible; for example, commercial treaties, which could not be regarded as of indefinite duration. Most commercial treaties, however, made express provision for termination, but even in the absence of such provision, termination might be inferred on reasonable notification.

21. Paragraph 6 dealt largely with mechanics, rather than with obligations, and might be included in a code, although it would be out of place in a convention. A group of countries might sometimes conclude a treaty and state that it was subject to ratification, but give no indication how the process was to be carried out or what was to be done with the instrument of ratification. Such treaties could not, of course, be regarded as lacking formal validity, but it would be very much more convenient if they indicated precisely what steps were to be taken. Usually, there was provision for a depositary and an obligation on the part of the depositary to notify the parties that instruments of ratification had been received and, ultimately, that the treaty had entered into force. The last sentence of paragraph 6 attempted to provide a residual rule.

22. Mr. VERDROSS thought that it would hardly be possible to enumerate in paragraph 1 all the particulars which were not essential to the validity of a treaty; a negative approach was relatively unnecessary, and paragraph 1 might accordingly be deleted. So far as he knew, no one had ever argued that a preamble was a juridical requirement of a treaty. With regard to paragraph 3, he said it was true that the United Nations Charter referred to Trust Territories; in fact, however, the Administering Authority acted not on behalf of territories but on behalf of the people of the territories. He proposed further to speak of *"Etats protégés"* and not of *"protectorats"*, since a *"protectorat"* was not a State, but a relation between two States.

23. Mr. SANDSTRÖM thought that article 16 should be rearranged, and doubted whether paragraphs 5 and 6 should be placed at that point in the

code at all, since they concerned interpretation rather than validity. The Drafting Committee might be asked to look into that question. Paragraph 1 might better be placed at the end of the article, an arrangement which might perhaps meet the point raised by Mr. Verdross.

24. Mr. EL-KHOURI, referring to paragraph 3, thought that it would be desirable to mention in the treaty itself the authority by virtue of which a State claimed to be competent to conclude a treaty on behalf of a protected or semi-sovereign State or territory, such as a mandated territory; in the latter case, the international organization from which the mandate was held should be named. In the case of a protected State, it should be specified whether the representation was arbitrary or by agreement between the protecting and the protected State. In order that a treaty made by the protecting State on behalf of the protected State should be binding on the latter, it was necessary that evidence of the authority by virtue of which the protecting State claimed to be acting should be given.

25. Mr. SCELLE thought that, if paragraph 1 was retained, it might be better to say that the presence of a preamble or conclusion might or might not have juridical importance, but that that depended on the interpretation, which should be dealt with elsewhere in the code. A conclusion, if it summarized the purpose of the agreement, might have a great and precise juridical validity, whereas often a preamble might not.

26. Mr. ALFARO said that article 16 would have to be discussed in great detail. On the whole, the article was well-conceived and a good introduction to the remainder of the code. He had, however, some doubts about the reference to preambles in paragraph 1. They were not usually a juridical requirement, but there was an important precedent in the United Nations Charter, which should not be disregarded. When the original chapters 1 and 2 of the Dumbarton Oaks Proposals had been discussed, some delegations had suggested that the principle *pact sunt servanda* should be incorporated in the body of the Charter itself, but the five permanent members of the Security Council had opposed the idea, and it had been finally agreed that the principle should be incorporated in the Preamble. At the United Nations Conference on International Organization, held at San Francisco in 1945, the committee responsible for drafting Chapter I of the Charter had approved a text, later adopted in plenary session,[2] to the effect that the Preamble would have the same juridical validity as the Articles themselves.

27. Mr. AGO said that he would have several comments to make when the article was discussed in detail. In principle, it might perhaps be better to begin the article with a reference to the requirements which were really conditions of validity of a treaty, and to refer later to those elements which were frequently inserted in a treaty but were not conditions for its validity.

28. Mr. AMADO said that the contents of article 16 were not fully in keeping with its title, "Certain essentials of the text"; matters which were admittedly not essential appeared in some of the paragraphs, particularly paragraph 5. The article in general seemed somewhat premature. The provisions concerning entry into force were elaborated in article 41 and so might be unnecessary in article 16. It would probably be preferable to deal with the various questions in their proper context in the code rather than in a preliminary article.

The meeting rose at 6 p.m.

[2] *United Nations Conference on International Organization, Ninth Plenary Session*, 25 June 1945, vol. 1, p. 614.

492nd MEETING

Tuesday, 12 May 1959, at 9.45 a.m.

Chairman: Sir Gerald FITZMAURICE

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

[Agenda item 3]

ARTICLE 16 (*continued*)

1. The CHAIRMAN invited the Commission to continue its debate on article 16 (*Certain essentials of the text*).

2. Mr. PAL said he could not agree with the remark made by Mr. Verdross (491st meeting, para. 22) that the negative approach in article 16, paragraph 1, was relatively unnecessary. From the trend of the observations made by some members it appeared that there was some misapprehension as to the purport of the paragraph. The paragraph was not intended to assess the value of a preamble and did not in the least minimize its value should one be provided. It only stated that a preamble was not a "juridical requirement" in the sense that its absence would not be a fatal formal shortcoming. The confusion might have arisen from the difference between the French phrase *"une condition requise du point de vue juridique"* and the English "juridical requirement". He had some doubts, however, about the article as a whole; in particular, he was not sure that the term "essential" was used consistently in the same sense throughout the article. In some cases the word appeared to mean a requirement affecting validity, but in others it apparently did not have that sense. The requirement of paragraph 2, for example, would affect the very foundation of the treaty, while the requirement of a ratification clause envisaged in paragraph 6 would not mean that its absence would affect the validity of a treaty. The term "essential" might have to be modified and some provision might have to be added concerning performance and non-performance dealt with in the Special Rapporteur's fourth report (A/CN.4/120).

3. Mr. KHOMAN said that, although the content of article 16 was fairly comprehensive, if the title "Certain essentials of the text" were construed strictly, it would be seen that only paragraphs 2 and 3 referred to essential matters, whereas the remainder related to discretionary clauses (*clauses facultatives*). He found some difficulty about paragraph 1, because, while that provision stated that a preamble was not a juridical requirement, the reference in paragraph 2 to "a preambular recital" implied that it might become so, inasmuch as it might indicate the States on whose behalf a treaty was initially drawn up. The title might be reworded to conform with the essentials set out in paragraphs 2 and 3; he suggested "Essential and non-essential clauses of the text". Alternatively, paragraphs 4, 5 and 6 might be placed in a separate article under the heading of "Discretionary clauses", and paragraphs 1, 2 and 3 might bear the title "Compulsory clauses". He had no objection to paragraph 1; indeed, it might be just as well to begin with the negative form.