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Summary record of the 503rd meeting

Topic:
Law of Treaties

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States can take place, then such participation can only take place through those methods.

"2. Where the treaty does not so specify and contains no general accession clause, then the participation of other States can take place by the consent of the parties to it, if the treaty is in force, or, if the treaty is not in force, by consent of the signatory States."

58. A possible variation of that text would be to provide for some majority in the last phrase.

59. He agreed with Mr. Sandström that, if a treaty specified the parties, the contractual relationship had become fixed and the question of the admission of additional parties could not be reopened. Fresh negotiations would be necessary concerning the admission of newly-created States. In the case of certain old treaties which contained no accession clause, the problem of admitting new parties was subject to the consent of the parties, if the treaty was in force, or of the signatories if it was not in force.

60. Mr. BARTOŠ considered the Special Rapporteur's draft clauses satisfactory, because they took into account the United Nations practice of determining the States which could sign treaties although they had not participated in the negotiations. Despite the general trend towards universal co-operation, States did not have the absolute right to participate in all treaties. The States Members of the United Nations and members of the specialized agencies had the right to participate in treaties concluded under the auspices of those organizations, but they had not yet lost the capacity to enter into treaties outside the organizations, even treaties of general interest, with whatever States they chose.

61. Mr. TUNKIN, replying to Mr .François, said that the problem he had raised for the Commission's consideration was important and very complicated; it should not therefore be over-simplified and merely reduced to the question whether or not States had an absolute right to participate in every treaty. It was obvious that that right was absent in the case of bilateral treaties. In the case of multilateral treaties, however, it was questionable whether any State or group of States had the right to settle by treaty problems which were of interest to certain other States and to exclude them from participation or negotiation. While he would not press for a decision now, he wished to draw the Special Rapporteur's attention to the question, since it would inevitably arise in connexion with subsequent articles.

62. Mr. GARCIA AMADOR thought that the question was one of fundamental rights and that it was scarcely possible to draw up an acceptable article within the context of the law of treaties. The concept of an inherent right of every State to participate in treaties of "general interest" was extremely vague. Although some interests could be regarded as undeniably general —for example the law of the sea—it was not always easy to decide at what point an interest ceased to be "general" and become particular. For example, certain American regional treaties dealt with matters of general interest to the States of the region, but others touched on matters of more than purely regional interest. In such cases, it was difficult to say categorically what States were entitled to participate.

63. Mr. EL-KHOURI agreed with Mr. Tunkin that the question referred to in article 24 was an extremely complicated one. The Special Rapporteur had found it difficult to solve the problem of the right of States to sign treaties; it would be even more difficult, however, to draft a provision which took into account the duties of States in that respect, since it would touch on State sovereignty. Yet, surely there was no right without a corresponding duty.

The meeting rose at 1 p.m.

503rd MEETING

Thursday, 28 May 1959, at 10 a.m.

Chairman: Sir Gerald FITZMAURICE

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

[Agenda item 3]

ARTICLE 24 (*continued*)

1. Mr. ALFARO considered that the new draft provisions suggested by the Special Rapporteur at the previous meeting (502nd meeting, para. 57) provided a good solution for the problem mentioned by Mr. François, concerning accession to existing treaties. He was sure, however, that the Commission could not envisage drafting an article on the purported right to participate in certain treaties, since no right to participate in a treaty could exist. There was no right without a corresponding obligation, and in international law there was no rule making it the duty of a State or group of States to accept another State as a party to a specific treaty. If a group of States wished to conclude a treaty affecting the interest of a State that was not invited to participate, the only course open to the latter was to declare that the treaty, if concluded, would be *res inter alios acta* and hence incapable of affecting that State in any way. Mr. Yokota had drawn an analogy with the "right" to establish diplomatic relations; the Commission had agreed that no such "right" existed, since the establishment of such relations was subject to mutual consent.

2. The CHAIRMAN, speaking as Special Rapporteur, thought that the first part of article 24, paragraph 1, should be retained and that the provisions he had suggested at the preceding meeting should replace paragraph 2. The Commission might decide to send the article to the Drafting Committee.

3. The only point that remained to be settled was whether the idea of consent by a majority of the existing parties to the admission of a new party should be introduced. Theoretically, if the unanimous consent of the existing parties was required, two or three parties could exclude a new State by withholding their consent. He thought that if a majority of three-quarters or two-thirds were established, that would be enough to ensure general approval, but would prevent any one State from exercising a veto. That idea might be referred to the Drafting Committee.

4. Mr. TUNKIN thought that in paragraph 2 the passage "The right . . . but" should be omitted and that the paragraph should begin with the words "Other States may be admitted to sign . . .". It would be more progressive to lay down no specific rule concerning the right of signature but to leave the matter to the parties concerned. The problem of unanimous or majority consent raised some doubts, in cases where

treaties contained no accession clause. In any case, most modern multilateral treaties contained such a clause.

5. The CHAIRMAN, speaking as Special Rapporteur, observed that his new draft provisions related only to treaties containing no accession clause. If such a clause existed, there was no need to seek the consent of the parties. He thought that his suggested substitution for paragraph 2 would meet Mr. Tunkin's point.

6. Mr. LIANG, Secretary to the Commission, thought that, with regard to the Hague Conventions cited by Mr. François (502nd meeting, para. 29), the procedure of consent by a two-thirds majority was sound in principle. The only obstacle to that procedure lay in the fact that the nature of the original treaties would then undergo a change as far as the parties were concerned. An analogy in municipal law was that, when the parties to a contract changed, a new contract came into existence, and that was the institution of "novation" in Anglo-American law. The question in relation to treaties concluded under the auspices of international organizations was somewhat simpler. For example, the General Act of Geneva, of 26 September 1928, had been revised at the third session by the United Nations General Assembly, which had—by its resolution 268 A (III)—prepared a new instrument, to which additional States could become parties. He did not see on what basis a new procedure in regard to the Hague Conventions was justified, except *de lege ferenda*. So far as positive law was concerned, the procedure adopted by the Netherlands Government in the case of the Hague Conventions was the only possible one.

7. Mr. FRANÇOIS said that the Special Rapporteur's new draft fully met the point that he had raised. He had again consulted the Hague Conventions and had found that only the Conventions of 1899 and 1907 for the Pacific Settlement of International Disputes contained no accession clause, since the agreement, provided for in articles 60 and 94, respectively,[1] had not been concluded.

8. Mr. SCELLE considered that article 24 as originally drafted stated a rule of classical law which had in practice been exceeded. Paragraph 2, in particular, related to the sovereign right of States to conclude treaties and to exclude any other States from participation. That procedure was a doubtful one under international law, since it implied ill-will against the State debarred from participating. But so long as the principle of absolute sovereignty was accepted there was no remedy against the practice. Some progress was, however, being made in the case of multilateral treaties and paragraph 2 therefore referred to a state of affairs which was gradually disappearing.

9. It was true that, in principle, participation in treaties—in the generic sense—was confined to the States participating in the negotiation. Nevertheless, law-making treaties creating rules of international law, which related to matters of general interest, usually contained accession clauses. He agreed with Mr. Tunkin that the opening passage of paragraph 2 was not correct so far as multilateral treaties of general interest were concerned. While the statements in paragraph 2 were correct in principle, they had become obsolete in view of the emergence of international organizations and, in practice, if a State could not send representatives to a treaty-making conference, that circumstance should not prevent it from acceding to and ratifying the treaty.

10. Mr. SANDSTRÖM agreed with Mr. Scelle's views. Certain treaties by their very nature required universal agreement. If such treaties contained no accession clause, it could be assumed that new States would be admitted to sign. However, the formal question whether a new State was recognized as such might arise, and in that case it was for the parties to decide whether such a State could accede to the treaty.

11. The CHAIRMAN, speaking as Special Rapporteur, said he hoped that his redraft of article 24 would meet the point raised by Mr. Scelle and Mr. Sandström.

12. Mr. AGO suggested that the automatic right or faculty to sign should be extended to all States originally invited to participate in the negotiations. It might happen that a State invited to a conference decided not to attend, but subsequently found that it could sign the resulting treaty. The fact that it had been invited seemed to imply the consent of the parties to the signature of that State.

13. He fully understood Mr. Scelle's difficulty. On the one hand, it was essential for the largest possible number of States to be able to accede to universal conventions. On the other hand, it was impossible to foresee all the possible reasons for the exclusion of certain States. Accordingly, a provision to the effect that any State could accede to a treaty which was general in character might raise very serious difficulties.

14. Mr. SCELLE agreed in principle with Mr. Ago, but thought that his suggestion did not eliminate the difficulty. As international organizations were being set up, their authority was gradually replacing the absolute sovereignty of nations. The condition of unanimous consent laid down in paragraph 2 was, in effect, a statement of the principle of absolute sovereignty, which was a source of anarchy in international relations.

15. Mr. ALFARO thought that Mr. Ago's suggestion was logical. By being invited to participate in negotiations a State had an implied right to sign the treaty. In his opinion, the suggestion was applicable to the case of multilateral treaties negotiated under the auspices of international organizations. In those cases, it was quite natural that, as members of the international community, States, even if they had not participated in the negotiations, should be able to sign treaties relating to universal questions on the same footing as the participants in the negotiations.

16. Mr. YOKOTA considered that the question of the admittance of new States to sign was complex, in the absence of an accession clause. The Special Rapporteur had suggested that the consent of two-thirds of the parties might be sufficient for such admittance. Difficulties might arise, however, in the case of a newly-created State which had not yet been recognized by certain other States. The two-thirds of the parties which had recognized that State might agree to admit it to sign the treaty, but the remaining one-third which had not recognized that State would object to it. Under the circumstances, it would be highly doubtful whether that one-third should be obliged to admit the new State as a party to the treaty. The Commission should exercise great caution in formulating a provision which would in fact constitute a new rule of international law.

[1] See *The Hague Conventions and Declarations of 1899 and 1907*, James Brown Scott (ed.) (New York, Oxford University Press, 1918), p. 79.

17. Mr. FRANÇOIS thought that Mr. Ago's suggestion was quite acceptable and corresponded to a practice dating back to the time of the Second Peace Conference at The Hague, of 1907, as shown by article 94 of the Convention for the Pacific Settlement of International Disputes.

18. Mr. Yokota had raised a difficult question with regard to recognition. There was a school of thought which held that participation in a multilateral convention more or less implied recognition of all the other parties; although that thesis had been contested, it was nevertheless generally admitted that joint participation in a treaty established a relationship which was not compatible with strict non-recognition. It was therefore hard to admit the participation of a State which was not recognized by a large number of other States. It would be difficult to include in the code a provision stating that conventions on matters of general interest should be open to all entities which claimed to be States and wished to participate.

19. Mr. TUNKIN thought that Mr. Ago's suggestion (see para. 12 above) was acceptable.

20. He agreed with Mr. Scelle and Mr. Alfaro that under modern international practice the right of signature was no longer confined to the participants in the negotiation. So far as universal treaties were concerned the modern rule was that every State was capable of participating. Universal treaties were intended to create rules of international law which might be accepted by, and be binding upon, all States; it was therefore only logical that all States should have the right to participate in such treaties. He considered it advisable, in order to maintain the principle of the equality of States, to mention universal treaties specifically in the code and to provide that all States could participate in them.

21. Mr. Yokota's views on recognition seemed to be based on the theory that a subject of international law existed only if recognized. That theory was obsolete. Recognition did not create a subject of international law, but was merely declaratory. There was no connexion between recognition and the right to participate in treaties.

22. Mr. SCELLE did not believe that recognition had no influence on the right to participate in treaties. He noted, however, that "recognition" was being referred to by some members as though it was an absolute and indivisible concept and as though there was no difference between *de facto* and *de jure* recognition. It was perhaps fashionable in modern times to confuse the two; in his opinion, however, the view that *de facto* recognition was equivalent to *de jure* recognition was inadmissible, for it meant that any State or Government, however dubious its origins, must be recognized on the principle that it could not be excluded from relations between nations. The only valid form of recognition was *de jure* recognition, for *de facto* recognition might be withdrawn in certain circumstances, since it was prompted only by necessity or, perhaps, expediency. For instance, the temporary sovereignty of Italy over Ethiopia had been recognized by some States, which had subsequently withdrawn that recognition. In that case, the correct act, obviously, had been the withdrawal, and not the recognition. *De facto* recognition was an act of mere expediency. He hoped that the Drafting Committee would take his remarks into account.

23. Mr. BARTOŠ agreed in principle with Mr. Ago's suggestion. The accession of new States to existing treaties was not a simple question. There were no precise rules in practice, not even in the practice of the United Nations. Inasmuch as the Secretary-General did not have the right to decide, on its merits, the question of accepting a subsequent signature or ratification, the practice of automatically notifying all communications concerning such matters was widely followed. Those obliged to study the effects of that practice could see that the situations encountered were very different. In the case of India, for example, the former sovereign State and the newly-created State had settled between themselves the question of the effects of pre-existing treaties by declaring that all such treaties continued in force, without asking the other parties to those treaties whether or not they accepted.

24. On the other hand, there were cases of new signatures, new accessions, on the part of the newly-created State, and in the case of Malaya, the new State had reaffirmed the actions of the former sovereign State. According to certain jurists of the new Asian and African States, that method constituted not only a new signature or accession, but also a confirmation of an existing position, it being asserted that the change of sovereignty had caused no change from the point of view of the situation of the territories concerned—formerly possessions and now States—in the system of treaties. Other jurists, on the other hand, found that a new contractual bond was involved and that the former obligation no longer existed, but that a new obligation had been created. He noted that it was not universally agreed among jurists that a newly sovereign State could be deemed to have been a party to a pre-existing treaty.

25. Referring to the question of the recognition of States, he said that he was not firmly convinced that a State became a subject of international law through recognition. He was an advocate of the declaratory theory of recognition and not of the constitutive theory. But it was the generally accepted view that one of the conditions to be fulfilled by the new political entity was that it must be willing to respect the fundamental principles of international law, in spite of the fact that it had not participated in the creation of those principles. How could a State show its approval of certain rules of international law established in the contractual form and contained in treaties? The only possibility was to declare its acceptance of the obligations resulting from such treaties. If all agreed that a newly-created State had to accept the existing system of international law, how could it signify such acceptance if it was denied the means of doing so?

26. That was the crux of the question raised in Mr. Scelle's statement concerning the admission of certain States to the international community by means of recognition and their exclusion by non-recognition. The problem was whether one could eliminate them from the international community and then hold them responsible for the non-application of the rules of international law.

27. The most obvious example was that of China. Two Governments claimed the exclusive right to govern China, and adherents of those Governments supported those claims politically and diplomatically. However, in his opinion there existed, in fact, two Governments and two States. In that connexion, he noted that the Geneva Conventions of 1949 for the protection of war victims had been signed by both Governments of China, and so had the World Postal Convention, although the

United Nations Secretariat took the view that that Convention concerned territories and not States.

28. He had raised only some of the difficulties encountered in the complex problem of the relationship of recognition to the law of treaties. It was a problem that the Commission could not ignore and on which it could not decide without a very thorough study. It might be possible to avoid it in connexion with section B, but it would have to be dealt with in detail when section C was examined.

29. The CHAIRMAN urged members not to stray too far from the subject. The question of the devolution of treaty rights and obligations, for example, was more properly connected with the law of State succession than with the law of treaties. He saw no reason why the Commission could not agree on a text which would not prejudice any question of recognition or State succession.

30. Mr. AGO said that, in connexion with Mr. François's point (see para. 18 above), the problem had been raised whether or not a decision that all States would have the possibility of automatically acceding to certain types of treaties would give rise to difficulties owing to the question of recognition of States. He was happy to find himself and Mr. Tunkin holding the same view, namely that recognition had nothing to do with the international personality of a State, that a State existed on bases other than recognition. However, he wished to point out to Mr. Tunkin that, so far as treaties were concerned, the effect of their common view of recognition would be exactly opposite to that suggested by Mr. Tunkin.

31. If a State, in spite of its not being recognized, was automatically entitled to sign certain treaties, it would thereby enter into treaty relations with the non-recognizing States, which by refusing to recognize it had signified their intention not to enter into any relations with it other than those required by the general and customary rules of international law, in other words, not to enter into treaty relations. The suggested rule of automatic participation would thus conflict with the very essence of non-recognition.

32. On the contrary, no problem existed for those who accepted the theory that recognition was constitutive of the rights and duties of statehood: in that case, an unrecognized State could not sign because it did not exist as a subject of international law unless it was recognized.

33. Apart from the difficulties caused by the question of the recognition of States, there were problems arising from the question of the recognition of Governments. Whatever the reasons, good or bad, for which an international organization recognized one of two Governments as the Government of a particular State, it would be an obvious contradiction to require that international organization to accept the signature of the other Government, which it did not recognize, to a convention negotiated at a conference convened by the organization.

34. Again, there was the question of the effect of measures ordered under Article 41 of the Charter: Would a State with which Members of the United Nations had broken all relations on orders of the Security Council be entitled to sign a convention negotiated at a conference organized by the United Nations?

35. Those were only some of the problems that occurred to him. While it was quite correct to attempt to open treaties to the largest number of members of the international community, circumstances, as Mr. Yokota had said, imposed upon the Commission a certain rule of prudence in the pursuit of that aim.

36. Mr. PADILLA NERVO thought that it would be very difficult to devise a general rule concerning the accession of new States that would adequately cover the cases of bilateral, plurilateral and multilateral treaties. He asked the Special Rapporteur whether it would not be possible to redraft article 24 in such a way as to deal with the three cases separately. In the case of bilateral treaties there was no problem. Plurilateral treaties, negotiated for a specific purpose by a restricted number of States called together by the invitation of one or more States, could not be acceded to by new States except with the consent of the parties to the treaty. Finally, in the case of mutilateral treaties negotiated at a conference called by an international organization he thought that the rule should be that all members of the international organization had the faculty to sign the treaty.

37. The CHAIRMAN, speaking as Special Rapporteur, agreed that Mr. Padilla Nervo's suggestion might go far towards solving the difficulty.

38. Mr. LIANG, Secretary to the Commission, said that ever since the establishment of the United Nations provision had been made, either explicitly or implicitly, for other States to become parties to multilateral treaties concluded under its auspices. Though the Charter did not contain a specific article dealing with the matter, Article 4 dealt with it implicitly: any new Members became parties to the Charter by the very act of admission.

39. The United Nations had adopted many conventions universal in character; they would be unenforceable if not generally accepted. The Convention on the Prevention and Punishment of the Crime of Genocide had been adopted in 1948 (General Assembly resolution 260 (III)) and had been signed by many Governments soon after its adoption. Article XI provided that the Convention might be signed on behalf of any Member of the United Nations and of any non-member State invited to sign by the General Assembly. That clause provided a procedure for the admission of new parties. The General Assembly, in resolution 368 (IV), implementing article XI of the Genocide Convention, had requested the Secretary-General to dispatch invitations to each non-member State which was or thereafter became an active member of one or more of the specialized agencies of the United Nations, or which was or thereafter became a party to the Statute of the International Court of Justice.

40. Similar provisions had been included in all subsequent multilateral treaties. By General Assembly resolution 268 A (III), dealing with the restoration to the General Act of 26 September 1928 of its original efficacy, a series of amendments had been made to that Act, one of which provided for the addition of a new provision under which the General Act "shall be open to accession by the Members of the United Nations, by the non-member States which shall have become parties to the Statute of the International Court of Justice or to which the General Assembly of the United Nations shall have communicated a copy for this purpose". The most recent example[1] was article 26 of the

[1] *United Nations Conference on the Law of the Sea, Official Records, Vol. II: Plenary Meetings* (United Nations publication, Sales No.: 58.V.4, Vol. II), annexes, document A/CONF.13/L.52, pp. 132-135.

Convention on the Territorial Sea and the Contiguous Zone. Thus, for all practical purposes, it was inconceivable that any convention concluded under United Nations auspices would lack a provision enabling non-participants to sign it or accede to it. The general question might be theoretical, but in practice no problem arose in connexion with multilateral treaties concluded under United Nations auspices. He therefore agreed with Mr. Padilla Nervo that such treaties should be placed in a separate category. In his opinion, there was no difficulty with regard to the practice of international organizations, which, though not absolutely uniform, was very general.

41. The pattern was varied in the case of conventions concluded outside the United Nations. Article 139 of the Geneva Convention of 12 August 1949 relative to the Treatment of Prisoners of War,[2] provided that the Convention should be open for accession on entry into force by any Power in whose name the Convention had not been signed. That provision emphasized the importance of universality of participation.

42. The United Nations system was not, therefore, as broad as that of the Geneva Convention of 1949, since conventions concluded under United Nations auspices provided that the General Assembly should be the organ determining what States were to be invited to accede. The criteria used by the General Assembly had, of course, been accepted by a majority of the Member States.

43. He was inclined to support the principle that separate treatment should be accorded to the so-called "conventions of a universal character". That would be no innovation in international jurisprudence. In its advisory opinion on reservations to the Genocide Convetion, the International Court of Justice had stressed the "universal character" and "scope" of the Convention in question[3] and had thus recognized the existence of universal treaties.

44. The difficulty mentioned by Mr. François with regard to old conventions which contained no article providing for accession still remained, however, and he agreed with Mr. Yokota that the Commission should be cautious in approaching them.

45. With regard to recognition, he said it was abundantly clear that recognition depended on the specific intention to recognize. For example, in the case of the Treaty of Paris of 27 August 1928, more generally known as the Briand-Kellogg Pact, the United States of America had explicitly stated that its signature did not imply recognition of any State which it had not already recognized, by virtue of the mere fact that the United States and such a State were co-signatories of the Pact.

46. In drafting the clause suggested by Mr. Padilla Nervo to deal with multilateral treaties, especially those concluded under United Nations auspices, the present practice should be borne in mind. It should be confirmed rather than changed to cover remote contingencies.

47. Mr. YOKOTA said that the question of the relative merits of the "declaratory" and "constitutive" theories of recognition was extremely interesting but too academic for the Commission to discuss fully at that stage. In any case, there was no need to go into the question at all, because the difficulty he had raised persisted whichever theory was accepted. If a new State was admitted to a treaty by the agreement of a majority of two-thirds of the signatories, and some State which had not recognized the new State objected to such admission, the non-recognizing State, if it ratified the treaty, would be bound by treaty *vis-à-vis* the new State and automatically had rights and duties *vis-à-vis* that State. Those rights and duties might be new ones which had not previously existed in international law, since every treaty, even codifying treaties, contained some rules *de lege ferenda*. The Commission had assumed that its draft of the treaty on the régime of the high seas,[4] for example, was a treaty containing general provisions embodying the existing rules of law, but at the United Nations Conference on the Law of the Sea, 1958, some delegations had regarded some of the provisions as new.

48. Mr. Ago had well explained the difficult situation in which States which had participated in a negotiation and had signed the text, but had not yet recognized a new State, would find themselves. If they ratified, they would have rights and duties *vis-à-vis* the new State, but if they did not wish to assume such rights and duties, they would be precluded from ratifying. It seemed unfair that a State which had participated in the negotiation should be precluded from ratifying simply because a new State, which might not even have been in existence at the time of the conclusion of the treaty, had subsequently been admitted. The Commission should approach such a complex question with extreme caution.

49. Mr. ZOUREK said that he agreed with those who argued that every State should have the right to participate in the negotiation of a multilateral treaty of a universal character or to sign it. The question was being unnecessarily complicated by the introduction of the problem of recognition. The large majority of authors acknowledged that the ratification of or accession to a multilateral treaty did not imply recognition of an unrecognized State either by a State which ratified or by a State which subsequently acceded to it. Thus, if a State which was not recognized by one of the parties itself became a party, the question of recognition was in no way affected. The Commission should resolutely disregard an argument that tended to invalidate the right of all States to participate in a universal treaty.

50. The argument that to admit a State which had not been recognized by another State to sign a universal treaty would impose on the latter State unjustified duties *vis-à-vis* the former could not really be considered as tenable. Even if a State was not recognized, it was a subject of international law and its international relations were governed by the general rules, and particularly the customary rules, of international law. The constitutive theory of recognition, whereby the existence of the State as a subject of international law was made to depend on its recognition, had no scientific foundation, since it took no account of reality. It amounted to a transposition into international law of the institution of "civil death" formerly known to feudal law.

51. If the customary rules of international law governed any State's relations with other States, how could it be held that, if such rules were codified in the form of a treaty, a State already bound by the same customary rules as those forming the subject of the treaty had no right to sign it? Any such argument rested on purely

[2] United Nations, *Treaty Series*, vol. 75 (1950), No. 972, p. 240.

[3] *I.C.J. Reports 1951*, p. 23.

[4] *Official Records of the General Assembly, Eleventh Session, Supplement No. 9* chap. II.

political considerations, which the Commission, as a body of jurists, should eschew.

52. The principle that every State, whether or not it had been recognized, was entitled to take part in negotiations concerning multilateral treaties of a universal nature flowed from the principle of the sovereign equality of States and from the special nature of international law, which was a law as *between States*, based on their collective will. That principle must be considered as a part of the law of nations; it was therefore out of the question that any one category of States should be excluded from its application, so far as universal treaties were concerned. In the case of bilateral and regional treaties, the question of participation was far simpler, as Mr. Padilla Nervo had pointed out.

53. He could therefore accept Mr. Padilla Nervo's suggestion (see para. 36 above) that the three types of situation should be dealt with separately, as well as Mr. Tunkin's views with regard to treaties of a universal character.

54. Mr. TUNKIN entirely agreed with Mr. Zourek. Mr. Ago's attempt to solve the difficulty pointed out by Mr. Yokota had been inconclusive. His remarks concerning the link between recognition and participation in universal treaties were not consistent with established practice, as Mr. Zourek had shown. Even in the case of the admission of new Members to the United Nations, it had frequently happened that States had voted for the admission of new States although they had not yet recognized those new States at the time of the vote.

55. There could be no doubt that States were subjects of international law, regardless of their recognition, and were equals under that law. How, therefore, could any State be precluded from participating in a multilateral treaty of a universal character?

56. A treaty could be universal in character, either because its object was one of universal interest, or because it created rules intended to be universally accepted. In modern times, many rules of international law were created by treaty, no longer solely by custom. Hence, it was not only illogical, but also illegal, to exclude any State from participating in treaties which dealt with matters of general interest and concerned the rights of all States.

57. He therefore proposed that the following new paragraph be added to article 24:

> "Each State has a capacity to participate in a multilateral treaty which by its nature is of a universal character."

58. With regard to the practice observed in the admission of States to the conferences convened under the auspices of the United Nations referred to by the Secretary, he agreed with Mr. Zourek that any discrimination in that respect was due to purely political reasons. It might even be said that the non-admission of the People's Republic of China to participation in many multilateral treaties—contrary to what was chiefly intended by that practice—was the direct result of the so-called Cold War. If the Commission countenanced and consecrated that practice, it would be failing in its duty as a body of jurists desirous of making a contribution to the maintenance of international peace.

59. Mr. GARCIA AMADOR said that in Mr. Tunkin's amendment the word "capacity" was technically inappropriate, since it was generally used to denote the contractual capacity of political entities, some of which were not necessarily States. The phrase "has the right" or "is entitled" might be preferable.

60. Mr. Tunkin and other members had argued that the participation of all States in universal treaties was a more important question than that of recognition, which was eminently political and therefore unsuited to discussion by the Commission. From the legal point of view, however, there was an even more important question: If the right of all States to participate in universal treaties was admitted, was it not implied that all States were bound by universal treaties, even by those in which they had not participated?

61. The question was very complex, because although some members would argue that all States had the right to participate in universal treaties, not all would be equally ready to accept the implicit idea that all States were bound by them. It was true that the word "universal" was relative in the context, since some regional treaties had certain universal aspects, but those aspects would not confer on all States the right to participate. The formulation suggested by Mr. Tunkin was hardly acceptable.

62. The CHAIRMAN said that he wished to make some comments as Special Rapporteur at the next meeting and suggested that the discussion be continued and that a vote might possibly be taken on certain issues.

It was so agreed.

The meeting rose at 12.55 p.m.

504th MEETING

Friday, 29 May 1959, at 9.50 a.m.

Chairman: Sir Gerald FITZMAURICE

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

[Agenda item 3]

ARTICLE 24 (*continued*)

1. The CHAIRMAN, speaking as Special Rapporteur, thought that Mr. Padilla Nervo's suggestion (503rd meeting, para. 36) for dividing article 24 into sections dealing respectively with bilateral treaties, treaties restricted to certain classes of States, and general multilateral treaties was generally acceptable. There was no problem in the case of bilateral treaties, and no real problem in that of regional treaties or treaties restricted to a particular group or class of States, since participation in a regional or "restricted" treaty by a State outside the region or group required the consent of the parties.

2. The main problem arose in the case of general multilateral treaties. The Secretary to the Commission had explained the practice of United Nations conferences and the practice in the General Assembly (see 503rd meeting, paras. 38 ff.) There was no essential difference, so far as participation was concerned, between a general multilateral treaty negotiated under the auspices of an international organization and a multilateral treaty not so negotiated. Either the treaty regulated participition—in which case no problem arose—or it was silent on the matter, and then the question did arise. It was, however, very unusual in modern times to find a treaty which did not regulate the participation of States which had not attended the conference. Thus, the problem was confined mainly to older treaties. Nevertheless, some general rule would have to be provided in a code, since