

Document:-
A/CN.4/SR.519

Summary record of the 519th meeting

Topic:
Other topics

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

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imply a preference for the one or the other variant. That would be inconsistent with the decision that both variants would be included in the report. Accordingly, he proposed that both the versions given in the Special Rapporteur's redraft of article 13 should be reproduced, as alternatives, in the report.

The proposal was rejected by 10 votes to 7, with 1 abstention.

46. The CHAIRMAN said that in view of the foregoing decision it now became necessary to choose which of the two versions should appear in the report in the form of an article.

By 11 votes to 6, with 1 abstention, the Commission decided that the longer variant (the first variant in the Special Rapporteur's redraft of article 13) would not appear in the report in the form of an article.

47. The CHAIRMAN said that the result of the vote implied that the second (shorter) variant would appear as article 13 and the longer variant in the commentary. Texts for the shorter version had been submitted in the Special Rapporteur's second variant, by Mr. Padilla Nervo (517th meeting, para. 2), by Mr. Verdross (513th meeting, para. 54 and 514th meeting, para. 24) and, in an amendment to Mr. Verdross's text, by Mr. Pal (517th meeting, footnote 1). As all contained similar elements, all might be referred to the Drafting Committee, on the following understanding: It would not be necessary to go into the question of the State acting *de jure imperii* and *de jure gestionis* nor to draw a formal distinction between diplomatic and consular functions. The draft article should not exclude the possibility that consuls might take action in the interests of the sending State, but should make it clear that they could do so only within the consular district, only vis-à-vis local authorities and only within the scope of consular functions.

48. An introductory clause might be drafted taking account of those points and of some others raised in the discussion, including those made by Mr. Matine-Daftary (see para. 23 above) and the proviso that consuls could not contravene the local law.

49. The introductory clause might be followed by a number of sub-paragraphs such as those suggested in Mr. Padilla Nervo's amendment and in the Special Rapporteur's second variant. The advisability of including a clause concerning the consul's role in furthering cultural relations might be considered.

50. The Drafting Committee might also consider whether some of the points in the Special Rapporteur's first variant which did not appear in any of the shorter versions should be embodied in the draft article, notably the important function of representing the interests of nationals in cases connected with succession (sub-paragraph 7 of the first variant) and some such general clause as that in sub-paragraph 17.

51. Mr. YOKOTA said that if the Drafting Committee was to carry out its work the Commission should decide whether the protection of the nationals of the sending State or the defence of the rights and interests of that State should be the main consular function. It was on that substantive question that the Special Rapporteur's second variant differed from the other texts.

52. The CHAIRMAN thought that that was a question of presentation, to which the Drafting Committee might well find the solution.

53. He announced that the Commission had concluded its preliminary work on the topic of consular intercourse and immunities.

Consideration of the Commission's draft report covering the work of its eleventh session (A/CN.4/L.83 and Corr.1)

CHAPTER I: ORGANIZATION OF THE SESSION (A/CN.4/L.83 AND CORR.1)

54. The CHAIRMAN asked the Commission to consider the chapter of its draft report relating to the organization of the session.

55. Referring to paragraph 7 (A/CN.4/L.83/Corr.1), Mr. ZOUREK said that he was not sure that he had been absent from the Commission "for more than half the session".

56. Mr. AMADO suggested that the phrase should be amended to read "almost half the session".

It was so agreed.

57. Mr. LIANG, Secretary to the Commission, referring also to paragraph 7, suggested that the phrase "without taking up the reports of the Special Rapporteur for that subject" should be deleted.

It was so agreed.

Chapter I, as so amended and with further drafting changes, was adopted

The meeting rose at 1 p.m.

519th MEETING

Friday, 19 June 1959, at 9.50 a.m.

Chairman: Sir Gerald FITZMAURICE

Consideration of the Commission's draft report covering the work of its eleventh session (A/CN.4/L.83 and Corr.1, A/CN.4/L.83/Add.1 (continued))

CHAPTER II: LAW OF TREATIES (A/CN.4/L.83/ADD.1)

1. The CHAIRMAN asked the Commission to consider the chapter of its draft report relating to the Law of treaties.

I. GENERAL OBSERVATIONS

Paragraph 1

2. Mr. GARCIA AMADOR said it was unnecessary to itemize the subjects selected for priority treatment; he suggested that the phrase "namely arbitral procedure . . . and high seas fisheries" should be deleted.

It was so agreed.

Paragraph 2

No observations.

Paragraph 3

No observations.

Paragraph 4

After an exchange of views, it was agreed that no change would be made in paragraph 4.

Paragraph 5

3. Mr. TUNKIN pointed out that the first two sentences merely repeated the reasons why the Com-

mission had been unable to complete the subject of consular intercourse and immunities. Those reasons were given in chapter I of the draft report (A/CN.4/L.83 and Corr.1).

4. On a suggestion by Mr. LIANG, Secretary to the Commission, the CHAIRMAN proposed that the two sentences in question and footnote 8 be deleted, that a footnote to the third sentence should refer to the relevant paragraph in chapter I and that consequential drafting changes be made.

It was so agreed.

Paragraph 6

5. Mr. TUNKIN said that owing to its decision regarding the agenda for the twelfth session (515th meeting, para. 45), the Commission could hardly hope to complete a first draft on the subject of the framing, conclusion and entry into force of treaties at that session.

6. The CHAIRMAN proposed that at the beginning of the paragraph the words "at its next (twelfth) session in 1960" be deleted and the words "in the fairly near future" inserted after the word "complete".

It was so agreed.

7. Mr. PAL proposed that the word "and" be substituted for the words "in order" in the last phrase of the last sentence.

It was so agreed.

Paragraph 7

8. Mr. TUNKIN doubted whether the Commission should at that stage invite any comments from Governments.

9. Mr. LIANG, Secretary to the Commission, pointed out that members of the Sixth Committee of the General Assembly would probably make some comments on the Commission's report in any case, but it would be inadvisable either to suggest that Governments might care to make comments or, at that stage, to employ the more correct procedure of directly inviting comments.

10. Mr. AGO proposed that paragraph 7 be deleted and the subsequent paragraphs renumbered accordingly.

It was so agreed.

Paragraph 8

No observations.

Paragraph 9

11. Mr. TUNKIN suggested that problems of theory should preferably be avoided in the report. In his view, agreement began to take form when the treaty-making process started and was complete at the final stage. It might be preferable to delete the end of the first sentence beginning "i.e. the conversion . . ." and to delete the remainder of the paragraph after "*ne varietur*". He could not accept the idea that the drawing up of the text had no connexion with agreement and that agreement was manifested only at the time of signature.

12. The CHAIRMAN said that he could not accept Mr. Tunkin's suggestion, for the articles already approved were based on the idea that there was no agreement until signature, and that, even then, the agreement was provisional only.

13. Mr. TUNKIN replied that it would be perfectly easy to avoid controversial theoretical problems.

14. Mr. PAL observed that paragraph 9 did not deal with theory but merely summarized the sections of the draft. He saw no reason for the proposed deletions.

15. Mr. LIANG, Secretary to the Commission, recalled that at one stage the phrase "basis for potential agreement" had been used in connexion with establishing the text. The question whether there was an element of agreement in establishing the text was a relevant one, and he thought that there was such an element, though it was not the same as substantive agreement to the treaty. He suggested that the phrase "as being the text to which they will agree if they eventually agree to it at all" might be unnecessary, since if the parties did not in some way agree on the text, it could not be established.

16. Mr. YOKOTA said that the difficulty seemed to lie in the word "conversion". The phrase beginning "i.e. the conversion . . ." might be deleted.

17. Mr. TUNKIN agreed with Mr. Yokota's suggestion.

18. The CHAIRMAN objected that members appeared to be reopening the discussion on the substance of the articles. The Commission had decided that a further step was needed to convert an established text into an actual agreement.

19. Mr. AGO suggested that, to avoid repetition, the phrases "considered simply as a text" and "the negotiators have drawn up the text and have authenticated it in some way, so that" should be omitted. Some different term should be found to replace the term "conversion".

20. The CHAIRMAN accepted the suggestions made by Mr. Ago and Mr. Yokota. Paragraph 9 might therefore be amended to read:

" . . . the topic of the drawing up and authentication of the text; and in the second place, the topic of the conclusion and entry into force of the treaty (i.e. the initial text becomes an actual international agreement by signature, ratification and entry into force). The first section would cover the treaty-making process up to the point where the text is established *ne varietur*. But up to this point . . ."

21. The last sentence in the paragraph would begin: "To cause the text, as initially drawn up, to become an operative treaty . . .".

It was so agreed.

22. Mr. AGO questioned the use of the words "*force exécutoire*" in the French text.

23. Mr. AMADO strongly objected to the phrase "*force exécutoire*", on the grounds that it was completely alien to the ordinary language of treaties.

24. Mr. SCALLE drew attention to the great change in treaty law that had occurred, in his view, since the United Nations Charter had come into force. Before that time treaties might be said to have had *force exécutoire*, in the sense that a State might have enforced them. That concept no longer prevailed. He suggested that the phrase "*force obligatoire*" should be substituted for "*force exécutoire*".

It was so agreed.

Paragraph 10

No observations.

Paragraph 11

25. Mr. FRANÇOIS objected to the reference to domestic legal systems in the last phrase of the first sentence. Domestic legislation had binding force, while the code that the Commission was preparing would merely constitute guidance.

26. The CHAIRMAN suggested that the phrase should be omitted.

It was so agreed.

27. Mr. TUNKIN said that the first sentence was based on the theory—to which he could not subscribe—that general international law was customary international law, not based on agreement, whereas conventional international law was only particular law. He believed that both categories of norms of international law were based on agreement and were, moreover, closely inter-connected. The sentence further implied that the Commission had taken a final decision that the draft should take the form of a code, rather than a convention; in actual fact, the question would have to be reopened when the draft was completed.

28. Mr. YOKOTA agreed that the first sentence was unduly categorical with regard to the ultimate form of the draft.

29. The CHAIRMAN suggested, in deference to Mr. Tunkin's and Mr. Yokota's observations, that the words "by the Commission or" should be inserted before "by the General Assembly", that the words "as yet" should be inserted before "envisaged its work" and that the first part of the second sentence should be altered to read: "The reasons for and advantages of this conception, as they appeared to the Special Rapporteur, are stated in the following passage from paragraph 9 of the introduction to his first report".

It was so agreed.

30. Mr. LIANG, Secretary to the Commission, drew attention to footnote 14, which did not appear in the introduction to the Special Rapporteur's report. He wondered whether such an important legal principle should be mentioned merely in a footnote.

31. The CHAIRMAN endorsed the Secretary's remarks and suggested that the footnote should be incorporated in the text of the Commission's report.

It was so agreed.

Paragraph 12

32. Mr. FRANÇOIS did not consider it appropriate to give as a reason for abridging the commentary the fact that the ground covered by the articles had already been covered by the reports of three Special Rapporteurs. That statement in the second sentence gave the erroneous impression that the Commission had approved the reports in question.

33. The CHAIRMAN suggested that the opening phrase of the second sentence "Not only has the ground . . . by way of commentary; but, in addition" should be deleted.

It was so agreed.

Paragraph 13

No observations.

II. TEXT OF DRAFT ARTICLES AND COMMENTARY

ARTICLE 1

34. Mr. GARCIA AMADOR suggested that, since paragraph 4 related to both oral and written unilateral

declarations, the generic term "unilateral acts" should be used instead of "unilateral instruments".

It was so agreed.

COMMENTARY ON ARTICLE 1

35. In order to take into account points raised by Mr. Ago and Mr. Amado, the CHAIRMAN suggested that the opening sentence of paragraph (1) of the commentary should end with the words ". . . second and third sessions in 1950 and 1951", and that the next sentence should read "The term 'treaty' usually connotes a particular type of international agreement, namely, the single formal instrument which is normally subject to ratification".

It was so agreed.

36. Mr. AGO suggested that the words "international instruments" in the second (now third) sentence of paragraph (1) should be replaced by the words "international agreements".

It was so agreed.

37. Mr. LIANG, Secretary to the Commission, pointed out that the effect of that change would be to make the sentence read: ". . . there are international agreements . . . which . . . are indubitably international agreements . . .".

38. The CHAIRMAN suggested that the word "international" should be deleted where it appeared the second time before the word "agreements".

It was so agreed.

39. Mr. AGO pointed out that the words "substantive validity", in the second sentence of paragraph (3) (b) of the commentary, would exclude such other forms of validity as temporal validity. He suggested that the word "substantive" should be deleted.

It was so agreed.

40. Mr. EDMONDS, referring to the same sentence, thought that the use of the word "indifferently", might give rise to misunderstanding.

41. The CHAIRMAN said that the word might be omitted.

It was so agreed.

42. Mr. LIANG, Secretary to the Commission, felt that the question at the end of paragraph (3) (b) should be put in the form of an indirect question.

43. The CHAIRMAN suggested that the question should be replaced by the words "But the question arises whether it is necessary to do even that".

It was so agreed.

44. Mr. AGO felt that the word "segregations" in the final sentence of paragraph (4) (a) was an odd usage. He suggested that the sentence should be amended to read: "No express distinctions between different forms of instruments are necessary for this purpose".

It was so agreed.

45. Mr. LIANG, Secretary to the Commission, observed that the meaning of the words "restricted class or group of States" as used in the definition of the word "plurilateral" in paragraph (5) was not clear. He suggested that the word "class" should be omitted.

46. The CHAIRMAN said that, whereas the word "group" meant a regional group, the word "class" was intended to imply that the States in the particular class had something in common other than a regional con-

nexion. He suggested that the word "class" should be replaced by the word "number".

It was so agreed.

47. Mr. LIANG, Secretary to the Commission, suggested that footnote 24 to paragraph (7) unnecessarily opened a debate concerning the drafting and implications of an article of the Charter. He suggested that footnote 24 should be omitted.

It was so agreed.

48. Mr. FRANÇOIS, referring to the fifth sentence of paragraph (8),* pointed out that technically the legislature did not ratify a treaty but approved ratification by the executive.

49. Mr. BARTOŠ said that that was not always the case. The constitutions of a number of East European States provided for ratification by the legislature.

50. Mr. AGO suggested that the words "require ratification by the legislature" should be replaced by the words "require that ratification shall be given or authorized by the legislature".

It was so agreed.

51. Mr. TUNKIN suggested that the words "considerations of general law" in paragraph (8) *bis* (b) and again in paragraph (9) should be replaced by the words "general principles of international law".

It was so agreed.

52. Mr. TUNKIN suggested that, in the fourth sentence of paragraph (8) *bis* (b) the words "for the purposes of the present Code" should be inserted between the words "could not" and the words "be treated".

It was so agreed.

COMMENTARY ON ARTICLE 2

53. Mr. AGO, referring to paragraph (1), doubted whether the word "defined" was appropriate.

54. The CHAIRMAN suggested that the word should be replaced by the word "used".

It was so agreed.

55. Mr. AGO observed that the play on the word "international" in the sentence "An agreement between States . . . is no doubt an 'international' agreement", in paragraph (3), might be difficult to follow. He suggested that the sentence should be deleted and that the beginning of the following sentence should be amended to read: "Is an agreement between States always . . .".

It was so agreed.

56. Mr. LIANG, Secretary to the Commission, referring to the words "customary international law (a part of treaty law, but also transcending it)", observed that the reverse was also true: the law of treaties was a part of international law.

57. The CHAIRMAN agreed and suggested that the words in parenthesis should be deleted.

It was so agreed.

58. Mr. TUNKIN suggested that the last two sentences of paragraph (3) should be deleted. The illustration cited related to the question of State responsibility, the codification of which was part of the future work of the Commission.

* Owing to a typographical error there were two paragraphs numbered "(8)" in the draft report. For the sake of clarity, the first will in this summary record be referred to as "(8)" and the second as "(8) *bis*".

59. Mr. GARCIA AMADOR, Special Rapporteur on the subject of State responsibility, supported the suggestion.

60. Mr. LIANG, Secretary to the Commission, drew attention to the possibility that the sentences might be quoted out of context by a student of international law.

Mr. Tunkin's suggestion was adopted.

The meeting rose at 1.5 p.m.

520th MEETING

Monday, 22 June 1959 at 3 p.m.

Chairman: Sir Gerald FITZMAURICE

Consideration of the Commission's draft report covering the work of its eleventh session (A/CN.4/L.83 and Corr.1, A/CN.4/L.83/Add.1) (continued)

CHAPTER II: LAW OF TREATIES (A/CN.4/L.83/ADD.1) (continued)

II. TEXT OF DRAFT ARTICLES AND COMMENTARY (continued)

1. Mr. EDMONDS, referring to the procedure employed, said that in the past the Commission's practice had always been to vote on an article and on the amendments to it, refer it to the Drafting Committee and then discuss further and vote on the text submitted by the Drafting Committee. At the current session, the Commission had taken almost no votes. It was an innovation for an article prepared by the Special Rapporteur to be referred to the Drafting Committee with amendments but without a vote. As a result, the report would contain articles which the Commission had not in fact approved. He appreciated the procedural difficulties which had beset the session; nevertheless, he considered that the report should state frankly that the text of the articles was that originally presented by the Special Rapporteur, as revised by the Drafting Committee, but had not been approved by the Commission as a whole.

2. The CHAIRMAN explained that he had been proposing to put the text to the vote in due course. Any member was free to raise any point he wished in connexion with the articles or the commentary. He had not yet put the articles to the vote because considerations arising out of the commentaries might lead to a change in the text of an article. After the discussion of the commentary he had been intending to ask whether any member wished the vote to be taken on any article or on any part of any article, and if no such wish was expressed, to regard the article as unanimously approved. He now agreed that a vote was necessary, subject to the understanding that the draft at that stage was provisional and that all the articles would have to be reviewed in the light of further work.

3. Mr. BARTOŠ, associating himself with the criticism of the procedure, said that, unless all members of the Commission had an opportunity of discussing the texts prepared by the Drafting Committee, the report would not be a true account of what had actually occurred.

4. Mr. TUNKIN said that, although the criticisms by Mr. Edmonds and Mr. Bartoš were justified, the procedure followed by the Commission did not differ greatly from the procedure it would have adopted if