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**Summary record of the 620th meeting**

Topic:  
**Law of Treaties**

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testify was liable to be fined a specified sum for each day of refusal. In other countries a recalcitrant witness was liable for damages caused by his non-appearance. An English expression should therefore be found to correspond to the French term *sanction*.

103. The CHAIRMAN, speaking as a member of the Commission, said that he also preferred the use of two terms in English. He suggested that the phrase "no coercive measure or penalty" should be used in the English text and *aucune mesure de coercition ou autre sanction* in the French.

*It was so agreed.*

104. The CHAIRMAN, speaking as a member of the Commission and referring to paragraph 3, suggested that the last sentence was not necessary. The similar sentence was necessary in paragraph 1, because that paragraph established the obligation to give evidence and it might follow that coercion might be applied in case of refusal to do so, but no such obligation was stated in paragraph 3.

105. Mr. ŽOUREK, Special Rapporteur, explained that the sentence had been included by the Drafting Committee in paragraph 3 after considerable discussion. The article applied to two categories of persons. In paragraph 1 the exemption was recognized only in the case of consular officials, whereas paragraph 3 covered all members of the consulate. The exemption had therefore had to be repeated in paragraph 3 to cover also employees of the consulate other than consular officials. Its retention might be of great practical use in certain States.

106. Mr. LIANG, Secretary to the Commission, observed that the last sentence in paragraph 3 was not only useless but might cause difficulties. It seemed to imply that the authority was entitled to impose a penalty and would in fact be applying a self-denying ordinance if it did not do so. But the paragraph referred to the official acts of members of the consulate and to the receiving State's duty under international law not to require evidence concerning matters connected with the performance of official acts.

107. Sir Humphrey WALDOCK agreed with the Secretary. The sentence was inappropriate because the immunity referred to in paragraph 3 was really the immunity of States, not of individuals.

108. The CHAIRMAN, speaking as a member of the Commission, recalled that during the debate on article 42 of the 1960 draft he had drawn the Drafting Committee's attention to the expression "may decline". It would be better to replace it by "are under no obligation". If there was no obligation, the question of a penalty did not arise at all. The second sentence in paragraph 3 should therefore be deleted.

*Those two amendments were adopted.*<sup>2</sup>

*Article 41, as amended, was adopted.*

The meeting rose at 1.5 p.m.

## 620th MEETING

Wednesday, 28 June 1961, at 10.20 a.m.

Chairman: Mr. Grigory I. TUNKIN

### Law of treaties

[Agenda item 4]

1. The CHAIRMAN said that a great deal of material on the law of treaties had accumulated, but the Commission had not been able to discuss more than part of it. At its eleventh session, in 1959, the Commission had discussed fourteen articles in the first report by Sir Gerald Fitzmaurice, the then Special Rapporteur (A/CN.4/101). The topic had been dealt with by a succession of Special Rapporteurs whose methods had not been identical. The first Special Rapporteur (Professor Brierly) had tried to draft some articles. The most recent Special Rapporteur had tried, with the Commission's authorization, to prepare a code. The problem was now what the Commission should do in the future and what instructions it should give to the new Special Rapporteur, Sir Humphrey Waldock. The Commission had a certain amount of experience and should be able to give the Special Rapporteur specific instructions. The first question was whether an attempt should be made to prepare a code or a draft convention. If the Commission decided in favour of a draft convention, it would then have to decide what kind of articles it wished, whether they should be extremely detailed, as in Sir Gerald Fitzmaurice's drafts, or more general. The Commission should also decide what parts of the law of treaties should be taken first by the Special Rapporteur, since he could hardly be expected, even on the basis of the material already available, to submit a report covering the whole field to the Commission's next session.

2. Mr. JIMÉNEZ de ARÉCHAGA observed that the law of treaties was too vast a subject for the Commission or its Special Rapporteur to cover in its entirety in one year. The three previous Special Rapporteurs had never attempted to deal with the topic as a whole, but had covered specific aspects in separate reports. It was true that enough reports were now available to embrace the whole subject, but the Commission should not expect a mere digest. The differences of approach and incompatibilities in the previous reports alone made it imperative that the new Special Rapporteur should submit his own original report. The Special Rapporteur himself should select some specific aspect; the Commission should not attempt to indicate to him what it should be, but should leave him ample discretion. When surveying the earlier reports, the Special Rapporteur might well find that certain aspects of the law of treaties were riper than others for codification.

3. If that restriction were imposed on the Special Rapporteur, the Commission must also accept it for itself at its next session. That was essential if progress were to be made. The Commission would not be devoting its time to minor subjects, but would be approaching important subjects step by step. Mr. Žourek had esti-

<sup>2</sup> With the consequential change of "and to produce" to "or to produce".

mated (615th meeting, para. 57) that it would take the Commission seven years to complete the work on the law of treaties. If so, that was a cogent argument for the piecemeal approach to the subject. Even if it confined itself to a small part of the topic, the Commission would have work enough during its next quinquennial period, as it was also expected to select other subjects for codification and to discuss them. If it wished to increase the tempo of the work on the law of treaties, it might well appoint additional Special Rapporteurs to deal with specific aspects. That would not create confusion or contradictions, as the Commission would remain responsible for the work as a whole. That method might be used in the preparatory work and the results might finally be synthesized in a single instrument.

4. The Special Rapporteur should be instructed clearly that the Commission would not require lengthy commentaries, although it could not dispense with the essential explanations of the articles as drafted. It had already had before it Professor Brierly's reports (A/CN.4/23 and 43), distinguished for their simplicity, Professor Lauterpacht's bold and striking suggestions (A/CN.4/63 and 87) and Sir Gerald Fitzmaurice's detailed and precise text and commentary (A/CN.4/101, 107, 115, 120 and 130). What the Commission would require at its next session was a report by the Special Rapporteur condensing the previous work into a few articles on the topics selected by him, leaving aside any statement of practices accepted without question by the majority of chancelleries. The object of codification was to settle the law in cases where the possible divergences existed. It would be unduly cumbersome to write a code or manual on treaty-making or to reduce to rules all the procedures employed by chancelleries.

5. It would be preferable to defer for the time being the decision whether the draft should take the form of a code or of a convention, as the answer to the question whether the draft would represent codification or the progressive development of international law would depend on the provisions to be drafted by the Special Rapporteur.

6. Mr. EDMONDS agreed in the main with Mr. Jiménez de Aréchaga's views, though he would prefer the preparation of a draft convention. He agreed with the previous Special Rapporteur that international agreements required a separate study, but the draft should cover all forms of treaty, from full treaties to exchanges of notes, with references to details where necessary. He agreed that the topic was a very large one and that the Commission would find plenty of work in carrying it out in sections.

7. The CHAIRMAN observed that the previous Special Rapporteur had in fact drafted 165 articles.

8. Mr. MATINE-DAFTARY said that, as the membership would be renewed in 1962, anything decided at the current session would not bind the future Commission. The Commission could not, therefore, give directives to the Special Rapporteur. It would be more practical if the Special Rapporteur declared his intentions and heard the Commission's reactions to them. He personally could not express a final opinion about what should happen to the draft articles submitted to the Commission on the topic of the law of treaties, for some parts were

more suited to a draft convention and others to a code or commentary.

9. Mr. FRANÇOIS also supported the views of Mr. Jiménez de Aréchaga, except with regard to the suggestion that the form should be settled later. Mr. Edmonds seemed to prefer the form of a draft convention. For the three main subjects dealt with in the past by the Commission—the law of the sea, diplomatic intercourse and immunities and consular intercourse and immunities—draft conventions had been prepared, but for special reasons. The law of the sea formed a whole, and it had been necessary to obtain the acceptance of certain rules if States were to accept other rules. As there had been almost unanimous agreement on most aspects of diplomatic and consular intercourse and immunities, a draft convention had been indicated. It was doubtful, however, whether the same reasons held good in the case of the law of treaties. It did not form a whole and there would be a considerable difference of views. It might therefore be preferable to prepare a series of standard rules. He could not agree with Mr. Jiménez de Aréchaga that the Commission should make its decision at a later stage. There would be a certain advantage in knowing beforehand what the final result would be. Even when there were no great differences of opinion, the acceptance and ratification of a convention gave rise to considerable difficulties. The presentation of standard rules by a body with the Commission's standing would have a greater impact on international law than a convention ratified by very few States with many reservations and restrictions. It was therefore essential to decide the question of form at the outset.

10. Mr. PAL said that it would be demanding too much of the Special Rapporteur to ask him to make his own suggestions. On the basis of the five reports by Sir Gerald Fitzmaurice and the earlier reports by the other two Special Rapporteurs the Commission should be able to decide between a draft convention and a codification. The previous reports had been drafted as if the Commission had had a code in mind. The Commission had already acted upon Sir Gerald's first, second and third reports and had discussed and accepted (A/4169, para. 20) the first chapter (The validity of treaties) of the first report (A/CN.4/101). If it was decided that a code was desirable, the Special Rapporteur would have no immediate work to do on the first chapter and could proceed to deal with Sir Gerald's fourth and fifth reports, with such modifications as might occur to him. If, however, the Commission decided that a draft convention was preferable, Sir Gerald's first chapter might be referred to a drafting committee to recast it in that form, and the Special Rapporteur should be instructed to draft the remainder in conventional form. He should be allowed to choose his own method.

11. Mr. AGO said that the Commission should endeavour to settle the approach to the law of treaties as that was essential for its future work. If it wished to speed up its procedure and if its work was to be effective, it must at all costs make its intentions abundantly clear, especially when giving instructions to the Special Rapporteur. Some clear-cut decision was therefore indispensable, so that the debate would not be reopened at the next session on

the form to be adopted and the parts of the law of treaties to be codified. It would be unfair to ask the Special Rapporteur to work in the dark.

12. The law of treaties was one of the key topics in the codification of international law. It was probably the most arduous task as yet undertaken by the Commission, and tremendous progress would have been made in the codification of international law if it could be carried entirely to a successful conclusion.

13. He referred to the Commission's past work on the topic. The Commission's ideas had tended in the direction of drafting, not a convention, but a set of standard rules. Sir Gerald Fitzmaurice, as Special Rapporteur, had submitted five reports, consisting of an introduction on scope and general principles, a first chapter on the validity of treaties, divided into three parts, which had given rise to very lengthy discussions, and a second chapter, divided into two parts, part I dealing with the effects of treaties as between the parties (operation, execution and enforcement) (A/CN.4/120) and part II with the effects of treaties in relation to third States (A/CN.4/130). Sir Gerald Fitzmaurice's draft had not been completed, since he had not produced any articles on the termination of treaties. The Commission had examined the introduction and part of the section in the first chapter on formal validity and had adopted a number of draft articles. The decision to be taken by the Commission at the current session would be important, because it was essential that the General Assembly should receive a clear picture of the Commission's opinion on the question whether the law of treaties should be a topic for a mere set of standard rules or for a draft convention.

14. In the early years of his membership of the Commission, he had held the idea that, in a matter like the law of treaties, a restatement of existing rules of international law would be preferable to codification in the form of a convention. He had, however, changed his mind after observing the attitudes of the newly-independent States, which comprised almost half the membership of the international community, and noting their desire to participate in the formulation of rules of international law. He had come to the conclusion that the Commission should be much bolder and should, in the case of the law of treaties, draft a convention. If a draft convention could be worked out that was acceptable to all States, and if they had participated in drafting it, a really practical result would have been achieved and it would then be possible to attain certainty in the law on the subject. The Commission should therefore aim at codification in the most technical sense, in other words prepare a draft convention to be submitted to a plenipotentiary conference, as in the case of the codification of the law of the sea. That meant also that the Commission would have to start with the intention of codifying the whole of the law of treaties, not merely the one or other of its aspects. If it subsequently found that some aspects could not be codified satisfactorily, it might have to abandon them, but there was no reason to despair of success.

15. Naturally, the Special Rapporteur could not be asked to submit a complete report to the Commission's next session, but he should not select certain aspects

at random. The Commission should accept its responsibility and work in logical order, dealing successively with the conclusion, the validity, the effects and the termination of treaties. The Special Rapporteur should therefore begin by studying the conclusion of treaties. He would, of course, be free to draw on the reports of his predecessors and also to base his work on principles accepted by the Commission, but he could not go too far in that direction, because all Sir Gerald Fitzmaurice's work had been directed towards scientific codification, not the drafting of a convention. If the Commission decided that a draft convention was needed, it must be realistic and eliminate undue theoretical discussion in order to obtain articles which would be acceptable to all the States. The previous reports should therefore be used rather as scientific background, but could not be followed article by article.

16. He could not agree with Mr. Jiménez de Aréchaga's suggestion that the Commission should defer its decision on the form of the draft. The decision should be made immediately because it would have a bearing on the planning of the Special Rapporteur's work. If he were left in uncertainty, he would not know what direction to take and might well prepare a code, after which the Commission might express a preference for a draft convention, and all his work would have been in vain.

17. It was true that the term of office of the Commission's members was drawing to an end, but the Commission as such remained. The Commission as such was perfectly competent to decide at the current session whether the law of treaties should take the form of a draft convention or of a code.

18. Mr. AMADO noted with satisfaction that Mr. Ago had now adopted the view which he (Mr. Amado) and certain other members of the Commission had long maintained.

19. It was not the role of the Commission to embark on a detailed restatement of international law. That type of work was more suitable to an academic body; the Commission should sift those rules which were of importance to inter-State relations.

20. The Commission's task in that regard had greatly increased in importance as a result of the emergence of a large number of new States unfamiliar with the Western practice of international law. Those States were anxious to participate in the formulation and acceptance of the rules of international law by which they would be bound.

21. In regard to the law of treaties, the Commission should commence with the consideration of the rules governing the conclusion of treaties. No attempt should be made to deal with theoretical questions relating, for example, to the validity of treaties. When that first stage of the Commission's work had been completed, it could then proceed to deal successively with other aspects of the law of treaties.

22. From the outset, attention would have to be focused on certain important changes which had occurred in the State practice connected with the treaty-making process. Procedural innovations in the matter had a

more or less marked influence on substance. The French author, Mr. Rousseau, had drawn attention to those changes which were increasingly weakening the contractual element in the making of multilateral treaties:

“ . . . ces innovations procédurales ne sont pas sans influence sur le fond même du droit, car elles tendent à accentuer la position individuelle des signataires et à affaiblir le caractère contractuel des engagements internationaux. Le traité multilatéral contemporain se présente en définitive non comme la résultante d'un échange de volontés, mais comme l'expression d'un régime légal offert à l'acceptation simultanée (signature) ou successive (adhésion, signature différée) des états . . . ”<sup>1</sup>

23. The development thus described had become particularly marked in the United Nations practice in the matter of multilateral treaties.

24. He agreed that the Special Rapporteur should be given definite instructions by the Commission. He would appeal to the Special Rapporteur to extract what was essential from the wealth of material at his disposal, to leave aside all baroque elements of decoration and to give to the Commission a structure having the sober purity of lines of a Greek temple, preferably of the Doric rather than the Corinthian order, which was too elaborate for his taste.

25. Mr. LIANG, Secretary to the Commission, said that the Secretariat would distribute at the next session a note containing a list of the subjects of the law of treaties dealt with by the three special rapporteurs in their reports since 1950. It was more owing to the vast scope of the subject of the law of treaties than to the Commission's preoccupation with other topics deemed more urgent that it had only been able to devote a very small portion of its time to the subject.

26. The Commission had not been able to deal with the reports of the first two Special Rapporteurs on the law of treaties. In 1959 it had given sustained consideration to part of Sir Gerald Fitzmaurice's first report. Its efforts had been rewarded, and it would be a serious pity if the results of the Commission's work in the matter were to be discarded; every attempt should be made to preserve the Commission's work on the subject of the conclusion of treaties.

27. It was necessary also to bear in mind attempts in recent decades to codify the law of treaties. He recalled, in the first place, the 1928 Havana Codifying Convention on Treaties, adopted by a number of Latin American countries.<sup>2</sup> In the second place, note should be taken of the Harvard Draft Convention on Treaties. That draft, though a private project, went into the subject more thoroughly than the Havana Convention.

28. In 1935, a second Harvard draft,<sup>3</sup> much broader in scope than the Havana Convention, had been pre-

pared. In particular, the comments appended to that draft constituted a valuable contribution to international law. However, many important changes had taken place during the period 1936-50. The whole network of multilateral treaties had acquired a more complex character.

29. He doubted whether a single convention could cover the whole vast field of the law of treaties. In fact, ever since the International Law Commission had been established, it had been clearly understood that the topic would be dealt with by stages.

30. Professor Brierly's draft, which the Commission had discussed at its second and third sessions in 1950 and 1951 respectively, was an example of conciseness. After Mr. Brierly's resignation, Professor Lauterpacht had then taken up the work and written profound and challenging reports dealing with many controversial aspects of the law of treaties. Sir Gerald Fitzmaurice had adopted a completely different approach. His report constituted a manual of reference for the use of governments and scholars and of future codifiers of the subject in another form. Considerable attention had been devoted by Sir Gerald to such questions as the “ formal validity,” the “ essential validity ” and the “ temporal validity ” of treaties, matters which were of great interest to the science of international law.

31. The Commission would be well advised to concentrate on that part of the subject which had been dealt with at its eleventh session in 1959. The Commission could, at its fourteenth session in 1962, complete that part, dealing with the conclusion of treaties. Upon finishing that task, the Commission could proceed to the next stage of the work.

32. The question arose whether the new Special Rapporteur was prepared to sponsor that part of the codification which had already been dealt with by the Commission. Perhaps the Commission might consider Mr. Pal's suggestion of appointing a committee to examine the articles already approved by the Commission and put them in a form appropriate for submission to the General Assembly.

33. He warmly agreed with Mr. Ago's views. The experience of the model rules on arbitral procedure (A/3859) had not been very encouraging. In 1958, the General Assembly had invited States to make use of those model rules in such cases and to such extent as they considered it appropriate and to report to the Secretary-General on the use they were making of the rules (resolution 1262(XIII)). It was significant that no reply from governments on that point had yet been received.

34. States did not seem sufficiently academically minded to use models of that type; what they required was an adequate presentation of the material of international law in the form of draft conventions. Particularly in recent years, there had been a marked tendency on the part of States to prefer the convention form for the purpose of codifying international law.

35. It would naturally be more difficult to present in that form the material of the law of treaties than that

<sup>1</sup> Charles Rousseau, *Droit international public*, Paris, Sirey, 1953, para. 45, p. 42.

<sup>2</sup> *International Legislation*, ed. Manley O. Hudson and Louis B. Sohn, vol. IV, p. 2378.

<sup>3</sup> Harvard Law School, *Research in International Law, III, Law of Treaties*, Supplement to the *American Journal of International Law*, vol. 29 (1935), pp. 707-710.

of diplomatic and consular relations. The Commission could, however, prepare a draft convention on the conclusion of treaties. From the point of view of feasibility it would no doubt derive encouragement from the compilation drawn up by the Secretariat of the laws and practices on the subject.<sup>4</sup> An examination of the national laws in the matter showed that there was a very large area of agreement regarding the technical rules on the subject of the conclusion of treaties.

36. If the Commission were to spell out more precisely the rules governing the conclusion of treaties, its work would probably appeal to States and receive the same good reception which had been accorded to the draft on diplomatic intercourse and which, he was sure, awaited the draft on consular intercourse.

37. Mr. BARTOŠ said that, although the question was a very difficult one, the Commission should take a decision on it; he personally agreed with the remarks of Mr. Ago. The Commission had been faced from the outset with the problem of the choice between restatement and a draft convention. Like Mr. Ago, he had at first had some hesitation, but had since become fully convinced that the draft should be prepared in such a form that it could serve as a basis for a multilateral convention.

38. He also agreed with Mr. Ago regarding the method of treating the subject, and in particular with the suggestion that the Commission should start its work by dealing with the rules governing the conclusion of treaties. However, he hoped that those rules would be preceded by an introduction setting forth some general principles and the conditions to be satisfied for the coming into being of an international treaty.

39. After the Commission had completed its work on the rules governing the conclusion of treaties, it could then proceed to consider the other aspects of the law of treaties. In doing so, the Commission would fill an existing gap in codified positive international law.

40. Mr. FRANÇOIS said that he could not share the optimism expressed by some members regarding the ratification of multilateral conventions. The fate of the 1958 Geneva Conventions on the Law of the Sea (A/CONF.13/L.52 and L.53) showed that the hopes entertained were largely illusory.

41. Another serious disadvantage of formulating a draft in the form of a convention was that an unratified convention was often worse than no convention at all. The experience of the two Peace Conferences had shown that an unratified convention could lead to a repression in international law. In the first place, many rules of customary international law were discarded in the hope of making the draft multilateral convention more acceptable to States. In the second place even those customary rules which were embodied in the draft convention were placed in jeopardy. It was not uncommon for a State to dispute the validity of a rule of customary

international law because it had failed to ratify a convention embodying it. It was very difficult to persuade States that they were still bound by such a rule, even if they did not ratify the convention.

42. While thus overestimating the prospects of ratification of a draft convention, the members to whom he had referred had underestimated the influence of a codification of the rules of customary international law by the International Law Commission. A codification of that type had always a considerable influence on the development of international law. The will of States as expressed by their signatures to international agreements was not the only source of international law. A codification of the rules of customary international law by the Commission had an effect on judicial and arbitral decisions and on the teachings of publicists of all nations, which also constituted sources of international law.

43. He recalled that the Commission had earlier taken the view that the rules of international law on the subject of the law of treaties did not lend themselves to formulation in an international convention (see e.g. A/4169, chapter II, para. 18).

44. Lastly, he urged the Commission to await the fate of the conventions concluded on the basis of the Commission's work before attempting to adopt that form for the subject of the law of treaties.

45. The CHAIRMAN, speaking as a member of the Commission, said that it was both necessary and feasible for the Commission to take a decision on the important question of the form of the draft on the law of treaties. The topic had been before the Commission for ten years and had been treated in a number of reports of varying form. The Special Rapporteur needed definite instructions on the question whether the Commission wished him to prepare a code or a draft convention. Unless those instructions were given, the Commission's work would be largely frustrated.

46. Much valuable material had been collected on the subject of the law of treaties and, although he did not agree with all the statements contained in the reports of Sir Gerald Fitzmaurice, he admired those reports as an outstanding contribution to the study of the subject. He recalled that, while the Commission had not taken any definite decision, there had been no objection to Sir Gerald's suggestion that work should proceed on the assumption that the draft on the law of treaties would constitute a code rather than a draft convention.

47. As a result, the Commission had before it a sort of manual on the law of treaties. In that form, the results of the Commission's work could not — indeed, were not intended to be — submitted to governments for acceptance.

48. He believed that the Commission should, wherever possible, attempt to prepare draft conventions. He agreed with Mr. François in regretting that so few nations had ratified the 1958 Conventions on the law of the sea. More States could, however, be expected to ratify those Conventions, and the matter might be

<sup>4</sup> Laws and Practices concerning the Conclusion of Treaties, United Nations Legislative Series (United Nations publication, Sales No. 1952.V.4).

raised soon in the Sixth Committee of the General Assembly with a view to making an appeal to States to ratify them.

49. If the Commission should decide that the draft on the law of treaties was to serve as a basis for an international convention, and if experience then showed that such a convention could not be concluded, the draft articles would still remain as a guide. The Commission should, however, endeavour to produce the draft of an international convention, for such a draft would be of much greater value for the codification and progressive development of international law than a mere set of model rules. The draft should not be excessively elaborate, nor should it be a bald statement of a few general rules. The draft should state certain generally accepted rules of international law and also contain some elements *de lege ferenda*. The Special Rapporteur should be instructed to review all the material prepared by his predecessors and consult the Commission's own discussions on the subject, and the whole structure of his draft should be determined by the practical requirements of modern international relations.

50. The first aspect of the subject to be taken up should be the conclusion of treaties; the others (e.g. validity and termination of treaties) would then follow in their logical order. He agreed with Mr. Ago that the ultimate aim should be to cover the whole field of the law of treaties and to undertake its comprehensive codification, but of course the draft could be submitted in parts to the General Assembly.

51. Mr. JIMÉNEZ de ARÉCHAGA said that, although understanding why some members strongly favoured a draft convention, he feared that a hasty decision in that sense might prejudice the issue. Surely, if the Commission gave clear instructions to the Special Rapporteur to submit draft articles stating the rules of international law in regard to treaties the Commission would then be in a far better position to judge whether those draft articles went no further than enunciating existing law and therefore needed no action by governments, or whether they contained new rules which would have to be submitted to a diplomatic conference. He urged therefore that the decision should be held over until the following session.

52. Mr. GROS associated himself entirely with Mr. Ago's view which had been supported by Mr. Bartoš and the Chairman. Though he appreciated the reasons for Mr. François' warning, he believed that the great value of the Conventions on the Law of the Sea should not be underestimated. Of course from the legal point of view it was regrettable that they had not yet been ratified by many States; but the non-ratification did not weaken their authority as international instruments adopted by a two-thirds majority in a conference of plenipotentiaries. The importance of the Conventions had not been contested even by those States which had not ratified, and there had been a clear trend since the Conferences of 1958 and 1960 to recognize the validity of the rules laid down in the Conventions.

53. Mr. François' argument that international tribunals

and arbitrators would give due weight to a code of model rules held good also for a draft convention drawn up by the Commission.

54. He was convinced that the course advocated by Mr. Ago would best advance the Commission's work in the law of treaties.

55. Sir Humphrey WALDOCK said in reply to Mr. Matine-Daftary that he had not yet had time to study all the material on the law of treaties and form a final conclusion but he had had some opportunity during the session of refreshing his memory and in particular of reading Sir Gerald Fitzmaurice's fifth report (A/CN.4/130). In general he subscribed to Mr. Ago's view that, as so many new States were joining the international community, the advantage of model rules was diminishing and that the Commission's object should be, where possible, to frame articles suitable for incorporation in draft conventions.

56. In the particular case of the law of treaties there was an additional argument in favour of a draft convention inasmuch as the topic was patently one of the most important on the Commission's agenda. If it tried to embark on the preparation of model rules he doubted very much whether it would be allowed adequate time by the General Assembly, which was likely to give priority to other work. It should try to bring to fruition the extensive work already begun by previous Special Rapporteurs on the subject.

57. He appreciated the reasons which had prompted Mr. François' remarks. He and others probably had in mind the failure of the Codification Conference of 1930 which was held by some to have been actually harmful in certain respects. But the situation had changed a great deal since then. A draft convention prepared by so large and representative a body as the Commission possessed an authority of its own even if the General Assembly decided against submitting it to a conference of plenipotentiaries. Real harm would only be done if a draft of the Commission were submitted to a diplomatic conference which failed to produce any text at all. He fully agreed with Mr. Gros as to the standing of a text which had gone through the various stages of discussion in the Commission, the General Assembly and finally in a diplomatic conference, and it was certainly true, as Mr. Gros had pointed out, that States were taking into account the changes in law introduced by the Geneva Conventions on the Law of the Sea.

58. For those reasons he did not believe that the objections of Mr. François outweighed the strong case made by Mr. Ago in favour of a draft convention.

59. Turning to the question of method, he agreed with the Chairman that the Special Rapporteur, who would have the advantage of previous reports as well as the Commission's discussion during its eleventh session (1959), should start with the subject of the conclusion of treaties. He hoped it would not appear presumptuous of him to express the view that it would be preferable for the Special Rapporteur himself rather than a drafting committee, as suggested by Mr. Pal, to revise the draft articles adopted by the Commission in 1959 and that

he should be given considerable latitude in that regard. Sir Gerald Fitzmaurice in his introduction to his fifth report had recognized that the language and form of the articles might require considerable modification if they were to be incorporated in a multilateral convention. Apart from the time factor another reason for assigning that task to the Special Rapporteur was that the draft articles adopted in 1959 were by no means complete.

60. The Chairman had rightly said that in preparing a draft convention the Commission was in fact also producing a model code and that, if for one reason or another, the General Assembly decided not to submit the draft to a diplomatic conference the articles would still remain. To that extent, he agreed with Mr. Jiménez de Aréchaga that the Commission would not need to commit itself finally until a later stage as to whether it should ultimately call its work a convention or a model code.

61. He doubted whether it would prove possible to complete more than one section of the draft in any one session, and the Commission would probably have to decide later whether to submit the draft to governments for comments section by section; but that was a matter which should not affect the more immediate decision to formulate with speed and all the necessary care a draft convention for consideration by the next session, which would be a particularly propitious moment to accomplish a substantial piece of work since there were no other topics envisaged as yet for discussion.

62. The CHAIRMAN, speaking as a member of the Commission, could not agree with Mr. Jiménez de Aréchaga and thought it essential to take a decision at the current session. Numerous draft articles on the law of treaties had been submitted to the Commission, but they were only suitable for incorporation in a model code. An international convention might need articles of quite a different character.

63. Mr. MATINE-DAFTARY said that, after listening to the preceding speakers, he had formed the considered view that under prevailing conditions in world affairs the Commission's task should be to prepare draft conventions; the codification of doctrine should be the work of learned writers on international law. Any topic that was unsuitable for incorporation in a draft convention should be set aside. He was certain that Sir Humphrey Waldock would take from the work of the previous Special Rapporteurs on the law of treaties whatever could be used in a draft convention and would drop a large part, which was more concerned with doctrine and might also be used in the commentary.

64. Mr. AGO entirely agreed with the Chairman that the Commission should take a decision forthwith because draft articles intended for a draft convention would have to be framed in an entirely different way to draft articles intended for a model code of rules.

65. He would not go so far as the previous speaker in maintaining that the Commission's sole task was to frame draft conventions, for under the Statute it had other tasks as well. His argument had related purely to the topic of the law of treaties where the Commission

was not likely to encounter greater difficulties than in the case of the law of the sea.

66. Even if a convention on the law of treaties did not secure many ratifications, its authority would be far greater — because approved by a large majority of States — than that of a model code of rules.

67. A secondary consideration but one to be borne in mind was that the psychological effect of informing the General Assembly, which was a political body, that the Commission intended only to draw up a model code of rules, could be disastrous. The General Assembly's support could only be obtained if the Commission clearly stated that the law of treaties was one of the major topics for codification and that the Commission's intention was that the topic should form the subject of an international convention.

68. Mr. JIMÉNEZ de ARÉCHAGA said that he had no objection to the course suggested by the Chairman, namely that the Special Rapporteur should be asked to prepare draft articles intended for inclusion in a draft convention.

69. Mr. AMADO emphasized that the Special Rapporteur should limit his first draft strictly to the conclusion of treaties, in which connexion the novel processes of treaty-making should be taken into account, so that the Commission would have something very definite to work on.

70. He had listened with keen interest to the warning sounded by Mr. François, as the problem of non-ratification of treaties was of special concern to Latin American countries. The danger was, of course, that international instruments might not be ratified precisely because they enunciated well established rules of law.

71. The CHAIRMAN announced that as he had some more speakers on his list, further discussion would be deferred until the following meeting. When the discussion had been completed, the Commission would resume debate on the draft articles on consular intercourse and immunities on second reading.

72. Mr. GARCÍA AMADOR, speaking on a point of order, referred to his report on the fourth session of the Asian-African Legal Consultative Committee (A/CN.4/139). As he would leave Geneva at the end of the week, he would be grateful if the Chairman could arrange for him to present that report at the following meeting, after the Commission had completed its discussion on the law of treaties.

73. The CHAIRMAN said that the Commission would have to discuss the question of sending an observer to the next session of the Asian-African Legal Consultative Committee, from whose observer he had received a letter expressing the hope that the Commission would reconsider its decision (597th meeting, para. 10) not to send an observer to that session. That question could be taken up once the discussion on the law treaties had been concluded.

74. So far as the discussion of Mr. García Amador's report was concerned, he referred to his statement at

the 605th meeting that the report would be discussed if the Commission so desired.

The meeting rose at 1.5 p.m.

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### 621st MEETING

Thursday, 29 June 1961, at 10 a.m.

Chairman : Mr. Grigory I. TUNKIN

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#### Law of treaties

(continued)

[Agenda item 4]

1. The CHAIRMAN invited the Commission to continue its debate on item 4 of the agenda.
2. Mr. HSU said that he was able to support the view that the draft articles on the law of treaties should be so framed as to form part of a draft convention, particularly as the Special Rapporteur was of the same opinion. Sir Humphrey Waldock should be given all possible latitude for the accomplishment of his task.
3. Fundamentally there was little difference between a draft convention and a model code of rules, since the Commission seemed generally to have agreed that academic theories should have no place in either text.
4. Two schools of thought had emerged in the Committee established by General Assembly resolution 94 (1). One, starting with the idea that all rules of international law must receive the consent of States, held that they had to be embodied in international conventions. The second, starting with another idea, held that codification being a process of systematising customary rules of international law, it did not have to take the form of a draft convention and could rest on the authority of a piece of work emanating from the Commission. He did not entirely agree with either view. Referring to the second view, he said that codification was not always a mere restatement of existing rules; it might include the formulation of certain new rules in order to fill gaps, and then there might be a need for an international instrument.
5. It was recognized in article 23 of the Commission's Statute that not all its drafts would have to take the form of a convention. It had to be admitted, however, that at a time when so many new States were coming into existence there would be a greater need for the preparation of draft conventions than of model codes.
6. Mr. BARTOŠ, reiterating his support for Mr. Ago's view, said that he also wished to associate himself with the opinion voiced by several members of the Commission that a convention adopted by a large number of States, whether ratified or not, constituted evidence of the existing international law. If learned authors were able to state what were customary rules of law, *a fortiori* a decision by a large number of States had even greater authority. The world had moved beyond the nineteenth-century ideal of codification by scientific bodies; in modern times the process was taking place in the name of the international community, and even when States did not assume treaty obligations, as members of that community they were bound to respect the rules confirmed by it. Such was his interpretation of the meaning of the General Assembly's resolution 95 (1) affirming the principles of international law recognized by the Charter and Judgment of the Nürnberg International Military Tribunal. Those principles reflected the conscience of mankind and created obligations even for States which had not subscribed to the resolution.
7. He considered that a convention which had been adopted by a conference but which had not entered into force because not ratified by a sufficient number of States had greater validity than a General Assembly recommendation that States should use as a guide certain model rules codified by the Commission and approved by the Assembly.
8. Mr. ERIM, referring to the list of the successive reports on the law of treaties (A/CN.4/L.96), asked for an explanation of the apparent change in the approach to the subject adopted by the Commission. As far as he could judge from the list, at the outset the Commission had discussed draft articles of a draft convention prepared by Mr. Brierly and later draft articles prepared by Mr. Lauterpacht, but at its eighth session Sir Gerald Fitzmaurice had submitted draft articles for a code on the law of treaties.
9. Personally, he favoured the former approach because a convention possessed all the advantages of a model code together with far greater authority, even if at first ratified by relatively few States. The Special Rapporteur should be given very precise instructions so as to ensure that the Commission had a definite text to work on at the next session.
10. Mr. LIANG, Secretary to the Commission, replying to Mr. Erim, confirmed that the reports submitted by Mr. Brierly had contained draft articles. That method had been followed by Mr. Scelle in the case of arbitral procedure. That was in conformity with the requirement laid down in article 20 of the Statute according to which the Commission had to prepare its drafts in the form of articles. Mr. Lauterpacht's reports on the law of treaties had also contained draft articles.
11. On the election of Professor Lauterpacht to the International Court of Justice, Sir Gerald Fitzmaurice had been appointed Special Rapporteur, but, like Mr. Lauterpacht, had not been given specific instruction concerning the form of his report, though there had been some discussion on the matter. Afterwards, Sir Gerald Fitzmaurice had been firmly of the opinion that the draft articles should in substance be suitable for a model code. It was stated in paragraph 18 of the Commission's report on its eleventh session (A/4169) that on the recommendation of the Special Rapporteur and of course without prejudice to any eventual decision to be taken by the Commission or by the General Assembly, the Commission had not envisaged its work on the law of treaties as taking the form of a treaty but rather as a