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Summary record of the 675th meeting

Topic:
Law of Treaties

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ascertain the provisions of another State's written constitution and even its other constitutional rules, but there could be doubt as to the facts known personaly by the negotiators. Similarly, it was difficult to rule on the validity of a treaty or the possibility of voiding it, or on the time-limit to which the right to contest the validity of an international act was subject.

61. With regard to paragraph 4 (*b*), while he approved of the principle that ratification could be voided when a representative had acted *ultra vires*, that principle was fraught with danger from the standpoint of the security of international relations, and he urged the Commission to postpone its decision for a week, in order to think the matter over while continuing a fruitful discussion.

62. He must enter a reservation regarding paragraph 2 (*a*), because the previous year he had been one of the minority who had been unable to accept the text concerning non-ratification of treaties in simplified form, and he would also have to make reservations on other articles which were closely linked with article 4 of Part I. What was at stake was not only the primacy of international law, but also the need to provide greater security in international relations and to establish the validity of international acts on a firmer basis.

The meeting rose at 12.55 p.m.

675th MEETING

Wednesday, 8 May 1963, at 10 a.m.

Chairman: Mr. Eduardo JIMÉNEZ de ARÉCHAGA

Law of Treaties (A/CN.4/156 and Addenda)

[Item 1 of the agenda] (*continued*)

ARTICLE 5 (CONSTITUTIONAL LIMITATIONS ON THE TREATY-MAKING POWER) (*continued*)

1. The CHAIRMAN invited the Commission to continue its consideration of article 5 in section II of the Special Rapporteur's second report (A/CN.4/156).

2. Sir Humphrey WALDOCK, Special Rapporteur, in reply to Mr. Tunkin's request at the previous meeting for information about the content of section IV of his second report, which would be circulated in about a week's time, said that of its four articles, the first would deal with the procedural authority to annul, denounce or terminate a treaty. The second would be concerned with the procedure in cases when there was an express or implied right to do any of those things in the treaty itself. The third, article 25, which might be more controversial, would contain his suggestions as to procedure when the right to annul, denounce or terminate a treaty arose by operation of law, as for example in the case of breach of the treaty or in application of the principle of *rebus sic stantibus*. The problem of procedure had been given great prominence by the authorities and one of the important issues to consider was whether there should be some form of procedural check on the exercise of those rights. He had deliberately dealt with the procedural aspect in a separate set of articles, and although they had an obvious bearing on some of the general problems that arose in sections II and III, he believed that the substance of the latter could be discussed in advance. The fourth, article 26, would be a short one dealing with the problem of the severance of treaty provisions.

3. Section V, which was not yet complete, would deal with the effects of the avoidance, denunciation or suspension of a treaty. It would contain some of the points covered in Sir Gerald Fitzmaurice's second report,[1] though in some respects his own draft articles differed substantially from his predecessor's. He had not yet been able to complete section V because of having to put it aside on receiving a communication from the Secretariat about the General Assembly's request, in its resolution 1766 (XVII), that the Commission study further the question of extended participation in general multilateral treaties concluded under the auspices of the League of Nations. He had felt bound to give that matter some preliminary thought in case he were asked to prepare something on the subject at short notice.

4. Mr. VERDROSS said he thought that the first three paragraphs of article 5 might be accepted in substance by all members of the Comimssion if the language were simplified in some places; that could be left to the Drafting Committee. Only paragraph 4 was to some extent controversial; the proposed text might well be replaced by the following:

> "(*a*) Paragraphs 2 and 3 shall not apply if the organ of a Contracting State or the organs of the Contracting States having authority to conclude international treaties is or are aware, or ought to be aware, that the treaty cannot be concluded definitively without the consent of another organ or of other organs of the States concerned.
>
> "(*b*) Nevertheless, such a treaty shall be valid internationally if the other organ (organs) competent to give its (their) consent to an international treaty does not (do not) react immediately after a treaty concluded without its (their) consent has come to its (their) notice."

5. In both the modern theory and the modern practice of international law a clear distinction was drawn, in the concluding international treaties, between the formation of the will of the State, which was governed by municipal law, and the declaration of that will vis-à-vis other States, the determination of the organ possessing authority to make that declaration being governed by both municipal and international law. The Commission itself had stated that rule in its 1962 draft.[2]

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[1] *Yearbook of the International Law Commission, 1957*, vol. II (United Nations publication, Sales No.: 1957.V.5, vol. II), pp. 16-70.

[2] *Official Records of the General Assembly, Seventeenth Session, Supplement No. 9*, pp. 4 ff.

6. The difficulty arose from the fact that the distinction between the formation of a State's will and the declaration of that will vis-à-vis other States was always based on the assumption that the organ concerned was declaring the true will of the State, in accordance with the basic principle of good faith. If the declaration was manifestly not in good faith, the treaty was obviously not valid. An important limitation should apply where the competent organ gave its consent subsequently, for in that case the problem no longer existed. When that was so, there was no need to go so far as paragraph 4. If the organs competent to give their consent to an international treaty did not react immediately after a treaty concluded without their consent had come to their notice, it could be assumed on grounds of the stability of international relations that they tacitly approved. In such cases it was for each State to say whether or not it approved an instrument concluded in such circumstances. He was therefore submitting his amendment as a basis for discussion; he would not object to adding to it paragraph 4, subparagraph (*b*) (i), which was sufficiently explicit.

7. Mr. BRIGGS said that it was difficult to reach any final conclusion on the articles in section II without knowing what would be the contents of section IV, which had not yet been issued.

8. On the whole article 5, which had been so skilfully drafted by the Special Rapporteur, appeared to be acceptable. Some members, however, had expressed misgivings about paragraph 4 because it introduced a principle contrary to that of ostensible authority embodied in the earlier part of the article, and in his opinion that paragraph should be jettisoned. Mr. Verdross' text was not a satisfactory alternative. Paragraph 3 (*b*) should also be dropped.

9. He wished to suggest, though not as a formal amendment, an alternative text, largely inspired by the first part of article 5, reading:

> "Whenever the constitution of a State subjects the entry into force or the binding effect of a treaty to prior constitutional approval by an organ of that State, the signature or the deposit of an instrument of ratification, acceptance, approval or accession in disregard of such constitutional requirements by a representative possessing ostensible authority under the rules laid down in article 4 of Part I may be withdrawn only with the consent of other parties to the treaty."

10. Mr. TABIBI said that the subject matter of article 5 was of great complexity and had given rise to widely differing views. For example, each of the three previous special rapporteurs on the law of treaties had based his proposals on a different doctrine. An article concerning the constitutional limitations on the treaty-making power should nevertheless be included in the draft.

11. Though he agreed in general with the Special Rapporteur's approach, the text as it stood was not wholly acceptable because it impaired the constitutional authority of the State in favour of international law. One of his main objections to the text was that under paragraph 4, the representative of a State lacking the proper constitutional authority could establish its consent to be bound by a treaty even if a contracting party or parties or the Depositary were aware of that defect. It would be extremely prejudicial, particularly to small, weak and inexperienced States which, more than any, needed the protection of international law, if, on their behalf, a representative lacking authority could conclude a treaty regarded as valid in international law, which endangered their political and economic interests.

12. It was, of course, difficult to make international law subject to internal constitutional limitations but, as Mr. Tunkin had rightly emphasized at the previous meeting, the right of political and economic self-determination must at all costs be safeguarded. That right was set out in article 1 of the draft Covenant on Civil and Political Rights, which had already been adopted by the Third Committee of the General Assembly and must be respected in any article dealing with constitutional limitations on the treaty-making power.

13. Given the difficulty of devising a provision that would protect the interests of the State under international law and preserve the stability of treaties concluded in good faith, perhaps it would be advisable to appoint a small working group which, after reviewing the Special Rapporteur's proposal and those of his predecessors, and taking account of the views expressed during the discussion, would prepare a new text to meet modern needs.

14. Mr. GROS said that article 5 admittedly gave rise to difficulties and that it might not perhaps be possible to settle its final form immediately, but he was not so pessimistic about it as some members of the Commission. The difficulty arose from the fact that the article touched on problems of the theory of law — in particular the relations between international and constitutional law; it was also connected with the practical consequences of the draft, should the article establish a rule of law in a matter that was still disputed.

15. Article 5, as conceived by the Special Rapporteur, dealt with treaties improperly concluded or ratified by reason of the fact that the representation of one of the parties had been only ostensibly valid. There were now so many general, multilateral and bilateral treaties that it was doubtful whether, juridically and in practice, any other rule could be followed than that of trust in appearances, for obvious reasons connected with the maintenance of good international relations in accordance with the principle of non-intervention in the domestic affairs of States and for convenience in negotiation; the opposite rule would mean verifying not only that the powers of all negotiators were in order, but also that they were "constitutional".

16. The line taken by the Special Rapporteur was consistent with international practice, as shown in his commentary on article 5 and in his excellent work on article 4. Most of the difficulties liable to be encountered in the case covered by article 5 would be removed by the subsequent conduct of States, as the Special Rapporteur had shown in article 4. It was essential

for the stability of legal relations that if a State whose representative had not possessed full powers did not react, but applied the treaty for a certain period, it should not be able to go back on its word. That rule had been twice confirmed by the International Court of Justice. It was a good rule of international law, for it took account of an interest of major importance; that of the security of relations between States. Admittedly, there could be exceptions, and no text could rule out exceptional cases, but the Commission should draw up rules based on the usual practice — that was to say, on cases in which States had negotiated with every appearance of proper representation — and the principle of trust in what appeared to be in order must be laid down.

17. With regard to the general problem of negotiation between States, although recent trends in international law showed some change, their general direction followed the line taken by the Special Rapporteur, which he himself adopted. All States, whether new or old, were concerned to maintain confidence between negotiators, to avoid intervention in the internal politics of other States, and to ensure stability of the results of negotiations.

18. He accepted, therefore, the general theme of article 5, namely paragraphs 2 and 3 (*a*), and would propose the deletion of paragraph 4, which upset the balance of the article by laying down a contrary rule based solely on exceptional cases which had attracted much criticism. On that point, he did not think that he was in disagreement with the Special Rapporteur, who had faithfully covered all the problems involved, though with shades of opinion reflecting his personal position which were clearly discernible in the commentary.

19. Moreover, paragraph 4 was based on purely subjective criteria, since it referred to the concepts " manifest " and " good faith ". Although he was not among those who considered that the concept of what was reasonable should be eliminated from international law and although that criterion was constantly applied in examining any matter in dispute, he could not help being struck by the complications that would result from applying paragraph 4 (*a*) in an international community which did not recognize any common authority or compulsory jurisdiction; paragraph 4 should accordingly be rejected, for the Commission should draw up rules that were as clear and simple as possible for an international community of 110 States.

20. The text proposed by Mr. Verdross would be excellent if there were some recognized court to apply it; in the absence of such a court it could only be a source of complications.

21. Article 5 could, he thought, be simplified by deleting paragraphs 1, 3 (*b*) and 4, but retaining the Special Rapporteur's excellent commentary on all the problems raised by the article.

22. Mr. TSURUOKA, commending the Special Rapporteur's draft, said he endorsed the general idea underlying the wording of article 5, though he was not convinced that paragraphs 3 (*b*) and 4 were necessary, and if paragraph 4 were retained, the drafting would have to be improved.

23. The Special Rapporteur's main concern had been to ensure the stability of legal relations in the international community and for that purpose he had accordingly come down on the side of internationalism. His concern was undoubtedly legitimate, seeing that such stability was essential for the maintenance of peace and the prosperity of mankind. If a country was to be well protected legally so long as it conformed to the existing rules of international law and acted in good faith and with normal prudence, it was quite natural to choose the internationalist system, which was more effective than constitutionalism in ensuring such protection. Under the internationalist system a country need have no fear of any commitment entered into by a contracting party endowed with ostensible authority subsequently proving invalid.

24. A further consideration was that the substantial increase in the number of independent States, while in itself desirable, did not make investigation into the constitutions of States any easier. And not only the newly created States but some of the older States had new constitutions, as witness the case of Japan. There was, therefore, all the more reason for basing article 5 on the internationalist rather than on the constitutionalist theory.

25. Internationalism also had the merit of satisfying the sense of equity, which was the very foundation of the legal system. If a State committed any constitutional irregularity in concluding a treaty, it alone should suffer the consequences, without damaging the other contracting party or the international community.

26. As other speakers had pointed out, internationalism was now the prevailing trend in the practice of States, and the precedents quoted in the report could be interpreted as confirming that fact. States which invoked constitutional irregularities to demand that an agreement be set aside were probably conscious of the weakness of such arguments, since they often supported them by legal arguments of greater weight. If the Commission opted for internationalism, it would only be making a codification along the lines of what was practised in many countries; hence the draft, which followed that system, was likely to be accepted by very many countries. He was not averse *a priori* to making concessions to constitutionalism, but they should be as slight as possible, for he was afraid that might lead to abuse and threaten the stability of the legal order, especially since the State alone had the right to interpret its own constitution.

27. Nor did he feel that internationalism was contrary to democracy, as some asserted, and deprived the legislature of effective control over the executive. Indeed, if internationalism became well established as a system, the legislature would have more control over the executive and that could lead to promoting democratic institutions.

28. Mr. PAREDES said he associated himself with the tributes paid to the work of the Special Rapporteur, but he had some doubts about article 5.

29. Article 5 formed part of the section dealing with the principles governing the essential validity of treaties; consequently, he did not understand why it omitted all reference to the capacity of the State. In his opinion, the capacity of the State to enter into a treaty was an essential question which preceded that of the capacity of the representatives who signed on its behalf.

30. In any act performed in the name of a collective legal entity, two persons or subjects of rights could be distinguished; first, the legal entity which possessed the right; second, the agent or individual called upon to exercise the right. It was necessary to consider separately the capacity of both of those persons under international law. By way of analogy, it would be surprising if a civil code were to deal only with the powers of an attorney and omit all reference to those of his principal. Consequently, in the matter of essential validity, it was necessary to consider not only the question of the power of the President or head of the Executive to sign a treaty on behalf of the State, but also the capacity of the State itself to enter into a treaty, a question which arose, for example, in connexion with mandates and trust territories with limited powers to contract.

31. The provisions of article 5 did not make a clear distinction between the head of a State and the official who negotiated a treaty on his behalf. In that context it was really necessary to distinguish three persons: the legal person, which was the State, the head of the Executive and the negotiator. In the conclusion of a treaty, it was therefore possible for an act *ultra vires* to be committed either by the head of a State who concluded the treaty or by the negotiator. The latter case would occur if the negotiator did not have full or sufficient powers to sign the treaty, the former if the head of State acted contrary to the will of the people or its authorized representatives or failed to comply with all the constitutional requirements.

32. Democracy required that the people affected by a treaty should have an opportunity to express their opinion before the treaty came into full effect. As article 5 was drafted, there was a danger of the personality of the State being confused, in international law, with that of the head of State. And that was all the more serious because, under authoritarian regimes, the head of the State frequently ignored all constitutional limitations and concluded treaties which reflected his own will and not that of his people.

33. In his own country, Ecuador, no treaty could be ratified without the advice and consent of the Legislature. As in many other countries, the Legislature was the authorized representative of the people's will. Hence, he could not accept the view that a strong Executive could enter into treaties behind the back of the Legislature and that such acts were valid.

34. Nor did he believe that it was at all difficult to ascertain the constitutional provisions in force in another State, for purposes of determining whether a treaty was valid. In private law, a party to a contract concerning matters of much less importance than affairs of State would invariably take steps to confirm the capacity of the other party, and the powers of his agent or representative. It therefore appeared even more natural to take the same precautions in matters of great importance such as those which were the subject of negotiations between States. So, just as the negotiators were required to produce their full powers, he thought that the Executive should be required to produce documentary evidence of its authority to act in the matter. At conferences between numerous States, such evidence should be submitted to a committee which would be called upon to pronounce on the treaty-making power.

35. There was, moreover, serious danger in drawing a distinction between the international validity and the internal validity of a treaty. For example, a loan agreement might be entered into by a head of State, without consulting the competent constitutional organs. If it was desired to obtain repayment of the loan and a claim was brought before the courts of the State concerned, it would inevitably be rejected; the courts would say that the loan agreement was void and had no effect in municipal law. In such circumstances, the agreement would be totally ineffective. That example clearly showed that it was necessary to take constitutional limitations on the treaty-making power into account. Those limitations might be manifest and clear without any profound legal study being needed to ascertain them. But if the position was not clearly defined, it would be advisable to require the negotiator to produce documentary evidence of the kind he had mentioned.

36. Mr. de LUNA observed that the overwhelming majority of the Commission had expressed the view that a treaty concluded *ultra vires* in breach of formal constitutional rules was valid.

37. Some feared that such an attitude might further an anti-democratic trend; he did not think their fears were justified. That objection might have been valid fifty years ago, when many States had an authoritarian régime; but now there were some constitutions that were democratic and others that were not. The question was whether international law did or did not take into account a constitution which might or might not be democratic. Although the advance of democracy should be promoted by all means, he did not think that would be achieved by sowing confusion and insecurity in international life. The solution he advocated seemed to him to be in conformity with the nature of the " external " power. It might be asked whether it was more consonant with democratic principles to grant a right of international representation to a head of State, who might have been elected by direct suffrage by the people as a whole, or to require the head of State, if a treaty was to be valid internationally, to take into account the will of representatives who would often have been elected by indirect suffrage. For foreign policy to be genuinely democratic, logic would require the application of direct democracy or continual recourse to the technique of plebiscites for all important acts, which would so complicate matters as to be quite absurd.

38. Moreover, the principle on which the Special Rapporteur's proposal was based was that of ostensible authority, a principle which also applied in internal law: an official whose appointment was void could

nevertheless perform acts which were ostensibly authorized so far as those affected by them were concerned. Similarly, in international law, a State was not expected to make sure that another State's institutions were genuinely democratic.

39. Again, there was a reassuring general principle of interpretation: always interpret so as to avoid, as far as possible, involving the international responsibility of a State. That principle was of the utmost importance, for even in internal law, it was difficult to know, in view of the distinctions which constitutions made between treaties, whether a treaty was or was not of a political nature and could be concluded without the consent of some particular organ. In deciding how a treaty should be classified, a State would be interfering in the affairs of another State: how could it be expected to know something that could only be known definitely through a decision of a constitutional court ?

40. Yet again, a number of *de jure* governments had begun as *de facto*, that was to say anti-constitutional governments. It was therefore impossible to intervene in the internal classification of treaties once an originally anti-constitutional regime had been recognized. In point of fact, no constitution was valid from the purely formal standpoint. When the law was applied, it reflected yesterday's, not today's, political and social situation. The Napoleonic Code was still applied, but interpretations of case-law had changed nearly all its articles. What had to be taken into account was not the formal situation, but what actually happened.

41. He therefore supported the view that treaties concluded *ultra vires* were valid. If the majority thought that exceptions should be made, he would support the proposal put forward by Mr. Verdross, but limiting the exceptions to treaties which could decide the existence of a State.

42. Mr. AGO said he approved the distinction so clearly drawn by Mr. Verdross, and to which he himself had also referred, between the declaration of will by a State, which was a matter of international law, and the process leading to the creation of that will, which was entirely a matter of internal law.

43. In reply to Mr. Rosenne, he explained that in using the word *renvoi* the previous day, when speaking of the reference made by international law to internal constitutional law, what he had wished to convey was not at all any idea of incorporation, but only that international law regarded as a State's valid will that which was expressed by the organ designated by internal constitutional law as being competent to declare it.

44. There was no doubt regarding the declaration of will, but with regard to the process of the creation of a State's will, the issue was whether international law should take into account the constitutional rules which governed the process or should be content with the declaration and adopt the attitude that the will declared by the competent organ was not open to question by other States. The difficulties arose in practice through the fact that in modern times certain organs of the State, which in the past had been competent not only to declare the State's will, but also to form it, now had competence only for the declaration, the formation being essentially within the competence of other organs.

45. The Commission should choose between two systems and not try to work out a compromise which could easily amount to a legal contradiction. If the Commission acknowledged, as international practice had done hitherto, that constitutional law had no other function in the matter than to designate the organ competent to declare the will of the State, it was acknowledging that, even if the head of State ratified a treaty without the prior authority of Parliament, the treaty was valid, whatever consequences might ensue for the State concerned. If, on the other hand, it adopted the contrary system, it must weigh the consequences of an innovation whereby, in international law, not only would a certain will have to be expressed by the organ which the constitution declared competent to express it, but that will would have to have been correctly formed by the organ which the constitution declared competent to form it, so that all the internal constitutional rules would be respected. If that view prevailed, then to be logical, no absurd distinction should be made between written constitutional rules and customary rules, or between rules which were easily known and rules which were not.

46. Some took the view that all the constitutional rules which related to the formation of the State's will should be taken into account, that if a head of State ratified a treaty without prior parliamentary authority the treaty should be deemed invalid, but that if parliament subsequently gave its authority, then the treaty was valid. However, it might legitimately be asked when, in that case, a treaty did become valid. If all the constitutional rules governing the formation of the State's will had to be taken into account, there was no doubt; in the case envisaged, the head of State had declared a non-existent will and therefore his declaration was void. When parliament took up the matter, either the head of State had to make a second declaration of will, or his first declaration would become valid only as from the time when parliamentary authority was given. To accept a different view on that point meant recognizing that it was the declaration of will which bound the State, and bound it from the moment when the will was manifested, and that the process of formation of that will in the internal legal order was of no concern for international law. In reality, the system which would take account of all the constitutional rules governing the formation of treaties did not reflect the present state of international law.

47. Reference had been made to " good faith ". He did not see what " good faith " had to do with the matter; whose " good faith " was meant ? Was it that of the organ authorized to conclude a treaty, that of the head of State, or that of the other State ?

48. From the practical standpoint, the idea that a State could interfere in a constitutional dispute between the various organs of another State should be avoided.

49. In reply to Mr. Paredes, he observed that, if a State doubted whether the organs constitutionally authorized to declare the will of another State were truly representative of the people's will, it could always refrain

from negotiating a treaty with that State. To take any other course would be to introduce grave uncertainties into international life.

50. It must also be remembered that, as Mr. Tabibi had pointed out, the new States were jealous of their constitutions and their sovereignty, and would not allow a third State to make conditions on such a subject.

51. As for the cases mentioned by Mr. Bartoš, he was convinced that they were cases in which there was a defect of consent; the constitutional rules might have been observed, but the will had been vitiated by violence.

52. At the previous meeting, Mr. Yasseen had spoken of the necessity — which should become clearer with each day that passed — of knowing the constitutional rules of other States. He had referred to the case of a court which was required to know the law of other countries and to apply it. Mr. Yasseen's great experience in private international law might have led him to see there an analogy which did not really exist. It was true that in private international law it was increasingly acknowledged that it was the national judge's duty to know the relevant foreign law, but there was no judge in the question which the Commission was considering, and the Commission should emphazise in the clearest terms that a State was sovereign and that no State had any right to set itself up as a judge of the observance of constitutional law and requirements by the organs of another State. While a knowledge of foreign constitutional systems might still be easily acquired for the purpose of bilateral treaties, the complications that would arise if the same principle were applied in the case of multilateral treaties could readily be imagined. Furthermore, who would be competent to decide whether the constitutional rules had been observed ? Would ratification be regarded as valid by some States and not by others ?

53. He therefore agreed with those who wished to delete paragraph 4, and was not even prepared to accept a formula as flexible as that proposed by Mr. Verdross. It was a question of principle; they must choose between two systems. Either consent was valid or it was not, and in the latter case it would not become valid merely because of lack of knowledge of the internal constitutional rules of a State by the co-contracting State.

54. The limitation which Mr. Verdross proposed in his paragraph 4 (*b*) was also questionable; how much certainty would be left if the validity of a treaty were made to depend on the possible reaction of some constitutional organ ? Moreover, who would say if that reaction itself was legitimate or not ? Would it be necessary to wait until the question of its legitimacy under internal constitutional law had been decided by the highest competent court ?

55. With regard to paragraph 2 (*b*), he felt that the use of the word " appears ", which implied ostensible competence, was inappropriate; in point of fact, the competence of the organ concerned to declare the will of the State was certain. It was unquestionable that the instrument had been executed in proper form; what was in question was whether the representative who had executed it had acted with authority to do so.

56. With regard to the title of article 5, he feared it might be interpreted as referring to the State's capacity to conclude treaties. It would be better to use some such wording as: " Constitutional limitations on the treaty powers of certain organs of the State ".

57. Mr. PAL said that, with regard to the question under discussion, he had at first inclined towards the views of the late Professor Brierly. With some doctrinal qualifications, he had followed that eminent writer's approach, because it had seemed to him to proceed logically from the concept of state personality. The Special Rapporteur, however, by his penetrating exposition, had converted him to his own views and he was now prepared to accept in substance the provisions of article 5.

58. He would refrain at that stage from entering into a discussion of doctrinal principles, reserving his right to do so later if necessary. Some of the remarks which had been made so far during the discussion had the appearance of great lucidity, but in reality introduced a further element of complexity. There was an understandable inclination to use such convenient expressions as " the formation of the will " and " the process of the declaration of the will ", but difficulties arose as soon as an attempt was made to determine how and when the will was formed. An even more difficult question was that of determining how to ascertain that the will had been formed by the competent organ concerned.

59. The notion of the personality of the State implied that every act of a State must be performed by a constitutional organ. The difficulties implicit in that situation would not be overcome by stating that international law dealt with the declaration of will and not with the formation of will.

60. Leaving those doctrinal considerations aside for the time being, he wished to make some general remarks concerning the drafting of the article. First, when referring to constitutional limitations, it appeared to place the emphasis on written constitutional provisions. It would be necessary to adjust the drafting so as also to cover unwritten constitutional limitations. Another point to be borne in mind was that, in certain countries, it was not the constitution itself that laid down the limitations, but an act of the legislature, itself acting by virtue of its constitutional powers; the provisions should be amended to cover that situation.

61. Secondly, paragraph 2 described the effect of constitutional limitations only with regard to the contracting party whose constitution was in question. Nothing was said on the position of the other party to the treaty. The article should not be confined to a statement of the effect on the State whose constitution was in question, but should also deal with how the limitations would affect the treaty itself and the position of the other party to it. It was necessary, among other things, to determine whether the question of capacity could be raised not only by the contracting party concerned, but also by the other party to the treaty.

62. With regard to paragraph 4, he believed that the amendment proposed by Mr. Verdross, far from im-

proving the original text, would create even greater difficulties. The requirement that a State should be " aware " of a certain situation was, to his mind, less inappropriate than that a specified organ of the State should be aware of the situation, particularly when specification brought in the same difficult constitutional question. Since, however, he agreed with those representatives who favoured the complete deletion of paragraph 4, he would refrain from elaborating further on the problems raised by that paragraph.

63. Lastly, as a matter of drafting he did not favour the use, in paragraph 2, of the expression " in disregard of relevant provisions ". That expression seemed to suggest deliberate omission or negligence; the intention was, in fact, to refer to an act which was simply at variance with the constitutional provisions in question.

The meeting rose at 12.55 p.m.

676th MEETING

Thursday, 9 May 1963, at 10 a.m.

Chairman: Mr. Eduardo JIMÉNEZ de ARÉCHAGA

Law of Treaties (A/CN.4/156 and Addenda)

[Item 1 of the agenda] (*continued*)

ARTICLE 5 (CONSTITUTIONAL LIMITATIONS ON THE TREATY-MAKING POWER) (*continued*)

1. The CHAIRMAN invited the Commission to continue its consideration of article 5 in section II in the Special Rapporteur's second report (A/CN.4/156).

2. Mr. ROSENNE said that the Commission should formulate as tersely as possible a rule that was workable and that eschewed theory; it would thereby meet a need which was real, but the importance of which should not be exaggerated. It was essential that its proposed rule should restrict as much as possible the scope for subjective determination on the part of the interested States.

3. Personally he was prepared to accept the Special Rapporteur's internationalist approach, which did not involve any digression into either the monist or the dualist theories of the relationship between international law and municipal law. The effect of the rules under discussion would be limited to the international plane; the Commission was working on the international and not on the domestic level.

4. He has three general preliminary comments to make on the matter dealt with in article 5. First, the concept of ostensible authority could be included in article 5 as well as in article 6, where it appeared for the first time in the Special Rapporteur's draft articles. That concept needed some further clarification, however. His first impression had been that it must be construed in the light of the provisions of article 4, paragraph 1, of Part I, adopted by the Commission at its previous session, and that the reference was only to the Head of State, the Head of Government and the Minister for Foreign Affairs. Under general international law, those three dignitaries were regarded as ostensibly authorized to bind the State on the international plane. On further examination, however, he had come to the conclusion that the term " ostensible authority " could go further and cover any duly authorized person; however, the authority and full powers of any such person must necessarily emanate from one of the three dignitaries he had mentioned.

5. In the light of those remarks, he felt that the Special Rapporteur and the Drafting Committee might consider whether a definition of the term " ostensible authority " should not be introduced into article 1, paragraph 1 (*e*), of Part I; at all events, the commentary to that article, which referred to the " competent authority ", should be clarified.

6. His second comment related to the term " constitutional limitations ". He shared the doubts expressed by certain members, especially Mr. de Luna and Mr. Pal, regarding the scope of the term " constitutional " and thought that it needed clarification. It should be made clear that the term covered not only constitutional law, but also constitutional practice and possibly also other provisions of public law which had the character of notoriety. The question was connected with the matter of full powers and their examination, and he wished to refer in that connexion to the discussion which had taken place on article 10 (Treaties subject to ratification) at the Commission's 646th meeting; [1] on the subject of the notoriety of constitutional provisions, he would refer to the explanations given in his book by Lord McNair.[2]

7. He thought, therefore, that the words " constitutional limitations " could be retained in article 5, but that an element of flexibility should be introduced by means of an explanation in the commentary. The whole matter should be reconsidered when the draft articles as a whole were re-examined by the Commission in two or three years' time in the light of the comments of governments.

8. Thirdly, he wished to reserve his position regarding the expression " essential validity ", which might be a theoretical requirement more appropriate to a code. The meaning given to that expression was by no means uniform. Sir Gerald Fitzmaurice, in his second report, had defined it as denoting " validity in point of substance, having regard to the requirements of contractual jurisprudence ".[3] That definition could be contrasted with the terms of article 3, paragraph 3, of the draft articles which the Commission had adopted at its eleventh session: " Validity in its substantial aspect denotes those intrinsic qualities relating to the treaty-making capacity of the parties, to the reality of the consent given by them, and to the nature of the object of the

[1] *Yearbook of the International Law Commission, 1962*, vol. 1.

[2] *The Law of Treaties*, 1961, pp. 61 ff.

[3] *Yearbook of the International Law Commission, 1956*, vol. II (United Nations publication, Sales No.: 1956.V.3, vol. II), p. 109.