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Summary record of the 676th meeting

Topic:
Law of Treaties

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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.

treaty. . . ." [4] In his second report (A/CN.4/156, para. 3), the Special Rapporteur had defined the term " essential validity " in slightly different terms.

9. From the point of view of jurisprudence, the term " essential validity " was of undoubted value. However, he did not believe that the concept had its place in a draft convention, for the purposes of which the validity of a treaty was to be taken as a comprehensive and unitary notion. Validity should be treated in a less sophisticated manner; its various facets could be isolated for purposes of academic treatment, but the real problem in a given case was that of determining whether consent to a treaty had really been given.

10. For those reasons, he reserved his position regarding the use of the term " essential ", although he would not press at that stage for its deletion. He would no doubt have an opportunity of reverting to his doubts in the matter when the Commission discussed other parts of the draft.

11. Referring to the substance of article 5, he said that there were two categories of treaties. The first comprised treaties which entered into force upon signature alone; the position regarding them was covered by a combination of the provisions of paragraph 2 (*a*) and 3 (*a*) proposed by the Special Rapporteur. The second comprised treaties in respect of which a period of time elapsed between the authentication of the text and the entry into force for a given State; an adequate solution for those treaties was provided by a combination of the provisions of paragraph 2 (*b*) and paragraph 4 (*b*) (i). However, in formulating the rule in the matter, he thought that article 5 would gain in clarity if a distinction were made between bilateral and multilateral treaties. In that connexion, paragraph 10 of the commentary on draft article 11 of the late Sir Hersch Lauterpacht's first report [5] and paragraph 2 of the commentary on articles 3 and 4 adopted by the Commission at its eleventh session [6] could profitably be studied.

12. Lastly, on the question of conduct as a cure for any vitiating factor, he agreed with Mr. Gros that the point was amply covered by article 4 of the Special Rapporteur's second report, which the Commission had not yet considered. He was therefore prepared to accept the solution embodied in paragraph 4 (*b*) (ii) of article 5, though that paragraph might not be necessary after article 4 had been adopted.

13. From the point of view of drafting, paragraphs 1, 3 (*b*) and 4 (*a*) could well be omitted; in the case of paragraph 4 (*a*), that applied both to the Special Rapporteur's text and to the formula proposed by Mr. Verdross.

14. With regard to the question of terminology, he was somewhat troubled by the use of the terms " conclude " and " enter into " a treaty in different parts of the draft articles. The first of those terms was used in draft articles 1 and 3 of Part I, while the second was used in article 25 of Part I and also in Article 102 of the United Nations Charter. It was desirable that the meaning of those terms should be clarified and the language, as far as possible, made uniform, in order to avoid any difference of interpretation with regard to them.

15. He thought that the Commission was approaching a solution along the lines of the internationalist approach advocated not only by the Special Rapporteur, but by many other members, and that the article could be referred to the Drafting Committee.

16. Mr. TUNKIN said that the complicated nature of the question under discussion justified the attention devoted to it by the Commission. He agreed with Mr. Gros that the question was closely connected with that of the relationship between international law and municipal law and also with the problem of the juridical nature of treaties.

17. In article 1 (*a*) of Part I adopted by the Commission at its previous session the term " treaty " had been defined as meaning any international agreement in written form concluded between two or more States or other subjects of international law and governed by international law.

18. As he saw it, a treaty was the expression of the co-ordinated wills of States, and the will of a State was expressed through its competent organs. Article 4 of Part I indicated two kinds of organ that could be used for that purpose. The first kind were organs which were *ipso facto* considered as empowered to represent the State in all spheres of international relations: the head of State, the head of Government and the Minister for Foreign Affairs. The second were organs which could be authorized to represent the State for the purposes of a particular transaction or a particular set of transactions.

19. The overriding consideration, however, was that States were sovereign and that a State could therefore limit the competence of any of its organs, including those which international law considered as having power to represent the State in all spheres of international activity. In that connexion, he preferred to speak of limitations under municipal law rather than of " constitutional limitations ". The distinction between constitutional law and ordinary law was material only in the internal sphere; so far as international law was concerned, it was without significance whether a limitation was laid down by the constitution or by an ordinary provision of the municipal law of the State concerned.

20. By virtue of the sovereignty of the State, it was therefore possible for municipal law to limit the competence of even the head of State, head of Government or Minister for Foreign Affairs. It was thus possible for one of those dignitaries to lack competence to perform any particular act connected with the treaty-making process. If the dignitary concerned were to perform such an act *ultra vires*, the will of the State would not have been expressed and no agreement would have been concluded.

[4] *Yearbook of the International Law Commission, 1959*, vol. II (United Nations publication, Sales No.: 59.V.1, vol. II), p. 97.

[5] *Yearbook of the International Law Commission, 1953*, vol. II (United Nations publication, Sales No.: 59.V.4, vol. II), p. 146.

[6] *Yearbook of the International Law Commission, 1959*, vol. II (United Nations publication, Sales No.: 59.V.1, vol. II), p. 97.

21. With regard to the relationship between international law and municipal law, he agreed with Mr. Ago that the only rule laid down by international law was that the three dignitaries whom he had mentioned had power to represent the State. Beyond that, it was for each State to decide who represented it and also to lay down any limitations on the competent organs. The content of municipal law in that respect was therefore of primary interest to international law. He agreed with Mr. Ago that it was not a matter of incorporating the provisions of municipal law in international law; it was rather a question of international law taking cognizance of the situation as determined by municipal law.

22. His conclusion was that he could accept the general principle that certain state organs possessed the necessary competence to bind the State. And for that purpose it was not admissible to seek to verify in each instance that the organ concerned was acting in accordance with the constitution. Ordinarily, of course, the question would not arise; but if there were certain visible limitations, international law must reckon with them.

23. As he had said at the previous meeting, he found the provisions of article 5 generally acceptable, but he agreed with Mr. Rosenne that paragraph 1 could be dispensed with. The introduction of that paragraph unnecessarily complicated an already complicated set of provisions.

24. Paragraph 2 embodied the principle that the organ of the State which acted in the international sphere was accepted in principle as being authorized to act as such.

25. With regard to paragraph 3, he thought that the concluding words of sub-paragraph (*b*) dealt with a procedural matter. The question whether the notice referred to was to be given to the Depositary or to the other party or parties to the treaty seemed to him to belong in section IV, which was to deal with procedural matters; that point was of no importance, however.

26. With regard to paragraph 4, he hesitated to accept the new text proposed by Mr. Verdross, though it could be referred to the Drafting Committee for consideration; on the whole, the text proposed by the Special Rapporteur was clearer. However, the reference to article 4 of Part II must be taken as provisional, since that article had not yet been approved.

27. Lastly, he urged the Special Rapporteur and the members of the Commission to consider the question he had raised at the previous meeting, namely, that of the international limitations on the competence of state organs, with particular reference to the principle of self-determination of peoples. The Commission would have to consider that point in due course.

28. Mr. EL-ERIAN said that the Special Rapporteur's second report, like its predecessor, was a balanced and scholarly document which provided the Commission with an excellent working basis for its deliberations. He was glad to note that in drafting the articles the Special Rapporteur had taken into account the remarks made at the Commission's previous session on the subject of length.

29. On the question of drafting, he agreed with Mr. Elias that the Commission should not lose sight of the fact that the articles were to take the form of a convention and not of a code; it was therefore necessary to avoid the statutory style and to draft the articles in a form suitable to a convention.

30. With regard to article 5, he could not help being struck by the fact that the four successive special rapporteurs on the law of treaties, although representing one and the same legal system, had adopted four different approaches to the question of constitutional limitations on the treaty-making power. The late Professor Brierly had favoured the incorporation of constitutional limitations in international law. The late Sir H. Lauterpacht had adopted the doctrine of qualified incorporation. Sir Gerald Fitzmaurice has adopted the doctrine of the supremacy of international rules for the conclusion of treaties. The present special rapporteur appeared to adopt the approach of qualified supremacy of international rules.

31. The Special Rapporteur had rightly warned the Commission, in paragraph 1 of his commentary on article 5, that the subject was one on which opinion had been sharply divided, and that international jurisprudence on the subject was neither extensive nor very conclusive. One of the most recent articles published on the law of treaties stated, on the subject of constitutional limitations on the treaty-making power, that:

> "The practice of States provides no certain guide. The doctrines of writers range over a wide spectrum from flat denial of the validity of unconstitutionally made treaties to the contention that international law gives the head (or the highest executive organ) of every State plenary power to bind the State." [7]

32. Nor was state practice any more conclusive. As was observed in the comment on article 21 of the Harvard draft:

> "Turning from an examination of the doctrine to the practice, it may be stated that generally States have denied the binding force of treaties concluded in violation of their own constitutions, although they have sometimes insisted upon execution of those which had been ratified by the other parties in violation of their constitutions." [8]

In view of that situation, the Commission, as pointed out by Mr. Bartoš, faced a great responsibility when working out a formula for article 5.

33. Article 5 dealt not with the formal, but with the essential validity of treaties. It was essential to give effect to democratic principles in treaty-making. In its development over the past century, the law of treaties had gone a long way in that direction. The first manifestation had been the requirement of ratification, which the Commission had embodied in paragraph 1 of article 12 of Part I, adopted at its previous session.

[7] Lissitzyn, O. J., "Efforts to codify or restate the law of treaties", *Columbia Law Review*, vol. 62, No. 7, November 1962, p. 1184.

[8] *American Journal of International Law*, 1935, vol. 27, supplement, part III, p. 1002.

34. A further step in that direction had been the requirement of registration, which had been prescribed in the Covenant of the League of Nations and the Charter of the United Nations as a means of discouraging secret diplomacy and restricting the power to invoke treaties the contents of which were not revealed.

35. The third step should be the adoption of the constitutional approach to the question of the authority to bind a State. That approach required that the rule to be adopted should be placed on a legal basis, as pointed out by the late Professor Brierly.

36. There were two principles involved: the first was that of the security of treaties and of the stability of international transactions; the second was that of constitutional requirements, and consideration should be given not only to internal constitutional requirements, but also to international constitutional limitations, such as those relating to the right of self-determination and sovereign equality, as pointed out by Mr. Tunkin at the previous meeting.

37. He did not agree with Mr. Ago that the Commission was faced with a choice between those two principles, but considered rather that it should endeavour to reconcile the two.

38. The provisions of article 5 were closely connected with those of articles 12 and 13. With regard to article 12, he commended the Special Rapporteur for departing from the traditional view that the validity of a treaty was not affected by the fact that it had been brought about by the threat or use of force. The time had come to draw up the rules deriving from the prohibition of threat or use of force in Article 2, paragraph 4, of the United Nations Charter.

39. With regard to article 13, which dealt with treaties void for illegality, he noted that its provisions specified as illegal only those treaties which involved the use or threat of force in contravention of the principles of the United Nations Charter or acts which constituted crimes under international law. In fact, other imperative principles were embodied in the Charter and the time had come to elaborate them as a part of the international legal order. The freedom to conclude treaties, which had formerly been taken as the starting point of international relations, had undergone a fundamental change, and the time had come for the International Law Commission to draw a distinction between *jus cogens* rules and declaratory rules. The former, being part of the *ordre public*, could not be disregarded by the provisions of any special treaty. The matter was an extremely important one and should receive the attention of the Commission in connexion with articles 12 and 13 and other articles of the draft. The final drafting of article 5 must, of course, await the determination of the scope of that article in relation to articles 12 and 13.

40. The question under discussion was that of essential validity and not of formal validity. It was therefore the lack of competence from the substantive point of view, not from the procedural point of view, that was the issue. For example, many constitutions contained a provision prohibiting the extradition of political offenders; a treaty concluded in disregard of such a prohibition could hardly be considered as binding in international law on succeeding governments of the State concerned, as would be the case if the approach adopted were that of the unconditional supremacy of international rules relating to the conclusion of treaties.

41. With regard to the consequences of constitutional limitations, there were two kinds of constitution. Some were silent on the subject; others specified that a treaty concluded in defiance of constitutional limitations was null and void. The national courts of a country having a constitution of the latter kind would normally refuse to give effect to an unconstitutional treaty. Clearly, it was undesirable that the Commission should adopt a rule which might invite violation of international law at a time when the interdependence and interconnexion between international law and municipal law were constantly increasing.

42. Like Mr. Ago, he did not favour undue analogy to rules of municipal law in international law. International law had developed its own jurisprudence and there was no need to indulge in drawing analogies to private law, which did not take into proper account the different nature of international relations. However, since the end of the second world war, a number of constitutions had been enacted which incorporated principles of international law, the first being that of France, which specified that national sovereignty could be limited by international law. The constitution of Yugoslavia expressly prohibited the use of force in international relations. A similar process had been at work in the case of human rights; human rights provisions had appeared in national constitutions as a result of the adoption by the United Nations of the Universal Declaration of Human Rights. That interaction of international law and municipal law showed that the two were not separate, but closely interrelated.

43. For the foregoing reasons, although he found the solution adopted by the Special Rapporteur generally acceptable, he would have preferred a change in the starting point of article 5.

44. In conclusion, he drew special attention to the provisions of Article 103 of the United Nations Charter, which clearly established the supremacy of the provisions of the Charter over those of any other international agreement subscribed to by States Members of the United Nations. It was important to remember that in regard to the same problem, the Covenant of the League of Nations had merely recommended States Members of the League to revise treaties that were incompatible with the Covenant. The Charter of the United Nations had thus been clearly established as the supreme law and as the basis of the international legal order. Therein lay the fundamental difference between contemporary international law and traditional international law.

45. The CHAIRMAN, speaking as a member of the Commission, said he had found the illuminating comments made during the discussion particularly helpful.

46. The Special Rapporteur had explained in his commentary on article 5 that his intention was to apply the same rule to two different kinds of constitutional limitations, those affecting the formation of a treaty or the treaty-making power proper, and those affecting its implementation; it was accordingly appropriate for them to be dealt with in a single provision, although from the theoretical point of view the two were different.

47. The solution proposed by the Special Rapporteur regarding the second category of constitutional limitations presented no difficulty because there could be no doubt, as he had stated emphatically in the commentary, that they could not be invoked by a State as a ground for denying the validity of treaty obligations it had assumed. The Commission had made a stipulation to that effect in article 13 of the Declaration on Rights and Duties of States,[9] and the principle ought to be stated more clearly in the text of article 5 itself.

48. Turning to the controversial problem of whether unconstitutional treaties were valid in international law, he said that the Special Rapporteur had been confronted with two conflicting doctrines, that of Sir Hersch Lauterpacht, according to which a treaty was voidable if entered into in disregard of the limitations of the State's constitutional law and practice, and that of Sir Gerald Fitzmaurice, according to which a treaty was valid even when there had been a failure to observe the correct constitutional processes. The present Special Rapporteur had adopted an intermediate position in the articles he had put forward and in them he had wisely refrained from expressing himself in a way that would commit the Commission to a particular doctrine and expose it to facile criticism. The theoretical controversy was probably largely academic and of no great practical significance. The Special Rapporteur had selected the two most important cases in which it was clear beyond doubt that, whatever doctrinal position was taken, constitutional defects could not be invoked against the international validity of a treaty; first, the principle of *préclusion* dealt with in article 4, and second, the situation in which, although there might be defects in the internal constitutional processes, the international procedures of signature or ratification had been properly complied with.

49. The Special Rapporteur had skilfully linked article 5 with articles 4 and 12 of Part I of the draft. Article 4 had laid down that any representatives of a State other than Heads of State, Heads of Government, or Foreign Ministers should be required to produce full powers or to furnish evidence of his authority to execute an instrument of ratification, and article 12 had laid down that a treaty in simplified form did not require ratification unless ratification was specified in a provision of the treaty or in the full powers. The Special Rapporteur proposed to decide that if the process of signature or of ratification had been followed according to the procedures established in Part I, then the State should not be able to deny the validity of those international acts, despite any constitutional defects which might lie behind them. In other words, to determine that it was not possible to pierce the facade of the accredited agent of the State, for the purposes of determining whether the State would be constitutionally bound by his action. On the other hand, under article 5, as drafted by the Special Rapporteur, a State would be entitled to invoke its constitutional provisions requiring prior parliamentary approval and ratification to contest the validity of a treaty, if the requisite international procedures had not been strictly observed, as, for example, in the case of a signature *ad referendum* being taken by mistake or lack of care as final. Thus, the onus of calling attention on the international level to constitutional requirements was placed squarely on the interested State where it properly belonged, since that State was the best judge.

50. In his opinion, a provision on those lines would not run counter to Sir Hersch Lauterpacht's view, in so far as he had quoted with approval Lord McNair's conclusion that ... " if one Party produces an instrument, complete and regular on the face of it ... though in fact constitutionally defective, the other Party ... is entitled to assume that the instrument is in order. ... "[10]

51. Since other Contracting Parties had to rely on credentials or evidence of authority, any signatory or ratifying State subsequently claiming that they had been issued in violation of its constitution would have to bear the consequences even of acts committed by its agents *ultra vires*. That had been designated by the Special Rapporteur as the principle of ostensible authority and was known in Roman law systems as the theory of appearance. The principle was even more necessary in international law, to safeguard the principle of non-intervention in the domestic affairs of States and the security of treaties, especially general multilateral treaties to which other States might accede at some later stage after the text had been established.

52. The arguments in favour of deleting paragraph 4 had been persuasive. The case of a representative signing a treaty in simplified form without sufficient authority and of the other Party, while aware of that fact, not calling for his full powers as it would be entitled to do under article 4 of Part I, was adequately provided for in article 6 of Part II, under which a treaty so concluded could be repudiated.

53. The only other loophole which might perhaps require the retention of paragraph 4 was the possibility of a Head of State, Head of Government or Foreign Minister exceeding his powers, since he was not required to furnish evidence of his authority; but that danger was probably not a serious one. It was for each State to circumscribe the abuse of authority by such persons by other methods of political control. Moreover, in view of the special position that such persons traditionally enjoyed in international relations, it would be difficult under international law to impose *ex officio* restrictions on their capacity to sign international agreements.

54. Mr. YASSEEN said that if the Commission failed to give due weight to constitutional, or rather internal

[9] *Yearbook of the International Law Commission, 1949*, Part II, p. 286.

[10] *Yearbook of the International Law Commission, 1953*, vol. II (United Nations publication, Sales No.: 59.V.4, vol. II), p. 143.

requirements, any conclusions it came to would be valid only if there were a positive international rule which explicitly recognized certain organs as absolutely and unconditionally authorized to conclude treaties. But many authorities disputed the existence of any such rule and their adversaries had not produced conclusive evidence to refute them.

55. Article 4 of Part I of the draft did not prejudge the constitutional validity of a treaty, but dealt merely with evidence of authority to negotiate; it assumed that certain organs possessed such authority within, of course, the limitations of the State's constitution. That was a mere assumption, and there was nothing to show that it could not be controverted. Practice varied widely. In any dispute on constitutional invalidity between States one party usually relied on the constitutionalist approach, the other on the internationalist.

56. An article which stated that anti-constitutional treaties were null and void but provided for corrections and exceptions to cover subsequent explicit or tacit confirmation would be consistent with democratic principles and not inconsistent with positive law. Nor should the fact be overlooked that it would be possible to invoke the principle of the responsibility of the State found to be at fault.

57. Mention had been made of the moral and material difficulty of ascertaining the constitutional requirements of a State with regard to the conclusion of treaties. He had put forward the analogy with private international law for the purpose of disputing the existence of a material difficulty, but he did not claim that the duty of a national court to take cognizance *ex officio* of the law of another State applicable under the rule governing a dispute was identical with the duty of a State to know the constitutional law of another State with which it wished to conclude a treaty. Analogy was not identity. There was undoubtedly a new tendency in municipal law to make it increasingly incumbent on the courts to take cognizance of foreign law *ex officio*. If a national court could thus be found, *a fortiori* a State should, with the assistance of its legal advisers, be capable of ascertaining the constitutional law of another State.

58. With regard to the alleged moral difficulty, it had been maintained that to investigate the constitutional law of another State would be tantamount to intervening in its domestic affairs. It was rather hard to maintain that argument, for a treaty was not of concern to one party only; its validity was an indivisible whole and concerned both parties, and it was only logical that one party should try to make certain that the other was not admitting any ground for invalidity.

59. There had also been talk of courtesy to the Head of State — an argument which did not hold water. A treaty was the most solemn instrument that existed in international law and often involved vital interests. As a matter of course considerations of courtesy must yield to the interests of States.

60. He was afraid that Professor Brierly had been right in his opinion that States would not accept any other rule than that which he had stated, namely, that a treaty should in principle be valid constitutionally.

61. Mr. PESSOU observed that article 5 dealt with the relatively infrequent cases of defective ratification. In practice, the president of a republic gave the agents of the State full powers, which they must produce before signing. Ostensible authority had been mentioned in that connexion, but on no good grounds.

62. Article 53 of the title concerning treaties and international agreements of the model constitution of the fourteen States of the African and Malagasy Union provided that the President of the Republic negotiated and ratified treaties and international agreements; article 54 provided that treaties of peace, treaties or agreements relating to international organizations and treaties involving amendment of the municipal law of a State could only be ratified by means of a law — in other words, after action by the national assembly or legislature.

63. Mr. Ago had said that reference must be made to constitutional law in order to ascertain the competent organs, but had added that matters must not be pressed too far, so as to avoid giving the impression of interfering in the domestic affairs of States. He endorsed that view and believed, too, that no compromise was possible between the two conflicting theses. If the view was accepted that international agreements of any importance were submitted to the national assembly, the Head of State obviously could not commit himself unless he had made certain beforehand of the assembly's consent.

64. Some members, in their eagerness for progress and in the belief that they were defending democratic principles, wished to incorporate constitutional law in international law; but in fact they would thereby defeat their own purpose.

65. To lay undue weight on article 5 might give the impression that it was an attempt to bypass the rules governing the validity of international agreements. The Commission should revert to the usual and moral rule. The State was not only a material, but also a spiritual entity, and it could not be conceived that a Head of State would wilfully endeavour to deceive another State by such methods.

66. Mr. CASTREN said that he had become convinced during the discussion that the best solution, scientifically and logically, would be to adopt the internationalist approach in its entirety, and so delete paragraph 3 (*b*) and paragraph 4 or else adopt the concise formulation for draft article 5 proposed by Mr. Briggs.

67. In any event, it would be better to make some concession to the constitutionalist approach, as the Special Rapporteur had done in his report, since some members of the Commission favoured it, and several States supported it. Article 5 could be re-drafted on the lines suggested by Mr. Ago, without any change in the substance.

68. Mr. AMADO remarked that no set of rules could cover all the cases that were liable to arise in practice. Exceptional cases might be settled peaceably by negotiation and arbitration, and it was there that the International Court of Justice would play its part. As

Mr. Gros had observed at the previous meeting, States should be willing to run some sort of risk. The Commission had considered every aspect of the matter and was ready to take a decision. To improve the substance of the Special Rapporteur's draft did not seem possible; the Drafting Committee could be trusted to make any necessary improvement in the form.

69. Mr. VERDROSS, replying to the comments on his proposal which Mr. Ago had made at the previous meeting, said that according to Mr. Ago, the Commission should choose between the view that international law must take account of all provisions of internal law concerning the conclusion of treaties, and the contrary view that all declarations made by representatives possessing authority to make such declarations vis-à-vis other States were valid.

70. His answer to that was that there were many States in which the law recognized a principle without also recognizing all the conclusions that logically followed from it. If the present practice in international law was to accept the declaration of a State's will without seeking to verify whether that will had really been formed, that was, as Mr. Gros had said, because the law placed trust in declarations made by an organ empowered to make them. That presumption failed, however, if it was notorious or manifest that the declaration was not in accordance with the truth because the will did not yet exist. It was solely in order to cover that admittedly exceptional case that he had put forward his amendment. To make his idea clear, he proposed that sub-paragraph (*a*) of his amendment should be replaced by the following:

> " Paragraphs 2 and 3 shall not apply if it is notorious or manifest that the organ of a Contracting State or the organs of the Contracting States having authority to conclude international treaties has or have definitively concluded treaties without the consent of another organ or of other organs of the States concerned."

71. On a second point, Mr. Ago had expressed the view that his (Mr. Verdross's) proposal would lead to the conclusion that a declaration manifestly contrary to the truth was void and consequently could not be completed by any subsequent act. In his view, however, there were cases in which an act initially considered to be void could subsequently be completed by successive acts and validated retrospectively.

72. If the majority of the Commission decided to delete paragraph 4, he asked that the points he had just made should be noted in the commentary.

73. Sir Humphrey WALDOCK, Special Rapporteur, summing up the discussion, said the preponderant weight of opinion in the Commission was clearly, if perhaps unexpectedly, in favour of the international rather than the constitutional approach. It had been helpful to have a further explanation from Mr. Ago as to what he had meant when he had said that international law made a *renvoi* to constitutional law in the context of article 5, for the purpose of determining the organs competent to exercise the treaty-making power. Those explanations seemed necessary, because the moment the concept of *renvoi*, even in that limited form, was introduced, all the difficulties attached to the constitutional approach arose. The root of those difficulties was precisely the fact that, if reference were made to constitutional law, the constitutions of so many countries failed to give clear indications as to the organs competent to enter into particular treaties.

74. The practice of concluding treaties in simplified form had fundamentally altered treaty-making procedures and in many countries had created considerable uncertainty as to the application of constitutional provisions requiring the submission of treaties to approval by parliaments. The uncertainty was well brought out by the State Department's memorandum quoted in the volume of the United Nations Legislative Series on *Laws and Practices concerning the Conclusion of Treaties*.[11] It was clear from that memorandum that political judgement played an important part in determining the procedure to be followed in the case of such treaties. In his view, it was not a question of *renvoi* at all. What international law did was to refer to the constitutional laws and practices of States only for the purpose of deducing from them general rules of *international* law as to the organs competent to declare the consent of States to treaties. It was those general rules which were incorporated in article 4 of Part I, approved at the previous session of the Commission.

75. Mr. de Luna had illustrated the kind of difficulties that might arise in adopting the constitutional approach, when he had pointed out that the validity of a treaty might not be challenged until a considerable interval of time had elapsed and a government found it inconvenient to perform the obligations assumed, or that the decision of a constitutional court might be necessary to determine the constitutionality of a treaty. He could have gone even further; for sometimes the constitutionality of a treaty might be brought in question only in the process of private litigation in the courts.

76. In drafting article 5 he had adopted as the fundamental principle the supremacy of the international rules concerning the authority of state organs to enter into treaties. Paragraph 4 admittedly departed from that principle in certain exceptional cases, and he had inserted it only as a possible basis for reconciling what he had expected to be a wider divergence of opinion in the Commission. He had done so reluctantly because it detracted from the simplicity and clarity of the general principle; moreover, it introduced a subjective element. He had explained in paragraph 21 of the commentary his reasons for inserting paragraph 4, and it was to be remembered that the exception in regard to a " manifest " failure to observe constitutional requirements had the support of eminent authorities — Lord McNair, Charles de Visscher, and apparently the UNESCO committee of which Professor Guggenheim had been rapporteur. If he could now express his personal opinion he would say that the arguments adduced during the discussion in support of the deletion of paragraph 4 seemed to him

[11] United Nations publication, Sales No.: 1952.V.4, section 80.

cogent. Nevertheless, consideration ought to be given to the doubts expressed by Mr. Tunkin and others about the wisdom of omitting it altogether, and perhaps the best course, before taking a final decision in the matter, would be to request the Drafting Committee to see whether, in the light of the comments made in the Commission, a new text could be prepared reconciling the various points of view.

77. Most of the drafting suggestions seemed to be acceptable and he agreed that, once a decision on the fundamental principle had been reached, paragraph 1, which was introductory in character, could be dispensed with. Paragraphs 2 and 3 (*a*) could probably be amalgamated and simplified, perhaps on the lines suggested by Mr. Briggs and Mr. El-Erian. He did not attach great importance to paragraph 3 (*b*), but it might serve to allay the misgivings of the few members who were uneasy about taking the international standpoint too rigidly.

78. Certain important issues connected with possible international limitations on the treaty-making power, the right of self-determination and *jus cogens*, which had been touched upon during the discussion, should perhaps be taken up in connexion with later articles. He sympathized with the concern expressed by certain members about the need to protect the interests of smaller and newly independent States, but believed that the protection of their sovereignty would be best achieved by article 5 as it was taking shape.

79. The CHAIRMAN suggested that the Commission might request the Drafting Committee to prepare a new text of article 5 in the light of the discussion and the formal amendments already submitted. That would give further time for reflection and thus satisfy Mr. Bartoš, and should also be acceptable to Mr. Tabibi, who had suggested that a small working group be set up to consider the article.

80. Mr BARTOŠ said that in that case he could agree to article 5 being referred to the Drafting Committee before the Commission had taken a position on the substance, though it was not, of course, the proper function of the Drafting Committee to do so. The Drafting Committee could not settle questions of substance. In his opinion it could, as an exception, give the plenary Commission its opinion on questions of substance if specially instructed to do so in respect of a particular article. He wished it to be understood that he was making a statement of principle.

81. Mr. TABIBI said that he had no objection to the article being referred to the Drafting Committee, but he thought that the authors of any amendments submitted during the discussion should be invited to attend its meetings.

82. Mr. CADIEUX said there seemed to be some confusion as to what the Commission intended to do. It was fairly clear that the opinions expressed during the discussion all tended in one direction and if the Drafting Committee was to be asked to word those opinions more clearly, that was one solution. On the other hand, if a negotiating committee was to be appointed to reopen the discussion on the formula which had prevailed, that was another solution and it was important that members should know precisely what the final decision was.

83. Mr. AMADO said he fully understood Mr. Bartoš's view. The Drafting Committee should confine itself to drafting — putting into words what had been agreed. It had no right to go into the substance, or even to change a single word which might affect the substance. But if the Drafting Committee went further than that, the Commission was there to restrain it. He asked Mr. Bartoš to be satisfied with simply referring the text to the Drafting Committee.

84. Mr. AGO recalled that in previous years the Drafting Committee had, at the beginning of the session, to some extent acted as a working group, thereby enabling the Commission to resume its discussion on a simplified text.

85. If, as Mr. Tabibi proposed, the Commission decided to include in the Drafting Committee all members who had put forward proposals on a particular point, it would have to be continually changing the Committee's membership and that would have serious drawbacks. It would be wiser to keep to a practice that had given satisfaction in the past.

86. Mr. GROS said the experience of past years showed that the authors of amendments need have no fear that the Drafting Committee would not pay enough attention to their proposals if they were not present. To change the Committee's membership might make it more cumbersome to no purpose.

87. The CHAIRMAN suggested that, in the light of Mr. Gros' remarks and since the procedure followed at the previous session had proved satisfactory, article 5 should be referred to the Drafting Committee.

It was so agreed.

The meeting rose at 1 p.m.

677th MEETING

Friday, 10 May 1963, at 10 a.m.

Chairman: Mr. Eduardo JIMÉNEZ de ARÉCHAGA

Appointment of the Drafting Committee

1. The CHAIRMAN proposed the appointment of a Drafting Committee consisting of Mr. Ago, Mr. Briggs, Mr. El-Erian, Mr. Gros, Mr. Padilla Nervo, Mr. Rosenne, Mr. Tunkin, Sir Humphrey Waldock, the Special and General Rapporteur, and Mr. Bartoš, the First Vice-Chairman.

The proposal was adopted.