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Summary record of the 100th meeting

Topic:
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Article 4

Paragraph (1)

122. By Mr. AMADO's asking why the expression used in the Harvard draft should not be retained in article 4 also and the words " to enter into treaties " substituted for " to make treaties ", the CHAIRMAN accepted those amendments.

123. Mr. HUDSON suggested that the paragraph read:

" The capacity of a State to enter into treaties is exercised by the organ or the organs of that State competent for that purpose under its constitution."

124. The CHAIRMAN thought that the words " for that purpose " were superfluous.

Paragraph (2)

124. Mr. HUDSON said he would prefer the paragraph to read:

" The Head of the State is competent to exercise the State's capacity to enter into treaties."

126. Mr. SPIROPOULOS wondered whether, even if all the members of the Commission were agreed to use the word " capacity " instead of " competence ", the form should be used in all the articles. Would it not be better in the paragraph under discussion to use the expression " treaty-making power "? Even in civil law a person was not said to have the capacity to do something, he was said to have the right to do it.

127. Mr. HUDSON, supported by the CHAIRMAN and by Mr. ALFARO, objected to Mr. Spiropoulos' suggestion on the grounds that it was a matter of principle always to use the same term in a legal text to denote the same thing. Otherwise there was a risk of its being inferred that something different was meant.

128. Mr. SPIROPOULOS wondered whether it was exactly the same thing. Capacity denoted a situation before the law, and the exercise of capacity was treaty-making power. Naturally he agreed that the same term must always be used to denote the same thing.

129. The CHAIRMAN read out the text of paragraph (2) amended to read:

" In the absence of provision in the constitution to the contrary, the Head of the State is competent to exercise treaty-making power."

130. Mr. AMADO preferred the wording adopted at the previous meeting. He thought that the Commission should not go back too often on what it had already decided.

131. Mr. LIANG (Secretary to the Commission) agreed with Mr. Spiropoulos, In his opinion it was not capacity that was referred to in the paragraph under discussion, but the exercise of treaty-making power, which was a quite different thing. Capacity resided in the State. In saying that the Head of the State was competent to enter into treaties, it was assumed that the constitution granted him the exercise of that power.

132. Mr. SANDSTRÖM said that the capacity to enter into treaties, referred to in article 3, and the capacity of organs of the State to enter into treaties, referred to in article 4, meant two different things.

133. The CHAIRMAN proposed that the two paragraphs be combined to read: " . . . by whatever organ or organs of that State its constitution may provide, or, in the absence of provision in its constitution, by the Head of that State ".

134. Mr. EL KHOURY suggested that the second paragraph be deleted. Why indeed should one bestow that power upon a man on whom his people did not wish to bestow it?

135. Mr. HUDSON pointed out that article 4 referred to the constitution of a State, but that its constitution might be silent on that point. It was possible that it was the law of the country which determined it.

136. Mr. SPIROPOULOS suggested using the expression " its constitutional law in general ".

137. Mr. HUDSON recalled that in article 1 of the Rio de Janeiro draft (A/CN.4/23, Appendix F) the words " internal law " were used. In the United States of America, only the President could enter into treaties, but postal conventions had for a long time past been concluded by the Postmaster-General.

138. Mr. SPIROPOULOS remarked that the same was true in many States.

139. The CHAIRMAN stated that he would choose between the two expressions " internal law " and " constitutional law and practice ".

The meeting rose at 1. p.m.

100th MEETING

Monday, 11 June 1951, at 3 p.m.

CONTENTS

Chairman: Mr. James L. BRIERLY

Present:

Members: Mr. Ricardo J. ALFARO, Mr. Gilberto AMADO, Mr. J. P. A. FRANÇOIS, Mr. Shuhsi HSU, Mr. Manley O. HUDSON, Mr. Faris EL KHOURY, Mr. A. E. F. SANDSTRÖM, Mr. Georges SCELLE, Mr. Jean SPIROPOULOS, Mr. Jesús María YEPES.

Secretariat: Mr. Ivan KERNO, Assistant Secretary-General in charge of the Legal Department; Mr. Yuen-li LIANG, Director of the Division for the Development and Codification of International Law, and Secretary to the Commission.

Law of treaties: report by Mr. Brierly (item 4 (*a*) of the agenda) (A/CN.4/23, A/CN.4/L.5, A/CN.4/L.17) *(continued)*

(*a*) CONSIDERATION OF ARTICLES TENTATIVELY ADOPTED BY THE COMMISSION AT ITS 88TH MEETING (A/CN.4/L.5)[1]

Article 1: Authentication of texts of treaties

1. Mr. HUDSON said that it was hardly necessary to consider the question of authentication of texts of treaties. The term " authentication " was only used when a treaty was drawn up in several languages. It was a practice which went back to the Treaty of Versailles, where it had been stated that the various versions of the text were authentic.

2. He seriously doubted whether signature and initialling should be placed on the same footing. He knew of no case in which a treaty that had merely been initialled had been submitted for ratification. It would be difficult to find a treaty which had been made final, in the sense of " brought into force " by mere initialling. If the question of initialling were to be considered, it should be treated as definitely subordinate to the question of signature, which was the preliminary expression of the fact that the negotiators of a treaty were satisfied with the text arrived at. United States representatives at international conferences never signed any text before having received express authority to do so, and that was only given at the last moment. The signature of multilateral treaties had a definite significance for experts. The League of Nations had made a practice of publishing the list of signatories of such instruments, whether they had ratified them or not. The fact of signing a convention indicated that the State concerned was prepared to assume obligations.

3. In general, he was entirely opposed to the text of article 1. In sub-paragraph (*a*), signature was not given sufficient importance and he thought that the provision regarding initialling should, at the most, be included in that part of the text which dealt with the formalities usually preceding signature.

4. In his opinion, sub-paragraph (*b*) was hardly more satisfactory. He was aware that the texts of conventions were frequently incorporated in the final act of a conference, but he considered that a bad practice. He realized, however, that the chief drafters at The Hague Conference of 1907, including Renault, had followed that practice and that at the Conference of American States held at Havana in 1928 the treaties and conventions had been incorporated in the final act, which alone had been signed. Nevertheless, each treaty included the usual formula " signed this day " etc. That practice was considered more expeditious.

5. He thought that the case referred to in sub-paragraph (*c*) rarely arose. He could of course cite various examples, but would hesitate to place that procedure on the same level as signature. Incorporation in a resolution following a majority vote was of secondary importance.

6. He found the provision contained in sub-paragraph (*d*) unsatisfactory. In fact, it meant that authentication was effected by the text itself. But he did not usually read a text before knowing whether it was authentic; that would be placing the cart before the horse.

7. He therefore proposed omitting the reference to authentication and giving the question of signature a certain importance.

8. The CHAIRMAN explained that the purpose of the article was merely to lay down the procedure for establishing the final text of treaties. There was no question of the effect of signature, of entry into force etc. Signature was one of the ways of establishing the text; the question of signature of treaties would be considered later.

9. Mr. HUDSON had never heard it said that signature was one of the ways of authenticating the texts of treaties. He had never heard of a formula worded as follows: " I hereby declare this to be the authentic text of the treaty ". He repeated that it was unnecessary to devote an article to authentication.

10. Mr. KERNO (Assistant Secretary-General) pointed out that the Commission had held a long discussion on article 1 of Mr. Brierly's second draft (A/CN.4/43) and that, of course, article 1 had originally had a different purpose. It had concerned the conclusion of treaties. The long discussion held by the Commission had shown that it was extremely difficult to define conclusion. It was in those circumstances that the Commission had left aside the legal effects of certain acts preceding ratification and had reverted to article 6 of the first draft (A/CN.4/23), which dealt solely with the authentication of texts of treaties.[2]

11. The CHAIRMAN thought that the Commission might be asked whether it wished to reconsider its decision or preferred to keep the article in its present form.

12. Mr. SPIROPOULOS observed that the difficulty was due to the fact that Mr. Hudson had not heard the Commission's discussions on that question. It had been difficult to arrive at a text expressing the Commission's views. Finally, it had been considered that the draft of the article in question was the best that could be produced. If Mr. Hudson had followed that discussion he would not consider the text so bad. He must have an opportunity to express his opinion but, on the other hand, the Commission could not go back.

13. Mr. HUDSON regretted that he had not been present during the discussion at which the question had been clarified. In his opinion the proposed text would be very badly received by scholars.

14. Mr. YEPES said that he was most impressed by Mr. Hudson's remarks, but was not in favour of reopening the discussion. He did not think that the word " authentication " was quite what the Commission meant.

15. The CHAIRMAN asked whether the word " establishment " would not be better.

16. Mr. HUDSON suggested following the International Labour conventions. From the outset it had been the

[1] See text in summary record of the 88th meeting, footnote 15.

[2] See summary records of the 84th meeting, paras. 4–66, and of the 88th meeting, paras. 3–32.

practice to authenticate the texts of those conventions by the signatures of the President of the Conference and the Director-General of the International Labour Office. The ILO still attached a certificate of authentication to the texts of conventions it sent to governments.

17. The Treaty of Versailles of 1919 had been authenticated in the following manner: the text transmitted to Governments had been accompanied by a certificate of authentication issued by the French Foreign Minister with whom the Treaty was deposited. He had a certified text of the Treaty of Versailles before him and it showed that the United States Secretary of State declared that the authenticity of the text had been certified to him by the Minister for Foreign Affairs of the French Republic.

18. If the question of the authentication of treaties was to be considered, it would be advisable to ask Mr. François what was the practice.

19. The CHAIRMAN thought that the word " authentication " was somewhat ambiguous and that Mr. Hudson had taken it in a sense different from that intended by the Commission. When a treaty was drawn up, there came a time when the negotiators did not wish to make any further amendment. The article under consideration did not settle the question of proof of authenticity of a treaty. He therefore proposed using the word " establishment ".

20. Mr. FRANÇOIS fully agreed with the Chairman on that point.

21. Mr. ALFARO thought that the article should be kept. The code which the United Nations wished to draft would serve as a text for future students. It should therefore be the expression of international law and should not contain mandatory provisions only. It should also show how international affairs were conducted; for instance, how the text of a treaty was authenticated. It should therefore be stated that a treaty was authenticated by signature or initialling *ne varietur*.

22. With regard to the word " authentication ", he did not know how far that term was open to objection in English. In Spanish it was perfectly acceptable. On the other hand, the word " *establecimiento* " could not be used; the proper term would be " *fijación* ".

23. Mr. SANDSTRÖM asked whether the text could not be slightly modified to meet the argument used by Mr. Scelle during the discussions on that question, namely, that the purpose of signature was to establish the text of a treaty in final form. For instance, the following wording might be used: " but the text of a treaty is finally established by such and such means ". That would be a better way to bring out the effect of signature, which made the text final.

24. The CHAIRMAN asked if that was not what the article already said: " The establishment of the text may be effected by ". It might also be said that " the text of a treaty becomes definitive ".

25. Mr. SPIROPOULOS did not think that formula was entirely in conformity with the Commission's intention. He believed that the text already adopted was better.

26. Mr. ALFARO explained that the text of a treaty became definitive when the parties had finally agreed on it and initialled it *ne varietur*. The agreement was put in writing and then authenticated.

27. Mr. HUDSON thought that the text was definitive before being attested by signature.

28. Mr. SPIROPOULOS reminded the Commission that it had wished to avoid reference to the conclusion of treaties and had said that the text was established. He did not think the Commission should split hairs.

29. Mr. HUDSON replied that others would do so.

30. He asked why the words " text or texts " had been included in the first line of the article. It had been the practice of the Permanent Court of International Justice to state that a treaty was drawn up in French and Spanish, for instance, when there was a French version and a Spanish version, which were merely two versions of one and the same text. The Commission should not adopt the careless habits of certain treaty drafters. Incidentally he thought it reprehensible to use the French formula according to which both texts: " *sont également authentiques* "; the proper wording was " *font également foi* ".

31. The CHAIRMAN agreed to the deletion of the words " or texts ".

32. With regard to sub-paragraph (*c*), Mr. HUDSON thought that that provision did not take sufficient account of the procedure followed in the International Labour conventions. Besides, the instrument in question might not be a resolution. He preferred the word " decision ".

33. Mr. SPIROPOULOS also proposed using the word " decision ", which was a general term. He thought that the term used should be as general as possible.

34. The CHAIRMAN thought that the word " resolution " was much more general.

35. With regard to sub-paragraph (*d*), Mr. HUDSON observed that he had never seen a text of a treaty which prescribed formal means for its authentication. What he had seen was a provision to the effect that the text of the treaty should be communicated to certain governments by a certain Minister for Foreign Affairs.

36. Mr. SPIROPOULOS attached great importance to Mr. Hudson's remarks and was inclined to believe that a treaty could not say anything about the establishment of its text. The sub-paragraph in question should be deleted or replaced by the words " by such means as the signatories may decide ".

37. The CHAIRMAN proposed the words: " by other formal means prescribed by the negotiating States".

The text of article 1 was adopted by 9 votes, with the following amendments:

For the word " authentication " substitute the word " establishment ", delete the words " or texts ", and for sub-paragraph (*d*) substitute the following: " By other formal means prescribed by the negotiating States ".

Article 2: Application of treaties

38. The CHAIRMAN pointed out that that article had been adopted after a long discussion, in which Mr. François had encountered heavy opposition.[3]

[3] See summary record of the 88th meeting, paras. 34–74.

39. In connexion with the title of the article, Mr. HUDSON observed that it was not a question of the application of treaties. Application meant carrying out a treaty in accordance with the obligations it laid down. Article 2 dealt with a subject which required much fuller treatment and was, moreover, dealt with in article 7. He had never been able to see any difference between " becoming legally binding " and " entry into force ".

40. The CHAIRMAN agreed that the title of the article was unsuitable.

41. Mr. AMADO observed that the article declared that a treaty was binding when it was binding.

42. Mr. HUDSON did not see why the same idea was repeated in two different forms, and would prefer the question to be dealt with in article 7. He proposed the following wording:

> " A treaty becomes legally binding in relation to a State by signature, ratification, accession or any other means of expressing the will of the State."

43. Mr. SPIROPOULOS considered that there was a fundamental difference between article 7 and article 2. The latter showed when a treaty became binding in relation to a State namely, when that State had signed, ratified or acceded to it or, it might even be added, had accepted it. That meant that a treaty was binding when one of those acts had been performed.

44. Article 7 provided that a treaty entered into force when it had been ratified by 20 signatories, for instance. That did not mean that it was binding on all the signatories; the treaty entered into force when it had been ratified by 20 States, but each State was bound only after ratification. When 20 States had ratified the treaty it would enter into force and become legally binding at the same time as far as they were concerned.

45. Mr. ALFARO explained that article 2 determined the time when a treaty became binding in relation to a State and article 7 showed how a treaty came into force in each of the cases stated in article 2.

46. The title of article 2 might be unsuitable, but he believed that the substance should be retained.

47. Mr. HUDSON then proposed the following text: " A treaty may become binding " (he saw no need for the word " legally ") " in relation to a State by signature, ratification, accession or any other means of expressing the will of the State through an organ competent for that purpose."

48. The CHAIRMAN added that the word " acceptance " would be inserted when the Commission had taken a decision on that procedure.

49. Mr. HUDSON thought that even if the word " acceptance " were added, the words " or any other means " should be kept.

50. In order to avoid the same difficulties, Mr. ALFARO suggested the words " or any other means of expressing the definite will of the State ".

51. The CHAIRMAN thought that if signature, ratification, accession and acceptance were mentioned, there was no need to add the words " or any other means."

52. Mr. SPIROPOULOS thought it preferable to keep those words, since some new means might be introduced.

53. The CHAIRMAN noted that the word " approval " was, in fact, also used.

54. Mr. HUDSON recalled that in recent years negotiations between States had resulted in agreements without signature, ratification, accession or acceptance.

55. Mr. SPIROPOULOS said that those were not treaties in the sense of the text under consideration. In addition to treaties, there were, of course, many other ways of binding a State.

56. The CHAIRMAN read out the beginning of the text proposed by Mr. Hudson: " A treaty may become binding ".

57. Mr. SPIROPOULOS asked why the words " may become " should be used.

58. Mr. AMADO and Mr. SCELLE also opposed that expression.

59. Mr. YEPES thought that the addition of the word " may " introduced some doubt, and that it might be asked whether there were not some other means; the word should be omitted.

60. The CHAIRMAN said that he had acted in a spirit of compromise, though he himself did not see the advantage of that wording.

61. Mr. YEPES said that in that particular case there should be no compromise. No dubious expressions should be introduced into the text.

62. Mr. HUDSON asked if the text meant that a treaty became binding on signature.

63. The CHAIRMAN replied that that might be so.

64. Mr. HUDSON noted that the words " in accordance with its constitutional law and practice " were contrary to the view taken by Anzilotti in the Eastern Greenland Case, since they provided that reference must be made to the constitution of a State before concluding a treaty with it.

65. He appreciated Anzilotti's view. If he were asked to negotiate a treaty with the United Kingdom and the representative of that country asked him to consult the United States constitution, he would reply that to ascertain the sense of that very short text drafted in 1777 it was necessary to consult the 350 odd volumes containing the interpretation of the constitution by the Supreme Court.

66. The CHAIRMAN pointed out that the Commission had decided by 8 votes to 1 to adopt the opinion expressed in the article in question[4] and he did not believe that Mr. Hudson's view, added to that of Mr. François[5], could change the Commission's decision.

66a. The Commission was familiar with the views of Mr. Hudson, who had explained them the previous year[6] and a large majority of members had chosen that solution,

[4] Decision on article 5 of Mr. Brierly's second draft (A/CN.4/43) taken at the 86th meeting; para. 61 of the summary record.

[5] See the summary record of the 86th meeting, paras. 53–54 and the summary record of the 88th meeting, paras. 36–38.

[6] See summary record of the 52nd meeting, paras. 75 *et seq.*

realising that it raised fewer difficulties than the alternative one.

67. Mr. SPIROPOULOS said that since the text had been adopted, he had again examined international practice. Certain writers held that if one contracting party had no means of finding out that another contracting party was acting contrary to its constitution, the latter would be bound by the treaty. The article might be slightly amended to facilitate existing international practice. He thought it advisable to consider that important point with a view to making some concession to the theory of Anzilotti. Something should be done to protect States which acted in good faith.

68. Mr. AMADO wondered what would happen if Sir Benegal Rau took his seat in the Commission and said that he did not approve of the articles; would members of the Commission have to re-consider the sacrifices they had made? He himself had made concessions in respect of the articles. He had favoured the more conservative line of stating that a treaty was a solemn instrument in writing concluded in good and due form, in order to distinguish it from an executive agreement. The Commission had adopted the text in order to reach a solution. That was why he had not yet intervened in the discussion. He proposed that the text should be adopted with the very clear and undoubtedly valuable amendments proposed, otherwise he would be uncertain whether he had been right in voting as he had. His view was that the Commission's decision should stand.

69. Mr. HUDSON asked his colleagues to forgive him but he had a further slight amendment to propose. He thought that in that article the Commission intended to stress the words " in accordance with its constitutional law and practice ". Hence the article might be drafted as follows:

" A treaty becomes legally binding in relation to a State when that State has expressed its will to be found in accordance with its constitutional law and practice."

70. He did not think the purpose of the article was to enumerate the means of expressing its will at the disposal of a State.

71. The CHAIRMAN explained that the article had that purpose also. It was necessary to say that whatever method was used to express the will, it must be in accordance with the constitutional law and practice of the State concerned, otherwise the treaty was not binding.

72. Mr. SPIROPOULOS considered that article 2 was the most important of all.

73. Mr. AMADO pointed out that in certain South American republics, such as Brazil, the constitution provided that treaties signed by a *de facto* government would not be recognized.

It was decided, by 9 votes, to retain article 2, last recorded as follows:

" A treaty becomes binding in relation to a State by signature, ratification, accession or any other means of expressing the will of the State in accordance with its constitutional law and practice through an organ competent for that purpose."

74. Mr. SCELLE hoped that the title of the article would be changed.

75. The CHAIRMAN agreed, and suggested that a general title be used, such as " Formation of Treaties ". Mr. Spiropoulos suggested " Assumption of legal obligations by a State "; that question might be left to the Rapporteur.

76. Mr. HUDSON proposed the title: " Assumption of treaty obligations ".

Mr. Hudson's proposal was adopted.

Article 3: Ratification of treaties

77. The CHAIRMAN reminded the Commission that it had decided to delete the words " and accepts " in paragraph (1), and to delete paragraph (2) as suggested by Mr. Kerno.

78. Mr. Hudson proposed the deletion of the word " finally ".

79. The CHAIRMAN thought that it was not, in fact, of any great importance.

Paragraph (1) was adopted in the following form:

" Ratification is an act by which a State, in a written instrument, confirms a treaty as binding on that State."

Paragraph (2) was deleted.

Article 4: Ratification of treaties

80. Mr. HUDSON thought the first paragraph should either be deleted or replaced by the following text:

" A State may undertake an obligation under a treaty by reason of its signature of the treaty if the treaty so provides or if the form of the treaty and the attendant circumstances indicate an intention that signature should be sufficient."

81. He pointed out that the United States had concluded about 500 executive agreements, which had been merely signed and brought into force, without any ratification.

82. The CHAIRMAN explained that the idea underlying the article was that ratification was the normal method.

83. Mr. HUDSON questioned that view; he considered that, on the contrary, the opposite method was the normal one.

84. Mr. YEPES observed that the Commission was considering treaties, not executive agreements.

85. Mr. KERNO (Assistant Secretary-General) agreed with Mr. Hudson that in practice many treaties were simply signed, always provided that the constitutions of the States concerned permitted. Nevertheless, the Commission had intended to stress the importance of ratification.

86. Mr. SCELLE pointed out that the text had been included because it had been realised that it was dangerous to entrust the fate of a State to the executive. In practice, ratification was a safeguard of political freedom. The text could, of course, be drafted otherwise. Mr. Hudson and Mr. Kerno were right in saying that executive agreements were very common; the State could in fact be bound by an instrument merely signed by a minister or

by a director of the ministry. But that practice might lead to abuses.

87. Mr. HUDSON pointed out that in certain countries the participation of parliament was not required.

88. Mr. SCELLE replied that in Switzerland, on the other hand, a referendum was necessary. If the door were left open for executive agreements, there would be no more treaties.

89. Mr. SPIROPOULOS asked what purpose was served by discussing that point. The Commission was not going to change the practice of governments. He agreed with Mr. Scelle; in his opinion the article adopted by the Commission and that proposed by Mr. Hudson said the same thing, but the Commission's text established a presumption of the necessity for ratification. When there was no doubt as to whether ratification was required or not, the effect of the two texts would be the same.

90. Mr. YEPES said that he would vote in favour of keeping the text of article 4 as it stood in the document before them. The formula proposed by Mr. Hudson contained an element of danger.

91. The words " if the treaty so provides " would enable the drafters of a treaty to evade the constitutional provisions of the States for whose signature it was open or, at least, make it possible to interpret the text as authorizing a State whose constitution required treaties to be submitted for ratification in the traditional manner, to cite a contrary provision of the treaty to show that signature alone was binding.

92. The CHAIRMAN observed that Mr. Hudson's formula only differed from the draft article in its form of words.

93. Mr. HUDSON said that he had wished to group the ideas expressed in the draft of article 4 in a single paragraph, so as to make them less vulnerable. The draft article laid down a rule in paragraph (1), but stated in paragraph (2) that that rule was not correct.

94. Following a discussion opened by Mr. AMADO, various members of the Commission concluded that the draft of article 4 could be more closely adhered to, but that the two paragraphs should be connected by some such words as " provided, however ".

It was provisionally so decided.

95. Mr. SANDSTRÖM thought that the draft articles should be more thoroughly overhauled. Article 2 listed the different means by which a treaty became legally binding. It should be followed by provisions successively defining those different means, namely, signature, ratification and accession. That being so, and as Mr. Hudson had suggested, article 4, paragraph (2) relating to signature should come first, then article 3 on ratification and so on.

96. The CHAIRMAN and Mr. HUDSON agreed that that view was justified.

97. Mr. HUDSON proposed that it be left to the Special Rapporteur to make those amendments to the draft Convention.

It was so decided.

Article 5: Ratification of treaties

98. Mr. HUDSON pointed out that the draft of article 5 was identical with article 8 of the Harvard draft; he thought that the first sentence of the comment accompanying that text in the Harvard draft [7] contained an idea which should be incorporated in the article to make it self-explanatory. It should be shown that the article referred to a treaty subject to ratification, by adding at the beginning of the draft article the words " If a treaty is subject to ratification."

99. Article 5 might thus read as follows:

" If a treaty is subject to ratification, its signature on behalf of a State does not create for that State any obligation to ratify the treaty."

100. Mr. YEPES thought that such a text was dangerous. States might regard it as an indirect invitation not to ratify; it seemed to show particular indulgence towards States which did not do so.

101. In his opinion it was necessary to show that signature created a " kind of obligation " for signatories (though not, strictly speaking, a legal obligation). When a treaty was signed, it was with the intention of ratifying it.

102. Mr. HUDSON explained that the text under consideration had been inserted in the Harvard draft for specific reasons. In the past, the prevailing opinion had been that the king must ratify treaties signed by his representatives within the limits of their powers. In 1920, the President of the United States had not ratified the Treaty of Versailles which had been signed on behalf of that country, although ratification was expressly provided for under the terms of the Treaty. It had therefore appeared advisable to state that when a treaty provided for ratification, the mere fact of signature did not oblige a State to ratify it.

103. With regard to the effects of signature and the " kind of obligation " referred to by Mr. Yepes, that question should rather be considered in connexion with article 6.

104. The CHAIRMAN observed that members of the Commission had already made similar comments at the first reading.

105. Mr. SANDSTRÖM thought that the Commission could satisfy Mr. Yepes by considering his comment in connexion with article 6.

Article 5 was provisionally adopted in the form proposed by Mr. Hudson.

Article 6: Ratification of treaties

106. The CHAIRMAN recalled that that article had been added to the draft on first reading, at the request of Mr. Yepes.[8]

107. Mr. HUDSON considered that the text in question tended to introduce into international law, provisions similar to those on the same subject contained in the

[7] *American Journal of International Law*, vol. 29 (1935), Supplement, p. 769.

[8] See summary record of the 86th meeting, para. 145; summary record of the 87th meeting, paras. 1–43; summary record of the 88th meeting, paras. 89–117.

Constitution of the International Labour Organisation (ILO). Under that constitution, when the ILO Conference adopted a convention, Members undertook to " bring the Convention before the authority or authorities within whose competence the matter lies, for the enactment of legislation or other action ".[9]

108. When two countries signed a treaty, however, it often happened that one of them subsequently found that the treaty would not be practicable and for that reason did not submit it to ratification procedure. He did not approve of the draft of article 6.

109. The CHAIRMAN asked Mr. Hudson whether the draft of article 6 would compel the President of the United States to submit all treaties signed on his behalf to the Senate, even if the Executive did not desire the treaty to enter into force.

110. Mr. HUDSON said that that would certainly be the case. Such a provision would cause a sensation in the United States.

111. Mr. YEPES explained that the draft of article 6 would certainly necessitate the submission of any treaties signed to the senate, but would not deprive the President of his power to suggest their rejection by the legislature.

112. It often happened that, in accordance with the wish or even the demands of public opinion, a treaty was signed by a reactionary government which had no intention of submitting it to parliament. Such situations must be prevented.

113. Mr. HUDSON did not think it any part of the Commission's functions to draw up rules for the exercise by a State of its capacity to make treaties under domestic law.

114. Mr. ALFARO thought it advisable to recall that treaties were not signed for pleasure or for pigeon-holing.

115. If a government signed a treaty in good faith, convinced that it would be to the country's advantage, it should submit that treaty to the test of public opinion. The number of treaties signed, but not ratified, was enormous. That was a cause for grave anxiety where multilateral conventions were concerned. Respect for democratic principles demanded that any treaty signed should be submitted for ratification.

116. The other signatory States also had an interest in a treaty's entry into force. Hence it was not a purely domestic question.

117. The CHAIRMAN asked members to refrain from repeating comments already made at the first reading.

118. Mr. HUDSON pointed out that the Declaration of London of 1909, which had been signed by a large number of States, had not been ratified by any of them. They had not even initiated ratification procedure. In the United States, however, the Senate had been consulted and had given its consent; but the President was not bound by a favourable vote of the Senate, since the Constitution provided that he was responsible for ratification, after the Senate had given its approval. The President of the United States had not ratified the Declaration. Similarly, the Geneva Protocol of 1924 had been a complete failure. States should remain free to reconsider their decision, even after signature.

119. Mr. AMADO said that he would vote against the retention of article 6 for the reasons he had explained at the first reading.

It was decided, by 5 votes to 3, to delete article 6.

120. Mr. EL KHOURY explained that he had voted in favour because he believed that the text in question did not require a State to act in an unconstitutional manner.

Article 7: Entry into force of Treaties

Paragraphs (a) *and* (b) *were adopted without comment.*

Paragraph (c)

121. Mr. HUDSON considered that notification of ratification was not sufficient. In his opinion the instrument of ratification must be communicated to the other signatories. An instrument of ratification drawn up by a State, but remaining in its archives, would not be a true ratification.

122. The Treaty of Versailles had accepted notification in the case of distant countries, but had not released them from the obligation subsequently to transmit the instrument of ratification.[10]

123. He also observed that, by analogy with paragraph (*a*), the beginning of paragraph (*c*) might read: " A treaty subject to ratification but containing no provision . . ."

124. Following a discussion in which Mr. YEPES, Mr. SPIROPOULOS and Mr. AMADO took part, *paragraph* (c) *was provisionally adopted, with the amendments proposed above.*

Article 8: Accession to Treaties

Paragraph (*1*)

125. The CHAIRMAN suggested that in the English text the words " accepts it . . . as binding:" be replaced by the words " declares . . . that the treaty is binding."

126. Mr. HUDSON having observed that in the English text the words " formally and in accordance with its terms " could equally well be taken as referring to the words " signed or ratified " as to the word " accepts ", the CHAIRMAN proposed that the paragraph be drafted as follows:

> " Accession to a treaty is an act by which a State which has not signed or ratified the treaty, formally declares, in a written instrument, that the treaty is binding on that State."

127. He pointed out that the words " in accordance with its terms " could be deleted since paragraph (2) already contained the clause " when that treaty contains provisions enabling it to do so."

Paragraph (*1*) *was provisionally adopted, as amended.*

[9] Constitution of the ILO, article 19, para. 5 (*b*).

[10] Treaty of Versailles of 28 June 1919, final article: " Powers of which the seat of the Government is outside Europe will be entitled merely to inform the Government of the French Republic through their diplomatic representative at Paris that their ratification has been given; in that case they must transmit the instrument of ratification as soon as possible."

Paragraph (2)

128. Mr. HUDSON wondered whether the Commission should not take account of the procedure followed in certain conventions, such as the General Act of 26 September 1928 or the Convention on the Privileges and Immunities of the United Nations, under which accession was the only means of becoming a party.

129. He proposed that in the English text the word " enabling " be replaced by the word " allowing," and that a comma be inserted after the words " to do so."

130. Mr. KERNO (Assistant Secretary-General) read out a passage from General Assembly resolution 268 (III) of 28 April 1949 on the revision of the General Act, giving the text to be substituted for the former article 46, concerning the entry into force of that convention.

Paragraph (2) was adopted with the amendments proposed by Mr. Hudson.

Paragraph (3)

131. Mr. HUDSON proposed that, in the English text, the word " itself " be deleted and replaced by a comma, and that the word " only " be transferred to before the word " after."

Paragraph (3) was provisionally adopted as amended.

132. Mr. HUDSON reminded the Chairman that in his capacity as rapporteur, he had agreed, at Mr. Sandström's request, to submit successive provisions on signature, ratification, accession and acceptance, to follow Article 2.

(*b*) CONSIDERATION OF ARTICLES TENTATIVELY ADOPTED BY THE COMMISSION AT ITS 98TH MEETING (A/CN.4/L.17) [11]

Articles 3 and 4: Competence to make treaties

133. Mr. HUDSON and Mr. SPIROPOULOS observed that the draft articles on competence to make treaties had only passed a first reading. The Commission had very quickly decided provisionally to adopt article 3 of the Harvard draft. Article 4 had not been provisionally adopted.

134. Mr. SPIROPOULOS pointed out that the Commission had adopted Article 3 of the Harvard draft [12] at the request of Mr. Amado. He himself would prefer to delete both that article and article 4. The Commission would remember the difficulty it had had in drafting those articles and how it had hesitated between the words " capacity " and " competence ". Moreover article 3 remained incomplete, since there were States which had absolutely no capacity to make treaties: for instance, the States of a Federation, such as those forming the United States of America, or, under the Weimar Constitution, certain German States such as Bavaria, though France had long maintained a diplomatic representative there.

135. Mr. HUDSON and the CHAIRMAN considered that such entities were not States in the international sense of the word.

136. Mr. SPIROPOULOS said that article 4 created a presumption of competence in favour of the Head of the State, which was not necessary. It was constitutions which determined the organs of a State competent to make treaties.

137. At the first reading, he had approved article 3 (article 3 of the Harvard draft) because he believed that an introductory article was useful by analogy with the practice of civil codes. But a provision on capacity was necessary in a civil code because in the past there had been persons with no capacity. With States, it was otherwise. On further consideration he thought both the articles of chapter II unnecessary.

138. Mr. AMADO pointed out that it was as a last resort that he had proposed reverting to the Harvard text. But he had never approved of the article.

139. He took the opportunity of saying that in his view there were no States lacking the capacity of States. If the Commission were asked to vote again, he would vote against the two articles of chapter II.

140. Mr. EL KHOURY reminded the Commission that he had proposed the deletion of the second paragraph of article 4.[13] All the constitutions of the world contained provisions on treaty-making procedure. It was usually the Heads of States that enjoyed that prerogative. In his opinion it would be sufficient to say that the competence of a State to make treaties was exercised by whatever organs or persons were recognized by its constitution as having that competence. The Commission should not introduce unconstitutional provisions into the law of treaties; far from promoting the progress of international law, that would be a retrograde step.

141. If a State had no constitution, it should be encouraged to adopt one. Constitutions were an essential element of democratic life. It would, however, be dictatorial to impose the adoption of any particular rule on a State in advance.

142. Mr. FRANÇOIS was in favour of deleting paragraph (2) for reasons rather different from those advanced by Mr. el Khoury. Even if their constitutions contained no provision on competence to make treaties, all States had a well-established constitutional practice in that matter, which made paragraph (2) superfluous. Article 2 (A/CN.4/L.5) was sufficient.

143. The CHAIRMAN announced that he would have no objection to the deletion of the text under consideration

144. Mr. HUDSON asked for separate votes on the two articles. In his opinion, the article 2 previously adopted was not an adequate substitute for article 3 and article 4, paragraph (2), which the Commission was considering.

145. Mr. YEPES was in favour of retaining article 3. Even if the idea it contained was self-evident, it was in conformity with the regular practice of all countries, while in codifying the principles of international law it could not be omitted without leaving a gap. It must be stated who was competent to make treaties.

It was decided, by 7 votes to 3, to retain article 3.

146. Mr. HUDSON observed that article 2 (A/CN.4/L.5), considered at the beginning of the meeting, and article 4, paragraph (1) (A/CN.4/L.17), related to the

[11] See text in footnote 11 of summary record of 98th meeting.

[12] Summary record of the 99th meeting, para. 121.

[13] See summary record of the 99th meeting, para. 134.

same question. He suggested that the rapporteur reconsider those texts in the light of their similarities.

147. The CHAIRMAN, speaking as rapporteur, said that if he were free to do so he would delete article 4, paragraph (1).

148. Mr. YEPES was in favour of keeping article 4 for the same reasons as article 3.

It was decided, by 7 votes, to delete article 4, paragraph (1).

149. The CHAIRMAN asked whether it was necessary to keep article 4, paragraph (2), which assumed that in the absence of constitutional provisions the Head of the State was competent.

150. Mr. SANDSTRÖM, relying on the previous comments of Mr. Spiropoulos, pointed out the connexion between the text of that paragraph and article 2 of the draft examined at the beginning of the meeting. He thought that those texts should be examined in conjunction and proposed deferring their drafting till the next session.

151. Mr. HUDSON pointed out that in article 2 (A/CN.4/L.5) the words " through an organ competent for that purpose " introduced an idea which was not the essential one. Those words could be transferred, in a different form, to article 4, paragraph (2). The Special Rapporteur could make the necessary changes.

152. Mr. SPIROPOULOS, recalling that he would have preferred to delete both articles of chapter II, said that he was quite willing to adopt Mr. Hudson's suggestion if article 3 were kept.

153. Mr. KERNO (Assistant Secretary-General) explained that the two texts in question did not relate to the same problem. Article 4 related to the competence of State to make treaties, whereas article 2, which had been previously discussed, related to the assumption of treaty obligations by States.

It was decided to entrust the Chairman, in his capacity as Special Rapporteur, with the preparation of a new draft for article 4.

154. Mr. KERNO (Assistant Secretary-General) thought that for the current session, the Commission had practically finished examining the report on the Law of Treaties. At its next session it would be advisable for the Commission finally to settle the question of the Law of Treaties. In his first report (A/CN.4/23), para. 1 the Special Rapporteur had mentioned his intention of adding further chapters dealing with the interpretation of treaties and with their termination and possibly also with the obligation or effect of treaties.

155. The CHAIRMAN confirmed that it was his intention to submit at the 1952 session a complete draft covering the whole problem of treaties.

General Assembly resolution 478 (V) of 16 November 1950: Reservations to multilateral conventions (item 4 (*b*) of the agenda) (A/CN.4/L.18)

DISCUSSION OF MR. BRIERLY'S DRAFT REPORT

156. The CHAIRMAN presented his draft report, explaining that he had not wished to pre-judge any solutions that might be arrived at in debate and was submitting it merely as a working paper.

157. The researches he had made, in particular the study of the General Assembly's discussions and of the Advisory Opinion of the International Court of Justice of 28 May, had shown him that the question of reservations was extremely complex.[14] The conclusions he had reached in his second report were somewhat different from those contained in the first. The development of his views would explain any differences between them.

The meeting rose at 6.10 p.m.

101st MEETING

Tuesday, 12 June 1951, at 9.45 a.m.

CONTENTS

Chairman: Mr. James L. BRIERLY
Rapporteur: Mr. Roberto CORDOVA

Present:

Members: Mr. Ricardo J. ALFARO, Mr. Gilberto AMADO, Mr. J. P. A. FRANÇOIS, Mr. Shuhsi HSU, Mr. Manley O. HUDSON, Mr. Faris EL KHOURY, Mr. A. E. F. SANDSTRÖM, Mr. Georges SCELLE, Mr. Jean SPIROPOULOS, Mr. Jesús María YEPES.

Secretariat: Mr. Ivan KERNO, Assistant Secretary-General in charge of the Legal Department; Mr. Yuen-li LIANG, Director of the Division for the Development and Codification of International Law, and Secretary to the Commission.

General Assembly resolution 478 (V) of 16 November 1950: Reservations to multilateral conventions (item 4 (*b*) of the agenda) (A/CN.4/L.18) [1] *(continued)*

DISCUSSION OF MR. BRIERLY'S DRAFT REPORT (A/CN.4/L.18) (*continued*)

GENERAL REMARKS

1. The CHAIRMAN, after recalling that the Commission had already embarked on a general discussion of the

[14] See " Reservations to the Convention on Genocide, Advisory Opinion ", *I.C.J. Reports 1951*, p. 15.

[1] Mimeographed document only, the text of which corresponds with drafting changes to Chapter II of the *Report of the International*