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Summary record of the 103rd meeting

Topic:
Law of Treaties

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103rd MEETING

Thursday, 14 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: Jr. 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: General Assembly resolution 478 (V) of 16 November 1950: Reservations to multilateral conventions (item 4 (*b*) of the agenda) (A/CN.4/L.18) *(continued)*

DISCUSSION OF MR. BRIERLY'S DRAFT REPORT (A/CN.4/L.18)[1] *(continued)*

PARAGRAPH 12 (*paragraph 22 of the "Report"*) (resumed from the preceding meeting)

1. The CHAIRMAN, speaking as Special Rapporteur, submitted the following text to replace paragraph 12 of the draft report:

"The members of the Organization of American States are in a special position. Their common historical traditions and their close cultural links with one another have no counterpart in the relations of the general body of States, and a procedure which is suited to their special needs is not necessarily the most appropriate for application to multilateral conventions in general. The Pan-American Union procedure, as described in paragraph 10, is well designed to secure the ratification of multilateral conventions by as many States as possible, and in some multilateral conventions this may well be the most important consideration. When this is the case it is always possible for States to adopt this procedure by inserting a suitable provision to this effect in the convention. But there are other multilateral conventions where the integrity and uniform application of the convention is a more important consideration than its universality, and the Commission believes that this is especially likely to be the case with conventions drawn up under the auspices of the United Nations. These conventions are often of a law-making type in which each State accepts limitations on its own freedom of action on the understanding that the other participating States will accept the same limitations on a basis of equality. The Commission therefore does not recommend that the Pan-American procedure should be adopted as the procedure to be followed generally when the parties have themselves failed to indicate their intentions."

2. Mr. HSU supported the new draft, which did away with all the difficulties. The second sentence was exactly what the Commission had had in mind in referring to the regional character of the Organization of American States; it was not necessary to speak of regions, and it was even preferable to avoid doing so. The Balkans, for example, were only part of a region, and were the seat of continual conflicts.

3. Later in the new draft it was said: "But there are other multilateral conventions where the integrity and uniform application of the convention is a more important consideration than its universality"; that expressed exactly what the report brought out. The penultimate sentence was also very clear. With the changes which had been made, the paragraph was now perfect.

4. It was most satisfactory that the Rapporteur had been able to draft such a paragraph, for paragraph 12 was one of the most important in the report. It might be necessary to bear in mind that paragraph 13 of the draft report (A/CN.4/L.18) would be scrutinized by seven judges of the International Court of Justice, but paragraph 12 would be scrutinized just as keenly by twenty-one sovereign States.

5. Mr. SCELLE also expressed his unqualified support for the drafting of paragraph 12. He felt some hesitation however, about the word "special" in the first sentence. Any group of States was in fact in the same position, and the same considerations could apply to the Arab League. He wondered if there was any point in giving a special place to the Pan-American Union, since in fact the Organization of American States had no special characteristics. It was one system and it was the one into which the American States freely entered, but it was not the only system that could be conceived. He would like to hear the views of the Chairman and of the Commission as to whether a continental or regional organization had any special features. He would not wish the Pan-American system to be regarded as well-suited to the Pan-American Union only, as it might also suit other organizations.

6. He proposed that before the words "are in a special position:" the following words be inserted "and the same may apply to any other regional or continental organization."

7. He approved the redraft, which was otherwise excellent, particularly the passage relating to conventions of a law-making type. He did not ask the Commission to define what it meant by conventions of a law-making type, but proposed that it say that such conventions are "always" of a law-making type.

[1] See summary record of the 101st meeting, footnote 1.

8. Mr. YEPES thanked the Special Rapporteur for having taken into account certain criticisms he had made of the first draft relating to the procedure used by the Organization of American States in respect of reservations. However, he feared that the redraft was not satisfactory.

9. If the various statements were considered separately, they were true. The second sentence expressed an absolute truth, but the conclusions drawn from it were feeble in the extreme; it was said that the procedure used by the American States would not be suited to a world organization. He believed that a system of individual exceptions presented far greater difficulties in a group united by historical ties than in a loosely-knit organization like the United Nations. If a method such as that used by the Pan-American Union had proved itself adaptable to a regional organization, it was *a fortiori* adaptable to an organization which would put less strain upon it.

10. It had been said that the conventions to which the Pan-American method applied were very different from those concluded under United Nations auspices. In point of fact the former were much more markedly law-making than the latter. Leaving the United Nations Charter aside, he defied anyone to find in the history of the League of Nations, or of the United Nations, a convention which went further than the Charter of American States. He would refer also to the Bogotá Pact of 1948 and the Rio de Janeiro Treaty of 1947, the latter of which was an extremely important law-making convention, which had served as a basis for the North Atlantic Treaty. The two arguments invoked in paragraph 12, namely, the close cultural links between countries of Latin America and the difference in character between conventions drawn up under United Nations auspices and conventions drawn up by the Pan-American Union, recoiled against the main thesis of the report. If the Pan-American procedure was suited to a close association of States, it would be even better suited to the United Nations.

11. The question had become somewhat distasteful to him as he had had to adopt a combative attitude which he did not like. The view seemed to be held, however, that the only satisfactory method was that envisaged in the biassed report presented to the General Assembly by the Secretary-General,[2] which was a piece of *pro domo* pleading designed to show that there was only one procedure for reservations.

12. It had been said that the Pan-American method was unacceptable, but it was as well founded in law as the other, and it was moreover the least bad — he used that term because all reservations were bad in themselves — in that it facilitated the ratification of conventions and their entry into force.

13. In his statement, he was merely trying to provide information; he was not advocating one particular system because it made reservations easier. The ideal system would be to do away with reservations altogether, but that was impossible because they were a necessary evil.

14. The two methods pre-supposed the absolute necessity of reservations being tacitly or expressly accepted by the other Parties to a treaty in order for those reservations to have effect so far as those Parties were concerned, and on that point there was no difference between them. He hoped that that satisfied Mr. Scelle in that respect; in his memorandum on reservations to multilateral conventions (A/CN.4/L.14, para. 14, or p. 7 of the English mimeographed text), Mr. Scelle stated: " No reservation can take effect after signature, unless of course it is unanimously accepted by all the signatories and parties, in which case it amounts to a modification of the treaty." It would be seen that the American States did not impose upon the other contracting parties the inadmissible obligation to accept reservations; their system differed from the Russian system of reservations which took effect at the wish of a single State, and was, in fact, a condemnation of it.

15. The American States could not accept the method used by the League of Nations and the United Nations, for all that the Secretary-General had given an enthusiastic description of it. Although the effect of reservations *vis-à-vis* the contracting parties as a whole was the same in the two methods, there were differences between them which militated in favour of the Pan-American system. In the first place there was a difference of procedure. Under the League of Nations system, the depositary of a multilateral convention could not accept deposit of a ratification subject to reservation, unless he had the prior agreement of the other parties. Under the Pan-American method, the depositary entered into communication with the State which had formulated the reservation, whose comments it transmitted to the other interested States; if subsequently the State which had ratified subject to reservation still maintained that reservation, the depositary accepted deposit of the ratification coupled with the reservation, and the State in question became a party to the convention.

16. There was clearly a world of difference between that system, the League of Nations system and the Russian system, under which the depositary was bound to accept the reservation without transmitting it to the other States and without entering into further communication with the State in question. In America, the depositary received the reservation but pointed out to the State that was formulating it that it might perhaps prejudice the implementation of the convention etc. Then, even if the State in question still maintained its point of view, the reservation was deposited and the State was not excluded from the convention as it was under the League of Nations method. The consequences were therefore different.

17. The fundamental difference between those systems was that under the Pan-American system the State which formulated a reservation became a party to the convention regardless of any objections made to its reservation. The only States affected were the State which made the reservation and the State which lodged an objection to it. If, for example, Colombia objected to a reservation made by Brazil, that did not mean that Brazil would be excluded from the convention. It was only relations between Brazil and Colombia that would be affected. In that way the door was left wide open for the ratification of treaties.

[2] A/1372.

Relations between Brazil and France, for example, would not be changed in any way.

18. Under the League of Nations system, on the other hand, if a single State made an objection to a reservation, the State which had made the reservation could not become a party to the convention, and the depositary of the convention could not accept its ratification. Thus the objection of a single State led to another State's being excluded from the benefits of the convention. That was exercise of the right of veto. If a State abused its sovereign powers and, for reasons that it would not or could not avow, opposed a reservation, the State which had made the reservation would be excluded from the convention.

19. Examples from contemporary history would illustrate the juridical grotesqueness of the solution proposed. The Convention relative to the Protection of Civilian Persons in Time of War, signed at Geneva on 12 August 1949, had an enormous importance which there was no need to stress. The United Kingdom delegation had taken a considerable part in drafting the convention—it amounted to a code — but had been obliged to formulate a reservation with regard to article 68. The consequence was that, if a single State objected to that reservation, the United Kingdom would be excluded from the convention. Did that appear just? Was it democratic? In 1947 the Rio de Janeiro Treaty had been signed by all American States, including the United States of America, with the sole exception of Ecuador, which had not signed for reasons of domestic politics, its Government at that time being a *de facto* government. When Ecuador had subsequently signed the treaty subject to a reservation, one State had objected to that reservation. Despite its reservation, Ecuador had entered the system called into existence by the 1947 Treaty, and was now a part of that system. That was the way to encourage the conclusion of international conventions which contributed to the progressive development of law. If the United Nations method had been used, Ecuador would have been excluded from the Treaty merely because one State had objected to it and without that State being called on to give the reasons for its objection. Those two examples brought out clearly the superiority of the Pan-American method over the United Nations method.

20. He would next show that the Pan-American system represented existing law, which was what the Commission was instructed to codify. The other system did not constitute existing law, but was a product of the imagination. In paragraph 10 of Mr. Brierly's report (A/CN.4/41) occurred the following passage: " The second question is whether State practice gives such a clear guide that any rules of law can be said to exist in the matter of reservations. A body of practice can be cited for the rule that if a State or States signatory to a treaty object to a reservation made by another signatory or a State subsequently attempting to become a party, the latter must either withdraw the reservation or refrain from signing or ratifying ". That text did not correspond to legal practice, which was rather in favour of the Pan-American formula. The United Kingdom and Belgian Governments, who were respectively depositaries of the International Telegraph Convention and the International Convention for the Unification of Certain Rules relating to Bills of Lading, had accepted without objection the reservation which the United States of America had made to each of those Conventions.

21. The Pan-American formula corresponded to the practice of a great number of countries. It was therefore a part of customary law, the binding character of which was indisputable. There were constantly recurring instances of the same kind, and there was the conviction of the States in question that they were exercising a right. The Pan-American formula had therefore both the necessary legal and the necessary practical foundation.

22. Sixty reservations had been made at the Hague Conferences of 1899 and 1907. The Netherlands Government, which was depositary of the conventions drawn up at those Conferences, had received ratifications subject to reservation and had accepted them. It was not therefore legal practice to make a State withdraw a reservation or to have it accepted by the other States.

23. As regards the Convention for the Pacific Settlement of International Disputes, dated 18 October 1907, ten States had deposited their instruments of ratification in 1909, and one of them, the United States, had made an important reservation. The *procès-verbal* of deposit of ratifications, which had been drawn up by the Netherlands Government, the depositary of the Convention, contained the following sentence word for word: " All instruments of ratification are in good and due form ". That meant that the United States reservation did not prevent it from joining the system brought into being by the 1907 Conference. Could it be said that the contrary practice, under which a State had to withdraw its reservation if it wished to become a party to the system that had been brought into being, represented existing law? The United States of America had formulated a reservation and the Netherlands Government had accepted the deposit of ratification. That was how the custom had been started. Thus there where three major depositary countries, the United Kingdom, Belgium and the Netherlands, which accepted that system.

24. To quote other cases where the same system had been applied, Russia had ratified the International Sanitary Convention of 21 June, 1926, and the International Convention for the Suppression of Counterfeiting Currency of 20 April, 1929, subject to reservations. So there was another important country which constantly used the Pan-American method.

25. Mr. SPIROPOULOS noted Mr. Yepes' statement that a great power made a reservation to a convention and that the reservation was accepted by the depositary of the convention. But the effect of the reservation was not known. If the other contracting States made no objection, it might be said that they tacitly accepted the reservation; in that case it was the traditional method, and Mr. Yepes' argument fell to the ground.

26. Mr. YEPES recalled that it had been said that when a State deposited its ratification subject to a reservation, it was not considered as being a party to the convention until all the contracting States had accepted the reservation.

27. Mr. SPIROPOULOS pointed out that the examples

quoted by Mr. Yepes threw no light on that point. The other parties to the conventions had been notified of the ratification subject to reservation, but Mr. Yepes did not say what their replies had been.

28. Mr. YEPES said that under the Pan-American method the State which was depositary of a convention had accepted the reserving State as party to that convention, without taking objections into account, whereas under the method which was now advocated, if a single State applied its veto, the reserving State would be excluded from the benefits of the convention.

29. It had been said that the Latin-American countries were not unanimously in favour of the Pan-American system. He could declare that all the Latin-American delegations to the fifth session of the United Nations General Assembly, with the sole and regrettable exception of Mr. Amado, had supported the Pan-American system in their speeches before the Sixth Committee.[3] He could quote two explicit statements by the Colombian representative acknowledging that the Pan-American system was the best. The Mexican representative, speaking on behalf of all the South American delegations, apart from Brazil, had said that that system appeared to him to be the best. That was the true position of the Latin-American countries. All of them, including Brazil, were of that view — he purposely said " including Brazil ", because that country was one of the most faithful champions of Pan-American institutions, and the day a real debate took place upon that question, the Brazilian representative would be found alongside the other States of Latin-America.

30. Mr. AMADO said that that would certainly be the case whenever the point at issue was the application of the Pan-American system to the American continent.

31. Mr. YEPES, resuming, said that Brazil was the State which was most faithful to Pan-American institutions, and he could not therefore imagine Brazil voting against a proposal to extend the Pan-American system. He could also quote the case of the United States of America, whose representative, Mr. Tate, had defended the Pan-American method; of Syria, whose representative had explicitly supported it; and of Turkey as well. Finally, the whole Soviet group, the USSR, Czechoslovakia, Poland, etc., had expressed their support for the Pan-American system. It was not the Russian system, but they had accepted it. To draw a balance, therefore, it would be seen that 21 American States, the Soviet group, the Arab group and Turkey, together far more than half the Member States of the United Nations, would vote in favour of that system. And yet he was told that that system was not existing law!

32. The system followed by the League of Nations and the United Nations gave greater scope to the power of veto. It was an anti-democratic system, which delayed ratification and hampered the progress of international law.

33. He had given this exposition for the purpose of enabling members of the Commission to make up their minds about the scheme with full knowledge of the facts.

34. The CHAIRMAN noted that Mr. Yepes wanted the Commission to recommend that the Pan-American system be applied generally. If it was the Commission's intention to make that recommendation, it was useless for it to study his draft report in detail.

35. Mr. EL KHOURY recalled that at the previous meeting Mr. Yepes had said that it was not his wish that the Commission adopt the Pan-American system, and he had submitted no proposal.

36. Mr. YEPES said he had wished to give the Commission the necessary information to enable it to vote with full knowledge of the facts. He would accept a compromise solution.

37. The CHAIRMAN thought that the question must be settled, whether or not Mr. Yepes submitted a proposal.

38. Mr. CORDOVA asked if the Chairman would have to put the same question in the case of the system advocated by the International Court of Justice.

39. The CHAIRMAN pointed out that no-one had proposed that that system be adopted.

40. Mr. CORDOVA had thought that the idea behind the excellent wording proposed for paragraph 12[4] had been that the Commission would accept the system recommended in the report, namely the system based on unanimous acceptance. If the Commission approved the report, there would be no need to vote against the Pan-American system.

41. The CHAIRMAN accordingly asked whether the Commission accepted the last sentence of the redraft of paragraph 12.

42. Mr. EL KHOURY thought it was not necessary to give an affirmative or a negative answer to that question.

43. The CHAIRMAN retorted that it was useless to continue detailed examination of the report unless that principle were accepted.

44. Mr. CORDOVA said he was prepared to accept the last sentence of the redraft of paragraph 12 because he was prepared to accept the whole paragraph. However, if a vote were taken on the last sentence only the Commission would not be expressing its views on the remainder of the paragraph.

45. The CHAIRMAN put before the Commission the following text, proposed by Mr. Yepes, to be substituted for paragraph 12 of the draft report on reservations to multilateral conventions (A/CN.4/L.18):

> " The Commission recognizes that the practice of the Pan-American Union, as described in paragraph 10, is well adapted to the needs of a regional agency and to the close relations existing between states within a defined geographic area, and believes too that that practice can be applied successfully to multilateral conventions in general, and to those drawn up under the auspices of the United Nations in particular. Actually, the system adopted by the Pan-American Union has been applied by the United Nations."

46. Mr. YEPES found it extraordinary, and the scientific world would find it so too, that a solution other than the

[3] See *Official records of the General Assembly, Fifth session, Sixth Committee*, 217th and 225th meetings.

[4] See para. 1 above.

Pan-American formula should be proposed, for that actually represented existing law. He was, however, quite prepared to listen to any arguments to the contrary.

47. Mr. AMADO said that, having been personally taken to task, he would like to reply. He could counter Mr. Yepes' extremely brilliant theoretical arguments with the views of Mr. Accioly.

48. In his *Tratado di direito internacional publico*, published in 1934, Mr. Accioly had written (p. 443): " Be that as it may, the general principle which is universally accepted is that ratification cannot be made subject to reservations, whether by the ratifying authority, or by the organ competent to authorize ratification, unless the other Contracting Parties agree to these reservations, or provision is made in the treaty itself for reservations." [5] Another author, Podesta Costa, on page 189 of his *Manual de derecho internacional publico* (1947) stated: " The presentation of a reserve is tantamount to a new proposal made to the other party. If the latter accepts it, a consensus of opinion exists and a new clause is embodied in the treaty; if the latter does not accept it, there is only a unilateral expression of intention, which cannot constitute a series of obligations. This is the basic rule which governs the matter." [6]

49. Those were authorities who in respect of American law, could bear comparison with any. He would ask Mr. Yepes if he had read the following paragraph of the dissenting opinion:

> " What is important to note is that the Pan-American Union procedure rests upon rules adopted by the governing body of the Union, as approved by the International Conference of American States held at Lima in 1938; that is to say, it depends on the prior agreement of the Contracting Parties." [7]

In his memorandum on reservations to multilateral conventions (A/CN.4/L.9, para. 23, or p. 11 of the mimeographed English text), he (Mr. Amado) had pointed out: " The practice of American States regarding reservations is, moreover, far from uniform." He referred to his statement at the 101st meeting.[8]

50. There were further arguments which could be brought against what had been said by Mr. Yepes. He must point out that the Brazilian delegation had never taken the attitude that Mr. Yepes had suggested. Brazil did not question the value of the system it faithfully followed; it fully accepted the Pan-American system for the American continent. But the question before them was different; it was whether the Pan-American system could be applied generally. It was on that point only that he did not share Mr. Yepes' opinion.

51. It was Mr. Yepes' desire to place those who did not share his view in a bad light that raised an awkward problem. The text before the Commission was clear and gave rise to no difficulties.

52. Mr. SCELLE supported the eminently sensible remarks that Mr. Amado had just made. The Commission was considering whether, if the signatories did not adopt some special system, the procedure which preserved the integrity of the treaty should or should not be applied. The General Assembly had instructed the Commission to consider the question from the point of view of existing law, but also from that of the progress of law. The Commission had to decide not whether the Pan-American system was preferable, or even whether it corresponded to existing law, but whether it was better to preserve the principle of the integrity of conventions or to allow them to split up into a multiplicity of bilateral agreements. It was not a question of adopting one system or another. It was for that reason that, in the amendment that he had submitted, he had intentionally used the wording " as may be the case with any other regional or continental organization ".

53. That question, of the integrity *versus* the divisibility of treaties, should not give rise to any discussion at all. The reason he had ventured to suggest the above-mentioned addition was because, in some other part of the world, there might perhaps be some advantage in adopting a system similar to the Pan-American system; there was no question of prohibiting that system, for all States were sovereign. To take the North Atlantic Treaty, which might become a matter of life and death to Europe, could reservations to it be accepted? In the event of admission of the Mediterranean States being considered, it might be necessary to accept reservations in accordance with the Pan-American system.

54. The Commission was entering upon an extremely liberal path. States were free to do as they wished, but if they failed to state the system they wished to have followed, the principle of international law must be determined that would then become applicable. Would it be the principle of little conventions, a principle destructive of any normative integrity, or would it be the principle of integrity? There could be no hesitation as to the answer; the progressive principle was that of integrity. The idea that must gain approval was that the norm of international law must be one. It was true that political considerations might lead States to adopt another solution; in that case one could only leave them to do so.

55. The CHAIRMAN proposed to put to the vote the text proposed by Mr. Yepes.

56. Mr. EL KHOURY, on a point of order, said that at the previous meeting Mr. Yepes had stated that he did not want his text to be voted on.

57. Mr. YEPES said that he now wished his text to be voted on.

58. Mr. ALFARO asked for the text to be voted on in parts. He could not accept the second part, beginning with the words " and believes too ", but he could not vote against the first part, down to the words " definite geographic area ".

59. Mr. HUDSON suggested that the words " is well adapted " be replaced by the words " may be adapted ".

60. Mr. YEPES said that he could not accept that amendment.

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[5] Cited in *Reservations to the Convention on Genocide, Advisory Opinion: I.C.J. Reports 1951*, p. 33.

[6] *Ibid.*

[7] *Ibid.*, p. 37.

[8] Summary record of the 101st meeting, para. 103.

61. Mr. HUDSON said he would vote against the words " is well adapted ", as he doubted whether they were true.

62. Mr. CORDOVA suggested that the Commission vote upon Mr. Hudson's amendment, with which he associated himself.

It was decided, by 8 votes, to substitute the words " may be adapted " for the words " is well adapted ".

63. Mr. SANDSTRÖM said that he had abstained because he did not think it was for the Commission to take a decision on that question.

The first part of Mr. Yepes' text was adopted by 10 votes in favour.

The second part of Mr. Yepes' text was rejected by 8 votes to 2 with 2 abstentions.

64. Mr. SPIROPOULOS explained that he had voted in favour of the second part of Mr. Yepes' text because he believed that what it said was correct, and yet it made no recommendation.

65. Mr. ALFARO explained that he had abstained from voting on the second part of Mr. Yepes' text, firstly because he had serious doubts whether the so-called Pan-American system was entirely satisfactory even for States of the American continent, and secondly because he did not think that it was the system which lent itself most readily to general application. Experience of the Pan-American treaties did not suggest that liberal treatment as regards reservations had encouraged ratifications. The present situation as regards the major American conventions — particularly those drawn up at the Havana Conference of 1928 — as it appeared from a publication of the legal division of the Pan-American Union, entitled *Status of the Pan-American Treaties and Conventions* (edition of 1 March 1951), was as follows:

(*a*) As regards the convention on the Status of Aliens, fourteen ratifications had been deposited by 1 March 1951, two of them subject to reservations. Seven other States had signed the convention, one with reservations, but had not ratified it.

(*b*) As regards the Convention on Asylum, fourteen unconditional ratifications had been deposited by the same date. One other State had ratified but had not yet deposited its instrument of ratification. Six other States had signed, one with reservations, but not ratified;

(*c*) As regards the Convention on Diplomatic Officers, fourteen States had deposited their ratifications, two with reservations, and seven States had signed without reservations, but had not ratified;

(*d*) As regards the Convention on Maritime Neutrality, eight States had deposited their ratifications, one with reservations, and thirteen other States had signed, two with reservations, but not ratified.

66. Mr. HUDSON pointed out that that particular Convention had been drawn up as many as 23 years ago.

67. Mr. ALFARO continued his enumeration:

(*e*) As regards the Convention on the Rights and Duties of States in the Event of Civil Strife, seventeen States had deposited their ratifications by the date in question, one with reservations. Four others had signed but not ratified;

(*f*) As regards the Convention on Treaties, which was of particular significance, since it was article 6 of that Convention that laid down the procedure followed by the Pan-American Union in the matter of reservations, seven States had deposited their unconditional ratifications by the date in question, while thirteen other States had signed but not ratified, two of them with reservations. One State had not signed at all.

(*g*) As regards the Convention on Private International Law, the so-called Bustamante Code, fifteen States had deposited their ratifications, nine with reservations. Nine States had signed, four with reservations, but not ratified. One State, the United States of America, had not signed at all.

(*h*) As regards the highly important Convention on Nationality, concluded at Montevideo in 1933, six States had deposited their ratifications or had acceded, four with reservations. One State had signed but not ratified, while fourteen States had not signed at all.

(*i*) As regards the Convention on Political Asylum, which had also been drawn up at Montevideo in 1933 and formed a complement to the convention on the same subject drawn up at Havana in 1928, eleven States had deposited their ratifications, one had ratified but not deposited its instrument of ratification while five had signed but not ratified. Four States had not signed at all. No reservations had been made. Those figures showed that the thesis that the Pan-American practice in the matter of reservations facilitated and encouraged ratifications was untenable.

68. Mr. HUDSON said that in his opinion there was nothing to prove that a procedure which destroyed the integrity of conventions encouraged their universal adoption.

69. Mr. ALFARO considered that a sentimental attachment to regionalism was an insufficient recommendation for the general application of a system, the results of which were not easy to assess. The traditional method, on the other hand, seemed to him to have definite advantages.

70. Mr. AMADO requested the Chairman's permission to ask why Mr. Alfaro had abstained in the vote that had just taken place.

71. Mr. ALFARO replied that he had thought that a number of representatives might approach the question from a sentimental angle and that he had not wanted to cast a vote which might be interpreted, however erroneously, as disparaging to Pan-Americanism, for which he had worked all his life.

72. Mr. AMADO requested that Mr. Alfaro's statement appear in the summary record of the meeting.

73. The CHAIRMAN thought it was inadmissible to criticize a member's vote. He could not permit a debate on that question.

74. Mr. HUDSON thanked Mr. Alfaro for the information he had supplied to the Commission. He wished to stress the fact that the United States was a member of the Organization of American States, but that he had nonetheless voted against the second part of Mr. Yepes' text, just as Mr. Amado had done.

75. Mr. YEPES said that the arguments adduced by Mr. Alfaro with regard to the Pan-American conventions could also be used to show the weaknesses of the system used by the League of Nations and the United Nations for conventions drawn up under their auspices. The Convention for the Prevention and Punishment of Terrorism, of 16 November 1937, for example, had been ratified by only one State.

76. The CHAIRMAN, speaking as Special Rapporteur, submitted the following text, which he had drafted in collaboration with Mr. Hudson to be substituted for the first two sentences of the redraft of paragraph 12 previously submitted to the Commission:

"The members of a regional or continental organization may be in a special position, by reason of their common historical traditions and their close cultural bonds, which have no counterpart in the relations of the general body of States. The members of the Organization of American States have adopted a procedure which they regard as suited to their needs."

77. He stated that Mr. Scelle, who had proposed another text at the beginning of the meeting, also approved the text he had read out.

The above text was approved without comment.

78. The CHAIRMAN submitted the third sentence of his redraft, which read as follows:

"The Pan-American Union procedure, as described in paragraph 10, is well designed to secure the ratification of multilateral conventions by as many States as possible."

79. Mr. HUDSON proposed the deletion of the word "well".

It was so agreed.

The sentence was approved as amended.

80. The CHAIRMAN submitted a text prepared by Mr. Hudson for insertion in paragraph 12, just after the sentence which had just been approved. The text, which took into account the observations of Mr. Alfaro, was as follows:

"Yet an examination of the history of the conventions adopted by the Conferences of American States over the past 25 years has failed to convince the Commission that an approach to universality is necessarily assured or promoted by permitting a State which offers a reservation to which objection is taken to become a Party *vis-à-vis* non-objecting States."

81. Mr. CORDOVA thought Mr. Alfaro's analys's of the Pan-American conventions was not very convincing. The figures did not show the reasons why States had not ratified. Failure to ratify was in no way connected with Pan-American procedure in the matter of reservations.

82. The CHAIRMAN and Mr. HUDSON thought the wording proposed was perfectly compatible with Mr. Córdova's remark. The use of the negative form was very prudent.

83. Mr. ALFARO recalled that he had quoted the figures for ratifications of the various American conventions to refute the assertion that the main virtue of the Pan-American procedure was that it encouraged ratifications. The figures did not support the contention that ratifications were encouraged by that procedure; actually there had been a large number of ratifications not subject to reservations.

84. If reservations to ratifications were numerous and bore on the same point, as in the case of the 1929 Convention on Inter-American Arbitration (Washington) where the purpose of the reservations of eight States had been either to substitute optional arbitration for compulsory arbitration or to restrict the categories of disputes to which the convention should apply, the convention was to some extent replaced by a series of bilateral agreements.

85. Mr. SPIROPOULOS said he would vote against the proposed text. It was not for the Commission to say whether the Pan-American procedure encouraged progress towards universality or not. In point of fact it did encourage it, because a State which was prepared to adopt most of the provisions of a convention, but objected to one particular clause, could become a party to the convention while making reservations in respect of the obligations it did not wish to assume. He was therefore convinced that the approach to universality was encouraged by the Pan-American procedure. In the case of the 1929 Arbitration Convention which had been quoted, eight States had been able, thanks to the Pan-American procedure, to become parties to the Convention subject to reservations; under the traditional system the acceptance of all the other Contracting Parties would have been required for those eight States to become parties to the Convention.

86. In that way universality was attained at least in respect of the clauses which all the Contracting States accepted.

87. Mr. CORDOVA pointed out that there was no reason to assume that a different system would have resulted in fewer ratifications. The Pan-American system neither encouraged nor discouraged ratifications. A State ratified a convention or did not ratify it according to whether it considered it useful or not.

88. Mr. YEPES said that, although he had voted for the first sentence of the paragraph, he could not accept the wording under consideration and would vote against it. Failure to ratify could be explained either by the fact that a convention appeared unacceptable, or because ratification procedure in Latin America was very complicated and, in most countries, required the approval of a majority of both Houses, just as with an ordinary law.

89. The text under consideration was a one-sided statement, which appeared to link the number of ratifications to practice in the matter of reservations.

Mr. Hudson's amendment was adopted by 7 votes to 4.

90. Mr. HSU thought the Commission had made a mistake in adopting Mr. Hudson's amendment.

91. Mr. YEPES proposed the addition of the following sentence: "The Commission believes, however, that the reasons for non-ratification may be found elsewhere, as for instance in the difficulties of ratification or in the contents of the treaty itself".

92. Mr. HUDSON, supported by the CHAIRMAN,

thought that that went without saying and that there was no need to include it in the report.

93. Mr. AMADO and Mr. CORDOVA said they would vote against the additional sentence proposed, which they interpreted as an adverse criticism of the ratification procedure of the Latin American countries.

Mr. Yepes' amendment was overwhelmingly rejected.

94. The CHAIRMAN requested the Commission to consider the remainder of the redraft of paragraph 12.[9]

95. After an exchange of views with Mr. HUDSON, the CHAIRMAN suggested that the next sentence might be slightly modified to read: " In some multilateral conventions, the securing of universality may be the most important consideration and . . .".

The sentence was adopted with the above amendment.

96. At the suggestion of Mr. YEPES, and after a discussion in which Mr. HUDSON, the CHAIRMAN, Mr. ALFARO and Mr. AMADO took part, Mr. CORDOVA proposed that the words " it is always possible " be replaced by the words " it would be advisable ".

The amendment was rejected by 5 votes to 3.

97. The CHAIRMAN submitted to the Commission the sentence in his redraft, beginning, " But there are . . .", and the following sentence beginning, " These conventions are often . . .".

The above two sentences were adopted without comment.

98. The CHAIRMAN submitted a proposal by Mr. François for the insertion of the following sentence after the sentence which had just been adopted:

> " The system has the effect of stimulating the formulation of reservations; the diversity of these reservations, and the divergent attitudes of States towards them, leads to the ' fragmentation ' of conventions, that is to say, to the replacement of the multilateral convention by a series of divergent bilateral conventions, thereby diminishing its effect."

99. Mr. FRANÇOIS, in support of his proposal, stated that he had been impressed by Mr. Alfaro's remarks on the possible fragmentation of conventions as a result of the Pan-American system.

100. In reply to a remark by the CHAIRMAN, Mr. FRANÇOIS agreed that his proposal ought perhaps to be inserted at some other point in the report.

101. Mr. HUDSON thought that the first clause in Mr. François's proposal was too absolute. Doubtless there were cases where States only made reservations because they knew that those reservations would not prevent their becoming parties to the convention, and where they would not formulate them if they were going to result in their being prevented from becoming contracting parties. To that extent, the assertion in the first clause of Mr. François's proposal was in accordance with facts. It should however be toned down a little, so as to read, for example: " The Pan-American system may have the effect of stimulating . . .".

102. Mr. FRANÇOIS accepted that suggestion.

[9] See para. 1 above.

103. The CHAIRMAN thought that the Commission should not criticize the Pan-American system.

104. Mr. YEPES said he did not understand the reasons for such an amendment, which was a direct criticism of the Pan-American Union's practice. The Commission had refrained from criticizing the opinion of the Court and for the same reasons should refrain from criticizing the practice of the Pan-American Union.

105. Mr. HUDSON thought that, far from criticizing the Pan-American practice, the proposed text stated an obvious fact.

106. Mr. AMADO shared Mr. Hudson's view and pointed out that at the previous meeting Mr. Yepes had protested against excessive recourse to reservations. The text proposed by Mr. François should therefore be retained, if need be in a modified form. All members of the Commission deplored the proliferation of reservations. The ideal, as Mr. Scelle had remarked, would be for States to refrain from reservations completely.

107. Mr. CORDOVA approved the amendment proposed by Mr. François. The Commission should state the legal arguments on which it based its rejection of the Pan-American procedure as a general principle in respect of reservations.

108. Mr. SPIROPOULOS thought that the sentence under discussion constituted the one and only legal argument which could be invoked against the Pan-American practice. At the same time, however, he must remind the Commission that he declined to admit that that practice did not encourage ratifications.

109. The CHAIRMAN put Mr. François' amendment to the vote, subject to possible drafting changes.

The amendment was adopted by 10 votes.

110. Mr. AMADO thought that that decision was one of the wisest that the Commission had taken.

111. After some discussion *it was agreed* that the Chairman, as Special Rapporteur, be responsible for deciding at what point the amendment just adopted should be inserted in the report.

112. The CHAIRMAN submitted to the Commission the last sentence of the redraft, beginning with the words " The Commission therefore . . .". Mr. François had proposed the deletion of the last words of that sentence, namely, the clause beginning " when the parties have themselves . . .".

113. Mr. FRANÇOIS in support of his amendment, said that the effect of the Special Rapporteur's redraft was to restrict the Commission's task, which, in his view, was not only to recommend the procedure to be followed when conventions were silent on the point under consideration, but also to afford guidance to the authors of new conventions.

114. Mr. HUDSON preferred the Special Rapporteur's text. The Commission would give guidance regarding new conventions in the following paragraphs of its report.

115. After an exchange of views between Mr. SPIROPOULOS, Mr. ALFARO and the CHAIRMAN, Mr. HUDSON again pointed out that the paragraphs under consideration dealt only with the procedure to be followed

in respect of reservations where conventions were silent on that point. That should be clearly stated, more than once even, so that there might be no misunderstanding.

116. Mr. SCELLE thought the last clause should be deleted.

The proposal to delete the last clause was rejected by a majority vote.

117. Mr. HUDSON proposed that, in the English text only, the word " Union " be added after the word " Pan-American " and that the words " their intentions " be replaced by the words " a procedure in the text ".

The above amendments were adopted.

118. The CHAIRMAN observed that the paragraph which the Commission had just adopted sentence by sentence would be numbered 11 in the report to the General Assembly.

PARAGRAPH 15 (*paragraph 25 of the " Report "*) (resumed from the previous meeting) [10]

119. The CHAIRMAN read out a text which he proposed be inserted after paragraph 15 of his draft report. The text read as follows:

> " The Commission believes that these considerations have a special pertinence to multilateral conventions of which the Secretary-General of the United Nations is the depositary, and it is impressed with the complexity of the task which he would be required to discharge if reserving States can become parties to multilateral conventions despite the objection of some of the parties to their reservations. It would be his duty to keep account of the manifold bilateral relationships into which this freedom would tend to split a multilateral convention, and he would have no power of determining any difference that might arise as to the admissibility of a reservation tendered. The Secretary-General is already the depositary of more than one hundred multilateral conventions, and may be expected to become the depositary of many more."

120. Mr. HUDSON thought that the more logical place for the last sentence would be in the first few lines.

121. Mr. KERNO (Assistant Secretary-General) recalled that the sole anxiety of the depositary of United Nations conventions was to give satisfaction in an orderly manner.

122. The fact that multilateral conventions were open to signature and ratification made his task more complex than that of governments depositaries of conventions, who only had to receive ratifications, since in such cases the conventions were signed at the close of the conferences that drew them up.

123. In the case of the Convention on Genocide, article XIII of which provided that it should enter into force only after twenty instruments of ratification had been deposited, in order to avoid the difficulties that might have been caused by the ratifications subject to reservations by Bulgaria and the Philippines, they had managed to collect five instruments of ratification in one day with the result that the number of such instruments deposited had risen overnight from eighteen to twenty-three.

124. But other embarrassing cases could occur. A note by the Secretary-General (A/C.6/L.122 and Add.1) had drawn the Sixth Committee's attention to a number of other multilateral conventions, the conditions for whose entry into force were much the same. Those conventions were the Havana Charter (24 March 1948), the Convention on the Inter-Governmental Maritime Consultative Organization (Geneva, 6 March 1948), the Convention on Road Traffic (Geneva, 19 September 1949), the Protocol on Road Signs and Signals (Geneva, 19 September 1949), the Agreement for Facilitating the International Circulation of Visual and Auditory Material of an Educational, Scientific and Cultural Character (Lake Success, 15 July 1949) and the Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others (Lake Success, 21 March 1950).

125. All those various conventions made entry into force dependent on the deposit of a specified number of instruments of ratification. When that number was reached, it was for the Secretary-General to declare that the convention was in force. If one of the instruments of ratification included in the necessary ten or twenty was accompanied by a reservation, who could say whether the convention was in force, and if objections were raised to that reservation by other parties, who would decide? Under the Pan-American system ratifications with reservations were valid *vis-à-vis* some of the parties, but not valid *vis-à-vis* others; under the system advocated by the Court, the same applied. Under the traditional method, a ratification subject to reservations was not valid until all the contracting parties had accepted the reservation.

126. At a particular juncture the depositary had to do certain things. Unless there was a well-established rule, he might find himself in a dilemma, and to that the Commission's eyes should be wide-open.

127. Mr. LIANG (Secretary to the Commission) said that he wished to make two comments on the sentence beginning " It would be his duty to keep account " in the text which the Chairman proposed be added after paragraph 13. In the first place he thought that the order of the two clauses should be reversed. The main point to bring out was that the Secretary-General had no power of determining differences; expression of the Commission's concern at the immensity of the task was secondary.

128. It was difficult to see the grammatical connexion between the words " this freedom " and the phrases which preceded it.

129. Bearing those two points in mind, he suggested that the sentence read as follows: " The Secretary-General has no power of determining any difference that might arise as to the admissibility of a reservation tendered. It would also be his duty to keep account of manifold bilateral relationships if the system of reservations tends to split multilateral conventions ".

130. Mr. HUDSON and Mr. SPIROPOULOS thought that if a State made a reservation under the guise of an interpretation, the Secretary-General would be faced with another difficulty in deciding whether or not that " interpretation " was in fact a reservation.

[10] See paras. 129–165.

131. The CHAIRMAN pointed out that the same difficulty would arise whatever procedure were followed in respect of reservations. At the present stage the Commission was merely endeavouring to determine the difficulties that would result from the solution recommended by the Court in its Advisory Opinion.

132. Mr. HUDSON drew the Commission's attention to a passage in the written statement of the Government of the United States of America to the International Court of Justice, advocating the system which the Court had adopted in its opinion. The passage in question stated that that method would simplify the role played by the depositary, who would be relieved of the necessity of taking any initiative and whose actions, it was argued, would be completely automatic.[11]

133. Mr. LIANG (Secretary to the Commission) pointed out that the depositary would in any event have to decide what effects reservations had on the entry into force of the treaty, and so on.

134. The CHAIRMAN suggested that the words " legal effect " be substituted for the word " admissibility ".

135. Mr. HUDSON thought the words suggested by the Chairman were much to be preferred.

The meeting rose at 1.5 p.m.

104th MEETING

Friday, 15 June 1951, at 9.45 a.m.

CONTENTS

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

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.

Closing date of the third session and arrangements for the fourth session

Closing date

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It was decided to fix 27 July as the closing date of the third session.

Place and date of the fourth session

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It was decided by 10 votes to 2 to recommend that the fourth session of the Commission be held in Geneva.

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Law 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) *(continued)*

DISCUSSION OF MR. BRIERLY'S DRAFT REPORT (A/CN.4/L.18) [1] (*continued*)

PARAGRAPH 15 (*paragraph 25 of the " Report "*) (continued)

27. The CHAIRMAN stated that he had redrafted the text which he had suggested should be added after paragraph 13, in order to take into account the various comments made towards the end of the previous meeting, particularly those of Mr. Liang. His redraft, which would be substituted for paragraph 15 of document A/CN.4/L.18, read as follows:

> " The Commission believes that these considerations have a special pertinence to multilateral conventions of which the Secretary-General of the United Nations is the depositary. The Secretary-General is already the depositary of more than a hundred such conventions, and may be expected to become the depositary of many more. The Commission is impressed with the complexity of the task which he would be required to discharge if reserving States can become parties to multilateral conventions despite the objections of some of the parties to this reservation. He would have no power of determining any difference that might arise as to the legal effect of a reservation tendered, and it would be his duty to keep account of the manifold bilateral relationships into which such a rule would tend to split a multilateral convention."

He requested the Commission to consider that new text sentence by sentence.

First sentence

28. Mr. HUDSON suggested that the words " to which the Commission paid special attention " be added after the words " these considerations ", so as to reflect the fact that the Commission had had in mind the instructions it had received from the General Assembly in resolution 478 (V).

[11] *I.C.J., Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Pleading, oral arguments, documents,* written statement of the U.S.A., p. 43.

[1] See summary record of the 101st meeting, footnote 1.