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Summary record of the 53rd meeting

Topic:
Law of Treaties

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raised objections against that consultation, declaring that the cession should have been made by the Crown without reference to Parliament.

The meeting rose at 1 p.m.

53rd MEETING

Friday, 23 June 1950, at 10 a.m.

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Chairman: Mr. Georges SCELLE.

Rapporteur: Mr. Ricardo J. ALFARO.

Present:

Members: Mr. Gilberto AMADO, Mr. James L. BRIERLY, Mr. Roberto CÓRDOVA, Mr. J. P. A. FRANÇOIS, Mr. Shuhsi HSU, Mr. Manley O. HUDSON, Mr. Faris el-KHOURY, Mr. A. E. F. SANDSTRÖM, 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 5 of the agenda) (A/CN.4/3) *(continued)*

1. The CHAIRMAN said he was sure the Commission would not be able to complete its discussion of the draft convention during the present meeting. At the same time, Mr. Kerno, the Assistant Secretary-General, had to be away the following week, and he would like to have Mr. Kerno's opinion on the question of reservations. Mr. Brierly being agreeable, he therefore proposed to take up that technical matter, which might be completed by the end of the meeting.

2. Mr. YEPES said he had made a suggestion on those lines the previous day. He hoped the Commission would resume the discussion of Mr. Brierly's report. On that understanding he supported the Chairman's proposal.

The Commission decided to examine the question of reservations.

ARTICLE 10

3. Mr. BRIERLY said he had nothing to add to the full commentary he had given. He emphasized the importance of the statement that a reservation was " part of the bargain between the parties and therefore required their mutual consent to its effectiveness " (A/CN.4/23, para. 87).

4. Mr. KERNO (Assistant Secretary-General) read out a series of passages from Mr. Brierly's report which he thought contained the salient points, and on which the Commission might be consulted:

(a) Point I. " A reservation is part of the bargain between the parties and therefore requires their mutual consent to its effectiveness." (*Ibid.*, para. 88)

He felt that in the English text the word " bargain " might be replaced by some other word. It was desirable to know whether the Commission approved the fundamental principle concerned—namely, that a reservation was an integral part of a treaty, and must be accepted before the treaty could be valid.

(b) Point II. " The text of a proposed reservation must be authenticated in formal fashion." (*Ibid.*, para. 92)

The reservation must be presented in a particular form, especially in the negotiation of multilateral treaties.

(c) Point III. " The acceptance of a treaty with a reservation is of no effect unless or until the necessary consents are forthcoming. " (*Ibid.*, para. 93)

(d) Point IV. " The necessary consents may be implied as well as express." (*Ibid.*)

(e) Point V. " If a proposed reservation relates to a projected treaty not yet in force " it is effective only if " consented to by all States and international organizations which have taken part in the negotiation of the projected treaty." (*Ibid.*, para. 96)

(f) Point VI. A reservation presented after the entry into force of a treaty must be consented to " by everyone of the then parties to that treaty." (*Ibid.*, article 10 (4), para. 95)

(g) Point VII. " A State or international organization accepting a treaty impliedly consents to every reservation thereto of which that State or organization then has notice." (*Ibid.*, article 10 (5), para. 100)

Those were the points on which he thought the sense of the Commission might be taken.

Point I

5. Mr. HUDSON referred to article 13 of the Harvard Draft (*Ibid.*, Appendix A), showing that a reservation consisted in making willingness to treat subject to a condition. He did not know what was to be understood by " parties " in point I. If it meant that a reservation must be accepted by certain States, he agreed. There was no point in saying that " the text of a proposed reservation must be authenticated in formal fashion ". What did the word " authenticated " mean ? It would be better to say " stated in a formal manner "; but he was not sure how far formality should be taken. A text formulated in writing was sufficient.

6. Mr. BRIERLY thought it was difficult to conceive of any other method.

7. Mr. KERNO (Assistant Secretary-General) said that on the subject of South-West Africa, the delegation of the Union of South Africa had given the San Francisco Conference its views in a document which was sometimes referred to as a " reservation ". Yet when

that case [1] had come up recently before the International Court of Justice, no one—not even the South African delegation—had regarded the document as a reservation proper. Actually, a reservation had not been presented either when the United Nations Charter was signed or when it was ratified. The fact that a reservation must be made in a certain form was therefore important.

8. Mr. HUDSON considered that if the Union of South Africa had signed the Charter without reservation, the reservation made during the preparatory negotiations had become null and void. It was not the form of the reservation that was at issue, but the fact that it had not been presented at the proper time. A reservation must be presented at a definite time—namely, the time of signature or ratification. If it had been made at the time of signature, mention of it could be omitted on ratification. The depository of the treaty should not accept a ratification with a reservation unless the States concerned had accepted the reservation.

9. Mr. BRIERLY thought Mr. Hudson and he were agreed on the principle, and differed only as to the way of drafting it.

10. The CHAIRMAN said that the word " bargain " mentioned in the English version was of no importance. It was not a part of a projected text, and it could be replaced by the word " agreement ". The Rapporteur had no objection. Mr. Hudson, he continued, had made a remark concerning the sense of the word " parties ".

11. Mr. KERNO (Assistant Secretary-General) thought the Commission was discussing general concepts. It was difficult to reach agreement on the sense of the word " parties ". The problem was like that of the chicken and the egg. Which came first, the treaty or the parties ? The word " parties " was not used in that context in a technical sense. There were no contracting parties until a treaty was in force. Everyone seemed agreed that general consent was necessary.

12. The CHAIRMAN said that the parties were the States which were or would be bound by the treaty. The idea formulated in point I left no room for doubt, and all were agreed on it. The precise wording might be left to the Rapporteur-General.

13. Mr. FRANÇOIS thought it advisable to bring out expressly the fact that a reservation was always reciprocal, in that a State which had not made the reservation could invoke it against the State which had made it.

14. The CHAIRMAN found Mr. François' remark very much to the point. A State which had made a reservation might be confronted with the reservation by any other party.

15. Mr. KERNO (Assistant Secretary-General) mentioned the reservation made by the Soviet Union in connexion with article IX of the Convention on Genocide, giving the International Court of Justice competence to settle disputes between the contracting parties. In the event of that reservation being accepted, it was essential to know whether another State could invoke the same reservation for its own ends against the Soviet Union. The idea of reciprocity was not included among the points he had listed; obviously, it was an omission.

16. Mr. HUDSON gave another example, the reservation made by the United States of America when signing the Statute of the International Court of Justice. That reservation barred disputes with regard to matters essentially within the domestic jurisdiction of the United States of America, as determined by the United States. A State which had not made a declaration of that kind might take advantage of it to thwart the United States.

17. The CHAIRMAN thought that, as Mr. Brierly was agreeable, that second point might be introduced following point I. He asked the Rapporteur-General to mention in his report that " any State party to a treaty may invoke against another State a reservation made by the latter."

Point II

18. The CHAIRMAN explained that if the text of a treaty was authentic, the text of the reservation must also be authentic.

19. Mr. BRIERLY agreed that a reservation must be presented formally, but it might be announced informally during negotiations; though that would not suffice to make it a formal reservation.

20. Mr. HUDSON suggested stating that a reservation could be made either at the time of signature or on ratification. Its substance must be known.

21. Mr. BRIERLY concurred.

22. Mr. KERNO (Assistant Secretary-General) thought that statements made during negotiations must be ruled out. Where it was possible to sign in the presence of the depository of the text within a period of, say, one year, it might seem desirable to ask States to make any reservations in a given form. Generally speaking, a reservation was recorded alongside the signature, or was inserted in the instrument of ratification, or in a separate protocol. The essential point was to stress the necessity of a specific form.

23. The CHAIRMAN saw no contradiction between what Mr. Hudson had said and point II. It might perhaps be added to point II that a reservation could be made at the time of signature, ratification or accession. It was pointless to speak of reservations made during negotiations, since there was no reservation until it was accepted. He suggested the addition of a further point to read: " The text of a reservation must be presented formally. The reservation may be made at the time of signature, ratification, or accession."

24. Mr. CÓRDOVA questioned whether it was really necessary to add that point.

25. The CHAIRMAN thought it would be useful, since the same procedure would not necessarily be followed on each of those occasions. At the time of signature, most negotiators were present, and it was easy to find out whether they accepted the reservation. But it was more difficult at the time of ratification. It was unsatisfactory that reservations should be made at the time of accession. Such action might lead to the emer-

[1] Advisory Opinion on the International Status of South West Africa.

gence of twenty treaties instead of one. Pillet described treaties with reservations as imperfect treaties. That was an exaggeration, since reservations were inevitable; but it must be admitted that very often reservations were the ruination of treaties. The important point was to find out whether the other States would accept such a procedure.

26. Mr. ALFARO thought a general principle was involved, and that it would be enough to state that reservations must be made by means of a communication formally presented.

27. Mr. LIANG (Secretary to the Commission) observed that the question under discussion had been raised in 1948 in the Sixth Committee, when the Convention on Genocide [2] was being discussed. Some delegations had wished to make reservations, and the Rapporteur, Mr. Spiropoulos, had said that reservations made at the time of voting would be inserted in the records of the discussions of the Committee, but would have no legal force, and that reservations could be made when the Convention was signed. The Chairman of the Committee, Mr. Alfaro, had maintained that the fact that representatives had made reservations merely indicated their anxiety to leave their governments free to make reservations at the time of signature or ratification.

27a. He wondered whether the case just quoted—the reservation made by the Union of South Africa—came under point II. That reservation was not receivable because the Charter made no provision for reservations; it had therefore not been rejected because it had not been presented formally.

28. Mr. HUDSON pointed out that it frequently happened that representatives of States made reservations during negotiations, and at the time of signature declared that they confirmed the reservation made on such and such a date. If such reservations were not confirmed, it was an admission that declarations made during negotiations did not rank as reservations. The fact that they were confirmed at the time of signature made them formal reservations. The Charter made no mention of reservations; hence, it was possible to become a Member of the United Nations and yet make reservations regarding certain provisions of the Charter, provided those reservations were accepted by other Members.

29. Mr. LIANG (Secretary to the Commission) thought a State which made a reservation at San Francisco would not have been able to sign the Charter. He quoted the precedent of China at the Versailles Conference in 1919. China had wished to make a reservation which was not accepted, and had had the choice of signing without reservation or not signing at all. China had therefore not signed the Peace Treaty with Germany.

30. The CHAIRMAN said that in the case of a treaty of a constitutional nature, the question was a special one. A State could not become a Member of the United Nations with reservations. He mentioned the case of Switzerland and the League of Nations. A special decision of the League of Nations Council had been necessary to admit Switzerland while allowing her to keep her neutrality. Articles 24 and 25 of the United Nations Charter were incompatible with a signature involving a reservation as to the neutrality of the signatory State. But that was not the type of case under consideration by the Commission, which was concerned at the moment with ordinary treaties. Mr. Hudson held that a reservation not accepted by the other signatories of a treaty was not valid if invoked against them.

31. Mr. KERNO (Assistant Secretary-General) felt there was no difference of opinion on point II. The word " authenticated " was not absolutely essential. Mr. Alfaro had suggested " presented in a formal manner ". It might also be added that a reservation could only be presented at the time of signature, ratification, or accession.

32. Mr. el-KHOURY had no objection regarding the principle under discussion. It was the principle that was at issue, not the drafting. " Authenticated " was out of place.

33. Mr. ALFARO presumed that the Commission had decided to adopt Mr. Hudson's proposal to add the words " a reservation may be made at the time of signature, ratification, or accession ".

34. The CHAIRMAN confirmed that that was the position. Point II was therefore adopted with the addition suggested by Mr. Hudson.

Point III

35. The CHAIRMAN read out point III.

36. Mr. BRIERLY thought that point merely repeated the principle enunciated in point I, but from the standpoint of a State wishing to make a reservation. If the reservation was not accepted, its ratification too was invalid.

37. Mr. YEPES did not think the word " acceptance " was admissible; he would prefer to say " ratification ".

38. Mr. BRIERLY argued that a general term was called for. He had not used the word " acceptance " in its technical sense, but had merely intended to use a general word applicable to all contingencies.

39. Mr. YEPES withdrew his objection to the word " acceptance " in view of Mr. Brierly's explanation.

40. The CHAIRMAN observed that the general sense of point III was acceptable to the Commission.

Point IV

41. Mr. HUDSON said he had some misgivings. Suppose there were twenty States concerned in a convention, and the Secretary-General, as the depository, received a ratification with a reservation on which he consulted the other States, which might raise objections. If they did not raise any objection, he wondered how far it could be said that their consent was implied.

42. Mr. BRIERLY pointed out that he had not quoted any particular case, but had merely stated that there

[2] See Yuen-li Liang, " Notes on Legal Questions concerning the United Nations ", *American Journal of International Law*, Vol. 44 (1950), pp. 100-101; p. 120.

might be instances of implied consent. He had quoted a case under point VII.

43. Mr. HUDSON said he had made a marginal note against that text to the effect that it implied the duty to take cognizance of reservations and to discover their existence. The implication was rather alarming.

44. Mr. BRIERLY asked Mr. Hudson whether he agreed that in certain cases consent could be implied.

45. Mr. HUDSON said he did not know what was the practice in that matter. Cases must crop up frequently. He wondered whether it could be said that a State had given consent where it had been notified of a reservation made by another and had not replied to the notification. He thought it was doubtful too where such a State ratified a treaty after notification of reservation.

46. Mr. KERNO (Assistant Secretary-General) recalled that the Soviet Union and Czechoslovakia had signed the Convention on Genocide with reservations. The Secretary-General, who was the depository of the Convention, had communicated the reservations concerned to the Members of the United Nations and to non-member States, which could become parties under a General Assembly resolution. The communication had been made in a circular letter. But he had sent a separate letter to the four or five States which had already ratified the Convention, informing them that, in his capacity as depository of the Convention, he would like to be informed as to their attitude to those reservations, and stating that failing any indication to the contrary he would assume they accepted them.

47. The CHAIRMAN thought that was a very wise course.

48. Mr. BRIERLY regarded the case as one of implied consent.

49. Mr. FRANÇOIS recalled that in the days of the League of Nations it was the practice to fix a time-limit for a reply, and to consider that the absence of a reply implied consent.

50. The CHAIRMAN thought the Commission might suggest that procedure, not only to the United Nations, but to States which were depositories of treaties.

51. Mr. BRIERLY felt that otherwise the Commission would reach an impasse.

52. Mr. FRANÇOIS added that in practice it was out of the question to hope for a reply from all States.

53. The CHAIRMAN thought that at any rate if States were warned that their silence would be regarded as acceptance, silence would amount to acceptance.

54. Mr. CÓRDOVA thought the Chairman's suggestion most helpful; but it must be remembered that the draft convention did not concern the powers of the depository. What the Commission was called on to formulate were his obligations. If a State invoked the principle of reciprocity, that very fact might be interpreted as acceptance of a reservation.

55. Mr. KERNO (Assistant Secretary-General) pointed out that it frequently happened that signatures were not all given at the same time. The Convention on Genocide had been open for signature until 31 December 1949. At the time when the Soviet Union made its reservation, five of the parties to the Convention had finally committed themselves, and they would therefore necessarily be among the first twenty ratifying or acceding States required before the Convention could come into force.

56. Mr. HUDSON took the instance of a text signed without reservation and later ratified with a reservation. Would that ratification count among the first twenty ratifications or not ? Under the terms of point III, that ratification could still be nullified.

57. Mr. KERNO (Assistant Secretary-General) suggested that complicated problem be left aside, and only the question of implied consent discussed.

58. Mr. HUDSON pointed out that the question he had raised was evidence of the vital importance of the particular time when reservations were made. In the Harvard Draft, three occasions were referred to (A/CN.4/23, Appendix A)—reservations at time of signature (article 14); reservations at time of ratification (article 15); and reservations at time of accession (article 16). He was of the opinion that if implied consent were admitted, the cases must at any rate be specified. If a long period, say several years, had gone by without any objections being raised, it could be argued that there was implied consent.

59. Mr. CÓRDOVA pointed out a contradiction between point III and point IV. Under point III, if a State made a reservation, it meant waiting until the other States had given their consent. He asked when it could be said that there was implied consent. Point III must be followed; there could be no implied consent to a reservation.

60. Mr. BRIERLY said he had merely stated that there were cases in which consent was implied.

61. Mr. HUDSON said the important point was that all the interested States must have full opportunity of making their objections to the reservation. If they had made no objections, it could be taken that they had given their consent. He would be happy if he could state that consent must be express, but he knew that was impossible. From the administrative standpoint, it was impossible to go as far as that. Not all governments answered communications sent to them. Where all the interested States had had ample opportunity of making their objections and had not done so, it could be maintained that there was tacit consent. He hoped the text would express that idea.

62. Mr. CÓRDOVA thought it was impossible to state precisely at what point full opportunity had been given.

63. Mr. AMADO said it must not be forgotten that reservations were a kind of fresh negotiation. They were an invitation to other States to accept them, and they were without effect if the other States did not do so. There were four possible hypotheses: a treaty was signed by all parties on the same date; it was open for signature until a given date; it was open for signature indefinitely; or certain States had made reservations at the time of signature and had then ratified the treaty. Any reservation implied a reopening of negotiations. Hence the other States must give their consent.

64. The CHAIRMAN also felt that such consent was necessary in every case, though it could be implied.

65. Mr. AMADO could not conceive how it was possible to conclude that a reservation had been accepted by the other States. That was the problem.

66. The CHAIRMAN thought it was possible to tell, if the depository of the text put the question to each State. He could do so by intimating that if the States did not reply, their silence would be regarded as giving consent.

67. Mr. el-KHOURY did not agree that silence could be regarded as giving consent. When a depository forwarded a reservation to the Foreign Minister of a contracting State, the latter might not always be in a position to reply immediately; a year might pass. Thus silence could not be regarded as constituting tacit acceptance. The reservation was part of the treaty, and must be accepted like the treaty. Silence must be regarded as a refusal to accept the reservation.

68. Mr. HUDSON observed that the Commission had in mind a multilateral instrument. The problem did not arise where a treaty was bilateral. In the latter case, there must be an exchange of ratifications, and that would not occur if one of the parties did not accept the reservation made by the other. In regard to multilateral conventions, the position was that the absence of objection after reservations had been communicated would be regarded as implying consent.

69. Mr. CÓRDOVA took the instance of his government receiving a notification from the Secretary-General that some State had made a reservation to a particular convention. The Secretary-General might intimate that in the absence of a reply within six months he would assume that the reservation was accepted. The government would acknowledge receipt of the communication, stating that it must submit the reservation to the senate, which would not be meeting before such and such a date. It was thus impossible to fix a time limit after which absence of objection could be considered as acceptance.

70. Mr. AMADO referred to article 6 of the Havana Convention (A/CN.4/23, Appendix B). He thought that " action implying . . . acceptance " constituted a semi-explicit acceptance.

71. The CHAIRMAN said that acceptance could be explicit, tacit or semi-explicit.

72. Mr. ALFARO thought the Commission was considering a problem distinct from the general principle that acceptance of reservations could be implied. The hypothesis in question often arose in the case of bilateral treaties—e.g., in treaties fixing frontiers. At the time of ratification, one of the States might declare that it assumed that the line would be drawn in such and such a fashion; the other State would receive that reservation without objection; and the frontier line would be fixed on the ground. If, therefore, the frontier line was fixed as indicated by the first State, that would constitute implicit acceptance.

72 a. To cite another example, suppose State B had undertaken to pay compensation to State A in the currency of the latter, then later declared that it would pay in some other currency, and State A accepted the payment. There were many instances in which a reservation was accepted implicitly. With regard to multilateral treaties, the rules governing such implicit acceptance must be drafted most carefully. He was prepared to admit that the acceptance of reservations could be either explicit or implicit.

73. Mr. CÓRDOVA did not think that mere silence could be interpreted as acceptance, though he was quite prepared to admit that acceptance could be assumed from certain actions.

74. Mr. el-KHOURY pointed out that oral acceptance arising out of actions were both known to common law; and both were regarded as express acceptance.

75. Mr. KERNO (Assistant Secretary-General) said that great caution must be exercised before a text concerning acceptance with reservation was formulated. In practice it would be impossible to avoid certain difficulties. He gave some details of the case of the Convention on Genocide which he had quoted previously. When the Soviet Union Foreign Minister had signed that Convention on behalf of his Government on 16 December 1949, he had made a reservation in respect of articles IX and XII. The Secretary-General had notified the governments which had ratified the Convention, adding that he would assume that the governments in question accepted those reservations unless they communicated their objections before the date on which the first twenty instruments of ratification or accession required for the entry into force of the Convention had been deposited.

75 a. The States thus had an opportunity to express their views. The Secretary-General had not fixed any time-limit within which those views must be expressed, apart from the date laid down by the Convention itself for its entry into force. Silence on the part of the governments could therefore not be regarded *ipso facto* as implying acceptance or otherwise of the reservation made by the Soviet Union until such time as the Convention came into force. The case showed that the general principle which the Commission was called on to formulate could in the last resort be drafted as it was now drafted under point IV.

76. Mr. el-KHOURY thought the text as at present worded might give rise to great difficulties. He gave the analogy of an invitation sent to a number of people, and marked R.S.V.P. If the guests did not reply, it might be assumed that they would come, though it was quite possible that they would not. The case of tacit acceptance of a reservation to a treaty was decidedly of greater import than the example cited, and might have very grave legal consequences. Hence, he would prefer to see point IV drafted more precisely.

77. Mr. BRIERLY thought that if it were declared that the acceptance of a reservation must invariably be express, other difficulties might arise—e.g., it would scarcely ever be possible to verify the exact position in regard to a treaty.

78. The CHAIRMAN suggested that it might be possible to agree that the fact of not replying to a

notification or reservation could be regarded as non-acceptance.

79. Mr. CÓRDOVA supported that suggestion. Acceptance should be specified quite clearly by means of an explicit reply or action proving that the reservation was accepted.

80. Mr. FRANÇOIS thought that rule could not apply, for example, to an international organization with some sixty members.

81. Mr. KERNO (Assistant Secretary-General) suggested that an explanation be added to the commentary on point IV, drafted on the lines of point VII.

82. Mr. el-KHOURY pointed out to Mr. Kerno that under the law in his country, tacit acceptance had no value unless accompanied by an action of by acquiescence in the action of a third party. If someone sold an article belonging to another person who was unaware of the sale, silence on the part of the owner did not imply agreement to the sale. But if the owner knew that the article was being sold by another person and made no demur, the sale was regarded as valid and did not constitute a violation of the right of ownership.

83. Mr. BRIERLY said that the discussion on point IV had produced a most valuable exchange of views. But he thought it preferable to bring it to a close and to examine points V, VI and VII. The Commission could then return to point IV and examine it in the light of the opinions on the other points.

It was so decided.

84. The CHAIRMAN thought that, although the discussion had not produced any conclusions or a definite rule, it had nevertheless been most useful and important.

85. The CHAIRMAN asked the Commission to pass on to points VI and VII, and requested the Rapporteur, Mr. Brierly, to give some explanation on point VI.

Point VI [3]

86. Mr. BRIERLY thought there was nothing he could add.

87. Mr. HUDSON wondered what was the position of " potential " parties to a treaty. Should such potential parties be at liberty to make objections as to reservations made by other States ? It might be argued that they were not free to raise objections against reservations until such time as they ratified the treaty. But there were States which might prefer to wait until a treaty had come into force before ratifying it themselves. Could they, when ratifying after the treaty's entry into force, still raise an objection against reservations, and could they themselves still make reservations ?

88. Mr. FRANÇOIS supported Mr. Hudson. He took the example of a treaty which had been signed by thirty States and had come into force after ratification by five States, while some of the other signatory States were preparing to ratify it. The sixth State might make a reservation at the time of depositing its instrument of ratification. Need only the five States which had previously ratified be consulted in connexion with that reservation ? That would hardly be fair. The 1937 Convention for The Prevention and Punishment of Terrorism laid down a waiting period of three years after signature, during which time all signatory States should be consulted as to reservations made by other States. Possibly that period was too long, but the idea underlying it was a sound one and might be embodied in point VI.

89. Mr. BRIERLY admitted the pertinence of Mr. François' proposal.

90. Mr. KERNO (Assistant Secretary-General) agreed that point VI as at present drafted did, of course, involve certain penalties for laggards. But any other procedure ran the risk of being extremely long and complicated.

91. The CHAIRMAN said that if it was laid down in a treaty that it would come into force once a certain number of ratifications were forthcoming, its entry into force was automatic the moment the number was reached. From that time on, it might be argued that the other signatory States did not count, even though they might still ratify subsequently. One thing was certain—that there was no treaty so long as the treaty had not come into force. Another thing was certain to his mind—namely, that the negotiations for a treaty did not end at the time of signature, but at the time of its entry into force. Entry into force turned a draft treaty into a treaty proper. Hence, reservations were admissible up to the time of entry into force of the treaty. It would be a good thing for the Commission to adopt the wording of point VI as it stood.

92. Mr. AMADO pointed out that signatories of a treaty who had not ratified it were not parties to the treaty. They became parties only if they ratified. He too thought the Commission could approve point VI.

93. Mr. BRIERLY thought that opinions differed on that point. However it was worded, there would always be drawbacks; but he still thought the present wording the most acceptable.

94. Mr. el-KHOURY thought that certain difficulties could be eliminated where it was laid down that a treaty came into force only within a certain period after the necessary number of ratifications had been forthcoming.

95. Mr. KERNO (Assistant Secretary-General) felt that in such cases other precautions would be called for. He reiterated the point raised by Mr. Amado, that States which had ratified a treaty were parties to it the moment it came into force, whereas the signatories were not.

96. Mr. FRANÇOIS thought that if a State made a reservation which had not yet been accepted by the other States, it must consult all the other States parties to the treaty to find out whether they accepted or rejected the reservation. It would be unfair not to consult the States which had signed the treaty in all sincerity, but had not yet completed the procedure for ratification.

[3] For the discussion on point V, see below, paras. 138 and ff.

97. Mr. HUDSON pointed out that article 15 (c) of the Harvard Draft (A/CN.4/23, Appendix A) covered the case of a treaty open for signature without a time limit. He could not see how point VI as at present worded could be applied in such cases.

98. Mr. AMADO regarded article 15 (c) of the Harvard Draft as unduly narrow in stating that a State could make a reservation when ratifying, only with the consent of all the other signatories, or of the States acceding to the treaty after it had been brought into force. It would thus mean waiting for the consent of all the States before the reservation became operative as between the State which made the reservation and the other States which had become or might become parties to the treaty. That seemed to him to be going too far.

99. The CHAIRMAN did not agree with the terms of that article of the Harvard Draft.

100. Mr. HUDSON said he could not accept the thesis that the signatories of a treaty should be debarred from consultation on reservations. Such a bar could only apply where they declared expressly that they did not intend to ratify. If the Commission accepted tacit consent with certain precautions laid down, there would be nothing against consultation of all the States concerned.

101. The CHAIRMAN noted that Mr. Hudson recognized that signature gave the signatories certain rights. He too agreed that such was the case, since the negotiation of a treaty was not concluded by the fact of signature.

102. Mr. KERNO (Assistant Secretary-General) said that a multilateral treaty could come into force before all the signatories had ratified. He could quite see that the rule laid down in point VI was not ideal, but any other formula would probably be still less so.

103. Mr. HUDSON and Mr. CÓRDOVA were afraid that if the Commission tried to formulate too strict a rule, the result would be that certain States would decline to ratify or accede. The secretariat of the League of Nations had studied ways and means of mustering a large number of accessions to treaties. The formula adopted by the Commission should be based on that same consideration, and should be calculated to bring in the largest possible number of accessions to treaties. Hence, all the States which were potential parties to the treaty should be consulted as to the admissibility of any reservations made.

104. Mr. AMADO thought there were two hypotheses: There were the treaties signed simultaneously by all the States responsible for the treaty; in such cases, a reservation could be made only at the time of signature. But if a treaty was open for signature for a certain period, or even without any fixed time-limit, a State wishing to accede to the treaty could make a reservation only with the consent of all the States parties to the treaty. The main point was whether a State which was a signatory but had not ratified was a party to the treaty.

105. The CHAIRMAN thought that a signatory State which did not ratify was not a party to the treaty, even though the objections on that score raised by Mr. François and Mr. Hudson were entirely pertinent. The Commission had to choose between a practical and a theoretical course. The reference to the risk of losing accessions was very serious. He personally was somewhat shocked—from the legal standpoint—at the idea of allowing States to challenge a reservation, even where they had no intention of ratifying a treaty themselves.

106. Mr. HUDSON thought the following might be added to point VI:

> " and by the signatory States, subject to any signatory State objecting to the reservation being bound to notify at the same time its willingness to ratify the treaty ".

107. Mr. FRANÇOIS thought that legally that was an excellent formula, though in practice it was not feasible. The Convention on Terrorism had provided a more practical method by fixing a time limit for consultation of signatory States on the subject of reservations. After the expiry of the period, only States which had ratified the treaty or acceded to it would be consulted.

108. Mr. LIANG (Secretary to the Commission) regarded Mr. Hudson's proposal as worded in too peremptory a fashion. It could be argued that the objection made by a signatory State to a reservation would have no legal effect until such time as the State ratified the treaty.

109. Mr. HUDSON felt that under his formula the question whether the reservation was accepted or not would be kept in abeyance for a time.

110. Mr. YEPES found Mr. Hudson's suggestion quite logical. A State objecting to a reservation automatically indicated that it accepted the treaty, and thus would have no reason to give an assurance that it would ratify it.

111. Mr. CÓRDOVA said he had changed his mind. The fact that a signatory State had not been consulted regarding reservations made after the treaty came into force should not prevent the State from ratifying it, since it could itself make reservations at the time of ratification.

112. The CHAIRMAN thought the question was identical with that arising in the case of accession to a treaty.

113. Mr. AMADO thought that if a State made a reservation after the treaty had come into force, the States which had already ratified the treaty and were parties to it could decline to accept the reservation on the grounds that a reservation derogated from certain stipulations in the treaty. That would mean fresh negotiations. Although be appreciated the force of the objection raised by Mr. François, he upheld point VI.

114. Mr. KERNO (Assistant Secretary-General) wondered whether after the current lengthy discussion the Commission might declare itself in principle agreeable to point VI, with the proviso that a commentary should be added to the effect that the formula as drafted did not cover all the problems which might arise on the subject, and therefore represented only a partial solution.

115. Mr. HUDSON pointed out that the Geneva Conventions of 12 August 1949, which had been signed by more than sixty States, laid down that they would come into force six months after at least two instruments of ratification had been deposited. What would be the position if, after ratification by two States, a third submitted its ratification with a reservation, declaring that its reservation was accepted by the two States which had already ratified? Would all the other signatory States have no say in such a case?

116. The CHAIRMAN thought Mr. Hudson's point was quite convincing, and asked whether the conventions in question admitted of reservations.

117. Mr. FRANÇOIS remarked that, among others, the Soviet Union had made a reservation at the time of signature of one of the Conventions. Mr. HUDSON said that, in such circumstances, the existence of the convention might be endangered by the caprice of a mere three countries. He recalled that certain conventions concluded by the Organization of American States came into force the moment two instruments of ratification had been deposited.

118. The CHAIRMAN said that many conventions adopted by the International Labour Conference came into force as soon as two States had ratified them. Mr. Hudson's remark was most pertinent. It could not be admitted that reservations came into force simply by the wishes of two or three States.

119. Mr. AMADO thought reservations should be made at the time of signature. The example quoted by Mr. Hudson illustrated the danger of allowing States to make them subsequently. That was also the view of Anzilotti, who went so far as to argue that reservations should be made prior to signature. Personally, however, he did not wish to turn down the idea that reservations could be made at the time of ratification.

120. The CHAIRMAN thought the Commission should make up its mind that reservations could not be admitted at the time of ratification.

121. Mr. CÓRDOVA said that when a treaty specified that it must be ratified before it could come into force, ratification was part of the negotiations. Hence, reservations could be made on ratification.

122. The CHAIRMAN did not agree. States could be expected at the time of drawing up a treaty to reflect on what they were doing, and not to destroy what their negotiators had built up.

123. Mr. HSU was opposed to the practice of reservations, which he thought was pernicious. It was true, however, that if States were allowed some latitude, they would be more inclined to ratify.

124. Mr. HUDSON suggested that it be left to the Rapporteur to note the opinions expressed by the Commission. The discussion on that ticklish subject had been a long one, and he thought it would be well to pass on.

125. Mr. el-KHOURY said that at the time when he was President of the Syrian Parliament, there had been a long discussion about the ratification of a treaty. As parliament could not reach a decision, he had announced the following ruling:

> " Parliament must accept or reject the treaty in its entirety. But if it wishes to make a reservation, the treaty will be referred back to the Executive, which will be called upon to open new negotiations at which a decision will have to be taken by the negotiators on the points which gave rise to difficulties. Only when an understanding has been reached in the negotiations may the treaty be brought again before Parliament for its decision. "

That proposal was accepted by the Syrian Parliament. Such a procedure was possible in the case of bilateral treaties, but could not, he thought, be applied in the case of multilateral treaties, since it was not feasible to reopen negotiations in such cases.

126. Mr. LIANG (Secretary to the Commission) said that reading the section of the report concerned, he had been struck by the words " to propose a reservation ". He thought that such a reservation should be made, and in fact accepted, before it could be regarded as valid.

127. Mr. BRIERLY agreed that he should have said " make a reservation ", and he would alter the passages in the report accordingly.

Point VII

128. The CHAIRMAN asked the Commission to pass on to the examination of Point VII.

129. Mr. HUDSON observed that Czechoslovakia and the Soviet Union had made reservations at the time of signing the convention on genocide. He thought that any signatory State could still raise objections to those reservations, since the convention had not yet come into force. Suppose the United States ratified the convention while those reservations were still pending. He did not think that by ratifying, the United States expressed consent to the reservations. Another example: suppose a non-signatory State acceded to the Convention on Genocide. The State would not figure in the list of States invited to accede to it; but its application for accession might be accepted. In such circumstances, was it not the duty of the State in question to verify whether reservations had been made previously, and what such reservations were? In view of all such cases that might arise, the formula " of which that State . . . then has notice " in Point VII was too laconic, and some more explicit phraseology should be sought.

130. Mr. KERNO (Assistant Secretary-General) suggested that the Commission re-read paragraph 101 of Mr. Brierly's report (A/CN.4/23).

131. Mr. BRIERLY thought that the difficulty which might arise in the cases mentioned by Mr. Hudson could not be solved without sober reflection.

132. Mr. HUDSON considered that it would be sufficient to draw the Rapporteur's attention to those various points and to ask him to give an account of the opinions of the various members of the Commission, drawing whatever conclusions appeared to him to be

deducible from the exchange of views that had taken place.

133. The CHAIRMAN agreed that the problems in hand were most formidable.

134. Mr. BRIERLY said it would be extremely difficult to reply at a moment's notice to the questions just put. He would like time for reflection before he replied.

135. Mr. CÓRDOVA suggested that Mr. Hudson set out very clearly the conclusions he thought could be reached on the points he had raised.

136. Mr. KERNO (Assistant Secretary-General) thought the words "reservations ... already ... *in operation*" in paragraph 101 of Mr. Brierly's report were worth emphasizing. Such reservations already in force were the ones referred to in point VII, and it would be helpful to have that idea lucidly expressed in the drafting of point VII.

137. Mr. HUDSON concluded that the terms meant that the reservations in question were already accepted. A State acceding to a treaty when a reservation was already in operation ought not to be at liberty to object to such a reservation; but it could always make a fresh reservation. The wording of point VII struck him as too succinct.

Point V

138. The CHAIRMAN suggested that the Commission go back to consider point V.

139. Mr. el-KHOURY remarked that, as bilateral treaties made up the great majority of treaties between States, the Commission might simplify its task by adopting under point V the rule that reservations were not admissible in the case of bilateral treaties, and were only permissible in multilateral treaties.

140. Mr. BRIERLY pointed out that point V referred only to multilateral treaties.

141. Mr. HUDSON hoped the Rapporteur would make the point in his report that States participating in negotiations for a treaty and deciding not to sign it had no right to make reservations. He mentioned the instance where the United States of America had been present during the negotiations resulting in the 1930 Hague Convention on certain questions relating to the conflict of nationality laws. The United States had declared its dissatisfaction with that convention and had declined to sign it. It had felt that it should be consulted where any State proposed to make a reservation.

141 a. Replying to a question put by Mr. Brierly, he said that in his opinion all signatory States should be consulted when a State wished to make a reservation; and he suggested that the words "all States and international organizations which have taken part in the negotiation of the projected treaty" be replaced by the words "all the signatories".

142. Mr. BRIERLY supported that proposal. It was his opinion that a State which had not signed had no right to be consulted, and could be ignored. But signatory States, which by the fact of being signatories were the originators of a convention or a treaty, should be consulted, and point V applied to such States.

143. Mr. KERNO (Assistant Secretary-General) thought that if the term "signatories" had to be defined, it should mean those signing on the occasion of the signing ceremony, as well as those signing within the period during which the treaty or convention was open for signature.

144. Mr. HUDSON pointed out that the Harvard Draft had attempted to formulate rules for cases where a treaty was open for signature at any time in the future.[4] In such cases, one might wait until Doomsday before all possible reservations were made. There were three distinct situations: reservations could be made first of all at the time of the simultaneous signature of the treaty by the negotiators; secondly, prior to a given date; and thirdly, at any time in the future. Could point V really apply to those three distinct cases?

145. The CHAIRMAN thought the explanations given during the discussion, and the various opinions put forward, had contributed to the clarafication of the problem. He thought it was true to say that there was a large measure of agreement on points I to VII, which might perhaps be expanded, in many instances on the basis of the articles of the Harvard Draft. He would like to add that the exchange of views which had just taken place had provided the Rapporteur with valuable data for his task. The Commission had admittedly not been able to deal with all the issues, nor to express an opinion on every point; but what it had done was undoubtedly of great value.

The meeting rose at 1 p.m.

54th MEETING

Monday, 26 June 1950, at 3 p.m.

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Chairman: Mr. Georges SCELLE.

Rapporteur: Mr. Ricardo J. ALFARO.

Present:

Members: Mr. Gilberto AMADO, Mr. James L. BRIERLY, Mr. Roberto CÓRDOVA, Mr. J. P. A. FRANÇOIS, Mr. Shuhsi HSU, Mr. Manley O. HUDSON, Mr. Faris el-KHOURY, Mr. A. E. F. SANDSTRÖM, Mr. Jean SPIROPOULOS, Mr. Jesús María YEPES.

[4] See A/CN.4/23, Appendix A.