Document:-
A/CN.4/SR.84

Summary record of the 84th meeting

Topic:
Law of Treaties

Extract from the Yearbook of the International Law Commission:-
1951 , **vol. I**

80. The evil was therefore that the Commission did not have enough time to do its work. If, for financial reasons, it was not possible to act on the United Kingdom proposal, the situation would have to be accepted, but the Commission should not waste its time in the belief that the situation could be successfully remedied by amending the articles of the Statute.

81. Mr. SANDSTRÖM drew attention to the fact that the object of General Assembly resolution 484 (V) was to have the work of the Commission expedited. The primary question, therefore, was the time at the latter's disposal and that fact should be clearly brought out in the report to the General Assembly. The other questions, such as the revision of the Statute and the collaboration of the Secretariat, were of secondary importance.

82. Mr. SCELLE agreed with Mr. Spiropoulos that, so far, the Statute had not really hampered the work of the Commission. The Statute was, however, like a constitution, and there were countries in which the constitution had to be changed because it did not work. He did not think that Mr. Spiropoulos had meant to imply that the Commission should not recommend any revisions of the Statute. When all the members of the Commission had expressed their opinion, they could, as Mr. Alfara had proposed, then discuss the Statute article by article and suggest appropriate amendments.

83. Mr. CORDOVA thought that in order to achieve a real codification of international law it was necessary to set up a body sitting permanently. That was, in his opinion, the main question. Budgetary considerations should not, however, be overlooked. No person could devote his whole time to the work of a body of that nature unless he received emoluments of such magnitude that it would be difficult to obtain them from the budget of the United Nations. Furthermore, in order to have a body performing really effective work, the General Assembly would perhaps be compelled to abandon the idea of equitable geographical distribution and take into consideration individual qualifications only. In a word, the Commission needed to know what the States Members had had in mind when they had set up the Commission. Had they been thinking in terms of technical work, or had they wished to have an expression of the legal ideas accepted in the world? If they desired the latter, the Commission should include persons with experience of international relations and representing all parts of the world. Such a system required a budget as large as that of the International Court of Justice. It would be impossible to obtain the desired end in any other way. The members of the Commission had other duties in their own countries and could not abandon them in order to devote themselves to the work of the Commission on a full-time basis, unless they received appropriate emoluments.

84. He hoped that the Commission would be able to find a solution. Perhaps the best thing would be to increase the staff of the Secretariat so that it could include enough experts to do the preparatory work of the Commission. In that way, the latter would always have at its disposal documents of the kind it had had before it at its first session. It might perhaps also be possible to make the sessions longer. He doubted whether it would be possible to arrange for the Commission to be in permanent session.

85. Mr. HSU said that he had declared himself in favour of the Commission sitting permanently but would not press the point. However, since objections had been raised to the idea of a permanent session, he would endeavour to reply to them. It had been said that it was very difficult to obtain the services of highly qualified persons. That was not the real difficulty. Everything depended on the inducement offered to such persons to sit on the Commission. Anyone's services could be obtained for a sufficiently high salary.

86. Mr. KERNO (Assistant Secretary-General) agreed with Mr. Spiropoulos that the Statute had not hitherto greatly retarded the work of the Commission, but it was nevertheless true that certain articles might prove an encumbrance in the future.

87. In the case of several of the matters so far studied, the Commission had decided that, since they involved special tasks outside the general work of codification, the procedure laid down in the Statute need not necessarily be applied. But in the case of matters really coming within the scope of codification, it would be otherwise. For instance the Commission now had before it Mr. Brierly's second report on treaties (A/CN.4/43), which it had decided to begin discussing at the next meeting. If it approved the articles proposed, that would be codification work to which it must apply the procedure laid down in articles 21-22, etc., which constituted a veritable strait-jacket and the Commission would, for the first time, become aware that its Statute required simplification. It would therefore be advisable to review the articles of the Statute and to see what amendments should be submitted to the General Assembly.

88. The CHAIRMAN announced that the general discussion on the first item of the agenda was provisionally closed but would be resumed when the remaining members of the Commission had arrived.[1]

The meeting rose at 12.50 p.m.

[1] See summary record of the 96th meeting, para. 110.

84th MEETING

Friday, 18 May 1951, at 10 a.m.

CONTENTS

Chairman: Mr. James L. BRIERLY, followed by Mr. Shuhsi HSU

Rapporteur: Mr. Roberto CORDOVA

Present:

Members: Mr. Ricardo J. ALFARO, Mr. Gilberto AMADO, Mr. J. P. A. FRANÇOIS, 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.

The Law of Treaties: report by Mr. James L. Brierly (item 4 (*a*) of the agenda) (A/CN.4/43)

1. The CHAIRMAN requested Mr. HSU, the first Vice-Chairman, to take the Chair.

Mr. Shuhsi Hsu took the Chair.

2. The CHAIRMAN felt that there was no need to engage in a general discussion before examining the draft articles contained in Mr. Brierly's report.

3. Mr. BRIERLY agreed with the Chairman.

The Commission *decided* to proceed to examine the articles contained in the report.

ARTICLE 1

4. Mr. BRIERLY reminded the Commission that at its previous session it had devoted three and a half days to considering the law of treaties. He had studied the records of the discussions with care and had almost finished preparing his comments, which would shortly be communicated to the members of the Commission. He felt that the work of the Commission would make better progress if such a wide subject were split up into parts. The General Assembly had shown its preference for that procedure by specially inviting the Commission, in General Assembly resolution 478 (V), to study the question of reservations to multilateral conventions separately. He had therefore devoted a separate report to the conclusion of treaties, a subject intrinsically suitable for independent study. The question of the ability to make treaties might receive similar treatment, for the same reasons.

5. The articles in the report (A/CN.4/43) were to take the place of articles 6–10 in his first report on the law of treaties (A/CN.4/23). The Commission had not examined the latter articles, but he had gathered from informal exchanges of view that they were regarded as departing too far from the traditional terminology, dispensing as they did with expressions such as " ratification " and " accession ". The argument had not quite convinced him, but he had preferred not to press his point in order to avoid appearing revolutionary.

6. He had introduced a distinction between the conclusion of a treaty, which in his view was the establishment of a final text, and its entry into force, i.e., its becoming binding on two or more States. It would be for the Commission to consider whether or not that distinction were sound.

7. Article 5, sub-paragraph (*b*) of the draft Convention on the Law of Treaties drawn up by Harvard University, which read as follows: " In the absence of agreement upon a procedure which dispenses with the necessity for signature, a treaty must be signed on behalf of each of the States concluding it ", was accompanied by the following comment: " The word ' concluding ' as used in this paragraph has reference to the totality of acts which are necessary to bring a treaty into force. A treaty is ' concluded ' not when it has been negotiated, but only when such further steps are taken as may be necessary to bring it into force. "[1] The comment thus assimilated " conclusion " to " entry into force " and did not make the distinction he suggested. But it appeared necessary to distinguish between two processes. In the first place there was the establishment of a text which would subsequently enter or not enter into force; secondly, there was the entry into force which made the text binding, a process which might consist in signature, ratification or some other procedure laid down by the provisions of the treaty itself.

8. Article 1 of the report had been criticised for not conforming with the procedure for the conclusion of treaties followed by the United Nations. Although it was not provided for in the Charter, conclusion of treaties by the United Nations had become an established practice. He had at first thought that sub-paragraph (*b*) of article 1 of his report, which made special provision for conventions drawn up by an international organization, might also cover conventions concluded by the United Nations. He now saw that that was not the case and that the text would have to be modified in order to cover that type of convention as well. The comment on article 5 of the report (A/CN.4/43) mentioned United Nations practice in that connexion. Possibly that comment too would have to be modified, but Mr. Kerno or Mr. Liang would be able to give fuller particulars.

9. Mr. ALFARO wished to speak about the use of the words " conclusion " and " concluded " in article 1. The verb " to conclude " could not be translated into Spanish by " *concluir* ". " To conclude " had two meanings: in the first place it meant " to terminate or put an end to ", and in the second place " to concert, to arrange or to reach a compact ", the Spanish equivalents of which were: " *concertar* " or " *celebrar* ". Obviously in the case in question " concluded " did not mean " terminated " but " concerted ". Translation of the draft article into Spanish would therefore raise serious difficulties.

10. Mr. BRIERLY considered Mr. Alfaro's remarks very just. For him, " to conclude " meant " to establish the text ". Replying to a question by Mr. Alfaro, he said that the words " A treaty is entered into " would by ambiguous.

11. Mr. YEPES supported Mr. Alfaro. " *Concluir* " in Spanish meant " to terminate ", and the Spanish equivalent of " to conclude " was " *celebrar* ". The Spanish title to article 1 ought to be " *Celebración de tratados* ". The English wording gave rise to great difficulties when it came to translating it into Spanish.

12. Mr. SCELLE had remarks to make very similar

[1] *American Journal of International Law*, vol. 29, (1935) Supplement, Part III, " Law of Treaties ", p. 732.

to those of Mr. Alfaro and Mr. Yepes. In French a concluded treaty was a complete, definitive treaty. It was therefore not possible to say that a treaty was concluded by the act of signature. For French-speaking jurists, a signed treaty was a draft treaty.

13. A distinction must be made between the legal effects of signature and those of putting into force. When a treaty came into force it was wholly binding on the signatories. The terminological difficulties the Commission was considering arose out of the historical development of the legal meaning of treaties. For centuries these instruments had been regarded as contracts; but in 90 per cent of cases treaties were not contracts but laws. A proof of that was the fact that the report had been obliged to assimilate conventions concluded by the specialized agencies of the United Nations to treaties proper.

14. There were differences between a treaty concluded by States, which might for the sake of convenience, though incorrectly, be called a treaty concluded on the *do ut des* principle, and a convention established by an international organization, which was unquestionably of a legislative character.

15. In the case of a convention drawn up by an international organization, the organ which prepared the "*celebración*" established a text which, though final or quasi-final, was not binding upon anyone. It would only enter into force as a result of ratifications or accessions. That type of law-making treaty had become so common that Mr. Brierly's report assimilated them to treaties concluded on the *do ut des* principle, which was, he thought, unfortunate.

16. A law-making treaty of that kind altered the powers of a great number of possessors of rights: the staff of administrations, judges of courts of law, individuals (in the case of commercial treaties for example): even legislators were bound by the terms of such a treaty, which was not a contract at all but a legislative act which altered the legal position of all the signatories in general and of an indefinite number of persons.

17. After a treaty had been drawn up it was still merely a proposal. It was like a bill which had been passed by one chamber of a parliament but had still to be passed by the other before it became law. If the treaty did not get beyond the drafting stage the legal effects of the text remained minor ones. After signature it was therefore merely a proposed text which had been approved by certain international legislators but had still, before it became complete, to receive the sanction of other legislators.

18. He was most anxious that the democracies should continue to enjoy the great benefits of the procedure of parliamentary ratification. What he disliked in the report was the way in which signature tended to gain importance at the expense of ratification. To decrease the importance of ratification was to risk opening the door to "informal engagements" which might be misused by administrations and by dictatorships.

19. He would confine himself for the moment to saying that it was important not to regard a treaty as concluded by the act of signature. In principle a signed treaty was a draft treaty. He supported what Mr. Alfaro had said. He asked the Commission to study the legal effects of the mere signature of treaties, and to distinguish them clearly from those of putting into force.

20. Mr. CORDOVA wondered whether "conclude" was the right word, because even in English it conveyed the idea of finality, and signature alone did not impart finality to a treaty. In Spanish at any rate it was inappropriate.

21. For the purposes of the question at issue he saw no difference between law-making treaties and treaties concluded on the *do ut des* principle, both of which implied a text, signatures and ratifications. The distinction applied mainly at the national level. At the international level, what were called law-making treaties had to be ratified, just like treaties concluded in the *do ut des* principle. The only difference was that in most cases a law-making treaty arose out of an earlier treaty which had been previously and duly ratified, and which provided for the possibility, within certain limits and in respect of certain matters, of making treaties which did not need individual ratification. At the national level, in the case of ratification of law-making treaties, that, in his opinion, was an instance of ratification effected previously, at the time of ratification of the original treaty.

22. Mr. SPIROPOULOS was surprised at the discussion. It had been felt necessary to mention the fact that "to sign" was not the same as "to conclude". If the man in the street read in his newspaper that a treaty had been signed or had been concluded, he would imagine that the treaty had force of law, but before giving an opinion on the matter a jurist would ascertain whether or not the procedure for bringing it into force had been completed. A definition of all the words appearing in article 1 could not be expected. The word "concluded" must be understood in its context. Its meaning was explained in sub-paragraph (*a*) which stated that a treaty was concluded when it "has been duly signed or initialled *ne varietur* on behalf of two or more States". It was the clearest text he had ever seen.

23. The difficulty of translating the text into Spanish had been mentioned. But in drafting a text one had obviously to observe the rules of the language in which it was being drawn up. Since the text was in English it was the suitability of the English words which had to be considered. The rest was a matter of translation.

24. Mr. AMADO, in support of the remarks made by Mr. Alfaro, Mr. Yepes and Mr. Scelle, quoted a passage from Anzilotti and Gidel, *Cours de droit international:* "Signature by the plenipotentiaries merely establishes a *draft treaty* which may or may not be followed by declarations of a common intent to conclude."[2] In his view that was a classical and perfect definition. The "common intent" mentioned in the passage was ratification.

25. By way of reply to the very clearly put statement of Mr. Spiropoulos, he would remark that the Brazilian

[2] Anzilotti and Gidel, *Cours de droit international*, vol. 1, p. 369, Paris, 1929.

Constitution gave the President of the Republic the right to conclude treaties *ad referendum* subject to ratification by the national Congress.[3] That meant that the President could sign treaties.

26. When Latin roots were employed in English they frequently underwent a complete change of meaning. He gave a number of examples. Similarly the words " is concluded " in Mr. Brierly's text meant " *est signé* ", whereas for Latin countries " *un traité conclu* " was a definitive treaty in force.

27. The idea that a treaty was a form or mould should not be abandoned; the definition given by Professor Rousseau might be called to mind: " the only satisfactory technical definition of the international treaty is a formal definition expressed in terms of the procedure employed for its conclusion. The international treaty is defined by its form not by its content ".[4] In the case of Brazil a further difficulty would arise if article 1 and in particular its last sentence were adopted. The Brazilian plenipotentiary who signed a treaty *ad referendum* would be deemed not to have signed, but the Brazilian Constitution stipulated that he must only sign *ad referendum;* even the President was subject to the same stipulation.

28. Mr. ALFARO felt that Mr. Spiropoulos had not properly understood his earlier statement. He had not said anything about use of the words " conclusion " and " concluded " in the English text. He had merely pointed out that those words could not be translated into Spanish by " *conclusión* " and " *concluido* ". " Concluded " was appropriate in the English text, but the Spanish equivalent was " *celebrado* " or " *concertado* ".

29. Mr. SANDSTRÖM remarked that it was hardly appropriate to use the word " conclusion " in the sense in which it was employed in article 1, when that sense was so remote from the one given it by the Harvard draft.

30. Mr. FRANÇOIS felt that the discussion had gone beyond a matter of terminology. It should be understood that mere signature did not bind the signatory States and that ratification was required, but tradition did sanction the idea that a treaty was concluded before it was ratified.

31. He had always ascribed to the French word " *conclure* ", a different meaning from that given it by Mr. Scelle. According to the Constitution of the Netherlands, the authors of which had drawn extensively on French terminology, the King *concluded* treaties but only ratified them after receiving the consent of parliament.[5] That being so, " conclusion " did not create legal ties. He would be grateful if Mr. Scelle would tell the Commission whether his interpretation was generally accepted in French law and doctrine.

32. Mr. SCELLE thought that what Mr. François had said was correct with regard to the terminology of constitutions, but that terminology was scientifically faulty. At the time of Montesquieu foreign affairs were exclusively a matter for princes and governments. Modern constitutions bore traces of that fact, a legacy from the past which no longer corresponded with reality.

33. A text entitled " Conclusion of Treaties ", containing provisions such as those of article 1, was likely to prove misleading. When the press announced the signature of the Schuman Plan, which was a treaty, it was the victim of no such misunderstanding. All the newspapers had been careful to point out that though the instrument had been signed it had not thereby come into force. Before coming into force it had to be ratified by the various countries.

34. A distinction should therefore be made between drawing up and putting into force. A drawn up treaty was not a concluded treaty. The " treaty . . . concluded " referred to in article 1 was only a draft. A treaty was by no means complete when it had been drawn up and signed. It was only a text offered to the parties for their acceptance. It was the Commission's duty not to continue to use faulty terminology.

35. When a convention of the International Labour Organisation was drawn up, for example, it was called a draft convention. It was drawn up by a two-thirds majority vote of the Conference of the Organisation. It only became binding after ratification or accession. Our of a liking for the idea of the treaty concluded on the *do ut des* principle, the French Government had for a considerable time actually held the view that a single accession was insufficient, whereas in reality a multilateral convention had binding force for any State which had ratified it, even if that State were the only one to have done so.

36. The draft articles contained in Mr. Brierly's first and second reports smacked overmuch of undesirable novelty. For some years, particularly during and since the Second World War, very important agreements had come into force without ratification by parliaments (the Yalta and Oasis Agreements etc.). Nations were thereby committed to courses which they were obliged to follow, without their parliamentary representatives having agreed to them. Fortunately the Charter of the United Nations had provided fresh procedure to take the place of agreements concluded in the manner of the Yalta Agreements. It had been possible to claim that such undertakings were not binding. A return to sounder practices had however been made and Parliaments had been duly consulted prior to the ratifications which had preceded the entry into force of the Charter.

37. To sum up, he considered that the text submitted to the Commission was unduly influenced by the tendency to revert to the old-style law of treaties, i.e., the procedure followed by princes, dictators and public administrations, and that it did not react sufficiently against the anti-democratic trends displayed in recent years.

38. Mr. CORDOVA considered that, in all languages, as he had already observed, the word " concluded " carried with it an idea of finality. It should therefore be avoided in article 1. When a treaty was " established in final written form ", that was only the initial phase; the main stages were the negotiation of the treaty, its

[3] Constitution of the United States of Brazil, 24 September 1946, article 87, VII.

[4] Charles Rousseau, *Principes généraux du droit international public*, Paris, Pedone, 1944, vol. 1, p. 156.

[5] See article 60 of the Constitution of the Kingdom of the Netherlands (text of 22 January 1947).

signature by duly accredited plenipotentiaries and finally, its entry into force either in accordance with a constitutional procedure or with the provisions to that end set forth in the treaty itself. A clear distinction must be made between the signature of a treaty and its entry into force, and in that respect, the word " concluded " was unsatisfactory. He proposed replacing the words " A treaty is concluded " by the words " A treaty has been negotiated ".

39. The existing text encouraged the practice of executive agreements designed to avoid submitting treaties to the constitutional procedure of ratification. If article 1 and article 2 of the report were taken together, an instrument which provided that " the present treaty shall enter into force one month from the time of its signature " would in fact take effect on expiry of that period, without the ratification procedure provided for and required by the constitution of a great many committees being carried out.

40. Mr. YEPES did not wish to harp on a purely terminological question, but would like to submit certain observations in reply to the remarks by Mr. Scelle to the effect that a treaty which had merely been signed was only a draft without any binding force.

41. Mr. SCELLE pointed out that, although certain secondary or lateral legal consequences arose from the signature of a treaty, a treaty which had merely been signed had no binding force with regard to the changes in competence provided for therein. The signatories were merely bound not to commit a legal abuse by refusing to ratify without valid reason. The fundamental legal consequences of treaties, or, in other words, their legal force, did not arise from the mere act of signature.

42. Mr. YEPES, continuing his previous statement, considered that a principle enunciated by such an authority as Mr. Scelle, a principle, which, as Mr. Amado had pointed out, was in accordance with the doctrine of Anzilotti, was worthy of mature consideration.

43. Were it accepted, the effect would be to devalorize, so to speak, the signatures of States and to encourage the frivolous appending of signatures right and left by State officers, in the belief that the instrument they were signing would never enter into force. There were far too many concrete examples of such a tendency in present-day international life, and particularly, in the acts of the big Powers. If the Commission declared that a signature was not binding on a State, it would be encouraging that tendency. Another concept, on the other hand, was to be found in the Charter, namely the principle of good faith as a fundamental rule of all international life. Good faith, however, required that a State which had appended its signature to a treaty was, at least, under the obligation to make every effort to ratify it and to do nothing to render ratification impossible. The concept of good faith could serve as a corrective to the thesis that a signature by itself had no binding force. The act of signature carried with it an obligation. It pledged the good faith of States.

44. Mr. SPIROPOULOS said he had misconstrued Mr. Alfaro's meaning. The question was one for linguists to settle. Some members of the Commission had asserted that the word " conclusion " gave the impression that the Commission thereby meant the conclusion of a treaty possessing binding force. The context, however, left no doubt on the question and article 4 clearly showed that it was only ratification which gave treaties their binding force.

45. The text given in the report established existing international practice, according to which the act of signature was not sufficient to render a treaty binding.

46. It was to another problem that Mr. Yepes had referred when he said that, in order to develop law, it was desirable to endow the act of signature with a certain legal force. Such was not the task of the Commission. Its task was to codify and, according to existing law, the act of signature entailed no obligation to ratify. It did, in fact, happen that States signed treaties under the pressure of public opinion and did not subsequently ratify them. But that had nothing to do with codification.

47. There seemed to be no point in pursuing that discussion. If one of the members of the Commission did not approve of the word " conclusion ", the best thing was for him to submit a text. The Commission could then compare the texts and decide.

48. Mr. YEPES shared the opinion of Mr. Spiropoulos on the need to put an end to the discussion on terminology, which was a secondary question.

49. Mr. Spiropoulos had affirmed that the sole mission of the Commission was to codify. He must protest against that interpretation. The Commission had more to do than that. It was clearly its duty to codify but it should also contribute to the progressive development of law. Mr. Spiropoulos, with his progressive spirit, would surely not declare himself in favour of that narrow limitation of the Commission's terms of reference. The latter should set itself the task of promoting the progress of international law, and it would be time enough to reconsider its attitude if the General Assembly did not approve of the solutions it submitted. By affirming that the act of signature entailed no obligation, the Commission would be contributing to the retrogression of international law. It was for that reason that he had wished to express his opinion with regard to Mr. Spiropoulos' views.

50. Mr. SPIROPOULOS thought there was a misunderstanding. He did not think that codification meant simply recording what existed. It was clearly understood that the Commission could modify, but the question, at the moment, was to decide on the sense of the word " conclusion ". He had said that the text proposed by Mr. Brierly was in accordance with existing law. What he wished to suggest was that the Commission should take a decision on the question of terminology and attribute the appropriate meaning to the term. The Commission could decide later on the point raised by Mr. Yepes.

51. Mr. BRIERLY acknowledged that, despite the support given to his text by some members of the Commission, he was not satisfied with it himself. He agreed that in English the meaning of the word " conclusion " was ambiguous and might give rise to confusion, since the Harvard University text gave it a broader connota-

tion which embraced the steps necessary to bring about the entry into force of a treaty. In the narrower sense of the word, however, it did not include such steps. The wording of the article would need to be changed.

52. Mr. KERNO (Assistant Secretary-General) recalled that, at the beginning of the discussion, Mr. Brierly had stated that in its present form, article 1 might not apply to cases of multilateral treaties concluded within the framework of the United Nations. The Convention on Genocide, for example, did not come within the cases provided for in sub-paragraph (*a*) of article 1, since no international conference had been held. Neither did it fall within the cases covered by sub-paragraph (*b*), since the Charter of the United Nations contained no provisions covering the method of negotiating conventions. It would therefore be necessary to introduce into article 1 the idea of a multilateral treaty negotiated under the auspices of the United Nations.

53. While the article was not as important as it seemed at first sight, it was not without a certain value. Of course everyone agreed that the entry into force was the most important moment. Nonetheless, the prior stages in the establishment of a treaty also had legal implications. That applied to the signature, and to the adoption of a convention by the United Nations General Assembly. He would cite once again as an example the Convention on Genocide which had been adopted by a General Assembly resolution in the following terms: " The General Assembly approves the annexed Convention on the Prevention and Punishment of the Crime of Genocide and proposes it for signature and ratification or accession in accordance with its Article XI." That adoption had brought Article XI of the Convention into application. From the time of adoption: " The Convention shall be open until 31 December 1949 for signature . . .". The whole machinery had thus been brought into being, which was the crucial point.

54. Was article 1 necessary or not? In order to reply to that question, the Commission would have to see whether it was necessary to mention in the draft the various stages in the preparation of a treaty. It had been said at that meeting that the act of signature conferred no binding force on a treaty. That was true in the standard case where signature had to be followed by ratification. There were, however, many treaties which required binding force from the sole fact that they had been signed. Care should therefore be taken not to overlook the more and more numerous cases in which the parties were bound by the mere act of signature.

55. The problem was complicated by the fact that there were law-making treaties and treaties concluded on the *do ut des* principle. That question had been much discussed, in connexion with reservations to multilateral conventions, at the International Court of Justice, where it had even been held that some articles in the same treaty might be of a legislative and others of a contractual character.

56. Mr. SCELLE thought that article 1 was by no means unnecessary. While the mere drawing up and signature of a treaty could of course have no legal consequences, it did involve something final. To speak in abstract terms, it involved a certain formalism which was, as a rule, final. It was true that the text was not always absolutely final, since it might be subject to reservations; but sometimes it was. What was offered was a final text which could not be tampered with, one which would be accepted or rejected but, if accepted, was accepted as it stood. Article 1 expressed that idea of the final character of the text.

57. One might perhaps say: " A treaty must be written and the text on which the parties have agreed must be regarded [in principle] as final." It could be decided later, when the question of reservations was examined, whether the words " in principle " should be kept or not. His suggested text was, so to speak, the first sentence of the article proposed in the report.

58. In that way the word " conclude " could be avoided, while the substance of what was rightly proposed in the report for acceptance by the Commission would be retained.

59. Mr. ALFARO wished to point out, in the event of the Commission deciding to retain Mr. Brierly's text, that as Mr. Kerno had stated, the article did not refer to treaties signed within the framework of the United Nations. Nor did it apply to bilateral treaties. Apart from the two lines of introduction, the article comprised two paragraphs, in neither of which was it stated whether it referred to a bilateral treaty.

60. Mr. BRIERLY explained that the first two lines of article 1 referred to bilateral treaties and that paragraphs (*a*) and (*b*) concerned special cases.

61. Mr. ALFARO said that the words which referred to bilateral treaties were therefore: " A treaty is concluded when the text agreed upon has been established in final written form."

62. The CHAIRMAN said that he had shared Mr. Alfaro's impression; he thought the text of the Article should perhaps be amended.

63. Mr. BRIERLY pointed out that he had not proposed that a vote should be taken, but that another text should be prepared. In the meantime, the Commission could pass on to the examination of article 2. It would be seen later whether article 1 was necessary and, if so, whether the new text was preferable to the one he had proposed.

64. Mr. SANDSTRÖM also suggested that it would be preferable not to take a final vote on the article at that juncture. There were several articles that were interconnected. The Commission should first discuss the principles and then take a decision on the wording of the articles.

65. Mr. SPIROPOULOS also thought that it would be preferable to take neither a provisional nor a final decision. Mr. Kerno's observation was very sound. There were treaties in existence which had not been signed; hence it was best to defer the question and revert to it later, if that were deemed necessary, in which case the necessary amendments could be made to the text.

66. Mr. CORDOVA felt that Mr. Brierly might perhaps modify the wording of the article.

67. Mr. BRIERLY thought it would be easier to do so after the other articles had been examined.

Mr. Brierly's proposal was adopted.

ARTICLE 2

68. Mr. BRIERLY said there was no need for him to comment on article 2 since it was an introduction to the following articles.

Paragraph (1)

69. Mr. CORDOVA asked whether Mr. Brierly had in mind treaties binding on a State which was not a party to them.

70. Mr. BRIERLY replied that he had not envisaged such a possibility.

71. Mr. CORDOVA said that a treaty might either be binding only on the States parties to it, or on other States also. He made that observation because reference had been made to treaties which were really universally applicable laws. Such treaties represented a method of legislating for international law. There were treaties concerning the prevention of certain acts by States, such as treaties designed to prevent the extinction of certain animal species.

72. A law-making treaty would be binding not only on the parties to it but also on third States. The treaties concerning whaling were an example. There would be no point in a certain number of States agreeing not to kill whales during the breeding season if the provisions of the treaty in question did not apply to all States. Besides, such treaties had been concluded in the interest of the whole world. While that was a new departure in international law, efforts should be made, within the framework of the development of law, to make such treaties effective throughout the world.

73. Mr. BRIERLY explained that article 2 was not designed to cover questions of that type. It gave no ruling either way. It stated the minimum requirements to enable a treaty to enter into force, namely that it should be concluded between at least two States.

74. Mr. SCELLE, supporting the remarks by Mr. Córdova, said that many multilateral treaties entered into full force after a certain number of ratifications. They were not in force for States which had not ratified them. In addition, there were treaties that were binding on third States, and that had always been so ever since treaties existed. He would refer to the Convention of Constantinople concerning the Suez Canal régime, signed in 1888.[6] Treaties could be binding on non-signatory States. That occurred when the signatories to a treaty had made a law for the entire world by virtue of a kind of implicit and customary delegation of power by all States to certain of their number. Such a situation arose when the States in question established international regulations, i.e., regulations governing the international use of canals, roads, etc. over which they exercised some authority.

75. When the Treaty of 1888 was signed, it was recognized that because of their *de facto* situation, the signatories had the right to lay down rules binding in relation to all States. The International Agreement for the Regulation of Whaling would not have made sense had it not been applicable to third parties. The first paragraph of article 2 did not cover that point; and it needed to be supplemented by a statement that a treaty could also be binding on non-signatory States.

76. Mr. BRIERLY replied that article 2 did not deal with that point. He would repeat that all it did was to set out the minimum conditions for the entry into force of a treaty. It did happen that treaties involved obligations for States not parties to them, but that was a question outside the scope of the article under discussion.

77. Mr. CORDOVA agreed that the text proposed by Mr. Brierly did not exclude treaties which involved obligations for third States, since it made no mention of " parties ". That same problem arose incidentally in connexion with the acquisition of legal binding force. The proposed text did not specify how a treaty could become binding in relation to third parties.

78. Mr. BRIERLY thought that reference to that point was inappropriate in the article in question.

79. Mr. YEPES pointed out that article 1 concerned cases where the text of a treaty was drawn up by an international organization or a specialized agency of the United Nations. The International Labour Organisation was one of the organizations referred to and as was well known, conventions approved by the International Labour Conference could be ratified by one State only and become binding on that State. But according to article 2, before it could come into force, a treaty must be ratified by at least two States. Was it then necessary also for two States to ratify labour conventions? If the text of article 2 were kept as it now stood, such conventions would be excluded. A statement was called for in regard to them.

80. Mr. BRIERLY said he was disturbed at the notion that an international convention could be binding even if it were ratified by only one State. Obviously no other State could require its application. For that two States were needed.

81. Mr. SCELLE took a contrary view. If he remembered rightly, the question had been raised by the French Government when Poincaré was President. It had raised the same objection, asking how there could be a convention if there was only one party. Albert Thomas had replied that the labour regulations were binding on France because she had ratified the Versailles Peace Treaty, where it was laid down in Part XIII. The International Labour Conference adopted final texts of draft conventions, and no reservations were permissible. The texts were then kept open for ratification by all States Members of the International Labour Organisation, and could be ratified by a single State. In that case, States found themselves bound in relation to all the other States, which could call for the application of the Convention. Obviously that procedure was exceptional. The Convention on the eight-hour day had been adopted at a time when he was

[6] A " Convention intended to guarantee the free use of the Suez Maritime Canal for all time and to all Powers, signed at Constantinople on 29 October 1888 ", in de Martens, *Nouveau recueil général des traités*, 2nd series, vol. 15, p. 557.

principal Secretary to the Minister of Labour. The French Government had been prepared to ratify the Convention, but had felt that it could not be the only one to bind itself. The Ministers of Labour of France, Great Britain, and Germany had met in Berne to settle the question of how they proposed that the Convention on the eight-hour day should be applied. It was not until after that meeting that the main industrial countries had decided on ratification. That had to be the procedure, otherwise France would have been bound by an instrument without any assurance that other countries would give the same undertaking. It was a risk which she could not afford to run.

82. It was extremely difficult to regard labour conventions as treaties if the notions of bilateralism and contract were included in the definition of a treaty. But there was a whole series of treaties which had no such characteristics. They were binding laws of a general kind.

83. What was hampering the Commission at the moment was the evolution of international law. It was noteworthy that Mr. Hudson's book should be entitled " International Legislation ". The Commission was hampered because, in its view, a treaty was still a contract. But a treaty was made for an international community composed of national communities. The whole body of those national communities had become the international community. All the legal rules included in the treaty constituted a special type of unification of international law. If a treaty were regarded as a reciprocal obligation, there was no development.

84. Mr. BRIERLY said that in spite of Mr. Scelle's eloquence he could not conceive of a treaty to which there was only one party. To take the case of an international labour convention ratified by a single State, he was quite willing to admit that that State might be bound, but it was not bound by a treaty, since no treaty as yet existed.

85. Mr. FRANÇOIS supported Mr. Brierly's view. Even among recent writers the point of view upheld by Mr. Scelle was strongly contested. It was by no means an established fact that a legal obligation was created by a treaty once a single State had ratified it.

86. Mr. CORDOVA thought that a treaty should represent a common will on the part of two or more States. He did not think an international labour convention was a treaty in the legal sense. It was what was called a law-making treaty and in his opinion there was no such thing as a law-making treaty. In the same way, a resolution of the Security Council was binding on States, but it was not a treaty; it was true international legislation.

87. The real difficulty arose when there actually was a treaty between two or more States that at the same time became binding in relation to a third State.

88. Mr. SANDSTRÖM thought that ratification of a labour convention by a single State bound that State not because it had ratified the convention, but because of the previous treaty by which it had become a member of the International Labour Organisation, thus accepting the procedure laid down for the adoption of labour conventions. The obligation arose out of the original treaty.

89. Mr. SPIROPOULOS suggested that the Commission keep to one problem at a time. It had a text before it. Mr. Córdova had asked whether a treaty concluded between certain States could impose an obligation on third States; and that was a pertinent question. But the Commission must not at the same time go into the matter of the international labour conventions, where only one ratification was required for their entry into force. He was making that remark in the interests of the Commission's work. Actually, in regard to the latter point he shared Mr. Sandström's view that the binding character of the conventions in relation to a State ratifying them arose out of its ratification of the Treaty of Versailles.

90. To return to the text under discussion, he wondered whether, in view of the many difficulties, it would not be better to leave aside the controversial point. Was the first part of paragraph 1 necessary (" A treaty enters into force when it becomes legally binding ")? That was tautological. Would not paragraph 2 be sufficient? If paragraph 2 alone were adopted, it would be unnecessary to examine the second part of paragraph 1, " in relation to two or more States ". Thus the whole difficulty would disappear.

91. The CHAIRMAN noted that Mr. Córdova was inclined to favour adjournment of the discussion of the problem he had raised. With regard to the point at issue between Mr. Scelle and Mr. Brierly, the Commission might examine it, but without devoting too much time to it.

92. Mr. BRIERLY was prepared to retain only paragraph 2 of the article.

93. Mr. AMADO said that as Mr. Brierly had accepted Mr. Spiropoulos' suggestion, there was no need for him to say what he had had in mind. But he would like to add in regard to the first part of the discussion that the comments made would be relevant when the effects of treaties in relation to third parties were discussed.

94. With regard to paragraph 1, he thought there was a treaty when two parties had a common intent and changed a draft treaty into a concluded treaty. In that connexion, the words " two or more States " seemed to him essential. He agreed with Mr. Spiropoulos that the first paragraph of article 2 was tautological and could be deleted.

95. Mr. KERNO (Assistant Secretary-General) agreed with Mr. Scelle. The difficulty arose from the fact that a change was taking place in the conclusion of treaties. It was an important point; more than one hundred multilateral conventions had been deposited with the United Nations Secretariat.

96. It was a peculiarity of the labour conventions that they were binding even if only one State had ratified them. The Convention on the Privileges and Immunities of the United Nations might also be cited. There was no doubt that even if only one State had acceded to it, it would be legally bound by it. Obviously it could be

argued that there was another treaty at the back of it, namely the Charter; nevertheless it was a type of convention somewhat different from the classical type.

97. Mr. SCELLE asked whether Mr. Brierly did not think it would be better first of all to consider treaties in the classical sense of the term, and for the time being, to disregard the labour conventions the system of which was different. The traditional type of treaty could hardly be placed on the same footing as international legislation. The latter and its technique were not the same as those of ordinary treaties and objections would always arise if such conventions were regarded as treaties in the classical sense. He suggested that the Rapporteur add a rider to the effect that in his draft, treaties were treaties in the classical sense, in which a previous common intent was necessary before there could be any undertaking.

98. Mr. SPIROPOULOS fully approved Mr. Scelle's suggestion. Actually the conventions concluded under the auspices of the United Nations, for example, were somewhat unusual in type. With regard to the Convention on Immunities, if a State ratified it unilaterally, it was automatically bound. That Convention was not a treaty in the classical sense. All the members of the Commission were affected by the classical doctrine. There was no reason why the Commission should not first of all establish the rules relating to treaties in the classical sense of the term, and then consider the special types of convention later. Otherwise there was a danger, as Mr. Scelle had said, of creating confusion by discussing matters which were not analogous. Hence he suggested that that procedure be adopted.

The meeting rose at 1 p.m.

85th MEETING

Monday, 21 May 1951, at 3.10 p.m.

CONTENTS

Chairman: Mr. Shuhsi HSU

Rapporteur: Mr. Roberto CORDOVA

Present:

Members: Mr. Ricardo J. ALFARO, Mr. Gilberto AMADO, Mr. James L. BRIERLY, Mr. J. P. A. FRANÇOIS, 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.

Communication from Mr. Kerno, relating to the nationality of married women

1. Mr. KERNO (Assistant Secretary-General) informed the members of the Commission that the Commission on the Status of Women, which had just met in New York, had adopted a resolution asking the Economic and Social Council to request the International Law Commission to consider the question of the nationality of married women at its 1952 session. The resolution, of course, merely constituted a recommendation to the Economic and Social Council, which alone had the right to decide whether or not the request should in fact be made.

Law of treaties: report by Mr. Brierly (item 4 (*a*) of the agenda) (A/CN.4/43) *(continued)*

ARTICLE 2 (CONTINUED)

Paragraph (1) (continued)

2. Mr. BRIERLY reminded the Commission that at the end of the eighty-fourth meeting Mr. Scelle and Mr. Spiropoulos had made the important suggestion that the law of treaties should be studied in two separate parts: treaties in the classical sense of the term and international legislation (Mr. Scelle) and special conventions of the modern type (Mr. Spiropoulos). He thought that the gap between those two types of treaty was not as wide as some members of the Commission appeared to think. Certain principles were common to both. A change was taking place in the law of treaties but it was still in the early stages.

3. He was prepared to accept Mr. Scelle's suggestion if it were taken over by the Commission. He proposed that the Commission should study the principles applicable to classical treaties and decide what provisions should be added or amendments made to the text of the article to make it also apply to treaties of the modern type.

4. Mr. KERNO (Assistant Secretary-General) said that he viewed with some misgivings the suggestion that classical treaties and multilateral treaties negotiated under the auspices of the United Nations should be considered separately. The Secretary-General wanted the Commission to guide him by defining the legal nature of the new treaties and the rules applicable to them. If it began by considering classical treaties it might not have time to deal with treaties of other types. He was very glad that Mr. Brierly had made his proposal. There were differences between the two types of treaty but not such as to prevent the Commission from studying them together.

5. Article 1, it would be observed, gave first a general rule and then two sub-paragraphs setting forth exceptions in the case of certain kinds of multilateral treaties.