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Summary record of the 85th meeting

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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.

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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.

6. He felt that certain statements made at the previous meeting had not been quite correct. Article 1 was also applicable, for example, to the Genocide Convention. The beginning of the article read: "A treaty is concluded when the text agreed upon has been established in final written form." That was a general rule applying both to classical treaties and to the majority of treaties concluded under the auspices of the United Nations. It was followed by exceptions: texts established at international conferences (sub-paragraph (a)), and texts drawn up by international organizations whose constitutions provided for the adoption of conventions (sub-paragraph (b)). Since the Charter did not provide for the adoption of conventions, sub-paragraph (b) did not apply to treaties concluded under the auspices of the United Nations; the general introductory sentence on the other hand did apply.

7. He had quoted the article to show that the gap between the two types of treaty was not perhaps as wide as had been stated at the last meeting. The Commission might therefore, while studying the question of classical treaties, consider whether special rules were not required for certain types of treaty, in particular multilateral treaties.

8. Mr. SCALLE reassured Mr. Kernö: he agreed with him that the Commission must not neglect multilateral treaties. He was sure that the present trend would continue and that multilateral treaties would take the place of treaties of the classical type. There was nothing against the Commission examining treaties of the classical type and multilateral treaties together, noting if necessary where a distinction should be made between them.

9. The CHAIRMAN called upon the Commission to proceed with its examination of article 2. The deletion of paragraph 1 of article 2 had been suggested, and Mr. Brierly had said he was willing to consider it.

10. Mr. BRIERLY was quite willing to agree to the deletion, since the paragraph added nothing material.

The Commission decided to delete paragraph (1) of article 2.

Paragraph (2)

11. Mr. CORDOVA did not like the words "in the first instance". A case might arise in which the text of a treaty did not state that ratification was required, but merely indicated the date of the treaty's entry into force. The rule laid down by the paragraph made no allowance for the possibility of the constitution of one of the parties requiring that treaties should be ratified before they entered into force, and seemed to imply the principle that the provisions of a treaty took precedence over those of the constitution.

12. Mr. YEPES thought that the paragraph was drafted in too absolute a manner. The terms of the treaty might not specify the conditions under which it entered into force and the constitutions of the two States might contain different provisions: one, for example requiring ratification of treaties, and the other not requiring it. He would like the text to be drafted in a manner which took more possibilities into account.

13. Mr. BRIERLY drew attention to article 5, which

provided for cases in which ratification was necessary. It was understood that the fact that a treaty did not make provision for ratification did not sanction a State failing to observe constitutional provisions which prescribed it.

14. Mr. CORDOVA asked whether Mr. Brierly would be willing to add a sub-paragraph to article 5 laying down that ratification should be necessary where the constitution of the parties required it. Sub-paragraph (d) — which read as follows: "(When ratification is necessary) (d) When the form of the treaty or the attendant circumstances do not indicate an intention to dispense with ratification" — would not be sufficient where the constitution of one of the parties requires that treaties should be ratified.

15. Mr. BRIERLY replied that of course ratification was necessary when it was required by the constitution, but he would prefer the matter not to be gone into until the Commission came to article 5. Mr. Córdova's suggestion did not relate to article 2; what he had said, however, possibly indicated the need for a provision being added to article 5.

16. Mr. CORDOVA was willing to defer consideration of the matter, as Mr. Brierly proposed.

17. Mr. BRIERLY did not think that there was any need to amend paragraph 2 of article 2.

18. Mr. CORDOVA considered that the paragraph put international law before the constitution of the parties and placed the treaty above the constitution. If the negotiators made a treaty when they were not empowered to do so, the treaty was null and void. It must not be suggested that the provisions of the treaty took precedence over the constitution, which was what conferred the power to make treaties. It was a question of capacity.

19. Mr. LIANG (Secretary to the Commission) believed that the statements of Mr. Yepes and Mr. Córdova mainly applied to article 3 concerning the application of treaties. Paragraph 2 of article 2 dealt with entry into force, as distinct from application. The Genocide Convention for example, which had already been referred to a number of times, had entered into force as an instrument, but that did not mean that it had binding force for the United Kingdom or any other country which had not yet ratified it.

20. Mr. BRIERLY thanked Mr. Liang for providing him with an argument which was very much to the point.

21. Mr. SANDSTRÖM felt that the paragraph was perhaps of more importance for multilateral treaties than for treaties of the classical type.

22. Mr. SPIROPOULOS drew the Commission's attention to a misunderstanding which had found its way into the discussion. There were two opinions about the meaning of the expression "enters into force". Paragraph 2 must be understood in relation to paragraph 1: "A treaty enters into force when it becomes legally binding in relation to two or more States". It was common knowledge that there were two opposite theories about when a treaty became legally binding: Anzilotti's theory, according to which the Head of the State bound the State even when he failed to observe the constitution

— a theory he did not accept — and the theory which he supported himself, that there could only be a treaty binding the State when the provisions of the constitution had been observed. If the Commission pronounced in favour of the latter theory it would have to enunciate a different general principle from the one expressed in paragraph 2. The text would have to read: "In principle a treaty enters into force by its ratification", and then proceed to specify the exceptions.

23. Mr. SCELLE supported Mr. Spiropoulos. A treaty was valid provided it was made by the competent authorities. Who those authorities were was determined by the constitution. The conditions of entry into force, however, were a different matter. Entry into force depended on the terms of the treaty, which could lay down for example that it would enter into force when it had received sixteen ratifications. The validity of the treaty and its entry into force must not be confused.

24. It was noteworthy that certain treaties modified constitutions. Thus by the terms of the Covenant of the League of Nations (Article 18) there were to be no more secret treaties. A number of constitutions, including the French Constitution of 1875, under which there were two types of treaties, secret treaties and those which the President of the Republic was required to submit to Parliament, had been changed — *ipso facto*.

25. That remark did not make Mr. Córdova's statement any less true. The State authorities empowered to conclude treaties must respect the constitution, otherwise a treaty would be null and void. No authority could perform an act outside its competence.

26. Mr. SPIROPOULOS thought the interpretation of the expression "enters into force" gave rise to some difficulty. Paragraph 1 must be taken into consideration, as it gave Mr. Brierly's interpretation. Furthermore, he thought the text contained an error. "Enters into force" implied legal binding force. Take for example the Convention on Genocide. It provided that it would enter into force on the ninetieth day following the date of deposit of the twentieth instrument of ratification. That meant that so long as only nineteen States had ratified it, the Convention would have no legal binding force in relation to them; but the depositing of the twentieth instrument of ratification would have the effect of giving binding force to the Convention in relation to the twenty States. In that case, entry into force meant having legal binding force in relation to any State ratifying the Convention.

27. Mr. AMADO found the article acceptable as it stood. When the Commission came to discuss the capacity required, it would examine the observations made by Mr. Scelle, Mr. Córdova and Mr. Yepes.

28. Mr. KERNO (Assistant Secretary-General) asked the Commission to consider the position of the depositary of multilateral treaties, namely, the Secretary-General of the United Nations, whose duty it would be to apply those provisions. Article 2, paragraph 2, was necessary and satisfactory, but it was desirable to agree as to its meaning. Like Mr. Córdova, he too had intended to enquire what the words "in the first instance" meant. He thought that if a treaty stipulated the time when

it came into force, the stipulation on that point was decisive; but if the treaty made no provision, how was its muteness to be interpreted? That question was a most important one for the depositary of multilateral treaties. Where a treaty made no reference to the point, if it were a bilateral treaty it would enter into force as soon as the two parties had carried out the act duly binding them. If it were a multilateral treaty, in his opinion, it would enter into force as soon as it had been ratified by all the signatory States. It could not be said that a treaty signed by thirty States and ratified by two of them would enter into force in relation to those two. He would like the Commission to corroborate that.

29. It had also been stated that ratification was valid when it proceeded from the competent authority. That was obvious. But what was the depositary of a treaty to do if the delegation of a State concerned handed him a document signed by the President and stated that the treaty was duly ratified, and the ratification was contested in the country itself?

30. Mr. CORDOVA noted that some of the members of the Commission felt that a distinction must be made between entry into force and validity. But the proposed text did not admit of that. It stated that a treaty entered into force when it became legally binding.

31. Under the Mexican Constitution a treaty must be ratified before it became binding. Supposing a treaty provided that it should enter into force on the first day of the following year, the wording of paragraph 2 suggested that ratification could be dispensed with, or at any rate that the treaty could enter into force without previous ratification. In other words, the paragraph appeared to put treaties on the same footing as constitutions. The wording of paragraph 2 was quite in order if it were assumed that signature brought the treaty into force. But if it were held that ratification was necessary — and he thought that was the opinion of the majority of the Commission — the wording must be changed. The text proposed by Mr. Brierly was based on the theory that, as far as entry into force was concerned, ratification was the exception, and signature the general rule.

32. If that were not the case the principle should be laid down in article 5 that ratification was necessary, and the exceptions to that rule mentioned.

33. Mr. YEPES said that the very interesting discussion which had taken place made it clear that the Commission could not accept the article as it stood.

34. He suggested that the words "in the first instance" be deleted and the words "or, in default of such terms in the treaty, on the legislation of the signatory States" be added. Both possibilities must be provided for. The constitutions of States must not be disregarded in connection with the entry into force of treaties.

35. He thought it extremely dangerous to state that a multilateral treaty which did not contain a distinct statement to that effect entered into force only when all the signatory States had ratified it. That amounted to the introduction of a veto. The statement was parti-

cularly dangerous when it came from the Assistant Secretary-General, whose words carried authority.

36. Mr. AMADO pointed out that the Commission was discussing ratification, though it had not yet properly reached that stage. He asked Mr. Córdova whether, under the Mexican Constitution, accession to a treaty required ratification of the treaty.

37. Mr. CORDOVA replied that in such instances, ratification — that was to say, observance of the constitutional provisions laid down for approval of a treaty — was carried out beforehand.

38. Mr. AMADO recalled that in the classical treaties plenipotentiaries signed, and in the past their signature had been sufficient in itself: but later on, the procedure for ratification had become necessary, since plenipotentiaries no longer had the right to conclude treaties. It was the Head of the State who concluded them, and Parliament which ratified them. Later still came the postponement of signature, and still more recently, the treaty open to all States for signature. At that point the notion of acceptance had appeared. Signature then regained its former status. That was the direction in which the world was tending, as Mr. Scelle had noted, owing to the fact that treaties were becoming multilateral. In those circumstances, the constitutions of Brazil and other countries came up against a problem. To solve it, Parliament authorized the President to accept the treaty. Thus, ratification continued to be the formality by which a treaty acquired binding force.

39. An examination of the articles proposed by Mr. Brierly showed that the formula adopted by him made allowance for those various stages — signature, entry into force and ratification. He thought the Commission should approve the articles in question.

40. Mr. SCELLE said his reply to Mr. Kerno was that he fully appreciated the anxiety of the person whose duty it was to register treaties. He would like to relieve Mr. Kerno of that anxiety, though not in the way Mr. Kerno had in mind. If a multilateral treaty made no mention of its entry into force, it would never enter into force. If it meant waiting for sixty ratifications, there would be a long wait, so long that the treaty would no longer have any practical meaning.

41. It would be wise to follow out the Commission's decision to study separately under each article the classical treaties and the multilateral treaties, and to propound a rule covering the latter. All that was required was a statement that "all multilateral treaties shall make provision for their entry into force". It was unacceptable that a treaty should make no provision, leaving it to be tacitly concluded that sixty ratifications were required. That meant giving the sixtieth State the right of veto. The Commission could not admit so retrograde a step. It was essential therefore that the Commission should establish the rule that a multilateral treaty must stipulate the conditions for its entry into force. It could provide that it would enter into force after ratification by two States, for example.

42. Mr. KERNO (Assistant Secretary-General) said that that solution met his wishes entirely, and that it

was desirable to urge States to insert such a provision in treaties.

43. Mr. SPIROPOULOS thought it would be well to try to discover the real meaning of paragraph 2. If it meant that a treaty must in the first instance specify the time when it became legally binding in relation to the States ratifying it, the text ought to be approved. But if the paragraph meant that it was the treaty that settled the issue and not the constitutional law of the given country, that was another matter.

44. It would be preferable to take no decision and to pass on to the examination of the article dealing with ratification, the most important of the articles. If the Commission did not succeed in reaching agreement on the meaning to be attached to the paragraph in question, it would be better to come back to it later.

45. Mr. ALFARO said that the discussion had enlightened him as to the significance of paragraph (2); but he still found its terms disturbing. It spoke of a first instance when there were no others, and laid down the exception without formulating any general rule. As the Commission regarded the questions of ratification and entry into force as connected, it would be well to delete the words "in the first instance", and to add "and where necessary, on the rules hereinafter set out on the subjects of ratification and accession".

46. Mr. BRIERLY assumed that the words "where necessary" proposed by Mr. Alfaro meant "in default of such provision in the treaty".

47. Mr. SANDSTRÖM was in favour of Mr. Spiropoulos' proposal. He drew the Commission's attention to the fact that the question under discussion was bound up with article 6, dealing with the date of entry into force of treaties and beginning "Unless otherwise provided in the treaty itself". There were connecting links between all the articles in the draft. The text of article 2 formed a complete whole, and by deleting paragraph 1 its balance had been upset. It was desirable to discover how the balance could be redressed, though the present was not the moment to do so.

48. Mr. CORDOVA thought there were two questions at issue. The first concerned the binding force of the treaty in relation to parties, and the second, the date on which a treaty entered into force. In the report, article 2 dealt with entry into force of treaties, and article 6 referred to the date of entry into force. He found the draft text proposed by Mr. Alfaro acceptable, provided the words "where necessary" were deleted. There would then be no question of a treaty taking precedence over the constitutions of States.

49. Mr. YEPES thought that multilateral treaties should invariably include a clause specifying the date of their entry into force.

50. He agreed to the text proposed by Mr. Alfaro with the amendment by Mr. Córdova; and he suggested that a new paragraph be added to read as follows: "Multilateral treaties shall always include a clause stating the terms of their entry into force."

51. Mr. BRIERLY thought that the difficulty could be got over more easily by leaving the article for the

time being and returning to it later after the related articles had been discussed.

52. Mr. SPIROPOULOS felt that there was an order of precedence in the principles involved, and that it was advisable to begin with the basic principles. For that reason, like Mr. Sandström, he proposed that the general principle be sought. In his opinion, it was to be found in articles 4, 5 and 6. The text under consideration should be left aside for the time being, and the Commission should decide what principle should prevail, and then adopt a definitive solution.

53. Mr. YEPES was sorry that he could not share that view. What was essential in connection with a treaty was to know when it would enter into force. The Commission had before it two concrete proposals submitted by the Rapporteur, Mr. Brierly, and by Mr. Alfaro and himself respectively. He suggested that it should take a decision.

54. Mr. CORDOVA thought the Commission should adjourn the discussion on the point. The logical order was to deal first with the question of ratification, which preceded entry into force.

55. Mr. SCELLE thought that the question of principle was that of the validity of treaties, not of their entry into force. In the case of bilateral treaties, the question did not arise. They came into force as soon as the two parties had ratified them. The question was important in the case of multilateral treaties. On the other hand, all treaties were affected by the question of what conditions they must fulfil before States were bound by them. It was therefore reasonable to pass on to the following articles.

56. Mr. BRIERLY suggested taking the sense of the Commission as to the adjournment of the discussion.

57. Mr. YEPES thought that the Commission was in favour of adjourning the discussion, and therefore would not press his proposal.

58. The CHAIRMAN noted that the Commission had *decided* in favour of adjourning the discussion on article 2.

ARTICLE 3

59. Mr. BRIERLY said he had nothing to add to the article, which was further enlarged upon in the succeeding articles, in which there might be something contentious.

60. Mr. SCELLE suggested the wording "when that State undertakes a final obligation under the treaty whether by ratification, accession or signature". His idea was that signature should take third place, since it was rare for it to suffice alone.

61. Mr. BRIERLY replied that in the United Kingdom it was not rare.

62. Mr. KERNO (Assistant Secretary-General) said he would take up the cudgels in favour of signature. It was not in any way exceptional for signature to give legal binding force to a treaty. There were a great many treaties which entered into force on mere signature. They must of course stipulate such procedure, but they very often did so. He did not attach importance to the position of the word in the enumeration given in the

article, though the word should appear there. Article 3 was an important one, as the succeeding articles referred only to ratification and accession. It was, therefore, essential to indicate in the present article that in many instances signature was sufficient.

63. Mr. SCELLE pointed out that in such instances the signature in question was an authorized signature which was equivalent to ratification.

64. Mr. KERNO (Assistant Secretary-General) said that if a treaty provided that signature made it legally binding, it was up to the State concerned to fulfil the appropriate parliamentary requirements before signature; the signature, however, was a definitive act.

65. Mr. AMADO recalled that, except under the English system, where signature was the principal act, the general rule was that ratification was necessary. During the discussions a year previously, Mr. Brierly had quoted a remark made by Gladstone as Leader of the Opposition, when the Government was consulting Parliament on a very important treaty, to the effect that the treaty should be concluded by the Crown without reference to Parliament.¹ In the United Kingdom, signature was sufficient to give a treaty binding force, but the signature was appended after Parliament had taken the necessary steps for the application of the treaty. That was acceptable, but it must be stated.

66. He did not see how the French translation of the text could be accepted, as it implied that in certain cases signature was sufficient to involve a final obligation.

67. Mr. CORDOVA said that after reading the English and Spanish texts, he found the same fault in the Spanish version. There appeared to be some tautology.

68. Mr. SCELLE and Mr. AMADO said that the same tautological wording appeared in the French text.

69. Mr. BRIERLY did not feel that it was his place to discuss the translations.

70. Mr. CORDOVA pointed out to Mr. Brierly that the remark applied also to the English text.

71. Mr. SPIROPOULOS agreed with Mr. Cordova. The same objection might be made to the first paragraph of article 2, but there the tautology was not a matter of great importance. It would be better to say: "A treaty becomes legally binding in relation to a State either by signature, ratification or accession."

72. Mr. BRIERLY proposed the following draft for article 3: "A treaty may become legally binding on a State either by signature or by ratification or by accession." The new wording would merely indicate the three procedures by which a treaty could become binding.

73. Mr. YEPES thought that the words "on a State" were open to criticism. In the case of the Convention for the Prevention and Punishment of the Crime of Genocide (General Assembly Resolution 260 (III)), for example, entry into force was subject to the deposit of twenty instruments of ratification. The formula proposed by Mr. Brierly implied that when for example only fifteen ratifications had been deposited such a Convention was binding on the States which had ratified it.

¹ Summary record of the 52nd meeting, para. 89.

74. Mr. BRIERLY pointed out that his revised formula merely enumerated the three procedures by which a treaty could become legally binding. It did not contain provisions covering particular cases, which were dealt with in later articles. It in no way prejudged the issue.

75. Mr. YEPES said that he accepted the formula proposed by Mr. Brierly.

76. Mr. KERNO (Assistant Secretary-General) quoted from a statement made by him before the International Court of Justice on 10 and 11 April 1951 :

“ The Secretary-General is the depositary of more than sixty multilateral conventions which have been drafted or revised under the auspices of the United Nations . . . In some twenty-five of these conventions, it is provided that the sole method by which States can become parties is by the deposit of formal instruments, which may be of ratification, accession or acceptance, with the Secretary-General . . . Sixteen other conventions provide that States may become parties either by signing without reservation as to acceptance or by deposit with the Secretary-General of an instrument of acceptance. The remaining conventions provide that States become parties by signature.”

77. Thus the practice of the United Nations was not uniform. The classical method of deposit of instruments of ratification or other instruments was followed in a large number of cases. In others the new method of acceptance was employed. To begin with there had been a tendency to substitute for the classical procedure of ratification or accession, the procedure of signature without reservation as to acceptance, signature with reservation as to acceptance followed by acceptance, or acceptance, which appeared to some people to be an advance. But at the fourth session of the General Assembly in 1949 the Sixth Committee, obliged to choose between the two procedures, had given its support to the traditional method by a decision which had, however, been a purely *ad hoc* one. The recital of past events he had given clearly showed how practice had wavered. If the Commission adopted article 3 in the form proposed by Mr. Brierly, it would exclude “ acceptance ” from the means by which a treaty could become legally binding.

78. Mr. SCELLE thought the new wording of article 3 satisfactory. In order to meet Mr. Yepes' objection, he proposed that the following words should be added at the end of the new version: “ the question of its entry into force being reserved ”. The addition would indicate that in the case of certain treaties, multilateral treaties, observance of the special conditions of entry into force was also required.

79. In reply to a remark by Mr. Brierly, Mr. SCELLE said that he thought his proposed addition to article 3 would make the article clearer and that there was nothing against repeating what already appeared in article 2.

80. Mr. BRIERLY pointed out that the Commission had not yet decided on the terms of article 2.

81. Mr. SPIROPOULOS thought the new version proposed by Mr. Brierly did not need anything added to it. He understood why Mr. Scelle had suggested an

addition, but it was not possible to say everything in a single article.

82. Replying to Mr. Kern, he said that he realized that many recent conventions employed “ acceptance ”. The new term was not fundamentally different from signature or accession. Since it existed it was legitimate to ask whether it should not be added to the list given in article 3. Reflection however suggested that it might be as well to keep to general terms so as not to exclude other procedures which might appear later.

83. Mr. SCELLE agreed, unreservedly, to withdraw his suggestion.

84. Mr. CORDOVA wondered whether there might not be a danger of the new version of article 3 being interpreted literally as meaning that a treaty became binding by being signed.

85. Mr. SPIROPOULOS said that article 3 was to be understood in its context and merely constituted an introduction to the articles which followed.

86. Mr. SCELLE thought it was obvious that “ signature ” meant signature in conformity with the conditions laid down in the constitutions of the parties.

87. Mr. BRIERLY asked whether the Commission wished to retain article 3 in the new version he had suggested, on the understanding that the decision, like any other which the Commission might take, was in no way final.

88. Mr. SPIROPOULOS approved that proposal.

It was so decided.

ARTICLE 4

Paragraph (1)

89. Mr. BRIERLY said that the paragraph followed fairly closely article 6 of the Harvard draft convention. It contained an addition to the effect that ratification must be made “ in a written instrument ”, and it substituted for “ are . . . confirmed and approved ” the words “ confirms and accepts ”, which were closer to the terminology of chanceries.

90. Mr. FRANÇOIS observed that Mr. Brierly had introduced into his second report the idea of ratification, which he had not mentioned in his first one (A/CN.4/23). The definition he gave the word, however, could be applied to acceptance. Ratification did not simply mean any written and signed instrument. It was a formal act effected by the signature or by affixture of the seal of the Head of State. A letter from a minister or diplomatic representative giving notice of the acceptance of a treaty would be a signed instrument but not an act of ratification.

91. Mr. BRIERLY did not think the distinction a real one.

92. Mr. KERNO (Assistant Secretary-General) said that it was precisely on account of such ambiguities that the authors of certain recent conventions had frequently provided for the procedure of acceptance. It had been maintained that ratification was an act of domestic and constitutional law. It was the constitution which made ratification dependent on a parliamentary decision. In

the case of the United States of America, for example, that decision had to be expressed by a two-thirds majority of the Senate. Yet parliamentary action was not always required. In the United States, in addition to treaties requiring the Senate's approval, there were executive agreements ratification of which was not subject to previous sanction by a two-thirds majority of the Senate. The term "acceptance" could apply to all cases. Ratification had previously been a term used on both the internal and the international level, two distinct ideas or at any rate two different aspects of the same idea being thereby confused. It was in order to avoid possible misunderstanding that some persons had preferred to speak of "acceptance" in international affairs. The change of term therefore rested on a real distinction.

93. Mr. SCELLE wondered what would happen if the Secretary-General, after having registered an acceptance of a treaty, and having, moreover, no authority to judge whether or not the said acceptance was in order, then received a communication from another State disputing the validity of that acceptance. One might take as an example the hypothetical case where, after a convention had received the number of ratifications required for its entry into force, one of the parties then declared that, as one or more of the ratifications was invalid, it did not consider itself legally bound thereby. In such an eventuality, the Secretary-General would have no power to judge to what extent the protest was justified and would, on the other hand, be powerless to prevent its being made.

94. Mr. KERNO (Assistant Secretary-General) pointed out that he had referred to that problem at the previous meeting. The Secretary-General would be faced with a grave problem. It might even prove impossible to appeal to the contracting parties, since, if the protest were well-founded, there would be no contracting parties. The difficulty would be similar to that which arose when ratifications with reservations were challenged by another State. The question could only be solved by agreement between the States concerned or by reference to the International Court.

95. Mr. SPIROPOULOS agreed that the depositary of a treaty might find himself in the situation described. In such a case he would have to be guided by the principle that a body entrusted with the application of a rule is qualified to interpret it. If, on the basis of its interpretation of existing law, it was convinced that all formalities had been duly fulfilled, it must declare the acceptance valid. Similarly, if convinced of the contrary, it must reject it. The dispute which would then arise would be a matter for the International Court to settle. It was for the depositary to decide, for instance, whether, from that point of view, a treaty had entered into force or not.

96. Mr. SCELLE pointed out that the Legal Department of the Secretariat, whose task it would be to study such a question, would find itself in a very difficult situation.

97. Mr. LIANG (Secretary to the Commission) did not believe that the problem was as alarming as Mr. Scelle feared. Any of the remarks he himself was about

to make would not, of course, commit the Assistant Secretary-General. If the ratification procedure followed by a State in connection with a particular convention was challenged by another State, the Secretary-General could not do otherwise than receive the instrument of acceptance addressed to him by the Foreign Minister of the country in question. An international organization was not competent to examine the constitutionality of an act of a State. In a case of one government or State succeeding another, a problem did indeed arise; to which however the theory of inheritance of sovereignty provided the answer. Generally, by virtue of that theory, the new government or State was bound by the acts of the old. If the challenge was made by a third State, the Secretary-General was likewise not qualified to judge of its merits.

98. Mr. SCELLE pointed out that Mr. Liang's reply came to much the same thing as the views he had himself put forward. His own opinion was that the Secretary-General, in such a case, should register the acceptance without being called upon to judge of its validity. The case might, however, arise in which a State challenged the entry into force of a convention on the ground that its acceptance by another State was invalid. According to a theory defended by, among others, Anzilotti, a State had no right to challenge the ratification of another State. He himself could not accept that theory and considered that States possessed such a right.

99. Mr. AMADO thought that the discussion had gone too far. He experienced some difficulty in following those members who considered it possible to give a third State the right to challenge the constitutionality of a ratification. He preferred not to prolong the discussion on that point.

100. The text under consideration was satisfactory to him in its English version. While he would point out, in passing, that the doctrine of confirmation was a highly disputed one, any harm there might be in using the word "confirms" was dispelled by the context in which it occurred. It should however be recalled that many jurists considered that ratification was not in itself a confirmation but merely an initial act.

101. In the French translation the word "binding" was rendered by the expression "*force obligatoire*". He personally would prefer to substitute in the French text words "*comme obligatoire un traité*" for the words "*la force obligatoire d'un traité*". Unless that change were made, it might perhaps be thought that the treaty was binding only in respect of those of its clauses which actually possessed binding force.

102. He would like to know whether Mr. Scelle would accept that redrafting, which he suggested in no uncompromising spirit.

103. Mr. SCELLE said he shared Mr. Amado's view. He would also like to point out that in French the phrase "*à titre définitif*" might lead to confusion. A treaty was never final. He need only quote the proviso "*rebus sic stantibus*" to justify the omission of the three words in question. Paragraph 1 of article 4 would then run as follows:

“La ratification est l'acte par lequel un Etat confirme et accepte un traité comme obligatoire, dans un instrument écrit, dûment signé.”

104. Mr. FRANÇOIS, replying to a question by Mr. Brierly, developed the objection he had previously formulated (see para. 90 above). The proposed text gave too broad a connotation to the term “ratification”. When a treaty provided that “the present treaty shall be ratified and instruments of ratification exchanged”, was it sufficient if a diplomatic representative informed the Foreign Minister of another contracting State that his Government approved the terms of the Convention and if in exchange a similar communication was sent to the diplomatic representative concerned. Was such an exchange of notes equivalent to ratification? Ratification had previously been understood to be a formal act. If the term ratification was to be applied to any duly executed instrument, the Commission was getting on to the notion of acceptance irrespective of form. He wondered whether that was really the Rapporteur's intention.

105. Mr. BRIERLY thought it difficult to insist on ratification taking a particular form. A State might prescribe a certain form under its constitution, but that was not a rule of international law.

106. Mr. CORDOVA considered that the word ratification applied to the particular national procedure by which the executive power signified its consent, such consent being generally subject to the approval of the representatives of the nation. It was accordingly impossible to say that an executive agreement, an exchange of notes, constituted an act of ratification, even though it were in accordance with the definition of ratification given in article 4, paragraph 1. In his view, an executive agreement between Mexico and the United States of America (whose constitutions contained very similar provisions with regard to the conclusion of treaties) was binding on the two Governments politically, but not legally binding on the two States, since the procedure of approval by the Senates of the two nations had not been complied with. In such a case it was not possible to talk of ratification.

107. Mr. BRIERLY maintained that the distinction established by Mr. Córdova was purely a matter of domestic law and not of international law. In the United Kingdom there were no legislative provisions requiring Parliament to be consulted.

108. Mr. CORDOVA thought that, so far as ratification was concerned, domestic and international law were closely linked. The provisions of domestic law had to be taken into account. Ratification, in order to be effective, pre-supposed the fulfilment of all national requirements.

109. Mr. SPIROPOULOS thought that Mr. Córdova and Mr. Brierly were referring to somewhat different things. In the proposed text, the ratification referred to was the final instrument of ratification, whereas Mr. Córdova had in mind the course of domestic procedure prior to the establishment of the instrument.

110. In Greece and in a number of other countries,

when a treaty was signed, it was generally submitted to Parliament, which confirmed it and made it law. Whereupon, the executive organ, the King, in the case in point, signed the instrument of ratification, attesting thereby that all conditions had been fulfilled. Finally, the instrument was deposited or exchanged against those of the other signatory States.

111. Mr. CORDOVA pointed out that the text under consideration defined ratification as a written and duly executed instrument of a State. The definition, however, should stipulate that it was essential for the constitutional procedure to have been observed in its entirety.

112. Mr. SCELLE wondered whether it was quite correct to describe ratification as an act of a State. It was for the executive power to affirm that all the requirements of the constitution had been fulfilled. Ratification was not an act of any State organ, it was the act of a clearly defined organ, namely, the executive power.

113. In the French Constitution, ratification could take place, in certain specified cases, without consultation of Parliament. The Swiss Constitution was even more definite on the point: no treaty concluded for less than 15 years was subject to referendum. The conditions of validity of a treaty were thus not always the same. Ratification accordingly could not be defined as in the proposed text. It was the organ competent to ratify, i.e., the executive power, which affirmed that all legal conditions had been fulfilled.

114. Mr. BRIERLY proposed amending^{xx} paragraph 1 of article 4 as follows: “Ratification is an act by which the competent organ of a State confirms and accepts a treaty as binding.”

115. Mr. SCELLE thought that by ratification the competent organ did not “confirm” but simply said that a treaty was binding.

116. Mr. BRIERLY remarked that the word “confirm” was current usage in that connexion.

117. Mr. ALFARO supported Mr. Brierly's new formula. It could not be forgotten that ratification was the act of the legislative power and that the act of the executive was the exchange or deposit of the ratification. In the new formula the Committee referred to both operations at once.

118. Mr. FRANÇOIS could not allow that ratification was the act of the legislature; the legislative power gave its consent but it was the executive that ratified. Such was the practice observed in nearly all countries.

119. Mr. AMADO supported Mr. François. Article 31 of the Constitution of the French Republic laid down that the President “signed and ratified” treaties. What Parliament — in Brazil the National Congress — did was to “approve” treaties. According to the country, ratification took the form of publication or of promulgation. Mr. Scelle had explained, in a study, that in his opinion promulgation was superfluous.

120. Mr. François had wondered whether a mere signed written document could be regarded as an act of ratification; in point of fact the definition given in the text more nearly applied to acceptance. Mr. Liang had

written an excellent article on the subject.² He wondered whether the traditional idea of ratification should be given, or whether it ought to be extended to include acceptance.

121. He would accept the text in question with the amendment proposed by Mr. Scelle.

122. Mr. CORDOVA considered that the new formula submitted by Mr. Brierly did not make any material addition to the former text. Mr. Scelle had shown very clearly that ratification implied that the constitutional procedure had been observed.

123. Mr. BRIERLY said that that was what he had intended to convey by using the words "competent organ".

124. Mr. AMADO remarked, for the benefit of Mr. Córdova, that the question of what authority should pronounce on the validity of undertakings made by a State *ultra vires* had given rise to endless theoretic discussions and was insoluble, as Mr. Basdevant had clearly recognised. Neither the Secretary-General nor another State had authority to declare a State's ratification invalid. A particularly clear precedent was provided by a dispute between Peru and Colombia. When a State was undergoing internal disturbances it was impossible to determine whether or not the power in control was really the legal power.

125. Mr. SANDSTRÖM proposed that in the text under discussion the words "declares that the treaty is confirmed and accepted by that State..." should be substituted for the words "confirms and accepts a treaty".

126. Mr. SPIROPOULOS said that a ratification contained no declaration.

127. Mr. YEPES submitted to the Commission a definition of ratification which appeared to him satisfactory: "Ratification is an act by which the competent organ of a State declares in an instrument duly executed that a treaty has been approved and accepted as binding."

128. Mr. SPIROPOULOS thought that any definition was dangerous. He had been much impressed by Mr. François' remark that the proposed definition would also apply to any acceptance, even where there was no formal ratification.

129. Since however some text or other had to be accepted, he proposed that the Commission should provisionally accept the last formula submitted by Mr. Brierly. The Commission would have an opportunity of examining it again. By continuing the discussion it might make confusion worse confounded. It was understood that the text was not satisfactory and would have to be improved.

130. Mr. BRIERLY confirmed that it would be a matter of a tentative acceptance.

It was so decided

The meeting rose at 6.5 p.m.

86th MEETING

Tuesday, 22 May 1951, at 10 a.m.

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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.

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

ARTICLE 4

Paragraph (2)

1-3. Mr. BRIERLY thought it would be advisable for the Commission to postpone its decision on the paragraph until it had taken cognizance of the opinion of the International Court of Justice.

Paragraph (3)

4. Mr. BRIERLY considered that paragraph 3 was no longer necessary in view of the changes in paragraph 1, which now embodied the provisions of paragraph 3.

5. Mr. CORDOVA asked Mr. Brierly whether he really felt that, by using the words "by which the competent authority of a State", the Commission had embodied paragraph 3 in paragraph 1, thus making paragraph 3 superfluous.

6. Mr. BRIERLY pointed out that after a lengthy discussion the Commission had decided to amend paragraph 1; hence paragraph 3 was no longer necessary.

7. Mr. SPIROPOULOS agreed with Mr. Brierly. Paragraph 1 as amended¹ included the provisions of paragraph 3.

ARTICLE 5

8. Mr. BRIERLY explained that in article 5 he had

¹ See the summary records of the 85th meeting, paras. 114 and 129-130.

² "The use of the term 'acceptance' in the United Nations treaty practice", in "Legal Notes", *American Journal of International Law*, vol. 44 (1950), pp. 342-349.