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Summary record of the 86th meeting

Topic:
Law of Treaties

Extract from the Yearbook of the International Law Commission:-
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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.

[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.

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 amended[1] 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.

taken an opposite view to the one he had taken the previous year. In his preliminary draft, the article established the presumption that ratification was not necessary. In the present article 5, the presumption was that ratification was necessary, unless provision were made to the contrary in the treaty. The article adopted the provisions of article 7 of the Harvard draft.

9. Mr. AMADO recalled that a similar change of attitude had taken place in the General Assembly during the discussion on the Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others. On that occasion, Mrs. Bastid had expounded the classical theory of ratification. Mr. Fitzmaurice had first of all argued that ratification was not necessary; but later he had agreed with Mrs. Bastid. Thus clearly, the United Kingdom did not hold to that view when co-operation in solving a theoretical problem was desired.

10. Mr. SCELLE supported that viewpoint. He was still opposed, as he had been hitherto, to the new method of concluding treaties without ratification. A treaty was an important matter, and when a State had signed a treaty, it must be allowed time for reflection. It had both the right and the duty to reflect. He was in favour of Mrs. Bastid's view. The opposite attitude was a distinctly retrograde step.

11. Mr. CORDOVA thought the draft should be based on some theoretical principle.

12. As he saw it, the draft laid down the general rule that a treaty became binding through the mere fact of signature, and that it was only in the instances set out in article 5 that ratification was necessary. The Commission should take the opposite course and, after laying down the general rule that ratification was necessary, enumerate the exceptions to that general rule. Otherwise, if a treaty did not come under the provisions of any of the paragraphs of article 5, the general rule on which the draft was based and under which signature was sufficient would be applied.

13. Mr. SPIROPOULOS was glad to find that Mr. Córdova shared the opinion he himself had expressed earlier. The principle must be that a treaty " becomes binding by ratification ". If the Commission accepted that principle it should say so quite clearly, and then set forth the exceptions.

14. Mr. KERNO (Assistant Secretary-General) said he would like to explain what had happened in the Sixth Committee when the draft Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others was being discussed at the fourth session of the General Assembly. There had been no suggestion of a choice between signature followed by ratification or signature pure and simple constituting a final obligation. What the Third Committee had proposed was a new method of acceptance by which acceptance amounted to ratification under another name. Under that new system, a State could, if it so desired, fulfil beforehand the constitutional conditions required to enable it to bind itself definitively. After that, its representatives would approach the depositary of the Convention and declare that their signature was not subject to reservation as to acceptance. Obviously under that new system, a State was completely free to proceed otherwise. It could also sign subject to acceptance, submit the treaty to its Parliament, and then deposit its instrument of acceptance. That would amount to the same thing as the old procedure of signature followed by ratification. There was a choice between the two alternatives.

15. As he had already pointed out, the rule could be ratification. It could therefore be stated that ratification was necessary failing any provision to the contrary in the treaty.

16. Mr. SCELLE was worried by the fact that signature appeared to bind a State even when the competent organ had not followed the prescribed procedure. The procedure Mr. Kerno had described was correct. It did not greatly matter whether the constitutional procedure came before or after signature, so long as it did take place. In certain instances it was, of course, admissible that treaties of unusual importance should be able to modify a State's constitution; but that was not the case with any and every treaty. The rule of international law was that a treaty was only valid if the constitutional provisions were observed. That customary stipulation must not be in any way challenged. An organ could not act *ultra vires*. The Commission must maintain that rule.

17. He could well understand that Mr. Fitzmaurice had been in favour of immediate signature. The British Constitution authorized that. The French Constitution did not.

18. Mr. AMADO asked permission to read out an extract from an article written by Mr. Liang:

> " The question of the use of the term ' acceptance ' as contained in the standard formula was again raised during the discussion on the Draft Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others in the Sixth Committee of the General Assembly during its Fourth Session (1949). The relevant article which, amongst others of the draft convention, had been referred to the Sixth Committee by the Third Committee which had drafted them, was framed in the terms of the standard formula. The representative of France (Madame Paul Bastid) introduced an amendment which provided for signature and ratification rather than acceptance as contained in the standard formula. She preferred the use of the terms ' signature, ratification and accession ' because this would be in conformity with the practice of the United Nations in the two most recent conventions approved by the General Assembly — the Convention on the Prevention and Punishment of the Crime of Genocide, approved on December 9, 1948, and the Draft Convention on the International Transmission of News and the Right of Correction, approved on May 13, 1949 — as well as with the classical terminology.
>
> " Madame Bastid added that since the term ' acceptance ' as contained in the standard formula had not been used in the most recent conventions approved

by the General Assembly, it did not appear logical to revert to a system already abandoned. An additional reason for the amendment was that the constitutional processes by which ratification was effected were usually performed by the parliament of a State, and as the draft convention in question might make it necessary for a number of States to enact new legislation, it was highly desirable that the parliaments which would have to pass that legislation should first approve the convention.

"The representative of the United Kingdom (Mr. G. G. Fitzmaurice), supporting the French amendment, said that in his opinion most States would find the method of signature followed by ratification the most suitable, although he acknowledged that it was true that the use of the term 'acceptance' was more flexible." [2]

19. That was what had happened. There were other contributions to the study of the way the problem had developed. He remembered a lecture given by Mr. Saba in 1948 on acceptance in multilateral treaty practice. Mr. Liang's article went into the question very thoroughly. A paper by a young French jurist, Mr. Leriche, who worked in the United Nations, might also be mentioned. It was an excellently written study explaining all the advantages of the system.

20. The Commission's task, as Mr. Scelle and Mr. Spiropoulos had stated, was to establish the general rule that signature must be followed by ratification, and then to state that exceptions such as acceptance were permissible.

21. Mr. SANDSTRÖM said he had interpreted article 5 of the draft as establishing the presumption that the necessity for ratification was the rule. Paragraph (*d*) had given him that impression. The text listed the cases where ratification was necessary, and they were three in number. But obviously, if the principle were first of all laid down, as Mr. Spiropoulos had suggested, and the exceptions mentioned subsequently, the text would be clearer. It was a question of form and not of substance.

22. Mr. ALFARO thought that on the whole the members of the Commission were in agreement on that point. The Commission should state that ratification was the rule and not that it was the exception. He proposed that article 5 be worded as follows:

"A State is not deemed to have undertaken a final obligation under a treaty until it ratifies that treaty, unless:

"(*a*) The treaty provides that it will not require ratification;

"(*b*) The treaty provides that it shall be ratified and that it shall come into force before such ratification; and

"(*c*) The full powers of the State's representatives who negotiated or signed the treaty stipulated that ratification was not necessary."

23. Mr. SCELLE saw the point of Mr. Alfaro's proposal. He personally did not think it admissible that a treaty should state that ratification was waived where it was required on constitutional grounds. The system of acceptance was admissible if it were put thus: that acceptance was feasible provided the State concerned had complied with the necessary constitutional conditions. Otherwise, it would be legal heresy. The system of acceptance was possible, but it must be delimited, otherwise it was no longer constitutional, i.e., plenipotentiaries would no longer be competent to accept a treaty. The very basis of treaty-making power was at stake. The United States Senate could never accept such a text.

24. Mr. SPIROPOULOS said that in establishing rules governing the question the Commission must be guided by current international practice and it could be said that ratification was the general principle. But there were treaties which provided that certain of their provisions became binding by the fact of signature alone. For instance, the Treaty of Rapallo stipulated that certain articles were applicable from the moment the treaty was signed. Similarly, the Balkan Treaty concluded in 1936 provided for application from the time of signature. That was the international practice. The Commission must not apply a general theory and disregard the facts.

25. The procedure for implementation by mere signature was not at variance with the general rule that ratification was necessary. Constitutions did not insist on ratification for all treaties. For example in Greece, a purely political treaty did not require the approval of Parliament. Where Parliamentary approval was unnecessary, the supreme executive organ of the State that signed through its representatives could stipulate that a treaty became binding once it was signed. Ratification thus took place at the same time as signature, and the principle of ratification remained intact. But when the constitution provided that the approval of Parliament was necessary, the signature of a representative who accepted a treaty and declared it binding without ratification was obviously invalid, since it conflicted with the constitution. Exceptions to the general principle should remain within constitutional limits.

26. Mr. AMADO shared the view of Mr. Spiropoulos.

27. Article 31 of the French Constitution stipulated that "The President of the Republic . . . shall sign and ratify treaties", while article 27 listed the categories of treaties for the ratification of which Parliamentary approval was required:

"*Article 27.* Treaties relating to international organization, peace treaties, commercial treaties, treaties that commit the national revenues, treaties relating to the personal status and property rights of French citizens abroad, treaties that modify French domestic legislation, as well as treaties that involve the cession, exchange or addition of territory, shall not become final until they have been ratified by an act of the legislature.

"No cession, no exchange, and no addition of territory shall be valid without the consent of the peoples concerned."

[2] *American Journal of International Law*, Vol. 44 (1950), p. 347.

28. Consequently, if the Government gave full powers for the final signature of a treaty relating to one of those questions, such a signature would be null and void.

29. The Commission should establish the general principle of ratification and leave it to the development of law to lend weight to the theory of acceptance.

30. Mr. SCELLE thought it should be laid down as a general principle that mere acceptance was valid only when it was in accordance with the constitution. A treaty could not relieve the authorities of a State of the duty of abiding by their constitution. In many cases a question of interpretation was involved. A typical case of difficulty of interpretation arose in the articles of the French Constitution just read out by Mr. Amado. The constitution stipulated that no territorial change could be effected unless previously sanctioned by law. The question whether such a rule applied equally to colonial territories had been the subject of some discussion in France and the majority of authors considered that the President of the Republic could ratify a treaty involving a change in a colonial territory without reference to Parliament.

31. The only point he wished to emphasize was that the rules varied from one country to another. It was, for instance, difficult to know where to fix the dividing line, from the point of view of the United States Senate, between a treaty and an agreement. It was therefore necessary for the Commission to allow a certain latitude and to confine itself to saying that it was not enough for a treaty to dispense with the need for ratification, since the possibility of doing so depended on the Constitution.

32. At the present time there was a veritable spate of simplified treaties. Authorities were taking upon themselves the right to conclude treaties and a postmaster-general, for example, had signed an agreement with a neighbouring country. Such a system was anarchical and anti-democratic. Someone might commit the State without having consulted the nation. It was a matter on which he felt rather strongly. It was quite inadmissible for the State to be committed by the mere will of plenipotentiaries and for such plenipotentiaries to declare that to expedite procedure they would sign the instrument there and then.

33. The Commission should be very firm on that point. That need not, however, prevent it from mentioning the possibility of an acceptance being valid on condition that it was in accordance with the constitution of the signatory State. Such a provision would not hamper the Secretary-General of the United Nations in the performance of his task.

34. Mr. YEPES thought that the Commission had confused ratification from an international angle with ratification from a constitutional standpoint. What was of interest at the moment was ratification from the international angle. The Commission should therefore say that a draft treaty became binding only after it had been ratified by the competent organ. The validity of the ratification, from a domestic standpiont, was dependent on the constitution of the State concerned. Certain treaties should be ratified only by law; others by the Head of the State. Such a question did not come within the Commission's competence and it should leave each State free to organize its ratification procedure as it pleased. The Commission should simply enunciate the general principle.

35. Mr. SPIROPOULOS thought that the members of the Commission were agreed on the general principle that ratification was necessary for treaties to become binding. That did not, however, entirely solve the problem. Did the statement that a treaty became binding after ratification mean that the treaty was binding only if ratification had been effected in accordance with the constitution? That was the crux of the problem. There were two theories on that point; that of Anzilotti, who did not postulate that condition, and a second, according to which ratification conferred binding force on treaties only if it was effected in accordance with the constitution.

36. If the Commission went no further than the view expressed by Mr. Yepes, the latter question would be left unanswered. Yet it was the most important of all.

37. Mr. CORDOVA said he had suggested, since the Commission had discussed the problem at length, that it should decide that ratification should constitute the principle. With regard to the meaning of the word " ratification ", he would support the argument put forward by Mr. Spiropoulos. He proposed that a provisional vote be taken on the sense of the word " ratification ". Did it mean the observance of the correct constitutional procedure in the States parties to the treaty, or merely the instrument by which the competent authority of those States recognized that the treaty was binding? Mr. Brierly could then re-draft article 5 in the light of that vote.

38. Mr. BRIERLY noted that Mr. Spiropoulos had resolved the difficulties pointed out by Mr. Scelle on the question of ratification. If the authorities of a State ratified a treaty in a manner contrary to the constitution of that State, the ratification was invalid. The authority had exceeded its powers and had not committed the country. He was quite content with Mr. Alfaro's text, which seemed to provide for everything and moreover to enjoy the approval of the Commission.

39. Mr. YEPES noted that the text proposed by Mr. Alfaro was in line with the ideas he himself had put forward, though he preferred the following text:

> " Treaties become binding only by virtue of their ratification by the competent organ of the State. The ratification procedure from the point of view of the constitution of each State depends on the latter's domestic legislation. Any ratification contrary to such legislation is invalid."

40. Mr. SANDSTRÖM thought the text proposed by Mr. Alfaro quite acceptable, though it did not meet the very pertinent objection of Mr. Scelle. An exception to the general rule might be expressed as follows:

> " Ratification is not necessary when not required by the constitutional law of a country and when no provision for ratification has been made in the powers

conferred on the representative of the State or in the text of the treaty."

41. Mr. ALFARO explained that it was not his intention to submit a final text but simply to formulate a system contrary to that of the original article and to establish a general rule, to which exceptions could then be made. It was, of course, understood that the ratification of a treaty should be effected in accordance with the provisions of the constitutions of States. He was willing, if it were thought necessary to expand the text, to accept some such clause as the following: " A State is not deemed to have undertaken a final obligation under a treaty until it has ratified that treaty in accordance with the procedure set forth in its constitution, unless: . . ." The text might be worded differently provided the substance remained the same. The Commission would thus have a basis for discussion.

42. Mr. SPIROPOULOS felt that the members of the Commission were more or less agreed on the substance of the question. The proposal submitted by Mr. Yepes was very much to the point. The members of the Commission considered ratification to be necessary and that it was valid if in accordance with the constitution.

43. The next question therefore was to define the exceptions. The act of signature could be sufficient when the competent organ enjoyed the right to ratify without any constitutional restriction, since in that case the organ could authorize its representatives to bind themselves by their signature.

44. Mr. KERNO (Assistant Secretary-General) remarked that the Commission was called upon to codify international law and not the constitutional law of the various States. Far be it from him to think that international law could ignore the various constitutions. It was however necessary to look at the matter from the standpoint of international law. What had to be settled was the procedure a State must follow in order to become a contracting party. The normal procedure was ratification but there were, of course, two other procedures, accession and signature. Naturally, in all three cases the act performed must be valid from the point of view of the constitution of the State concerned. Each ratification must therefore be in accordance with the constitution, since otherwise it would be invalid. The same was true of accession and the act of signature.

45. He hoped that the Commission would not introduce a system which would rule out the mere act of signature, when not contrary to the constitution of the State concerned, as a method of concluding a treaty. That would be a step backwards.

46. Mr. CORDOVA thought that the exceptions formulated in the text proposed by Mr. Alfaro appeared still to permit a treaty to dispense with the need to abide by constitutional provisions. It would be preferable to enunciate the following general principle: " Ratification must be effected in accordance with the requirements of the constitution ", and then to provide for exceptions to that rule.

47. Mr. YEPES asked Mr. Córdova whether he was in favour of leaving the procedure for acceptance to the domestic legislation of each State.

48. Mr. CORDOVA replied that the text should clearly show that ratification must be in accordance with all the constitutional rules established by domestic legislation.

49. In that connection a drafting difficulty arose and he would be pleased if Mr. Brierly and Mr. Scelle would get together to establish a text.

50. Mr. SCELLE said that Mr. Alfaro's text came as rather a shock, since it declared ratification to be necessary unless the treaty dispensed with the need for it. It was not, however, the treaty which dispensed with the need for ratification. There were a number of cases in which ratification was unnecessary under the constitution. It was also possible to talk of acceptance. It was, on the contrary, inadmissible for a treaty to dispense with a constitutional obligation and it was not possible to say: " unless: (*a*) the treaty provides otherwise, etc.". A treaty, he would repeat, could not change the constitution.

51. That was the point on which there was a lack of agreement. All the new methods of concluding treaties which did not involve ratification were acceptable, provided they conformed with the constitution.

52. It was not because the treaty so provided that ratification became unnecessary.

53. Mr. FRANÇOIS pointed out that some of his colleagues had stated that all the members of the Commission were agreed that ratification did not confer binding force on a treaty if it conflicted with constitutional rules. He could not accept that view, since it was contrary to the theory of Anzilotti, with which he himself was in agreement as was also, indeed, Basdevant.

54. A distinction must be made between the formal and the substantive exercise of powers. If the Head of the State ratified the treaty and if, under the constitution, he was making formal use of his powers, the treaty was binding on the State under international law. The question might perhaps arise whether the Head of the State had exceeded his powers but that was a domestic matter that concerned the substantive exercise of powers. It was necessary to accept that theory. As soon as the treaty was ratified, in the classical sense of the term, by a State, there must be the certainty that it would be binding on that State.

55. Mr. SCELLE was sorry he did not agree with Mr. François. The theory of formal exercise of powers must be rejected. The essence of power was the exercise thereof. Were that not so, the whole theory of powers being exceeded was destroyed.

56. Mr. FRANÇOIS replied that that was a question of domestic law.

57. Mr. SCELLE considered it a question of general method. In France, since the work of Duguit, the criterion of formal exercise of powers had been abandoned. Basdevant, after some hesitation, had rejected the theory, as had also Madame Bastid.

58. Mr. SPIROPOULOS was surprised that Mr. François should raise the question at that stage of the discussion. Mr. François could surely have stated earlier

on that he rejected the theory, which it had been assumed that all the members of the Commission accepted.

59. He suggested that the Commission should decide what theory it wished to adopt.

60. Mr. YEPES and Mr. ALFARO supported the proposal.

61. Mr. SPIROPOULOS proposed the wording: " A treaty becomes valid on ratification provided such ratification is in accordance with the constitutional law of the State."

Mr. Spiropoulos' proposal was adopted by 8 votes to 1.

62. Mr. SPIROPOULOS thought that, having laid down the principle, the Commission should set out the exceptions. He suggested provisionally the wording: " A treaty may become binding either by signature or accession provided that be possible according to constitutional law."

63. Mr. SCELLE and Mr. AMADO found the text acceptable.

64. Mr. ALFARO pointed out, in connexion with Mr. Scelle's observation, that the text was entirely in keeping with the theory that no treaty may change the constitution of a State, and that if a treaty provided that it need not be submitted for ratification, it presupposed that the constitution made that possible. It was merely a question of form. He had signed several treaties with the United States in which ratification was dispensed with, since the constitutions of the United States and Panama allowed plenipotentiaries to proceed thus.

65. The text proposed by Mr. Spiropoulos was acceptable in form. The underlying idea was that all the treaties with which the Commission was dealing were concluded in conformity with the constitutions of the countries concerned.

66. Mr. SCELLE remarked that Mr. Spiropoulos and Mr. Alfaro were thinking on the lines of Talleyrand's famous dictum: " What goes without saying goes still better when said. " He found Mr. Spiropoulos' proposal acceptable.

67. Mr. SPIROPOULOS reiterated that the Commission had only decided on the principle provisionally, and was leaving it to the Rapporteur to draft the article.

68. Mr. SANDSTRÖM asked whether, according to the text proposed by Mr. Spiropoulos, signature alone could give the treaty binding force.

69. Mr. SPIROPOULOS replied that, in the case of certain treaties, the provisions laid down in the constitution must be followed, whereas in other cases not subject to parliamentary sanction, the State could grant its plenipotentiary the power to commit it on the strength of his signature alone, provided of course — and that would answer Mr. Córdova's enquiry — that such delegation of powers was permissible under the constitution.

70. Replying to a question by Mr. Amado, Mr. BRIERLY explained that the whole of article 5 would have to be revised in the light of the principle just adopted by the Commission.

71. Mr. SCELLE asked Mr. Kerno whether he thought it advisable for the Commission to add, in the enumeration of the various ways in which a State could be committed, the word " acceptance ". He would like that new type of international undertaking to be included in the enumeration.

72. " Acceptance " was the process by which, assuming that the constitutional formalities were complied with, an obligation was incurred on the strength of mere notice of acceptance.

73. Mr. KERNO (Assistant Secretary-General) thought that the addition would make the various procedures for binding States more flexible. Obviously, any such procedure must be in accordance with the constitution. That was a truism.

74. Mr. BRIERLY thought that the recasting of article 5 would raise a drafting complication. Some expression like the following was called for: " The act must be in accordance with constitutional requirements. " But where should it be inserted? He personally felt that a formula of that kind should constitute a separate article, so as to avoid a series of repetitions.

75. Mr. SCELLE said that it should be left to the Rapporteur to choose the formula he considered most suitable. The solution just agreed upon by the Commission was flexible, since it enabled account to be taken of the fact that any constitution was capable of modification by custom, not merely when it was based on custom as in the United Kingdom, but even — though that point was more controversial — when the constitution was codified.

ARTICLE 6

76. Mr. FRANÇOIS thought the question of reservations accompanying ratifications also applied to article 6 and was very important. Hence article 6 should be left in abeyance until the International Court of Justice had given its advisory opinion.

77. Replying to a question by Mr. AMADO, Mr. KERNO (Assistant Secretary-General) agreed that Mr. François was right in stating that the problems raised by the existence of reservations might complicate the question of ratification. But it did not seem necessary to raise those difficulties in connexion with article 6. They could be examined later, if necessary.

78. Mr. FRANÇOIS agreed to that course.

79. Mr. YEPES asked for the three paragraphs of article 6 to be discussed and voted on separately.

It was so decided.

Paragraph (1)

80. Mr. BRIERLY pointed out that the retention of the words " Article 5 " would depend on what articles were finally adopted.

81. Mr. YEPES found the proposed text too categorical. A treaty might expressly stipulate that its entry into force would take place at a given time after signature. By adopting such a text, the Commission would make it impossible for drafters of treaties to establish a specific date of application.

82. Mr. SCELLE and Mr. KERNO pointed out to Mr. Yepes, who agreed, that the introductory phrase " Unless otherwise provided in the treaty itself " allowed full latitude in the drafting of treaties.

83. Mr. AMADO was prepared to approve paragraph (1) as it stood.

84. Mr. SPIROPOULOS said that the text under consideration presupposed a treaty which did not have to be ratified, and stipulated that in such a case the treaty entered into force " on signature ". But there was one point missing. It was not stated whether " signature " meant signature by all the parties. Paragraph (3) of the same article, referring to treaties subject to ratification, specified that " all the signatories " were meant.

85. Mr. KERNO (Assistant Secretary-General) said he too had been struck by that difference. Paragraph (1) must be understood to mean that as soon as two contracting parties had signed, the treaty entered into force between them. That distinction was justifiable on the grounds that in paragraph (3) a series of signatures was involved.

86. He mentioned the example of a treaty of the type provided for in paragraph (1), for the demilitarization of a territory. When two States signed a treaty of that kind, could it be said that it became binding on those two States alone? It was a knotty problem.

87. Mr. YEPES thought that paragraph (1) needed to be rounded off. If, for example, two States alone signed a regional treaty which affected a number of countries linked together by some community of interest, the treaty did not come into force between those two States, since the intention was that it should enter into force between all the signatories. Hence the words " by all the contracting States " should be added to paragraph (1).

88. Mr. SPIROPOULOS remarked that at the previous meeting some of the members of the Commission, Mr. Scelle in particular, had considered that ratification by all the signatories was not necessary, as otherwise a multilateral treaty would never enter into force. Now Mr. Yepes was proposing an amendment which would make the text much less flexible. The main point was whether it was to the interest of the parties that entry into force should apply in relation to two States only, as soon as two signatures had been obtained, or in relation to them all, on the strength of all their signatures. The will of the parties had to be ascertained.

89. Mr. YEPES said that the introductory phrase in article 6 would always allow for the insertion in the treaty of provisions differing from the prescribed rule.

90. Mr. SPIROPOULOS asked what would happen if the treaty laid down no such rule.

91. Mr. YEPES pointed out that certain collective or multilateral treaties could not enter into force in relation to one of the contracting parties alone, as for instance in the case of a treaty establishing a customs union. Suppose for example a treaty were concluded for a customs union between Turkey and the Balkan States, what would happen if the treaty were signed by Greece and Yugoslavia alone?

92. Mr. SPIROPOULOS said that the criterion to be applied in such cases was the spirit of the treaty and the will of the contracting parties. That will must be consulted in order to discover whether the entry into force of the treaty did or did not require the signature of all the parties. He had reflected for a long time before reaching that conclusion, which he thought was the only possible one.

93. To discover the intention of the parties was a tricky problem. Taking an example akin to the one just mentioned, an extradition treaty concluded by the same States might very well be applied in relations between two of those States only, if they were the only ones that signed it. Hence " contractual intention " varied with the type of treaty.

94. Mr. YEPES was of the same opinion.

95. Mr. AMADO pointed out that the text under consideration reproduced one of the provisions (article 10) of the Harvard draft.

96. What Mr. Spiropoulos had said was true. Fauchille had given examples [3] illustrating that principle: the treaty signed on 3 July 1880 in Madrid by a large number of European Powers for the unification of the exercise of the right of protection in Morocco provided that, subject to the special consent of the parties, its provisions should enter into force as from the date of signature. The Treaty of Rapallo, dated 16 April 1922, between Germany and the Soviet Union stipulated that article 1 (*b*) and article 4 should come into force on the day of ratification, while the rest of the articles would come into force immediately. Thus it was the intention of the parties that determined the date of entry into force.

97. Mr. KERNO (Assistant Secretary-General) observed that the discussion was somewhat similar to the discussions in the International Court on the question of reservations.

98. However useful a general provision as to entry into force might be, its importance must not be exaggerated, since the parties were obviously free to stipulate whatever they wished. A clause of that kind only covered cases where the convention made no reference to the point. It would be advisable for negotiators to realize the effect that signatures would have on application in the absence of a statement by them. Hence it was important that there should be a rule — stipulating either unanimity of signatures, or the depositing of two signatures only. Negotiators would then know whether departures from that rule should be provided for.

99. Mr. SANDSTRÖM pointed out that if the rules governing contracts under private law were applied by analogy, the theory propounded by Mr. Spiropoulos was the only admissible one. In each individual instance, the intention must be ascertained. Intention varied according to circumstances and according to the will of the parties. It would always be a difficult matter to discover what the intention was.

100. Replying to a question by Mr. BRIERLY, Mr.

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[3] *Traité de droit international public*, vol. I, Part 3, Paris, 1926, pp. 321–322.

YEPES referred to his amendment to add, at the end of paragraph (1), the words " by all the contracting States ".

101. Mr. KERNO (Assistant Secretary-General) pointed out that the text proposed by Mr. Yepes did not specify which parties were referred to. Was it the countries that had negotiated, or those entitled to sign the treaty? To be accurate, the wording would have to be " by all States which have participated in the negotiations " or " by all qualified to sign ".

102. Mr. YEPES said that what he had meant was " all States which have participated in the negotiations ".

103. Mr. SPIROPOULOS remarked that the existence of a rule would compel the parties to state their intentions, and where necessary to provide for departures from that rule in the treaty.

104. Mr. YEPES said that that was precisely the purpose of his amendment.

105. Mr. SPIROPOULOS and Mr. BRIERLY saw no objection to the amendment proposed by Mr. Yepes.

106. Mr. YEPES formally moved that his amendment be modified to read as follows: " by all the States which have participated in the negotiations ". That modification took account of Mr. Kerno's remarks.

The text of article 6, paragraph (1), as supplemented by Mr. Yepes' amendment modified as above, was adopted.

107. Mr. SCELLE said that if the rule were drafted thus, treaties would seldom be brought into force. It would be a long time before the signatures of sixty States parties to a multilateral convention were forthcoming. He regarded the rule as neither more nor less than a comminatory clause.

108. Mr. YEPES said that it was for the negotiators to insert in a convention provisions constituting exceptions to the rule.

109. Mr. KERNO (Assistant Secretary-General) pointed out that the will of the parties must obviously be ascertained, but there must be a rule to cover cases where the parties had not expressed their intention.

Paragraph (2)

Article 6, paragraph (2) was adopted without comment.

Paragraph (3)

Article 6, paragraph (3) was adopted without comment.

ARTICLES 7 AND 8

110. Referring to article 7, Mr. BRIERLY said he had included it in his report not because he held any brief for it, but with a view to stimulating discussion.

111. Mr. AMADO thought article 7 was superfluous, though no doubt Mr. Yepes, as the champion of international good faith, would wish it to remain. He proposed that article 7 be deleted.

112. Mr. BRIERLY supported that proposal.

113. Referring to article 8, Mr. CORDOVA thought that States should be left free to ratify or not as they wished. A State which had signed a treaty subject to ratification must not be forced into ratifying it, as the article appeared to suggest.

114. Mr. AMADO pointed out that the Pan-American Convention signed at Havana provided that a State not ratifying should give its reasons for not doing so, and that if a State delayed ratification, another State could enquire the reason for the delay.

115. Mr. SCELLE did not think that articles 7 and 8, which were obviously closely linked, were pointless. Under the theory of the abuse of rights, if a State refused to ratify with an intention to cause harm, say for instance in order to prevent a joint arrangement from materializing, it would be making use of article 8 for a purpose quite different from the one envisaged. A State surely was not entitled to decline to ratify in order to cause damage to another State. He could quote a precedent for that. A treaty to which Japan was a party provided that entry into force should take place as soon as all the signatories had ratified. Although Japan had not ratified, the rest of the parties brought the treaty into force among themselves on the grounds that they regarded the refusal to ratify as an abuse of rights on the part of Japan.

116. In private law, abuse of rights as interpreted nowadays had a very wide connotation. Abuse of rights occurred not only where there was an intent to cause harm, but also in the case of merely frivolous acts. In international law it might perhaps be going too far to admit such an extension.

117. It would be well to specify that signature — even when subject to ratification — entailed certain obligations. It was only permissible to refrain from ratifying if there were legitimate grounds. But the intent to cause harm would have to be proved. It would be wrong to go so far as to force a signatory State to ratify. Ratification had been instituted, as had been pointed out at the previous meeting, to give States a chance to reflect, but not to enable them to do harm. Ratification existed for the benefit of States, but not to enable them to commit fraud or to hamper international development. Refusal to ratify on unjustifiable grounds might thus in certain instances involve States in liability.

118. That concept was not by any means his own. Politis had expounded it at great length in a course of lectures on restrictions on sovereignty delivered at the International Law Academy at The Hague in 1925.[4] Why should the concept of abuse of rights not be incorporated in international law? The Commission might establish the principle.

119. The order of articles 7 and 8 should be reversed. It was article 8 that laid down the general principle.

120. Mr. SPIROPOULOS said he had followed Mr. Scelle's reasoning with great interest. He personally was in favour of extending the concept of abuse of rights to international law. He had written a monograph on abuse of rights in connexion with the exercise of the veto in the Security Council. He thought that when a big Power voted in the Security Council against the setting up of a committee to ascertain whether in a

[4] " Le problème des limitations de la souveraineté et la théorie de l'abus des droits dans les rapports internationaux ", *Recueil des Cours, de l'Académie de droit international*, vol. 6, 1925, pp. 5 *et seq.*

particular instance the Charter had been violated, it was committing an abuse of rights if its vote was intended to prevent the enquiry from taking place.

121. However, the Commission must not be content with that theoretical outlook. The abuse of rights certainly applied to every field of law, but it was not necessary to repeat it in every sentence. It was obvious once the concept was accepted. Hence there was no reason why article 8 should not be approved as it stood. He would not like to see the Commission establish the principle that a State's liability arose with non-ratification.

122. In his view, it would be better to eliminate article 7, which was not necessary.

123. Mr. YEPES found article 8 unacceptable as it stood. The present wording of the text offered an inducement to States not to honour their signatures. It was a very dangerous trend. The signatures of States must not be de-valued. The casual way in which international conventions were signed nowadays was alarming.

124. Article 8, borrowed from article 8 of the Harvard draft, was justified at the time (1935) on the grounds that the principle of good faith was then a purely moral one. Today, with the Charter of the United Nations, good faith had become a matter of positive law. He was accordingly unable to accept article 8, the terms of which should at least be modified.

125. Mr. SANDSTRÖM entirely agreed with the view of Mr. Spiropoulos. It would be very dangerous to extend the theory of abuse of rights to the sphere of treaties. States must remain free to ratify or not to ratify a treaty signed on their behalf.

126. Mr. CORDOVA pointed out that article 7 provided that the signatories to a treaty subject to ratification should refrain from taking action likely to prevent its ratification. That was a reasonable solution. The obligation involved was both moral and legal. The principle was sound, though it was possible for it to be somewhat differently expressed.

127. With regard to article 8, the Commission could not declare that the act of signature carried with it the obligation to ratify. If it did so, it would deprive a nation of the power to reject an undertaking signed by officers of its Government. It would, in fact, compel a nation to ratify conventions against its will. It should, however, be borne in mind that the only obligation which arose for a State out of the signature of a treaty was that of setting in motion the constitutional procedure of ratification. The ratification itself was not compulsory. What was compulsory was the setting in motion of the ratification procedure.

128. The hypothetical case might be taken of a multilateral treaty which provided that it should enter into force when fifteen ratifications had been deposited. If, when eight or ten signatories had ratified it, there happened to be one or two who did not set in motion the constitutional procedure of ratification, those States would be failing to fulfil an elementary obligation, the only one arising out of the fact of their signature, by leaving indefinitely those States which had ratified the treaty in a state of uncertainty as to the treaty's entry into force.

129. Mr. SCELLE thought it had been rightly said that the idea of abuse of rights was always tacitly understood. It should always be possible to bring a liability action against a State which had acted with malice aforethought. That being so, the question must be asked whether the text of article 8 did not make it impossible for such action to be brought.

130. Supposing that a State committed an act of deliberate fraud by taking part in negotiations only with a view to wrecking them, could it be claimed that such conduct was admissible? The formula selected by the Commission should not enable a State to shelter behind its absolute freedom not to ratify.

131. The theory of abuse of rights was an interesting legal development. The fact had been realized that powers were of value to society only if they were employed for the purpose for which they had been created. The regime of absolute rights no longer existed. Formerly, for example, it used to be claimed that property was an absolute and sacred right. At the present time, however, the view was that the owner did not possess the right to harm his neighbours.

131a. In the case in point, the Commission could not let it be implied that the right not to ratify could be exercised with a view to harming other States. If the Commission contented itself with the narrow formula proposed for article 8, States would use it as an argument to justify their not ratifying an instrument without legitimate reason. The Commission might therefore include the following provision in article 7:

> " in certain cases, good faith requires that a State shall exercise its right not to ratify only when it has reason for so doing ".

132. There was perhaps not a single State whose case law rejected the idea of abuse of rights. Why then should it not be possible to extend the idea to international law? International law was not, by its nature, an absolute law. The concept of the absolute sovereignty of the State was only a relic of former days.

133. Mr. BRIERLY thought it would be preferable to consider the two texts separately. The Commission could first take a decision on article 8.

134. It seemed to him that all reference to the motive underlying a State's refusal to ratify should be left out of the text. He did not see how the Commission could examine such motives. As Mr. Spiropoulos had said, the proposed text reflected existing practice and States would insist on preserving that practice.

135. Mr. SPIROPOULOS thought that the Commission should take care not to confuse international morality with codification. To accept moral rules would be of no avail and would have no practical results.

136. Mr. YEPES considered that it was no longer possible to talk in that vein since the entry into force of the Charter.

137. Mr. SPIROPOULOS said he had the courage to stand by his remarks. If it was to accomplish something practical, the Commission must leave out of account the concept of abuse of rights, a concept which he none the less personally accepted. It had a choice between two

alternatives: either to accept or to reject the text of article 8. Either the Commission would record existing practice or it would ignore it. He therefore proposed that a vote be taken.

138. Mr. SCELLE said that if need be he would support the text of article 8. It was better than no text at all.

139. Mr. SANDSTRÖM thought that in private law the concept of abuse of rights did not apply to negative acts.

140. Mr. AMADO pointed out that the discussion on the application of the theory of abuse of rights was outside the scope of the discussion on article 8. To pursue it might lead to awkward political or moral considerations. He personally had given a great deal of time to comparing the doctrinal point of view with the facts of the situation.

141. The Commission should for the time being take a decision on article 8, which formulated the practice applied by States.

142. Mr. YEPES pointed out that he objected to the wording of article 8 only because it codified the existing law in a categorical manner and amounted to an inducement not to ratify. He proposed that at the very least, the word " legal " be inserted before the word " obligation ".

143. Mr. AMADO asked Mr. Yepes what the attitude of Colombia would be if other Powers forced her to ratify a convention signed by her representatives.

144. Mr. YEPES said that Colombia had actually been a victim of such circumstances. She had had pressure brought to bear on her from outside to force her to ratify. That had been palpable interference.

145. The draft of article 8 might also be expanded to include the following formula: " But the mere fact of its signature being duly appended places the State under an obligation to take in good faith such steps as are required to ensure the constitutional ratification of a treaty signed by that State." That was the least that could be asked. A plenipotentiary must not append his signature lightly.

146. Mr. SPIROPOULOS thought the Commission should vote first of all on the amendment proposed by Mr. Yepes, and then on the article as a whole.

147. Mr. SCELLE felt that the article under discussion was too narrow and too categorical. He thought the word " obligation " should be accompanied by some expression implying that the freedom left to the State was not irrefragable. The article might be supplemented by the words: " Subject to a State's responsibility ", although such a formula ran the risk of being considered too severe. The words " in principle " would meet his point.

148. Like Mr. Yepes, he thought that if the Commission adopted article 8 as it stood, governments — which did not always act in good faith — would regard an article as categorical as that as a loophole enabling them to evade the obligation to act in good faith.

149. Following an observation by Mr. Yepes, Mr. SCELLE and Mr. SPIROPOULOS agreed to the addition of the word " legal " before the word " obligation ".

150. Mr. BRIERLY had no objection to the addition of the word " legal " as it did not alter the sense of the text.

151. Mr. SANDSTRÖM was opposed to the insertion of the word " legal ". It might give the impression that other obligations established by the Commission were not legal obligations.

152. Mr. ALFARO thought the discussion had reached its inevitable conclusion. The principle laid down in article 8 could not be watered down in any way. It must be either adopted or rejected.

153. Some members had pointed out that as it stood the article might encourage States to act in bad faith and refuse to ratify particular treaties. But it must be looked at from another angle, that of the relations between small States and the big Powers. Some of the small States might feel that they were being compelled to ratify for political reasons. They might be the victims of abuse of power. The last word must rest with the people, whose consent was necessary for ratification; signatures were sometimes given contrary to the will of the people.

154. In 1947, the Panama Government had signed a treaty with the United States because it had felt that there was no other way out. He himself had then been Foreign Minister, and as he did not agree, he had resigned. Subsequently ratification had been unanimously refused by the Panamanian Parliament.

155. It happened at times that treaties dealing with territorial boundaries were concluded under pressure which amounted to *force majeure*. There again it was important to let the will of the people prevail.

156. It would be remembered that in 1902 the Panama Canal Treaty had been rejected by the Colombian Senate. It was undoubtedly within its rights.

157. Hence he would vote for article 8 as it stood, and could not agree to the insertion of the word " legal ". Any change in the article would weaken international law. There were cases where ratification was obligatory on moral grounds, but there were other cases where it was not. The Commission must not legislate for exceptional cases.

Mr. Yepes' proposal to insert the word " legal " before the word " obligation " was rejected by 5 votes to 3.

The text of article 8 was adopted by 8 votes.

The meeting rose at 1.15 p.m.

87th MEETING

Friday, 23 May 1951, at 9.30 a.m.

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