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Summary record of the 87th meeting

Topic:
Law of Treaties

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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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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)*

ADDITIONAL ARTICLE PROPOSED BY MR. YEPES

1. Mr. YEPES recalled that on the previous day he had submitted a proposal for article 8, worded as follows:

> " 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 that the treaty thus signed is subjected to the constitutional procedure for ratification or rejection."

He requested that his proposal be discussed before the Commission went on to examine article 7.

2. Mr. SPIROPOULOS objected on the grounds that Mr. Yepes was referring to article 8 when the Commission had already voted on that article.

3. Mr. YEPES replied that the Commission had not taken any decision on his proposal.

4. Mr. SPIROPOULOS thought the Commission had disposed of the amendment when it had voted on the article, though he would not press for the application of the rule.

5. Mr. CORDOVA said that on the previous day the Commission had begun to discuss articles 7 and 8 and had then decided to discuss article 8 only. He thought Mr. Yepes' proposal related to the obligation on the signatory prior to the entry into force of a treaty — the point dealt with in article 7.

6. Mr. BRIERLY asked Mr. Yepes to say whether his proposal related to article 7 or to article 8.

7. Mr. YEPES was prepared to accept the decision of the Commission if it considered that his text related to article 7, or to submit it as a separate article.

8. Mr. CORDOVA supported Mr. Yepes' idea that signatory States should be obliged to take the steps required to ensure that the competent authority took a decision in regard to ratification. Many instances could be cited, especially in the Organization of American States, where a treaty was not in force because some State had postponed the procedure for ratification.

9. When a treaty declared that it should enter into force as soon as it had been ratified by, say, fourteen States, and two States failed to ratify, it was never clear whether the States which had already ratified were bound or not. The least the Commission could do was to stipulate that a State which had signed — assuming that it had signed in good faith — would set in motion the machinery for ratification.

10. Mr. AMADO thought the Commission was attempting to do the work of the chanceries. It was the task of governments to take steps to ensure that ratification took place. He did not see how a mere recommendation in a text the purpose of which was codification was likely to induce States to change their present practice. A State was free to ratify or not to ratify; and he personally was reluctant to express a recommendation in a text which should be precise and set out in legal form.

11. Mr. FRANÇOIS wondered whether Mr. Yepes had allowed for the possibility of new circumstances arising subsequent to signature. Often there were extremely complex matters which the government had not previously had time to study thoroughly. If Mr. Yepes' proposal were accepted, States might be inclined to instruct their delegations not to sign.

12. Mr. SANDSTRÖM agreed with Mr. François. Governments would hesitate before signing a treaty. That might be an advantage, but more often than not it would be a disadvantage. He hoped the Commission would not adopt the clause.

13. Mr. CORDOVA explained that the point was to stipulate that, once a treaty was signed, States must forward it to their parliaments. It was an excellent thing that a State should advise its representatives to act with prudence; but once a treaty was signed, the State should do all that was required under its constitution to have that treaty ratified. There must be no signing with a concealed intention of not ratifying, as was the case with many treaties.

14. Mr. SCELLE thought Mr. Yepes' proposal was undoubtedly progressive, but it did not represent existing law. What Mr. Córdova proposed could be found in Part XIII of the Treaty of Versailles in connexion with labour conventions. Governments were to undertake to submit to their parliaments within a restricted period any draft conventions adopted by the International Labour Conference; and they were required to do so under the terms of the Versailles Treaty which they had ratified (article 405). That was a case where a treaty was capable of modifying constitutions. It was beyond question that the Treaty of Versailles had modified constitutions, since normally it was the executive power which had to decide whether or not to submit a treaty for the approval of parliament.

15. Mr. Yepes' proposal would restrict that privilege, and he did not feel that such a proposal was in keeping with positive law. If the Commission was anxious to

take that progressive step, and he personally was in favour of doing so, it must not decide that States were invariably under an obligation to proceed according to Mr. Yepes' text, since there might be instances where a government considered that it was not desirable to submit a treaty for ratification by parliament, especially if new circumstances arose after the treaty had been signed. He did not think it feasible to establish a general rule on the matter, though he was in favour of taking a step forward. The procedure laid down in Part XIII of the Treaty of Versailles might be extended to other specialized agencies.

16. In that connexion, multilateral treaties differed from bilateral treaties. If a multilateral treaty was adopted by a specialized agency, it was natural to consider it as a draft international law, and parliaments ought to take a decision on it. It was much less natural in the case of a bilateral treaty of a political nature. In that case, it was no simple matter to try to force governments to have the treaty voted on by their parliaments. If a treaty had been signed for example under pressure from a great power, the government might find itself out of step with public opinion, and might not wish to submit the text for ratification.

17. It could be considered a step forward, at any rate so far as multilateral treaties were concerned, for a government to be required to submit them to its parliament, since that was the way in which international law was made. A text was proposed for a law, and any State was at liberty to accede to it or not; the parliament of each State then rounded off the " optional " law by making it binding.

18. Mr. Yepes' proposal was certainly a step forward; but it could not be propounded as representing current practice. Rather, it was the ideal to be achieved. It would be a way of extending and making generally applicable what Part XIII of the Treaty of Versailles had laid down for labour conventions.

19. Mr. AMADO drew attention to the effects of any such statement, which would provide political parties with an extremely useful weapon. Mr. Yepes' proposal would lead to a situation in which governments would be faced with a large number of questions from opposition parties as to what had been done about such and such a treaty which had been signed.

20. He did not see how a statement of that kind could induce States to act along the desired lines. It was a mere pious hope that people would act with a greater degree of good faith.

21. Mr. YEPES explained that it was a legal obligation and not the mere expression of a hope.

22. Mr. SCELLE thought the difference between the two points of view was a matter of temperament. He personally was in favour of fostering the influence of parliaments, whereas when Mr. Amado spoke of the State he had in mind the executive power.

23. Mr. AMADO replied that he was not concerned purely with theory; he had been a member of the Brazilian Parliament for 24 years. Actually, he shared Mr. Scelle's viewpoint *de lege ferenda.*

24. Mr. SCELLE said that by adopting the provision in question, the Commission would be providing governments with a loophole by encouraging them to refer the matter to parliament.

25. Mr. BRIERLY pointed out that the text proposed by Mr. Yepes would give a great deal of power to plenipotentiaries who would find themselves in a stronger position than the Foreign Minister and government, who had to refer the matter to the authority with the power to ratify. In the United States, when a treaty had been signed by the representatives of the country, would the President be obliged to submit it to the Senate? As was well known, he was not obliged to do so, and often he did not refer to the Senate treaties which had been signed. It would surely be foolish to say that the President must submit such treaties to the Senate, since in practice there would be no change. Furthermore, it would be contrary to the purpose of ratification, which was to give governments time to reconsider texts they had signed. To deprive them of that possibility would be to undermine the whole theory of ratification.

26. Mr. KERNO (Assistant Secretary-General) thought that the concern felt by Mr. Yepes and Mr. Córdova arose from the fact that article 8, as adopted by the Commission the day before, might give the impression that the Commission did not wish to urge States to ratify. But after all, that was the law as it now stood.

27. If Mr. Yepes' proposal were adopted, it would be a step in the direction of progress. If the majority decided against Mr. Yepes' proposal, he would like the report or comments accompanying the articles when submitted to governments to mention the fact that article 8 was not meant to discourage States from ratifying or to encourage them to sign lightly, and that States should not remain idle once they had signed.

28. Mr. ALFARO said that international relations were based on co-operation and good faith. The principle of good faith was established in Article 2, paragraph 2 of the Charter, which read: " All Members, in order to ensure to all of them the rights and benefits resulting from membership, shall fulfil in good faith the obligations assumed by them in accordance with the present Charter."

29. When a government decided to sign a multilateral treaty, it was because it believed in good faith that the treaty would be beneficial to its country and to the world at large. The least one could require of States was that once they had signed in good faith, they should indicate whether they proposed to ratify or not. That was a most important point. It did happen that multilateral treaties were signed by a group of States and never came into force because of the laxity of certain governments which did not submit the treaties to their parliaments. The text proposed by Mr. Yepes merely demanded that States should submit treaties to parliament for ratification.

30. That measure came within the framework of the progressive development of international law; and he felt that the Commission would be entirely justified in approving it. It might be added that States should take in good faith " within a reasonable time such

steps . . ." so as to make it clear that there was no pressure being brought to bear. The proposed rule would eliminate uncertainty as to whether the treaty was or was not to be ratified.

31. By adopting Mr. Yepes' proposal, the Commission would be taking a step in the direction of good faith and co-operation.

32. Mr. YEPES was willing to accept the additional words suggested by Mr. Alfaro.

33. The least a State could be asked to do after signing a multilateral treaty was to submit it to its parliament. Some of the members of the Commission had had the feeling that his proposal would mean bringing pressure to bear on governments. That was not the case. Its effect would be to ensure that governments submitted treaties to the constitutional procedure for ratification or rejection.

34. It frequently happened that a treaty was signed with the support of public opinion, and parliament was quite ready to ratify it, but the government was neglectful and did not give public opinion an opportunity to discuss whether the treaty should be approved or rejected. His proposal was made in a progressive spirit. There had often been complaints in the international organizations that States did not ratify multilateral treaties. That was one means of attaining the ideal which the Commission had in mind.

35. Since the words " in good faith " appeared to worry Mr. Amado in his interpretation of the article, they might well be omitted.

36. Mr. CORDOVA asked Mr. Yepes whether he would be willing to agree to add to his proposal the words " to a multilateral treaty " so that it would read: " the mere fact of its signature being duly appended to a multilateral treaty . . .".

37. Mr. YEPES agreed to the amendment.

38. Mr. SCELLE suggested the wording: " the mere fact of its signature being duly appended, especially to a multilateral treaty . . .".

39. Mr. CORDOVA and Mr. YEPES were agreeable to that version.

40. Mr. YEPES pointed out that the words " for ratification or rejection " left parliaments ample freedom.

41. Mr. CORDOVA said that the words to which Mr. Yepes had drawn the Commission's attention were very important. They covered cases in which some new factor arose between the time of signature and the forwarding of the treaty to parliament. Even when it referred the treaty to parliament, a government could point out that the situation had changed, and possibly even recommend that the treaty be rejected. Thus the text met Mr. François' objection.

42. Mr. SCELLE said that in the case of international labour conventions, a government was obliged to submit them to parliament, though it was always free to oppose them.

43. Mr. CORDOVA explained that whatever the outcome of the Commission's vote, the general report would give a clear statement of the position.

43a. A vote was then taken on the following amended text:

" The mere fact of its signature being duly appended, especially to a multilateral treaty, places the State under an obligation to take, within a reasonable time, such steps as are required to ensure that the treaty thus signed is subjected to the constitutional procedure for ratification or rejection."

The text was adopted by 5 votes (the Chairman, Mr. Alfaro, Mr. Córdova, Mr. Scelle and Mr. Yepes) to 4 (Mr. Amado, Mr. Brierly, Mr. François and Mr. Sandström).

43b. The Commission *decided* that Mr. Yepes' proposal be embodied in a separate article.

ARTICLE 7 (*resumed from the 86th meeting*)

44. Mr. BRIERLY thought that as the Commission had given ample discussion to article 7, it might take a decision quickly. He still felt that article 7 should be deleted from the draft. As Mr. Sandström had pointed out, it was not the Commission's task to codify international ethics. That being so, it was surely improper to refer to a specific example of the moral principles which States should observe. By emphasizing that good faith was called for in one particular case, some doubt might be cast on its necessity in other cases.

45. If the Commission decided to retain the article, he would have one or two drafting changes to suggest.

46. Mr. YEPES read out the commentary given in the report under article 7: " This article adopts article 9 of the Harvard draft. It is included here for the purposes of discussion, although in the opinion of the Rapporteur it states a moral rather than a legal obligation." Mr. Brierly had suggested that the Commission reject the article. He personally did not agree with what the commentary stated; the obligation was a legal one. The circumstances envisaged by the article had arisen from time to time. International treaties had laid it down that, between the time of signature and that of ratification, the parties should refrain from any act calculated to make ratification impossible. According to international jurisprudence and to writers on the subject, there was a legal obligation on States to refrain, between the time of signature and the time of ratification, from any act likely to hinder ratification.

47. Article 38 of the General Act of Berlin dated 26 February 1885 [1] provided that, pending ratification, States signatories of the Act undertook to adopt no measure at variance with the provisions of the Act. That was an instance where States had considered that there was a legal obligation. A further instance was the Treaty of Washington of 6 February 1922 for the Limitation of Naval Armament; [2] and there were other treaties which might also be cited.

48. Thus a kind of practice had grown up that States should do nothing at variance with a treaty that had

[1] *British and Foreign State Papers*, vol. LXXVI, (1884–1885), pp. 4 *et seq.*

[2] Hudson, *International Legislation*, vol. II, pp. 998 *et seq.* See article 19.

been signed, even if it had not been ratified. The Mixed Greco-Turkish Arbitral Tribunal had made a ruling in the same sense. The case had been as follows: between the signature and the ratification of the Treaty of Lausanne in 1923, Turkey had ordered the seizure of a safe in a bank, in contravention of the provisions of the Treaty, which had been signed but not yet ratified. The Mixed Arbitral Tribunal had ruled that Turkey should restore the safe and its contents as having been seized in violation of a treaty signed but not yet ratified. It had pronounced that ruling on the grounds that, as from the date of signature of the treaty and pending its entry into force, the parties were under an obligation to do nothing calculated to prevent the clauses of the treaty from being executed.[3]

49. He might also mention the course given by Cavaglieri at the International Law Academy in The Hague, and Anzilotti's course in international law. Fauchille wrote as follows in his Treatise on Public International Law:

> " Actually, a treaty which has been signed only, is not devoid of value. It must be recognised that once a treaty is signed, the States parties to it are under an obligation to take no step until the time of ratification, which may make ratification valueless or superfluous. If it were otherwise, and the treaty did not necessarily have to be left intact, as at the time of signature, there would be as it were a kind of breach of the undertaking given, and the door would be open wide to arbitrary action. One thing at any rate is certain about a treaty signed and not yet ratified, and that is that it is still only a draft treaty, though a draft with its clauses fully circumscribed and defined, and not admitting of any further change. Thus there is . . . an obligation to do nothing calculated to interfere with the treaty so as to make ratification superfluous." [4]

50. He thought the authorities cited and the philosophical arguments in its favour were sufficient to warrant approval of article 7.

51. Mr. SANDSTRÖM appreciated the weight of Mr. Yepes' arguments. But the wording of the article seemed to him somewhat vague. The text read: " Under some circumstances, however, good faith may require . . ." In the case of the award by the Mixed Arbitral Tribunal quoted by Mr. Yepes, ratification had taken place before the court was called upon to pronounce its award, and that fact might very well have influenced the decision.

52. Mr. SPIROPOULOS said that a careful reading of article 7 showed that its value was absolutely nil. That was not Mr. Brierly's fault — indeed Mr. Brierly himself was not in favour of it — and the text was taken from the Harvard draft. As Mr. Sandström had pointed out, the text read: " under some circumstances " — it did not say when. It went on " good faith may require " (a somewhat vague expression) . . . " pending the entry into force of the treaty " (that might mean a very long wait) . . . " the State shall, for a reasonable time after signature " (what was to be understood by a reasonable time?). In his opinion, that text could be deleted, as it was not applicable in practice.

53. Mr. Yepes' argument was that the provision was in keeping with international law; but it was not a general principle. He had had experience of several similar cases. If they were examined, they turned out to be treaties imposed on the conquered by the conquerors. In the instance quoted, the defeated nation had been forced to do certain things. It was therefore inconceivable that it should be allowed to expunge everything that had obliged it to execute the treaty. It could not be allowed to do so. The treaty must begin to be effective from the moment of signature. Those principles could not be applied to all treaties.

54. Treaties were signed daily, and that rule had never been applied to them. Fundamentally, the problem was to discover the will of the parties. There again, the question appeared in different lights. One party ratified, another party did not. The question was whether the first party was bound even if the other party did not ratify until twenty years later. There again a limit must be laid down. In each individual case the will of the parties must be sought, and that must be the deciding factor.

55. A study of the question showed that the interpretation of the will of the parties was invariably the touchstone. Conventions were applied after ratification, not before. Procedure to the contrary was permissible only where the will of the parties demanded it. The Mixed Arbitral Tribunal had had to deal with a special case, and possibly it had stated its opinion in unduly broad terms.

56. In conclusion, since the will of the parties must be sought in each case, a principle such as that stated in article 7 could not be established. It was better that the text should be mute on that point.

57. It was possible that if a different tribunal were called upon to apply the principle afresh, it would not state its opinion in such comprehensive terms. Otherwise its award would be at variance with the law as applied in the great majority of cases.

58. Mr. AMADO said that no one had ever questioned that signature constituted a minimum in the negotiation of a treaty. The notion of good faith was implicit in State practice. It was the Harvard draft which had included the reference to good faith in article 9, with a view to producing as comprehensive a text as possible. But the comment on the article explained that in declaring that " good faith " might require a policy of abstention on the part of signatories in the circumstances mentioned, it did not envisage a legal duty. The comment went on to say that the non-performance of obligations under a treaty signed but not yet ratified: " may expose the non-performing State to the charge of bad faith, or may impair its good name and reputation; but it does not render such State liable to damages for violation of a legal obligation, because no legal obligation existed which could be violated ".[5]

[3] Award of 26 July 1926. *Recueil des décisions des Tribunaux arbitraux mixtes*, p. 395, vol. 8, pp. 390 *et seq.*

[4] Fauchille, *Traité de droit international public*, vol. I, Part III, pp. 319–320.

[5] *American Journal of International Law*, vol. 29 (1935), Supplement, p. 781.

59. Mr. YEPES pointed out that the Harvard draft was ten years older than the Charter.

60. Mr. AMADO replied that the Charter did not constitute the whole of international law.

61. The question of signature had taken on a wide significance under the influence of Mr. Scelle, who had changed the notion of contract into the notion of law. Signature had become the manner in which the community of States adopted a law. It enabled the international community to have a majority and a minority.

62. Personally he had no doubt that in some cases, signature had a greater value than in others. In certain cases, States had to give an undertaking, and then the signature had a significance which did not merely correspond to the theoretical minimum.

63. The idea of referring to good faith was a fine one. He was not afraid of being regarded as a Utopian, but when it came to codification, there was no room for provisions of that kind. He would vote against the article which, incidentally, its authors had recognized as having no value. He did not understand why the Rapporteur, who had likewise been convinced of its uselessness, had inserted it in his report.

64. Mr. SCELLE said he had constantly to admire the learning displayed by Mr. Amado. He had been touched by the reference to a doctrine which had no other merit than that of being in accordance with the development of the facts.

65. He considered the article most useful. He was not surprised that Harvard University had taken the trouble to go closely into the question. Actually, the Harvard group had stated its view that it was desirable to discover whether or not positive law was involved.

66. The article was very interesting. It consisted of two parts, a positive part and a negative part. Mr. Spiropoulos had said that treaties were interpreted according to the will of the parties. But a distinction must be made between the classical type of treaty, corresponding to the old idea of contract, and multilateral treaties, which were in keeping with modern practice and were not contracts. In a multilateral treaty, of the type now being dealt with by the Commission, there was an optional law, a draft law which became binding in the event of ratification. There was no will of the parties to be interpreted. The Commission was concerned at the moment with the interval between signature and ratification, and it had been argued that there was no undertaking prior to ratification.

67. What the article under consideration called for was that a legal norm should be established by which in given circumstances, pending entry into force, a State should refrain from performing certain acts. The Commission was being asked to state whether it felt that abstention from certain acts was called for by the fact of signature.

68. How was it conceivable to argue that that was not so? A quotation had been read from Fauchille, the most recent edition of whose work was published in 1924. Thus for a quarter of a century the statement made by Fauchille had been accepted practically unanimously by jurists. For a quarter of a century the statement of that writer, who had never been regarded by anyone as a revolutionary writer, had stood, and there they were being told that signature involved no obligation.

69. He would admit that article 7 was very vague and not strong enough; but failure to adopt the article would mean the abandonment of an advance which was virtually consolidated.

70. His idea would be to delete the mention of good faith and to say: " Under some circumstances, however, a State must abstain . . ." As for what was meant by reasonable time, it began with signature and might cover a fairly considerable period. Did the Commission propose to define more clearly the length of such a reasonable time? He hardly imagined that the Anglo-Saxon members would wish to do so. The period might be of varying length. The international authorities would determine the length of the period when an action was brought before them.

71. He was quite decided in his intention to vote in favour of the article, subject perhaps to the reservation that certain drafting changes were made to it. If the article were rejected, he would request that it be expressly mentioned that he had voted in favour of it.

72. Mr. SPIROPOULOS said that the question had a very particular theoretical importance. He feared that the Commission would be making a mistake if it adopted that principle, which did not mean what its authors had intended.

73. He did not believe that a codification should include the whole series of principles. If it did, that would still not get rid of the difficulty. The principles must always be interpreted.

74. For him, the speeches by Mr. Amado and Mr. Scelle had thrown a clearer light on the question. If treaties could be made binding from the time of signature, the difficulty would not arise. Unfortunately, under the existing procedure, there was a certain time-lag between signature and ratification. In treaties other than peace treaties, the will of the parties was that the contract should become effective after its entry into force, and such treaties constituted the majority of cases. If that principle were to be applied, the will of the parties must be established in each individual instance — not by reason of the fact that the treaty had been signed, since the text could not be binding unless there had been concurrence of will. It was not ratification that produced will. Will was present from the time the treaty was signed. He felt that it would be better not to press that principle.

75. Take for example a peace treaty signed but not ratified, e.g. the Treaty of Sèvres between the Allied Powers and Turkey. The will of the parties had been that Turkey should execute the provisions of the treaty immediately upon signature. Turkey had not ratified the treaty at all. Could she be said to have violated the treaty? There had been no obligation to ratify. The acts committed by Turkey in defiance of her obligations had not constituted violation of the treaty, since the treaty had not been ratified. Thus the question was by no means simple.

76. He reiterated that it should not be settled by an express provision in the draft.

77. Mr. SANDSTRÖM, referring to the award cited by Mr. Yepes, again stressed that the fact of the treaty being ratified subsequent to the events responsible for recourse to a court, might have had some influence.

78. It could not be said that a party was executing a convention in good faith if it changed the situation between signature and ratification. Like Mr. Spiropoulos, he felt that, if the treaty had not been ratified, the Tribunal could not have taken that decision. It was wise not to interpret judicial decisions too literally.

79. He felt that it would be too difficult to propound that principle precisely in the text, and therefore he would vote against the adoption of the article.

80. Mr. YEPES pointed out that he was not pleading *pro domo*. He was defending the proposed article.

81. In his remarkable speech, Mr. Spiropoulos had tried to persuade the Commission that the article called for the execution of the treaty in the interval between signature and ratification. That was not at all what he had had in mind. What he was suggesting was that, between the time of signature and the time of ratification, none of the States should do anything at all calculated to make the ratification of the treaty impossible.

82. Suppose for example that a treaty were signed providing for the reduction of armaments, and a period of several months was allowed for ratification; if in the interval between signature and ratification, one of the signatories increased its armaments, ratification would be made impossible. That was an abuse of power which must be provided against. The report was intended to obviate situations of that kind.

83. Mr. AMADO asked whether Mr. Yepes was forgetting the clauses of treaties by which parties safeguarded their interests. It was not for the articles of the draft codification to do the safeguarding for them.

It was decided by 5 votes (Mr. Amado, Mr. Brierly, Mr. François, Mr. Sandström and Mr. Spiropoulos) to 4 (Mr. Alfaro, Mr. Córdova, Mr. Scelle and Mr. Yepes), with one abstention (the Chairman), to delete article 7.

84. Mr. SPIROPOULOS said he would like to explain his vote. In voting against the article, his intention had been merely to indicate that he was opposed to the formulation of a principle which at the same time he admitted was sound. It was for the courts to judge, in the light of all the factors, as to the behaviour of States in specific cases submitted to them.

85. Mr. SANDSTRÖM pointed out that the Commission would have to review the decisions it had taken at its previous meeting. At Mr. Spiropoulos' suggestion, it had adopted two general principles governing the validity of treaties. So far as he was concerned, the exact scope of the decisions was still not clear. Supposing that in the convening of the Parliament of a particular country for the purpose of ratifying a treaty certain provisions of the constitutional law were not observed, would the resulting infringement make the ratification in question, and hence the treaty, invalid? It would depend on the answer given to that question whether or not he would propose that the principles adopted be re-examined.

86. Mr. SPIROPOULOS said that Mr. Sandström and Mr. François had explained to him their viewpoints in a private conversation. At the previous day's meeting the Commission had agreed almost unanimously that ratification should be carried out in accordance with the constitutional procedure. It had recognized that before a treaty entered into force in a valid sense, the constitutional law must have been observed. Mr. François alone had held a different opinion.

87. The question of the consequences of technical infringement during the procedure for ratification also confronted the domestic court. In Greece, for example, it would take account only of substantive violations. In international law, the action of a court should be based on similar considerations.

88. The CHAIRMAN asked Mr. Sandström to raise the question again in the Commission at an opportune moment.

ARTICLE 9

89. Mr. BRIERLY said that article 9 of his report might give rise to a discussion similar to the one which had taken place previously in connexion with ratification and bearing on the constitutional competence of the organ responsible for accession. He would like to obviate a repetition of the same arguments; and he therefore proposed to produce in article 3 a new text dealing with that general principle. If his suggestion were adopted, article 9, paragraph (5), and article 4, paragraph (3), of the draft could be deleted.

90. He therefore proposed the insertion under article 3 of a text to read more or less as follows: " A treaty becomes legally binding in relation to a State when that State undertakes a final obligation under the treaty whether by signature, ratification or accession, in accordance with its constitutional law and practice through an organ competent for that purpose."

91. The Commission might approve that text in substance without expressly adopting it as it stood. A text of that kind would obviate the necessity for discussion as to the constitutional competence of the organ of accession in relation to article 9, and would make it possible to go on to examine the various paragraphs of the article, with paragraph (5) deleted.

It was so decided.

Paragraph (1)

92. Replying to a question put by Mr. François, Mr. SCELLE said that in his opinion the distinction made by some writers between " *adhésion* " and " accession " was an academic one.

93. Mr. FRANÇOIS pointed out that the question of accession could only arise after the time-limit laid down for signature had expired. He suggested that the words " within the prescribed time-limit " be added following the words " signed or ratified ".

94. Mr. BRIERLY thought Mr. François' remark was justified, but the wording of his amendment was not satisfactory.

95. Mr. FRANÇOIS said that the question of the wording could be settled by the Rapporteur.

96. Mr. KERNO (Assistant Secretary-General) pointed out that under the classical system, a sharp distinction was made between signature and ratification on the one hand, and accession on the other. As a rule, a treaty allowed a certain time for signature and ratification. It could also lay down accession procedure for States which had not followed the routine of signature and ratification. In principle, accession was the normal rule in the case of a treaty already in force.

97. In present-day practice, long periods were often allowed for signature, and in such cases difficulties were prone to arise. Often, of course, the treaty itself avoided the difficulties by fixing a time-limit for signature. The Convention on Genocide, for example, remained open to States for signature until 31 December 1949 only (article XI of the Convention). As from 1 January 1950, it was no longer possible to sign, though it was still possible to accede. Obviously it was possible in such cases for the treaty to enter into force before the expiry of the period during which it remained open for signature. States signing after the entry into force, but before the expiry of the time-limit, would ratify the treaty, but would not accede to it; while, if the treaty did not muster the number of ratifications necessary for entry into force before the expiry of that time-limit, it was possible for accessions to be made before its entry into force.

98. Mr. YEPES considered that there were two distinct ways in which States could accede. The General Act of Geneva signed in 1928 allowed for the possibility of separate accession to any of its provisions. A similar possibility might be allowed for by the insertion between the words " the treaty " and " as binding " of " or part of the treaty ".

99. To meet Mr. Yepes' suggestion, Mr. BRIERLY proposed that the words " to a treaty " following the word " Accession " be deleted, and the words " or part of the treaty " be inserted before " as binding ".

100. Mr. YEPES said that that was precisely what he had in mind.

101. Mr. KERNO (Assistant Secretary-General) did not care for the alteration. It appeared to authorize States to accede to part of a convention, even where such partial accession was not expressly provided for.

102. Mr. BRIERLY suggested that, to meet Mr. Kerno's point, the words inserted might be expanded as follows: " the treaty, or, if the treaty so provides, part of the treaty, as binding ".

103. Mr. SCELLE asked for the words " for that State " to be added following the words " as binding ".

104. Mr. SPIROPOULOS did not think that Mr. Yepes' proposal for the addition of the words " or part of the treaty " was satisfactory. The option of acceding to part of a treaty could be laid down in the treaty itself, but the Commission must keep to general principles.

105. Mr. CORDOVA, supported by Mr. Brierly, agreed with Mr. Spiropoulos. There was no need to enumerate every provision a treaty could contain.

106. Mr. YEPES withdrew his proposal.

107. Mr. FRANÇOIS thought that accession as referred to in the General Act of Geneva was something distinct from accession in the classical sense. As in the Convention on Privileges and Immunities, it was a new type of accession, since in such instances there was to be no ratification. Paragraph (1) did not seem to him to cover such cases.

108. Mr. KERNO (Assistant Secretary-General) agreed that the Convention on Privileges and Immunities provided for accession only; but he did not think that that type of accession was essentially different from the other.

109. Under the classical system, the procedure for the entry into force of conventions was signature followed by ratification, naturally with appropriate time-limits. Once the convention was in force, participation by a State was achieved by means of a single act, preceded if necessary by consultation of parliament. The act was accession and it took the place of both signature and ratification. He found paragraph (1) satisfactory. The fears expressed by Mr. François seemed to him without foundation. Whatever examples were quoted, the fact still remained that accession was possible only for States which had not signed or ratified.

110. Mr. FRANÇOIS pointed out that a State which had signed might not ratify within the prescribed time-limit if it found the latter inadequate. There were conventions which expressly provided for the possibility of accession in such instances, e.g., the 1886 Convention of Berne, for the Protection of Literary and Artistic Works, revised at Brussels on 26 June 1948 (article 28, para. 3). [6]

111. Mr. CORDOVA pointed out that that particular example was outside the general rule. In principle, it was impossible to refrain from ratifying, and then to accede.

112. Mr. AMADO considered that the doctrinal rule was categorical. Accession (which must not be confused with acceptance) was the procedure for States which had not signed or ratified. Accession was more particularly reserved for States which had not taken part in the negotiations. Accession before the ratifications required for entry into force had been mustered was only possible when a treaty expressly stipulated it.

113. He found paragraph (1) entirely satisfactory.

114. Mr. BRIERLY pointed out that the convention referred to by Mr. François included an unusual provision. The suggestion made by Mr. Spiropoulos that the draft should keep to general rules would apply in that instance.

115. Mr. SPIROPOULOS agreed that when a signatory State had not had time to ratify, a legal problem arose. But it would be going beyond the sphere of codification to introduce a rule covering that particular case. Like Mr. Brierly, he felt that the Commission had no call to deal with it. Any dispute arising out of such a case should be judged by a court, or in some other way.

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[6] *Le Droit d'auteur*, Year LXI (1950), pp. 73 *et seq.*

116. Mr. KERNO (Assistant Secretary-General) shared the view expressed by Mr. Spiropoulos and Mr. Brierly. Paragraph (1) was satisfactory. Exceptional circumstances should be provided for in the treaty itself. Failing such provisions, the rule contained in the latter part of paragraph (2) should be adhered to. Exceptional instances where a State had not the time to ratify should be catered for in the treaty itself. In any event, there was generally no time-limit for ratifications.

117. Mr. FRANÇOIS said that though he was not convinced, he would not press the point.

Paragraph (1) was adopted unchanged.

Paragraph (2)

118. Mr. FRANÇOIS proposed that the words " unless invited to do so by all the parties to the treaty " be replaced by " with the consent of all the parties to the treaty ".

119. Mr. BRIERLY agreed to the change.

120. Mr. FRANÇOIS wondered who were the parties. That was the point that mattered in connexion with reservations.

121. Mr. KERNO (Assistant Secretary-General) agreed that the question of reservations might arise in the present instance, as in many others.

Paragraph (2) was adopted with the above amendment.

Paragraph (3)

Paragraph (3) was adopted without comment.

Paragraph (4)

122. Mr. ALFARO asked Mr. Brierly whether he would agree to the word " or " being replaced by " and ". The paragraph dealt with two separate cases, not two alternatives.

123. Mr. BRIERLY was agreeable.

124. Mr. YEPES pointed out a contradiction between the text of paragraph (3) and the end of paragraph (4). According to paragraph (3), accession could only occur after the entry into force of the treaty, whereas paragraph 4 envisaged the possibility of accession before entry into force.

125. Mr. KERNO (Assistant Secretary-General) said he had been surprised when he had read paragraph (4). As was stated in the comment, the paragraph did not appear in the Harvard draft. He could well understand that.

126. In principle, accession was a definitive act and one which was not taken subject to ratification. That was how it differed essentially from signature. Subsequent ratification of accession was possible in theory, but it must remain the exception, and it presupposed an express stipulation in the treaty. The constitutional procedure should take place prior to accession.

127. He urged that paragraph (4) be deleted, so as to confine article 9 to a statement of general rules.

128. Mr. BRIERLY agreed that paragraph (4) referred to an exceptional instance. He had no objection to Mr. Kerno's suggestion.

129. Mr. ALFARO and Mr. SCELLE shared that view.

It was decided to delete paragraph (4).

Paragraph (5)

130. Mr. BRIERLY reminded the Commission that he had suggested deleting the paragraph and replacing it by the statement of a general principle in article 3.

It was so decided.

ARTICLE 1 (*resumed from the 84th meeting*)

131. Mr. BRIERLY suggested that the Commission turn back to the first article, on which discussion had not been completed.[7]

132. Mr. SCELLE said that the Commission had devoted a great deal of time to discussing that article. The word " concluded " had been criticized; at the same time article 1 embodied a valuable principle. The text of a treaty, once it was fixed by the plenipotentiaries, was, in principle, not subject to change. It was desirable to stress that fact, especially in connexion with multilateral treaties.

133. He would vote in favour of any text maintaining the principle of immutability which appeared in the original text.

134. Mr. AMADO pointed out that the authorities who wrote in French, as well as Anzilotti, used the word " parfait " to indicate that a treaty was finally established in form.

135. Mr. BRIERLY and Mr. SCELLE suggested that at the beginning of the first article the words " the text of a treaty becomes final " should be used.

136. Mr. CORDOVA referred to a previous proposal by Mr. Scelle.[8]

137. Replying to a question put by Mr. BRIERLY, Mr. SCELLE was agreeable to the deletion from his previous proposal of the words " in principle ".

138. Mr. AMADO said he would like the expression " *ne varietur* " to be included.

139. Mr. SCELLE had no objection.

140. Mr. KERNO (Assistant Secretary-General) pointed out that Mr. Brierly's first report (A/CN.4/23) already included in its chapter III (The Making of Treaties) an article (article 6) entitled " Authentication of Texts of Treaties ". He would introduce the expressions into the discussion for what they were worth.

141. Mr. SPIROPOULOS was not opposed to adopting the text proposed by Mr. Scelle. It seemed to him to express the sense of the Commission. But he thought it was tautological to state that a text was final when it was written. Such a provision would not be inserted in a civil code in connexion with private law contracts.

142. Mr. SCELLE pointed out that a text of that kind provided a prior indication which would be useful as a criterion in connexion with reservations.

143. Mr. FRANÇOIS shared Mr. Spiropoulos' misgivings about a text which did indeed seem to have shortcomings.

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[7] See summary records of the 84th meeting, para. 67.

[8] *Ibid.*, para. 57.

144. Mr. SANDSTRÖM was under the impression that the Commission was proposing to adopt the formula " the text of a treaty becomes final . . .".

145. Mr. SCELLE distinguished between private law contracts and treaties. Until the time of signature, the parties were always at liberty to modify a private contract. In the case of a multilateral treaty, on the other hand, they must either accept the text as it stood, or reject it. For example, the drafts of the International Labour Conference conventions were final drafts to which no reservations could be made. It had actually been decided not to admit reservations. Reservations were replaced by special stipulations affecting particular States and inserted into the body of the draft.

146. Mr. BRIERLY thought the best solution would be to revert to the text of article 6 of his first report; he proposed that the question be studied at the next meeting.

It was so decided.

ARTICLE 5 (*resumed from the 86th meeting*)

147. Mr. BRIERLY read out the following draft text:

" *Article 5.* A State is not deemed to have undertaken a final obligation under a treaty until it has ratified that treaty, provided that a State is deemed to have undertaken a final obligation by its signature of the treaty

" (*a*) If the treaty so provides;

" (*b*) If the treaty provides that it shall be ratified but that it shall come into force before ratification;

" (*c*) If the full powers of its representatives who negotiated or signed the treaty stipulate that ratification is not necessary;

" (*d*) If the form of the treaty or the attendant circumstances indicate an intention to dispense with ratification."

148. Mr. SPIROPOULOS thought the Commission had adopted two principles which it was proposing to substitute for the text of article 5, namely: a treaty will be binding if ratified in accordance with constitutional procedure; and a treaty may be binding by signature or accession if the constitution so permit.

149. Mr. BRIERLY thought the Commission had accepted those principles as such, but not as draft articles. Article 5 was to be recast.

150. Mr. SPIROPOULOS said that that was indeed the position; but he felt that the new wording was not in conformity with the decision taken by the Commission.

151. Mr. BRIERLY pointed out that the first principle under which an act by a constitutional organ which was not competent would be null and void was to figure in article 3. There was no point in mentioning it again under article 5.

152. Mr. KERNO (Assistant Secretary-General) corroborated Mr. Brierly's remarks. At the previous meeting the Commission had laid down the principle that all the procedure for giving binding force to a treaty must be in conformity with the constitution. The principle was expressed in the new draft of article 2. In the article under consideration, the question was to determine in what circumstances certain procedures were permissible.

153. Mr. CORDOVA shared the viewpoint expressed by Mr. Spiropoulos. The new text did not prevent ratification as required by a constitution from being waived by means of a stipulation in the treaty.

154. Mr. SANDSTRÖM thought the members of the Commission would see the position more clearly if all the articles so far adopted were submitted to them in a document to be prepared by the Secretariat.

155. Mr. CORDOVA, supported by Mr. SCELLE, mentioned that at the previous meeting the Commission had stressed that it did not wish to see treaties derogating from constitutional procedure. The new articles 3 and 5 were mutually contradictory.

156. Mr. BRIERLY pointed out that article 5 should be read in conjunction with article 3, in which the Commission would state that a signature appended by an authority without competence was not valid. That statement could not be repeated at every step.

157. Mr. SANDSTRÖM again suggested the need for a single document setting forth the text of the articles as it emerged from the decisions so far taken by the Commission.

158. The CHAIRMAN and Mr. BRIERLY supported that suggestion.

It was so decided.

The meeting rose at 1.10 p.m.

88th MEETING

Thursday, 24 May 1951, at 9.45 a.m.

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