

Document:-
A/CN.4/SR.88

Summary record of the 88th meeting

Topic:
<multiple topics>

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

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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. SCALLE 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. Briery'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. SCALLE, 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. Shushi HSU,
followed by: Mr. James L. BRIERLY
Rapporteur: Mr. Roberto CORDOVA

Present:

Members: Mr. Ricardo J. ALFARO, Mr. Gilberto AMADO, Mr. J. P. A. FRANÇOIS, Mr. A. E. F. SANDSTRÖM, Mr. Jean SPIROPOULOS, Mr. Jesús María YEPES.

Secretariat: Mr. Ivan KERNO, Assistant Secretary-General in charge of the Legal Department; Mr. Yuen-li LIANG, Director of the Division for the Development and Codification of International Law, and Secretary to the Commission.

Communication from the President of the International Court of Justice

1. Mr. BRIERLY, as Chairman of the Commission, read out a letter from Mr. Basdevant, President of the International Court of Justice, thanking the members of the Commission for their condolences on the death of Mr. de Barsos Azevedo, Judge of the Court.

Law of treaties: report by Mr. Brierly (item 4 (a) of the agenda) (A/CN.4.43, A/CN.4/L.4) (continued)

2. The CHAIRMAN declared open the discussion on document A/CN.4/L.4, in which the Secretariat had embodied the tentative decisions taken by the Commission during the first reading of Mr. Brierly's second report (A/CN.4/43).

ARTICLE 1: AUTHENTICATION OF TEXTS OF TREATIES.¹

3. Mr. BRIERLY stated that article 1 of the redraft had been taken, with some slight changes, from his first report (A/CN.4/23) in which it appeared as article 6. He commended it as not employing the word "conclusion", the imprecise nature of which had been brought to light by the discussion at the eighty-fourth meeting.

4. Mr. KERNO (Assistant Secretary-General) observed that in sub-paragraph (c) of the French text the words "la constitution" had been used by mistake instead of the words "la pratique constitutionnelle". Replying to a question by Mr. SANDSTRÖM, he said he thought the French words "procédures officielles" were the equivalent of "formal means".

Sub-paragraph (a)

5. Mr. FRANÇOIS proposed that the words "which have taken part in the negotiation of that treaty" be deleted, since the minister who signed or initialled had frequently not taken part in the negotiation.

6. Mr. BRIERLY said that the sub-paragraph would be too vague if it ended with the words "of the States".

7. Mr. ALFARO considered Mr. François' remark very pertinent. During prolonged negotiations the minister

in office might be replaced. In that case his successor would sign without having taken part in the negotiation.

8. Mr. CORDOVA pointed out that the words "which have taken part in the negotiation of that treaty" referred to the States, not to the representatives.

9. Mr. YEPES thought Mr. François' proposal a very sound one, and agreed with Mr. Brierly that deletion of the last clause would leave the sub-paragraph incomplete. He therefore supported the deletion but, since the States referred to in the sub-paragraph should be clearly indicated, he also proposed that the word "contracting" be inserted before the word "States", or the word "concerned" added after it.

10. Mr. SANDSTRÖM associated himself with Mr. Cordova's observation and thought that the French text of the sub-paragraph would be clearer if the word "ayant" were substituted for the words "qui ont".

11. Mr. FRANÇOIS felt that the text would still be ambiguous.

12. Mr. AMADO said that the signatories of a treaty had not always taken part in the negotiation, giving as examples the history of relations between the Argentine and Uruguay at the beginning of the nineteenth century, and the treaty of 1785 between the United States of America and Prussia which had been negotiated for the United States by Franklin but signed by Jefferson.

13. Mr. ALFARO was willing for the clause in question to be deleted if the sub-paragraph were amended to read as follows: "The signature or initialling *ne varietur* of the duly authorized representatives of the contracting parties".

14. Mr. KERNO (Assistant Secretary-General) said that Mr. Alfaro's proposal raised a fresh difficulty. There were no contracting parties until conventions had entered into force. It was true that the expressions "High Contracting Parties" or "Contracting Parties" usually appeared in the preambles of treaties, but in the text under discussion their use would be misleading. What was meant was of course that the treaty should be signed or initialled by all those who had taken part in the negotiation.

15. The English text was not ambiguous. The word "which" could only refer to the States, not to the representatives. The French text on the other hand would remain ambiguous even if it were improved by the substitution of "ayant" for "qui ont".

16. Mr. ALFARO proposed the following formula for sub-paragraph (a) to overcome the various difficulties: "The signature or initialling *ne varietur* on behalf of the States which have taken part in the negotiation of the treaty by their duly authorized representatives".

Mr. Alfaro's formula was adopted.

Sub-paragraph (b)

17. Mr. KERNO (Assistant Secretary-General) pointed out that the French text did not take into account the various deletions made in the English text. It should read: "*par incorporation dans l'acte final d'une conférence de tels représentants*".

¹ Article 1 of document A/CN.4/L.4 read as follows:

"The authentication of the text or texts of a treaty may be effected by:

"(a) The signature or initialling *ne varietur* of the duly authorized representatives of the States which have taken part in the negotiation of that treaty; or

"(b) Incorporation in the Final Act of a conference of such representatives; or

"(c) Incorporation in the resolution of an organ of an international organization authenticated in whatever manner the constitutional practice thereof may provide; or

"(d) Other formal means prescribed by the treaty."

18. Mr. YEPES felt that the form in which sub-paragraph (b) was cast was faulty and lacked clarity.

19. Mr. KERNO (Assistant Secretary-General) explained that while sub-paragraph (a) covered the case of plenipotentiaries signing or initialling, sub-paragraph (b) covered the possibility of a Final Act drawn up at a conference incorporating the text of the treaty. In the latter case authentication of the text was effected by its incorporation in the Final Act and what was signed was the Final Act.

20. Mr. SANDSTRÖM proposed the substitution of the words "similarly signed or initialled" for the words "of such representatives".

21. Mr. KERNO (Assistant Secretary-General) pointed out that the Final Act of a conference could be signed by all the representatives or by the Chairman of the conference alone. He proposed that the words "of such representatives" be deleted.

It was so decided.

22. Mr. YEPES felt that the nature of the conference should be indicated, for example, by substituting the words "an international conference" for the words "a conference".

23. Mr. BRIERLY, in order to meet Mr. Yepes' wishes, proposed the following wording: "of the conference at which the treaty was negotiated".

24. Mr. YEPES agreed.

It was so decided.

24a. After an exchange of views between Mr. YEPES, Mr. AMADO, Mr. KERNO (Assistant Secretary-General) and Mr. SANDSTRÖM concerning the possible substitution of the word "insertion" for the word "incorporation" in the French text, it was decided that the translation of the English word "incorporation" be left to the Languages Division.

Sub-paragraph (b) was adopted as amended.

Sub-paragraph (c)

25. Mr. LIANG (Secretary to the Commission) said that it ought to be made clear that in the English text the word "authenticated" referred to "resolution" and not to "incorporation".

26. He wished to know why the expression "constitutional practice" had been used instead of the word "constitution", in view of the fact that what appeared to be referred to was the Charter of the United Nations.

27. Lastly, it was not customary for resolutions of the United Nations to be authenticated.

28. The comment on former article 6 of the first report on the Law of Treaties (A/CN.4/23) threw little light on the three points he had raised.

29. Mr. BRIERLY, replying to Mr. Liang's first point, said he thought the redraft might be improved by substituting the words "in accordance with the constitutional practice of that organization" for "authenticated in whatever manner the constitutional practice thereof may provide".

30. He had used the expression "constitutional practice" deliberately. Though the Charter of the United Nations

did not provide specifically for that method of authentication, it had been employed in practice at the General Assembly for the adoption of draft treaties.

31. Mr. Liang's third criticism was met by the proposed amendment, which did not contain the word "authenticated".

32. Replying to a remark by Mr. YEPES, Mr. BRIERLY said that he saw nothing against the words "in a resolution" being substituted for the words "in the resolution" in the English text. The amendment did not affect the French text.

Sub-paragraph (c) was adopted as amended.

Sub-paragraph (d)

Sub-paragraph (d) was adopted without comment.

ARTICLE 2: ENTRY INTO FORCE OF TREATIES

33. Mr. BRIERLY observed that it had already been decided to delete the article.²

ARTICLE 3: APPLICATION OF TREATIES³

34. Mr. BRIERLY stated that the text was a new one, its purpose being to indicate that signature, ratification and accession must always be in accordance with constitutional law and practice. Inclusion of the article made it unnecessary to repeat the same thing a number of times.

35. Mr. SANDSTRÖM said that he no longer felt the misgivings which he had expressed earlier. He had no objection to the new article 3 being adopted.

36. Mr. FRANÇOIS wished once more to emphasize the possible undesirable results of such an article, even apart from the difficulties which might arise in connexion with deposit with the Secretary-General.

37. He asked the Commission to consider the imaginary case of a treaty between two States which had been signed and ratified by both parties. The heads of State had exchanged the instruments of ratification. Provisionally the treaty was in force. In one of the two countries the public criticized the head of the State for having ratified without parliamentary authorization. The matter had to go before a court — a national court since it was a matter of domestic law. The national tribunal ruled that the ratification was invalid and retrospectively null and void. In that case the other State, which had duly followed the ratification procedure and ever since the exchange of ratification had duly fulfilled its undertakings, would be faced with a partner who could say: "Since the ratification is null and void, I am not bound by the treaty."

38. A text which made such a state of affairs possible could not be accepted. It meant sacrificing the stability

² At the 85th meeting, paragraph (1) was deleted (summary records of the 85th meeting, para. 10). In document A/CN.4/L.4, it was suggested to delete paragraph (2) in view of the provision of new article 6.

³ Article 3 of document A/CN.4/L.4 read 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."

of international relations to the desire to respect the national will.

39. Mr. CORDOVA pointed out that the Commission had taken a decision on that point. He noted that Mr. François attached more importance to the form of ratification than to its intrinsic features and thought that if the form was observed, ratification must be valid in all cases. But the Commission had voted against that view; it had recognized that, in order to be valid, ratification required not only observance of the form but also of the constitution, since international law was concerned with the capacity required by those who were subject to it to contract valid obligations. That capacity could only be determined with reference to domestic law. The position was the same, *mutatis mutandis*, as in the case of a contract under private law entered into by a minor without the consent of his guardian.

40. The judge determining the validity of ratification would be an international judge. That procedure had been adopted in hundreds of arbitration cases. In claims involving Mexico and the United States — a subject with which he was familiar because he had been the Mexican representative in arbitrations between the two countries and in several other cases besides — the international judge, in order to determine whether there had been a denial of justice, had had to ascertain whether the domestic law had been correctly applied. Thus it sometimes happened that domestic law became a part of international law.

41. Mr. BRIERLY agreed that there were two schools of thought. The adoption of either of them raised difficult problems. The majority of the Commission had supported the principle of respect for constitutional law, in spite of the force of the contrary argument, in defence of which Mr. François had the support of Anzilotti and, so far as theory was concerned, of Mr. Basdevant. He thought that if the Commission had any choice it might support that view. It was the feeling that States would never accept such a doctrine that had led the Commission to reject it. Its decision had been based not on legal principles, but on practical considerations.

42. Mr. SANDSTRÖM said that Mr. Córdova had forestalled him with a comment that he had himself intended to make. The validity of ratification must certainly be decided by an international court. From one point of view ratification was, indeed, a domestic act, but as an instrument deposited or exchanged it was also an international act.

43. Mr. KERNO (Assistant Secretary-General), referring to the difficulties which might confront the depositary of treaties, explained that under article 3 existing practice would be continued. The Secretary-General would be obliged to accept signatures, ratifications or accessions if they appeared at first sight to be in good and due form, until that was disputed or disproved.

44. It might also be asked whether a document intended to facilitate international relations and make them more secure should give such prominence to the principle stated in article 3. That principle was good in itself,

but should it form part of the façade of the legal edifice they were constructing?

45. Following a comment by Mr. BRIERLY, the CHAIRMAN asked Mr. François if he was formally proposing that the Commission reconsider its former decision.

46. Mr. FRANÇOIS said he was not asking for another vote, but wished to indicate that he was definitely opposed to article 3. In reply to a question by Mr. YEPES, he added that his criticisms did not concern the form of the article, but its substance.

47. The CHAIRMAN pointed out that in the past, as a result of pressure from Japan, the Chinese Government had concluded certain treaties with that country without following the constitutional procedure of the Chinese Republic. He therefore considered that there was a need for the rule formulated in article 3, with which he was fully satisfied.

48. Mr. AMADO proposed that the word "organ" be replaced by the word "organs". That amendment applied to States in which ratification depended on parliamentary approval, and several organs were consequently concerned.

49. Mr. CORDOVA did not think it would be correct to refer to "competent organs". Signature, ratification and accession took place through the agency of a single organ, even if several were concerned in the preliminary procedure.

50. Mr. SPIROPOULOS pointed out, in addition, that the word "organ", taken as a general expression, did not preclude plurality.

51. Mr. AMADO did not press his amendment.

52. Mr. BRIERLY reminded the Commission that at the previous day's meeting he had expressed the view that acceptance should be mentioned among the acts which could make a treaty legally binding. After further consideration, and having consulted Mr. Kerno, he had become aware of certain difficulties. He thought that it would be better to confine the draft to conventional procedures and not to include that new form. The Commission could explain the reasons for that deliberate omission and signify its willingness, if the General Assembly so requested, to repair it in a commentary to be inserted in its report.

53. Mr. KERNO (Assistant Secretary-General) pointed out that if acceptance were mentioned in article 3, it would be necessary to draft parallel texts of the subsequent articles taking account of that new procedure.

54. If the Commission considered that the classical doctrine was best, it should keep the present wording of article 3, but explain to the General Assembly that it was bearing acceptance in mind and was willing to include it in the draft if the General Assembly so requested.

55. Mr. CORDOVA pointed out that acceptance was one of the methods by which treaties could be concluded. The Commission should include it in the draft.

56. Mr. SPIROPOULOS thought that it would take too long for the Commission to explain acceptance. It had prepared a text on classical lines. Acceptance was

a new procedure to which others might be added in the future and the principle stated in article 3 did not rule out new procedures. Ratification, accession or acceptance were all manifestations of will, which differed only in form.

57. Mr. CORDOVA considered it the Commission's duty to codify all procedures and proposed the addition of the words "or acceptance" after the word "accession".

58. Mr. BRIERLY observed that that addition would compel the Commission to define acceptance in another article. At the present time there were three different forms of acceptance. There were agreements which were merely accepted, others which were signed subject to acceptance (in that case the procedure was very similar to ratification), and finally, other instruments which were signed without reservation as to acceptance.

59. Mr. CORDOVA agreed that his amendment might make it necessary to draw up three articles on acceptance. But what was important was to state that acceptance, also, must be in accordance with constitutional practice. Without such a provision, it might be concluded that acceptance was not necessarily subject to compliance with constitutional law.

60. Mr. AMADO read extracts from a lecture delivered in 1948 by Mr. Saba, Director of the Legal Department of the United Nations, entitled "Certain Aspects of the Development of Treaty Technique":

"For some years now, a new procedure and terminology have been adopted, which are to be found, in particular, in the Constitution of the World Health Organization, the Constitution of the International Refugee Organization, the Convention on the Intergovernmental Maritime Consultative Organization, the Protocols transferring to the United Nations certain functions previously exercised by the League of Nations under the Conventions on narcotic drugs, the traffic in women of minor and full age, the circulation of obscene publications, on statistics, and, quite recently, in the Protocol bringing synthetic drugs under international control. These Conventions and Protocols provide that a State may become a party to the agreement, either by signing without reservation as to subsequent approval or acceptance; or by signing subject to acceptance and subsequently accepting; or, finally, by accepting, without previous signature being required.

"Thus States which have no constitutional difficulty in the matter, have been given a means of becoming parties to the Convention immediately, by signing it.

"Moreover, approval or acceptance following conditional signature is very similar to the procedure of ratification and takes account of the need of certain States, under their constitution, formally to ratify Conventions which they have already signed.

"The term 'ratification' has, however, been replaced by the terms 'approval' or 'acceptance', though the relevant terminology is not yet uniform or final. The difference between the terms 'acceptance' and 'approval' and the term 'ratification' is that acceptance has a wider scope than ratification since, according to the definition of the Anglo-Saxon writers, by whom this

new procedure was inspired, acceptance must express the definite will of a State to become bound by a convention. The form in which that will is to be expressed has not been specifically laid down in the instruments, but the usual practice has been to recognize in addition to formal letters of ratification, simple written statements from the head of the government or the Minister for Foreign Affairs.

"The substitution of the term 'acceptance' for 'ratification' had another advantage. Under certain constitutions, ratification of a treaty requires a formal act by the Chief of State, performed in pursuance of a decision adopted by a two-thirds majority of the Senate. In order to avoid that long and complicated procedure, the States in question have endeavoured to employ, in the international agreements they concluded, a terminology enabling them to act outside the framework specifically provided by their Constitutions. They have, indeed, considered that in referring formally to treaties and their ratification, the Constitution was only intended to apply to formal ratification of political treaties of a general character, without excluding the possibility of entering into other agreements by a more flexible procedure. Hence they endeavoured to modify the terminology of the agreements they concluded, in that respect."

61. He regarded that text as an illustration of the line of reasoning followed by Mr. Spiropoulos. The Commission should consider whether it was really necessary to lay down rules for a procedure which was itself not fixed.

62. Mr. SPIROPOULOS thought that the Commission could get round the difficulty by indicating that the enumeration in article 2 was not exhaustive. It might, for instance, add after the word "accession" the words "or any other means by which a State expresses the will to become bound".

63. Mr. AMADO proposed the following variant: "or acceptance as the case may be".

64. Mr. FRANÇOIS said that, with regard to that particular point in Article 3, he favoured the solution recommended by Mr. Spiropoulos; but he added that the definition of "ratification" given in article 4 (1) was already so wide that it also covered acceptance. Widening the concept of ratification was one way of recognizing acceptance.

65. Mr. KERNO (Assistant Secretary-General), expressed his doubts. As the excerpt from Mr. Saba's lecture had shown, the new procedure of acceptance had of course been adopted for important treaties. Hence the Commission could not ignore it. It was necessary to decide whether it was merely a question of a new term or whether it represented a substantial innovation. Mr. Saba had stated that acceptance was a more flexible procedure, which made it possible to provide, in one and the same convention, for signature and ratification by certain States, and signature without any reservation with regard to ratification, in the case of the others. According to the classical formula, however, where there was a provision regarding ratification

in a convention, it applied to everybody. Acceptance therefore did perhaps offer differences of substance.

66. The matter was one for the Commission to decide. If it preferred to leave States the option of resorting to the more flexible formula, it should not only mention acceptance in article 3, but should go more deeply into that procedure.

67. Mr. CORDOVA pointed out that article 1, subparagraph (d), already opened the door to other procedures. The Commission should, however, safeguard the observance of constitutional rules in the case of all the procedures.

68. In his opinion, Mr. Spiropoulos had resolved the difficulty by his proposal to insert in article 3 some such phrase as: "or any other means of expressing the will of the State". He himself accepted that amendment which would make it unnecessary for the Commission to explain what constituted acceptance.

69. Mr. LIANG (Secretary to the Commission) noted that Mr. François regarded acceptance as a kind of ratification and that the article devoted to ratification dispensed with the need for making special mention of acceptance.

70. While, in the majority of cases, acceptance was in fact a kind of ratification, he had nevertheless been able to show in a recent study,⁴ by analysing the forms of acceptance resorted to by the authors of various conventions, that acceptance and ratification were not identical.

71. Under certain provisions of the Bretton Woods Agreements (establishing the International Monetary Fund and the International Bank for Reconstruction and Development):

"It was necessary for these agreements to enter into force by a specified date by final action taken by the States representing specified percentages of quotas or minimum contributions. The need, therefore, arose for a flexible procedure in order that as many States as possible could, in accordance with their respective constitutional requirements, take the necessary final action before the specified date. The use of the 'acceptance' procedure afforded the requisite elasticity. The United States, for instance, after the requisite legislative authorization was obtained from the Congress, including financial appropriations necessary for fulfilling the obligations of membership, was able to become a party to each of these agreements by means of an instrument of acceptance, signed by the President, setting forth that the United States accepted the agreement 'in accordance with its law and has taken all steps necessary to enable it to carry out all of its obligations under the agreement.' In other words, it was thus made possible for the United States, in accordance with its municipal law, to become bound by these agreements without the need of following the procedure, including advice and consent of the Senate to ratification, reserved in the United States for treaties in the constitutional sense."

⁴ *American Journal of International Law*, vol. 44 (1950), pp. 342-349.

72. In that instance, the case was one where acceptance was not identical with ratification but was designed to replace it. It was rather more analogous to accession. In that connexion, the study he had just mentioned contained the following passage:

"Acceptance not preceded by signature corresponds to the recognized meaning of 'accession', namely, an act by which the provisions of the treaty are formally accepted by a non-signatory State. 'Acceptance' in this sense as an alternative method to that of signature without reservation as to acceptance or to that of signature to be followed by acceptance, places a State availing itself of this method on the same level as those signatories which have become parties to the treaty, thereby blurring the traditional distinction between signatory and acceding States. In other words, for the purpose of this formula, such signatory States and the accepting (acceding) States come under one single category, namely, 'parties to the instrument'."

73. Acceptance was equivalent to ratification in most cases. It had just been shown that it could also at times be much the same thing as accession. In other cases, it possessed special features to meet particular requirements.

74. Mr. BRIERLY proposed that the Commission adopt Mr. Spiropoulos' suggestion to insert the words "or any other means of expressing the will of such a State", after the word "accession" in the third line. If the General Assembly wished the Commission to go into greater detail, the latter would draw up a complete text defining acceptance which, as Mr. Liang had said, covered three types of procedure.

Mr. Spiropoulos's amendment was adopted.

Article 3 was adopted as amended.

ARTICLE 4: RATIFICATION OF TREATIES⁵

Paragraph (1)

75. Mr. BRIERLY observed that the wording had already been provisionally approved.

Paragraph (1) was adopted.

Paragraph (2)

76. Mr. BRIERLY pointed out that the Commission could take no decision until it knew the opinion of the International Court of Justice.⁶

ARTICLE 5: WHEN RATIFICATION IS NECESSARY⁷

77. Mr. BRIERLY said that the text took account of the changes made by the Commission to the original

⁵ Article 4 of document A/CN.4/L.4 read as follows:

"(1) Ratification is an act by which the competent organ of a State, finally and in a written instrument duly executed, confirms and accepts a treaty as binding on that State.

"(2) Ratification may be made subject to reservations or conditions in accordance with the provisions of Article 10."

(Paragraph 3 of original article 4 has been deleted by a tentative decision of the Commission at its 86th meeting, paras. 4-6 of the summary records.)

⁶ See also paras. 121-127, *infra*.

⁷ Article 5 of document A/CN.4/L.4 read as follows:

"A State is not deemed to have undertaken a final obligation under a treaty until it has ratified that treaty provided that a

article. It began by establishing ratification as the general rule and then provided for exceptions. It would, however, be preferable for the words "provided that a State is deemed" to form the beginning of a second paragraph. Sub-paragraph (b) made provision for a case which might arise with certain clauses.

78. Mr. YEPES drew the attention of the Commission to the lack of concordance between the French and English texts at the beginning of article 5. The form of the French text, divided into two sentences, was the one he preferred, its wording being clearer and more precise. He asked Mr. Brierly whether it would not be preferable to follow the French text.

79. Mr. BRIERLY said that Mr. Yepes was right and that the sentence in the English text was heavy.

80. At the suggestion of Mr. Brierly, Mr. Yepes and Mr. Sandström, *the Commission adopted the following text:*

"A State is not deemed to have undertaken a final obligation under a treaty until it has ratified that treaty."

"A State is, however, deemed . . ."

Sub-paragraphs (a) and (b) were adopted.

Sub-paragraph (c)

81. Mr. FRANÇOIS wondered whether the wording of the sub-paragraph was not too wide in scope. If a State sent its plenipotentiaries with permission to negotiate without having subsequently to submit the treaty for ratification, whereas the majority of the States adopted an opposite attitude and it was decided to draw up a treaty subject to ratification, sub-paragraph (c) could not then be invoked.

82. Mr. BRIERLY explained that the sub-paragraph meant that the State in question was bound. There was no objection to a State declaring that it intended to bind itself by their mere act of signature.

83. Mr. FRANÇOIS thought it would be more prudent to add: "if the treaty does not require ratification". He would remind the Commission that as full powers were never published, the nature of their contents was unknown.

84. Mr. KERNO (Assistant Secretary-General) said he shared the concern of Mr. François and wondered whether sub-paragraph (c) was necessary.

84a. Mr. BRIERLY having agreed, *it was decided to delete sub-paragraph (c).*

Sub-paragraph (d) was adopted.

85. On the proposal of Mr. Sandström, the title of article 5, "When ratification is necessary", was deleted.

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."

ARTICLE 6: ENTRY INTO FORCE OF TREATIES⁸

86. Mr. CORDOVA recalled that a slight change had been made to paragraph (1) on the proposal of Mr. Yepes ; the words "of all States which have participated in the negotiations" having been added.

87. On the proposal of Mr. SPIROPOULOS, the beginning of paragraph (1) was amended to read: "A treaty not subject to ratification enters into force. . .".

Article 6 was adopted as amended.

ARTICLE 7: OBLIGATION OF A SIGNATORY PRIOR TO THE ENTRY INTO FORCE OF A TREATY⁹

Article 7 was deleted.

ARTICLE 8: NO OBLIGATION TO RATIFY¹⁰

88. At the suggestion of Mr. KERNO (Assistant Secretary-General), the Commission *decided* to omit the title of article 8: "No obligation to ratify", and to place the article after article 5.

NEW ARTICLE¹¹

89. Mr. YEPES asked that the article be left where it was. He hoped there would be no discussion at that meeting in the absence of Mr. Scelle, who was one of the chief supporters of the article.

90. Observations could be submitted on second reading.

91. Mr. BRIERLY said he did not wish to reopen the discussion. He hoped the Commission realized the implication of its decision, particularly insofar as it affected the United States of America. It was like saying to the President of that country: "Your plenipotentiaries have signed the treaty but you and your Secretaries of State will not have an opportunity of re-considering the question and you must send the treaty to the Senate and leave it to the latter to accept it or reject it." If the Commission said such a thing to the United States, that country would certainly never accept the draft Code.

⁸ Article 6 of document A/CN.4/L.4 read as follows :

"Unless otherwise provided in the treaty itself :

"(1) When a treaty is not subject to ratification, it enters into force on signature of all States which have participated in the negotiations.

"(2) A treaty which provides for the exchange or deposit of ratifications enters into force on the exchange or deposit of ratifications by all the signatories.

"(3) A treaty which is subject to ratification but which contains no provision for exchange or deposit of ratifications enters into force when it is ratified by all the signatories and when each signatory has notified its ratification to all the other signatories."

⁹ Article 7 had been deleted by a tentative decision of the Commission at its 87th meeting, para. 83 of the summary records.

¹⁰ Article 8 of document A/CN.4/L.4 read as follows :

"The signature of a treaty on behalf of a State does not create for that State any obligation to ratify the treaty."

¹¹ The new article of document A/CN.4/L.4 read as follows :

"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."

92. Mr. CORDOVA was in favour of the article because it had almost become the custom, in inter-American relations, to sign treaties and never to ratify them. The article would clear the air. States would be morally obliged to take a decision. Furthermore, the obligation involved was that of submitting the treaty to Parliament and not that of asking for ratification. All that was asked was that the State should express its will.
93. Mr. YEPES said he would like the Commission to know that it was the United States which, at the Pan-American Conference, had taken the initiative of asking for the adoption of provisions designed to make signatory States take the necessary steps for ratification. The Commission was only following the practice adopted by the United States.
94. For instance an article had been adopted at the Inter-American Conference for the Maintenance of Peace, which met in 1936 at Buenos Aires, under which States agreed to take all the necessary steps to see that treaties were constitutionally ratified. The article now under consideration did no more than that.
95. Mr. AMADO did not wish to reopen discussion on the article but felt he must remind his colleagues that the conferences referred to had been political conferences of States at which the bases of a common American policy were laid. The Commission's purpose was to codify international law and to formulate the rules of law as they existed. The article in question however expressed a political and moral desire.
96. He deeply regretted having to say so in the absence of Mr. Scelle, but he would say in the presence of Mr. Yepes, who was also very anxious that the view be expressed, that it was difficult for him to accept that article. He shared Mr. Brierly's opinion on that point.
97. Mr. SPIROPOULOS pointed out that he had abstained when the vote had been taken, and that as a matter of fact, was how it came about that the article had been adopted. He must say that the solution of the problem lay in the importance attributed to the act of signature. In his opinion, when a State signed a treaty, it meant that the representatives had agreed on a definite text but it still remained to be decided whether the government would go any further. Agreement had been reached, after lengthy discussion, on a text which might perhaps become a treaty. It was going too far to place governments under the obligation of submitting the treaty to their competent organ. He had abstained and would continue to do so.
98. Supposing the text were adopted, he did not understand why the Commission should say: "especially to a multilateral treaty." If the principle existed, it existed for all treaties. The words should be deleted.
99. Mr. YEPES, on a point of order, observed that the article had been approved at the previous meeting.
100. Mr. SPIROPOULOS replied that it was a question of wording only.
101. Mr. SANDSTRÖM recalled that the text had only been adopted provisionally and that the final vote would be taken when the other members of the Commission they were still expecting finally arrived.
102. Mr. ALFARO considered that the inclusion of the words: "especially to a multilateral treaty" was most felicitous and highly scientific. It gave force to the article. It was, in fact with regard to multilateral treaties that the inaction of States caused the greatest harm. In the case of the Bogota Charter, for example, all the States of the American continent had had the intention of forming a juridical organization of American States which had in fact existed since the signature of the first agreement at the end of the last century. The community of American States had felt the desire to give legal force to that organization, and he did not think there was a single people opposed to it. Yet there were Governments which had not taken, and were not likely to take for a long time to come, the necessary steps to ratify the Charter. If they did not wish to ratify it, they should say so.
103. There was in existence a list of conventions signed but not ratified, from which it could be seen that one of the American Republics had signed 61 treaties and had only ratified 9 of them; not because of the opposition of the people, but because of the inertia of those in the seat of government. The inclusion of the words in question would help to dissipate such harmful uncertainty. They could not be deleted since the object was to emphasize the importance of the rule, with special reference to multilateral treaties. It was, he would repeat, in respect of the latter that the evil was greatest. By omitting the words, the Commission would destroy the whole basis of the draft.
104. Mr. LIANG (Secretary to the Commission) recalled, in connexion with that article, the suggestion submitted in 1947 by the Secretariat to the Committee on the Development and Codification of International Law, namely: to authorize the Secretary-General to remind States signatories to a multilateral convention that they should take the necessary steps to submit the convention to the constitutional procedure provided for ratification.¹² It was important for the development of international law that signatory States should take such measures. The members of the Commission who had been representing their countries on the above-mentioned Commission would not fail to recall that Mr. Koretsky had opposed the suggestion on the ground that States ratified when they wished to. The Secretariat's suggestion had been based on action contemplated by the League of Nations.
105. He wondered however whether such an article was in its right place in the codification of the law of treaties or whether it should not rather form the subject of a General Assembly resolution requesting the Secretary-General to draw the attention of States to the matter. He was inclined to consider that the article would assist the development of international law.
106. Mr. SPIROPOULOS said he would not deal with the substance of the question but would like to return to the matter of wording. Could it be claimed that the obligation was widened in scope by leaving the words in question in the text? If there was an obligation, it existed and its force was not increased or reduced according to

¹² A/AC.10/7, pp. 4-5.

the nature of the treaty. The text applied equally to the two types of treaty. On the contrary, by leaving the text as it was, it would apply more strongly to multilateral treaties.

107. He did not wish to press the point.

108. Mr. YEPES said that the discussion was contrary to the rules of procedure. The Commission would have the opportunity of discussing the article thoroughly at the second reading. He would like to confirm Mr. Liang's statements. The article reflected existing practice. In the case of the Convention on Genocide the United Nations had made innumerable representations to the signatory States to get them to ratify. There was no question of interference with the domestic sovereignty of States. It was the role of an international organization to see to it that conventions were ratified.

109. The CHAIRMAN agreed with Mr. Spiropoulos that the words "especially to a multilateral treaty" should be struck out. The text would be strengthened thereby. The Commission had not however decided to resume discussion of the article.

110. Mr. SPIROPOULOS repeated that he would not press his proposal, but on the other hand could not understand the opposition of Mr. Yepes. Articles could be changed. The Commission had done so already.

111. Mr. YEPES agreed that Mr. Spiropoulos' statement was correct. It was nevertheless true that the article had been approved at the 87th meeting by a small majority and that if the question were taken up again in the absence of Mr. Scelle, the article might be rejected.

112. Mr. SPIROPOULOS withdrew his proposal.

113. Mr. CORDOVA thought that the Commission had approved the substance of the article. He would himself be opposed to any modification but did not see why the form should not be changed. By preserving the words in question, the effect of the article with regard to bilateral treaties was weakened.

114. Mr. ALFARO would like to confirm what Mr. Yepes had said with regard to the constant practice in the Organization of American States. For a long time past the Council of the Pan-American Union had been vigorously protesting against the practice of signing treaties and not submitting them to ratification.

115. In 1928, he had himself proposed to the Council that the Governing Board send a mission to all American Governments to enquire why they did not submit the conventions they had signed to ratification. It had been considered that such an act would constitute pressure on Governments and the Governing Board had decided to publish a report on the situation every six months. In 1928, at Havana, the Pan-American Union had taken shape and a Convention had been signed. Pending ratification, the Union was to begin work and provisions to that end had been adopted. The Convention had never been approved. In 1948, a Charter had been signed at Bogotá setting up a regional organization within the framework of the United Nations and it had been decided to send to governments at regular intervals a booklet to remind them of the steps they were required to take.

116. There was a certain flexibility about the text of the article under consideration in that it specified "within a reasonable time". That meant that, in the case of multilateral treaties, the period should be shorter than in the case of bilateral treaties.

117. Mr. SPIROPOULOS pointed out that, since he had withdrawn his proposal there was no further suggestion before the Commission.

The new article was adopted.

ARTICLE 9: ACCESSION TO TREATIES¹³

Paragraph (1)

118. Mr. CORDOVA asked that the wording of paragraph (1) be changed in order to remove the ambiguity arising from the use of the words "on whose behalf".

119. Mr. BRIERLY replied that the words referred to the State and not to the competent organ.

120. Mr. ALFARO pointed out that the Harvard draft had adopted the habit of saying "the State on behalf of which the treaty has been signed", thereby implying that it was not the State, an abstract entity, but the plenipotentiaries who had signed, as was obvious. In the case in point, however, the expression made the text obscure. It was preferable to say "a State which has not signed". The Commission had used the same expression elsewhere.

121. Mr. LIANG (Secretary to the Commission) did not think that the formula adopted was a correct one. He would prefer the wording: "an act by which a State accepts through its competent organ". It would be necessary to use the same formula in the other articles of the draft.

122. Mr. BRIERLY recalled that article 4 had been thus amended because the Commission had not at the time taken any decision with regard to article 3 which contained the general provision relating to competence. Now that article 3 had been adopted¹⁴, it was desirable to use in article 4 the wording "by which a State...".

123. If reference were made to the competent organ in article 4, a similar reference would have to be included in article 9. In both cases he was in favour of saying simply "a State". There was no objection to that term in view of the provisions of article 3.

It was decided both in article 9 and article 4 to substitute the words "by which a State..." for the words "by which the competent organ of a State".

¹³ Article 9 of document A/CN.4/L.4 read as follows:

"(1) Accession to a treaty is an act by which the competent organ of a State, on whose behalf the treaty has not been signed or ratified, formally, and in accordance with the terms of the treaty, accepts, in a written instrument duly executed, the treaty as binding for that State.

"(2) A State may accede to a treaty only when that treaty contains provisions enabling it to do so or with the consent of all the parties to the treaty.

"(3) Unless otherwise provided in the treaty itself a State may only accede to a treaty after it has entered into force."

(Paragraphs (4) and (5) of original article 9 have been deleted by tentative decisions of the Commission, 87th meeting, 23 May.)

¹⁴ See para. 74, *supra*.

124. Mr. CORDOVA proposed that the text run on as follows: "by which a State which has not signed or ratified the treaty accepts . . .".

125. Mr. BRIERLY accepted that amendment.

Mr. Córdova's amendment was adopted.

126. Mr. SPIROPOULOS thought the words "duly executed" were unnecessary and should be deleted.

127. Mr. BRIERLY agreed.

Mr. Spiropoulos's amendment was adopted.

Paragraph (1) was adopted as amended.

Paragraphs (2) and (3) were adopted.

Mr. Hsu relinquished the chair to Mr. Brierly.

Programme of work

128. The CHAIRMAN proposed that at the next meeting the Commission begin discussion of the report by Mr. Spiropoulos CA/CN.4/44 on a draft code of offences against the peace and security of mankind (item 2 (a) of the agenda).

129. He enquired whether any member of the Commission was opposed to discussing a text which had so far appeared in English only.

130. Mr. CORDOVA doubted whether the text adopted on the question of treaties was substantial enough to be sent to governments or to the General Assembly. He thought it would be a good thing to continue discussion of Mr. Brierly's first report on the law of treaties in order to advance the study of a subject which was of immediate interest and concern to all.¹⁵

¹⁵ Discussion of the report of Mr. Brierly was resumed at the 98th meeting. The text of articles tentatively adopted by the Commission at its 88th meeting read as follows:

" Article 1

" The authentication of the text or texts of a treaty may be effected by:

" (a) The signature or initialling *ne varietur* on behalf of the States which have taken part in the negotiation of that treaty by their duly authorized representatives; or

" (b) Incorporation in the Final Act of the conference at which the treaty was negotiated; or

" (c) Incorporation in a resolution of an organ of an international organization in accordance with the constitutional practice of that organization; or

" (d) Other formal means prescribed by the treaty.

" Application of treaties

" Article 2

" A treaty becomes legally binding in relation to a State when that State undertakes a final obligation under the treaty whether by signature, ratification, accession or any other means of expressing the will of the State, in accordance with its constitutional law and practice through an organ competent for that purpose.

" Ratification of treaties

" Article 3

" (1) Ratification is an act by which a State, finally and in a written instrument, confirms and accepts a treaty as binding on that State.

" (2) Ratification may be made subject to reservations or conditions in accordance with the provisions of Article 10. (This paragraph was deferred to await the advisory opinion of the International Court of Justice on the question of reservations.)

131. Mr. YEPES thought that the discussion on the draft relating to the law of treaties could not be closed. He had proposed a new article at the second session, which, it had been promised, would be included in the agenda for the third session and in the report¹⁶. He asked that that article be discussed at the next meeting. It ran as follows:

" In order to be valid, a treaty, as understood in this Convention, must have a lawful purpose according to international law. In case of any dispute regarding the lawfulness of a treaty, the International Court of Justice shall state its opinion on the matter at the request of any State directly or indirectly interested, or of the United Nations.

" A treaty with an unlawful object may not be registered with the Secretariat of the United Nations. Whenever the lawfulness of a treaty submitted for registration is in doubt, the Secretary-General of the United Nations shall ask the International Court of Justice for an advisory opinion."

" Article 4

" (1) A State is not deemed to have undertaken a final obligation under a treaty until it has ratified that treaty.

" (2) A State is, however, deemed to have undertaken a final obligation by its signature of the treaty if

" (a) The treaty so provides;

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

" (c) The form of the treaty or the attendant circumstances indicate an intention to dispense with ratification.

" Article 5

" The signature of a treaty on behalf of a State does not create for that State any obligation to ratify the treaty.

" Article 6

" 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.

" Entry into force of treaties

" Article 7

" Unless otherwise provided in the treaty itself,

" (a) A treaty not subject to ratification enters into force on signature of all States which have participated in the negotiations;

" (b) A treaty which provides for the exchange or deposit of ratifications enters into force on the exchange or deposit of ratifications by all the signatories;

" (c) A treaty which is subject to ratification but which contains no provision for exchange or deposit of ratifications enters into force when it is ratified by all the signatories and when each signatory has notified its ratification to all the other signatories.

" Accession to treaties

" Article 8

" (1) Accession to a treaty is an act by which a State which has not signed or ratified the treaty, formally and in accordance with its terms, accepts it, in a written instrument, as binding on that State.

" (2) A State may accede to a treaty only when that treaty contains provisions enabling it to do so or with the consent of all the parties to the treaty.

" (3) Unless otherwise provided in the treaty itself a State may only accede to a treaty after it has entered into force."

¹⁶ See summary records of the 78th meeting, para. 49c.

132. The CHAIRMAN stated that the article had nothing to do with the section of the law of treaties with which the Commission was dealing and which concerned the conclusion of treaties.

133. Mr. YEPES thought that view was open to dispute. The Commission had established the framework of treaties but had omitted to state what could be consented to.

134. It had stated that a treaty should be signed, ratified etc., but had neglected the substance of the treaty. A State could not sign, ratify etc. a treaty with an unlawful purpose.

135. Mr. SANDSTRÖM recalled that Mr. Córdova had raised a far broader issue than Mr. Yepes and one which should be considered first. Was the draft which the Commission had just adopted the only text it was going to submit on that item to the General Assembly? That was what should be discussed.

136. Mr. CORDOVA also considered that the latter question should be settled before the problem raised by Mr. Yepes was broached. That problem could not be included in the part of the report the Commission had just adopted.

137. He would like to return to a fundamental point. What the Commission had produced was very little. Could it face the opinion of governments armed with that text alone?

138. Mr. SPIROPOULOS thought that, before taking a decision on that point, it was necessary to await the arrival of the other members of the Commission. It might then be possible to decide either to send the text to governments or to wait until the following year. Or the decision might be left until later.

139. The problem raised by Mr. Yepes was a very important one. He thought it should be kept in view, though it was not the moment to discuss it. The Commission should return to it when it began discussing the section of the law of treaties to which the problem belonged.

140. Mr. KERNO (Assistant Secretary-General) noted that the Commission had almost reached the end of the second week of its third session, which ran to only ten weeks, and had so far completed merely the provisional adoption of that small part of the report.

141. If it did not take steps to expedite its work, it would not achieve such fruitful results as at its first and second sessions.

142. During the meeting in progress, the Commission had transformed itself into a drafting committee. It might perhaps be better for it to concentrate on the important questions and leave the drafting to its rapporteur or to a drafting committee which could meet in the afternoon.

143. If the Commission maintained its decision to commence consideration of the report by Mr. Spiropoulos at its next meeting, that did not mean that it would not deal with the second report by Mr. Brierly. The report by Mr. Spiropoulos was ready for discussion and the Commission could give it priority.

144. Mr. CORDOVA thought on the other hand that since the members of the Commission had the problem of treaties fresh in their minds, it would be preferable to continue the study of the subject. It could consider Mr. Spiropoulos' report afterwards.

It was decided to begin the study of the report by Mr. Spiropoulos at the next meeting.

The meeting rose at 1 p.m.

89th MEETING

Friday, 25 May 1951, at 9.45 a.m.

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Chairman: Mr. James L. BRIERLY

Rapporteur: Mr. Roberto CORDOVA

Present:

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

Preparation of a draft code of offences against the peace and security of mankind: report by Mr. Spiropoulos (item 2 (a) of the agenda) (A/CN.4/44)

GENERAL

1-2. Mr. SPIROPOULOS (Rapporteur) said that his task had not been a difficult one: it had been to put the report into more or less final form; after discussion it would be sent to Governments, in conformity with article 16 of the Statute of the Commission.

3. He proposed that the Commission should begin its examination of the report not with the introduction but