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98th MEETING

Thursday, 7 June 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. Gilbert AMADO, Mr. J. P. A. FRANÇOIS, Mr. Shuhsi HSU, Mr. Manley O. HUDSON, Mr. Faris EL KHOURY, 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.4/23) (resumed from the 88th meeting)

ARTICLES 3 TO 5 OF DOCUMENT A/CN.4/23: CAPACITY TO MAKE TREATIES

1. The CHAIRMAN recalled that, the previous year, articles 3, 4 and 5 of the draft Convention on the Law of Treaties, which he had submitted in his report on that subject (A/CN.4/23), had been discussed at length by the Commission but no final conclusion had been reached.¹ He would like the Commission to adopt the suggestion put forward the previous year by Mr. Hudson, and supported by other members of the Commission, that it should leave aside, for the moment, the question of the capacity of international organizations to make treaties, that it should draft the articles with reference to States only and that it should examine later whether they could be applied to international organizations as they stood or whether they required modification.

It was so decided.

2. Mr. KERNO (Assistant Secretary-General) was anxious that the decision should not be interpreted as casting doubt on the capacity of certain international organizations to make treaties. Some of them, and foremost among them the United Nations, undoubtedly possessed that capacity. The Commission had accepted that view without any objection at its second session.²

¹ See summary record of the 52nd meeting, and of the 78th meeting, paras. 78-92. For document A/CN.4/23 see *Yearbook of the International Law Commission*, 1950, vol. II.

² See summary record of the 52nd meeting, para. 72.

ARTICLE 3: CAPACITY IN GENERAL

3. Mr. FRANÇOIS proposed that the article be deleted. He could not see that any useful purpose would be served by including in the draft a stipulation which did not indicate by whom and in what manner the treaty-making capacity of some States might be limited. In any case, it was the capacity of all States that could be limited.

4. Mr. YEPES shared Mr. François' opinion. The article was lacking in clarity. Was it by virtue of international law or by virtue of its own constitution that the capacity of a State to make treaties might be limited?

5. He thought that reference should be made, at least in the commentary, to Article 103 of the Charter which he took as limiting the capacity of States. Article 103 provided that: "In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and the obligations under any other international agreement, their obligations under the present Charter shall prevail". The significance of that article was that the treaty-making capacity of States was limited by international law itself. In ratifying the Charter, States had relinquished part of their sovereignty.

6. A passage should be inserted, either in the text of the article itself or in the commentary, to indicate that the treaty-making capacity of States was limited by the United Nations Charter, since the latter was a constitution of States and took precedence over treaties concluded between individual States.

7. The CHAIRMAN suggested considering the two points separately and beginning with the proposal by Mr. François to delete the article.

8. Mr. SPIROPOULOS found the article satisfactory. A civil code, for instance, referred to the capacity of persons. In the same way, the first part of the article laid down the principle of international law that all States have capacity to make treaties. In teaching international law, one began by saying that every State had the general capacity to make treaties and then went on to explain that there were limitations to that capacity, for example in the case of confederations of States or of States not enjoying full independence. It was to such situations that the second part of the article referred. In Switzerland, the cantons could not make treaties with foreign States. If a State was independent, its capacity was subject to no limitation.

9. Mr. SCELLE objected that Article 103 of the Charter did limit that capacity.

10. Mr. SPIROPOULOS replied that the United Nations was a union of States and that clearly the constitution of a union of States could provide for limitations. What Mr. Yepes had in mind was covered by the second part of the article: "but the capacity of some States to enter into certain treaties may be limited". The Charter provided for limitations which were binding. The same provision applied to federal States such as pre-Hitler Germany or Switzerland.

11. In his opinion, the article was sound in principle and he saw no reason for its deletion.

12. Mr. ALFARO thought that Mr. François was, to

a certain extent, right but that all the articles were supposed to be an expression of international life. The power to make treaties was a consequence of sovereignty. He thought that the article should be retained.

13. Mr. SCELLE noted that, in the general opinion of the members of the Commission, the article was the expression of a primary truth. Who should, in fact, establish the law of treaties if not States? Any State might negotiate treaties within the limits of its competence, a word which he preferred to the term "capacity" usually employed in connexion with private persons. It was certain that the more treaties States made, the more they limited their competence. All the States Members of the United Nations had done so in ratifying the Charter of the United Nations. The majority of international law manuals were of that opinion.

14. Mr. FRANÇOIS emphasized that it was not the capacity of some States, but that of all States which might be made subject to restrictions.

15. Mr. SCELLE explained that there were certain States whose status differed from that of independent States, namely protected States, the capacity of which was limited in international law. As a general rule, their competence was not entire. They were sometimes called semi-sovereign States. That was the category of States which the article was designed to cover.

16. Mr. LIANG (Secretary to the Commission) remarked that the article was ambiguous. To take the last words of it, "may be limited", they could be interpreted as meaning, "lends itself to limitation" or "is limited". Both in the text of the Harvard draft Convention on the Law of Treaties, which ran as follows: "Capacity to enter into treaties is possessed by all States, but the capacity of a State to enter into certain treaties may be limited", and in the text of the report, it was, he thought, a question of noting, or of describing, a phenomenon of international law, namely, that there were States whose capacity to enter into treaties was limited.

17. The Swiss Civil Code distinguished between *Rechtsfähigkeit* and *Handlungsfähigkeit*. The limitation of capacity referred to in article 3 related to *Rechtsfähigkeit*. The text noted the fact that in present-day international society there were non-competent States, States whose capacity to make treaties was limited. If the purpose of the article was to describe that *de facto* situation it might be of value; otherwise, it was not.

18. Mr. EL KHOURY said that, in chapter II, which dealt with capacity to make treaties, it was clear that the purpose of article 3 was to indicate who might make treaties. It established a fact. The second part of the article should be redrafted to show by whom and in what manner the capacity of States might be limited, since the question was not referred to in the articles which followed.

19. Mr. SPIROPOULOS said he must beg the members' pardon. When speaking, he had had the text of the Harvard draft before him. That text was in the following terms: "The capacity of a State to enter into certain treaties may be limited." He found that text perfect and did not see why Mr. Brierly's draft referred only to

the limitation of the capacity of some States. He was accordingly in complete agreement with Mr. François, and proposed saying "The capacity of a State". He did not approve of the word "competence".

20. The CHAIRMAN recalled that Mr. François was in favour of deleting the article entirely.

21. Mr. FRANÇOIS said it might be desirable to note that the Harvard text was quite different. He had no objections to the latter text.

22. Mr. SANDSTRÖM was also dissatisfied with the drafting of the article. He noted that the commentary on the article, in paragraph 42 of the report, stated: "As respects States, whilst, in general, international law imposes no limitations upon their treaty-making capacity, the capacity of a particular State to enter into any category or all categories of treaties may be limited by reason of its qualified status or its existing treaty obligations".

23. If the comment was made with reference to the second part of the article, the article would need to be changed, since the comment did not speak of the limitation of the capacity of some States only. Article 3 should therefore also mention that the capacity of any State might be limited. The article in its existing form corresponded only to that part of the comment which said that the capacity of a particular State might be limited by reason of its qualified status.

24. Mr. HUDSON had no doubt that the first part of the article served a useful purpose. He conceived of international law as the law of the entire community of States. A State living within that community must possess the competence to make treaties, i.e., to regulate its relations with another State. There might, however, be a hybrid type of State which, while claiming to be a State, declared that it had not the necessary competence to make treaties. The reason why the question of competence in the matter of concluding treaties was stressed was in order to emphasize that each State lived in the community of States as a member of that community and, as such, possessed competence to conclude treaties. He would like to keep the first part of the article, but thought it should be worded as follows: "Each State has competence to make treaties".

25. He preferred the term "competence" suggested by Mr. Scelle. The article could then go on to say: "but the exercise of that competence may be limited".

26. Reading out Article 103 of the Charter, he observed that account must be taken of a fact which he thought Mr. Yepes had not mentioned, namely, that there were 18 States in the world who were not Members of the United Nations.

26a. Article 103 stated that "In the event of a conflict between the obligations of the Members of the United Nations under the present Charter, and their obligations under any other international agreement", i.e., under any pre-existing agreement, "their obligations under the present Charter shall prevail".

26b. Article 20 of the League of Nations Covenant laid down, with regard to the obligations arising out of treaties concluded by Member States with non-Member States, that:

"2. In case any member of the League shall, before becoming a member of the League, have undertaken obligations inconsistent with the terms of this Covenant, it shall be the duty of such member to take immediate steps to procure its release from such obligations."

26c. The first paragraph of Article 20 of the Covenant stipulated that: "The members of the League severally agree that this Covenant is accepted as abrogating all obligations or undertakings *inter se* which are inconsistent with the terms thereof...". Prior undertakings were hence abrogated. The paragraph continued "and solemnly undertake that they will not hereafter enter into any engagements inconsistent with the terms thereof". Such a provision was preferable to that of Article 103 of the Charter which said that: "their obligations under the present Charter shall prevail". The effect of the article of the Covenant was that States would not exercise their general competence to make treaties.

27. If a State A made a treaty with a State B, undertaking not to alienate any part of its territory and then made a treaty with a State C, under which it ceded part of its territory to the latter, it would be exceeding its competence, since it had already subjected it to a limitation. The fact that such situations did occur must be taken into account. It was, in his opinion, of great importance to specify that each State possessed competence to make treaties but that such competence could be limited. If that were said, he saw no objection to the article.

28. The CHAIRMAN noted that the formula proposed by Mr. Hudson permitted the limitation of the exercise of competence but that the competence itself remained entire. He wondered whether, in the case of Switzerland, it was only the exercise of competence which was limited by neutrality.

29. Mr. KERNO (Assistant Secretary-General) suggested that the discussion might gain in clarity if they drew the distinction, which everyone felt but no one had so far expressed, between the right to conclude treaties and certain limitations, or prohibitions, imposed by law or by other treaties, on entering into certain contractual undertakings. In civil law, it was said that every individual possessed the capacity to enter into undertakings. Yet, as they were aware, in Roman law not all individuals enjoyed that capacity. Even in modern civil law, minors were only allowed a limited capacity. That was the primary notion. The second notion was that certain types of contract were forbidden by law or other contractual undertakings. Even though in western society every person of full age enjoyed absolute capacity, he or she could not contract a marriage while still bound by another marriage.

30. What Mr. Yepes had said on the subject of Article 103 of the Charter was correct but was independent of the question of capacity. The article in question did not place States in the position of minors. The limitation arising therefrom belonged to the second notion which he had defined. Mr. Hudson had spoken of the limitation on the exercise of the competence of States; that was, however, not quite the same thing. The capacity itself

might also be affected. There were, in fact, States in the position of minors.

31. Mr. YEPES was pleased to note that the interpretation he had given of Article 103 of the Charter, namely that the latter was the constitution that all members of the international community must respect, had been accepted by Mr. Hudson. He proposed that the article as a whole be worded as follows: "All States have competence to make treaties. Such competence may be limited by general international law or by the status proper to each State." He thus provided for two sources of limitation: on the one hand, international law and Article 103 of the Charter, which, he would repeat, made the Charter the binding minimum constitution governing the competence of States Members of the United Nations and, secondly, the status proper to each State. The limitation in question was one voluntarily accepted, for instance, on entering into an alliance. Both limitations were comprised in the second sentence of the article he proposed.

32. Mr. HUDSON thought that the old doctrine of the equality of States should be preserved. He did not like the expression "status" of a State.

33. The CHAIRMAN pointed out that the article under examination applied to sovereign States.

34. Mr. CORDOVA did not share the view of Mr. Yepes that reference should be made to Article 103 of the Charter. He also noted that Mr. Kern thought that the capacity of States could be limited by a treaty. He himself considered that it could be limited only by international law.

35. He was stressing the point because the commentary in the report said: "by reason of its qualified status or its existing treaty obligations" (A/CN.4/23, para. 42), and he could not accept that passage.

36. The CHAIRMAN replied that he would change that passage.

37. Mr. AMADO had been under the impression that Mr. François considered the article superfluous. When he himself had first read the text, he had thought that the problem of capacity had been included to enable the formula to cover the capacity of international organizations. In manuals of international law, the question of capacity was considered from another angle. Such manuals only mentioned capacity in order to speak of the competence of State organs, except in the cases of States whose limitation of capacity was structural as, for example, States under trusteeship, Egypt in its relations with the United Kingdom, or the Dominions under the former régime. The capacity of sovereign States was so natural a thing that he did not see any reason for referring to it in the draft. As Mr. Liang had said, the article noted a phenomenon. He did not think that the Commission should do that sort of thing in a codification. He was opposed to the article.

38. If the object of the article was to specify that "all States have the necessary capacity to make treaties" in order then to point out that international organizations are endowed with a similar capacity, he would vote in favour of it.

39. Mr. SCELLE said that the Commission had just heard a number of truths. It seemed to him however that the members of the Commission were not very well agreed on the method to be followed. Mr. Kerno had said something which was quite correct; and Mr. Hudson too. For his part, he thought that there were several questions. All States had competence to make treaties. That competence could only be diminished by an act of their will. There were, however, certain categories of States whose capacity was diminished in advance, just as in the case of minors. He had in mind neutral States, protectorates, States members of a confederation, and federated States. In all such cases, he did not think that it was the protectorate treaty, the declaration of neutrality or the treaty of association, the place of which was very often taken by the constitution, that limited the competence of the State. It was the fact that the State voluntarily placed itself in a certain category of States that brought about the diminution of its competence. The fact which determined the competence of Tunisia was neither the Treaty of Bardo of 12 May 1881 nor the Convention of La Marsa of 8 June 1883; it was the fact that Tunisia had more or less voluntarily placed itself under that régime. He would point out that the 48 States of the United States of America had perhaps not all been entirely prepared to abandon their competence. It was therefore, he would repeat, the fact of placing itself in a particular category which diminished the competence of a State. It then no longer possessed the full right to make treaties. In general, a federal State had the right to make treaties but federated States no longer possessed it.

40. The second question was as follows: it seemed to him that in talking in the same breath of Article 103 of the Charter and Articles 20 and 21 of the League of Nations Covenant, the members of the Commission had confused two very different problems. Competence to make treaties and a conflict between successive treaties were two different questions. The articles quoted dealt with the second question. A State did not relinquish one jot of its competence by signing contradictory treaties. In signing the Covenant, which was a treaty, States had subscribed to an obligation which might prove to be in conflict with previous treaties. The question was to determine what was the effect of the Covenant on treaties concluded perhaps with third States, who, according to the classical doctrine, had the right to insist on observance of those treaties. The conflict between successive treaties had not been settled by Articles 20 and 21 of the Covenant. The latter, indeed, went no further than to tell States to do everything in their power to procure their release from obligations inconsistent with the terms of the Covenant. Article 103 of the Charter, on the other hand, said that such treaties no longer counted, either in relations with other Members or in relations with non-Member States. That, from the point of view of classical doctrine, was disposing of the rights of strangers. Incidentally, he would like to mention that he approved of that provision. Article 103 abolished contractual undertakings by going over the heads of the strangers concerned. That was such a provision as one might find in a Constitution, but for adherents of classic international law, was hard to accept.

41. He suggested that provisionally the question be left on one side. The point with which the article before the Commission seemed to be concerned was that there were certain States whose competence was diminished by international law. There were treaties which they could not make, any more than an heir could sell property before he had reached his majority. The rules were the same whatever the type of legal machinery.

42. Mr. LIANG (Secretary to the Commission) reminded the Commission that it had heard all those arguments the year before. At that time, he had had occasion to point out³ that Article 103 related to the validity of treaties and not to the capacity to make them. If the Article were compared with Article 20 of the Covenant, it could be seen that the former was, to a certain extent, the more important one. From another standpoint, however, Article 20 of the Covenant involved a more forcible obligation. No prohibition on concluding treaties inconsistent with the Charter was contained in Article 103, which simply specified that the obligations under the Charter should prevail over obligations under any other international agreement. In the Harvard draft, the reply to the questions raised by Article 20 of the Covenant was of the type of those uttered by the oracles.⁴ He would repeat, it was advisable to leave Article 103 out of account when studying the question of capacity.

43. In his opinion, it was pointless to endeavour to describe international facts and record them in the text. Certain facts had changed since 1936, when the Harvard draft was produced. China and India had acquired full competence and the same had occurred in the case of other States. Moreover, the Charter stressed the need for promoting the advance of the peoples towards independence. It would therefore be an anachronism to give official countenance in the text to the idea that there were non-competent States. The article should be formulated differently.

44. Mr. HUDSON thought that two things would be better left out of the discussion. The first was the analogy drawn by Mr. Kerno with private law. For his part, he considered that nothing was more dangerous than an attempt to draw analogies between the two types of law such as that which had just led Mr. Scelle into making a few rather venturesome statements. The discussion should keep to matters of public international law.

45. Mention had been made of protectorates. There were, however, certain categories of States not covered by the text; for example, the Malay States, which had lost their competence to make treaties. Those States should also be excluded which were members of a federal union. The States forming the United States of America were not States under international law. The Constitution of the United States stipulated that a State, say, for instance, New York, could make treaties only with the consent of the Federal Government, and then only as representative of the United States of America. In the case of Switzerland, the existence of a treaty on dual taxation between the canton of St. Gallen and Austria

³ See summary record of the 52nd meeting, para. 66.

⁴ *American Journal of International Law*, vol. 29 (1935), Supplement, p. 708.

had been pointed out to him by the observer of the International Red Cross. Like any treaty concluded by a canton with a foreign State, however, it had been submitted for the approval of the Federal Council. Protectorates and States members of a union should, as he had said before, be left out of account.

46. The question to be considered was the competence of States which were definitely States — there were 80 of them in the world — and not that of Tunisia or Morocco, for example.

47. The CHAIRMAN enquired whether, in Mr. Hudson's opinion, there would be anything left to put in the second part of the article.

48. Mr. HUDSON said he approved of certain parts of Mr. Liang's analysis of Article 103 of the Charter and Articles 20 and 21 of the League of Nations Covenant. Article 20 said: "and solemnly undertake that they will not hereafter enter into any engagements inconsistent with the terms thereof". The same provision was not to be found in Article 103. It was a question of fixing a limit to the exercise of competence.

49. Mr. HSU considered that the tendency of the community of nations to promote the establishment of independent States was worthy of approval. States which were not independent had limited competence in certain cases. There were, in fact, two questions: first, the limitation of capacity itself and, secondly, the limitation of the exercise of capacity. When a really independent State agreed to refrain from doing certain things, its capacity was limited to that extent. He proposed saying:

"All States have capacity to make treaties, but the capacity of some States, and the exercise of such capacity by all States, may be limited."

50. Mr. SANDSTRÖM said that Mr. Hudson had got in before him; he had been going to say the same thing. He would, however, add that certain points had been clarified by Mr. Kernö and Mr. Scelle.

51. The Commission had not defined what it understood by a "State". Did it refer to entirely independent States only? In that case, treaty-making was within their competence and to speak of limitations of their capacity was contrary to such a definition of the State. So long as the Commission was not clear what notion of a State it had in mind, there would continue to be a lack of clarity.

52. Mr. SPIROPOULOS explained that he had remained silent since his first remarks because he had wanted to hear the opinions of his colleagues. He would not conceal the fact that he had found everything which had been said very interesting but had the impression that a great deal of confusion prevailed, because a large number of questions were being dealt with at the same time and the various speakers were basing themselves on different premises. Mr. Sandström had said that it was essential to know what constituted a State. Mr. Hudson had considered that the Swiss cantons and States Members of confederations should be left out of account. Should the Commission endeavour to agree on what it called a State? It seemed to him that, if it began with a discussion, it would never come to any conclusion.

The civil code did not define Man. There were some things which had to be accepted without a definition. He felt bound, to his great regret, to say that the remarks of Mr. Yepes were inopportune. They bore on a special question of specific law, whereas the Commission was studying the codification of general international law.

53. He thought that the Commission should first vote on Mr. François' proposal, which was the furthest removed from the text of the draft article, and was on the question as to whether an article on capacity in general was required or not. It could then vote on Mr. Hudson's amendment which he himself entirely accepted. If Mr. Hudson's amendment were rejected, the Commission would have to return to the text of the draft.

54. Mr. FRANÇOIS pointed out that he had voiced an objection to the article in the draft but not to any and every such article.

It was decided that an article on the point be included.

55. The CHAIRMAN put to the Commission the first clause of the article of the draft: "All States have capacity to make treaties", and Mr. Hudson's amendment: "Each State has competence to make treaties". He himself was prepared to accept either text.

56. Mr. SPIROPOULOS proposed that they consider Mr. Yepes' proposal first, as the furthest removed from the text of the draft.

57. Mr. YEPES said he proposed for the first part of the article the wording: "Every State has competence to make treaties". There was therefore no difference between his text and Mr. Hudson's, except that he said "Every" instead of "Each". He was thus in agreement with Mr. Hudson.

58. Mr. ALFARO noted that it was proposed to make two modifications to the text of the draft article in the report, namely to say "each" instead of "all" and "competence" instead of "capacity".

It was decided by 5 votes to 3 to retain the wording "All States".

It was decided by 6 votes to 4 to adopt the term "competence".

59. The CHAIRMAN requested the Commission to take a decision on the retention or deletion of the second clause in article 3.

60. Mr. SPIROPOULOS considered that the adoption of the first part of the text would not be justified unless the second part were retained.

61. Mr. AMADO said he was against the article as a whole for the reasons he had already outlined.

62. Mr. SCELLE said he would vote in favour of the retention of a text which recognized the possibility of limiting State competence.

63. The CHAIRMAN noted that the Commission as a whole was in favour of preserving a reference in article 3 to possible limitation. The next step was to decide on a text. To that end, Mr. Yepes had proposed the following formula:

"such competence may be limited by general international law or by the status proper to each State".

Personally, he considered such a wording open to objection.

64. Mr. YEPES explained that, in using the expression "status proper" he had in mind the case of neutral States. The condition of neutrality was a limitation on the capacity of States. There were certain treaties into which they were unable to enter. Another word could, however, be used instead of the term "status".

65. In order to understand the opening words of the formula he had suggested, it was necessary to refer to Article 103 of the Charter, which accorded priority to obligations arising out of the Charter over obligations States had contracted under any other international agreement.

66. The CHAIRMAN thought that Article 103 had no bearing on the question of competence.

67. Mr. SPIROPOULOS proposed that a vote be taken on the wording suggested by Mr. Yepes.

Mr. Yepes' amendment was rejected by a large majority.

68. The CHAIRMAN read out Mr. Hudson's amendment:

"but the exercise of such competence may be subjected to limitation"

and Mr. el Khoury's amendment:

"the exercise of this capacity may, in some cases, be limited or suspended by virtue of international provisions to that effect".

The second text limited the exercise of competence only and not competence itself.

69. Mr. EL KHOURY explained that, in his draft amendment, he had tried to cover the case of States, the exercise of whose competence was suspended by the fact of their being protectorates. Their competence continued to exist but the exercise of it was suspended by a protectorate treaty, or a trusteeship agreement. It was suspended until further notice and could be re-assumed when the limitations to which it was subjected ceased to exist. Such limitations might equally result from the constitution of the State itself.

70. The CHAIRMAN asked the Commission to vote on the question whether it was sufficient for the article in question to deal with limitations on the exercise of competence, without referring to limitations on competence itself.

It was decided, by 6 votes to 4, that the article should refer to limitations on competence itself.

71. The CHAIRMAN pointed out that, as a result of the vote, the amendments submitted were no longer acceptable without the addition of other provisions.

72. Mr. HSU put before the Commission the text of an amendment which he had previously outlined in general terms. It was as follows:

"but the competence of some States, and the exercise of such competence by all States, may be subjected to limitation".

73. Mr. SANDSTRÖM thought that it would be simpler to say: "this competence or its exercise may be limited".

74. Mr. LIANG (Secretary to the Commission) observed that if the draft Convention contained both the term "competence" and the term "exercise", it would be necessary to give examples in the comment to enable them to be distinguished.

75. Mr. KERNO (Assistant Secretary-General) noted that certain members were prepared to support Mr. Hsu's amendment, while others were in favour of the formula suggested by Mr. Sandström. All were accordingly in favour of referring both to limitations on competence and limitation on the exercise of competence. Any differences were only on a question of drafting. The authors of the two amendments might perhaps draw up a joint proposal.

76. Mr. SCALLE did not think that it would be sufficient to say that competence could be limited and the exercise of competence could too. It would be necessary to state by what they were limited. Competence was limited by international law itself. The exercise of competence could be limited by obligations under treaties. The exercise of competence might even be limited by treaties not in accordance with international law, as for example the "treaties of inequality" concluded with China under threat of force, or the treaties made with Turkey entailing relinquishment of administrative rights. The latter treaties were, by the way, not necessarily contrary to international law.

77. A State could relinquish the exercise of its competence, but could not relinquish its competence. The competence of a protectorate or a State member of a confederation was limited by international law. The State concerned could not resume its full competence. Turkey, under a private treaty with Austria-Hungary, had relinquished the exercise of its competence in Bosnia and Herzegovina.⁵ In law, the competence of Turkey remained intact, only the exercise of its competence being limited.

78. Mr. HUDSON remarked that a further example could be quoted of the limitation of the exercise of State competence, namely, the Treaty of 1902 between Panama and the United States of America. Under that Treaty, Panama recognized that the United States had certain powers over the Canal Zone which remained under Panamanian sovereignty. Panama undertook not to exercise its jurisdiction over that territory. Its capacity to make treaties remained entire, but the exercise of that capacity was subject to limitations in so far as the Canal Zone was concerned. Such an example brought out the distinction clearly.

79. Mr. ALFARO pointed out that the provisions inserted in the constitution of Cuba, by virtue of the Platt amendment,⁶ also furnished an example of limitation of the exercise of competence.

80. Mr. SCALLE considered the neutrality of Switzerland a limitation of its competence. Switzerland had, by a general decision of the international community

⁵ Cf. Treaty of Berlin of 13 June 1878, article XXV, para. 1: "The provinces of Bosnia and of Herzegovina shall be occupied and administered by Austria-Hungary."

⁶ Voted by the United States Congress on 2 March 1901, and incorporated in the Cuban Constitution of the same year.

at the Congress of Vienna in 1815, been declared neutral for reasons of common interest. It was a limitation which it was not in the power of Switzerland to abolish. When the question of the admission of Switzerland to the League of Nations had arisen, special intervention by the international community had been necessary to make it possible.

81. Mr. SPIROPOULOS thought that the divergences of opinion arose from the fact that the Commission had ruled out the word "capacity" and was trying to give the word "competence" the connotation of the word "capacity".

82. Mr. SCELLE pointed out that sovereignty was often defined in German by the expression *Kompetenz-Kompetenz* (the right of a State itself to define its own competence.) However, rules of international law governing the competence of States were necessary. Some States enjoyed major competence, others, such as neutral States and States members of a confederation, were endowed with a lesser competence, whose limitations arose out of international law.

83. The CHAIRMAN requested the members of the Commission to avoid too theoretical disquisitions not indispensable to the discussion of the text under study.

84. Mr. SANDSTRÖM suggested that the Commission refer only to limitation of competence, and leave aside the limitation of the exercise of competence, which might be considered as a matter of course.

85. Mr. HSU recognized that, in essence, his draft amendment and Mr. Sandström's formula came to much the same thing. The differences would not be clear to the uninformed reader and were consequently not essential. The Commission could therefore choose quickly between the two texts.

86. The CHAIRMAN put to the vote the question whether, quite apart from limitations of competence, it was advisable to make reference also to limitation of the exercise of competence.

It was decided by 7 votes to none with 3 abstentions to refer to both notions in the draft Convention.

87. The CHAIRMAN put Mr. Hsu's amendment to the vote.

Mr. Hsu's amendment was adopted by 6 votes to 4, Mr. Sandström's formula being thereby rejected.

ARTICLE 4: CONSTITUTIONAL PROVISIONS AS TO THE EXERCISE OF CAPACITY TO MAKE TREATIES

Paragraph 1

88. Mr. HUDSON doubted whether the Commission should deal with that question. The extent to which a State negotiating with another State should take account of the latter's constitution was a matter of debate. In the case of Eastern Greenland, the Permanent Court of International Justice had come to a negative conclusion.⁷ It had held that the statements of a Foreign Minister — in the case in point, Mr. Ihlen, Norwegian Foreign Minister — made on behalf of his Government and on

a matter within his competence, were binding on his country, whatever its constitution might be.

89. The CHAIRMAN recalled that the Commission had already discussed the case.⁸ Personally, he had not approved that part of the Court's judgment. Mr. François, on the other hand, had supported the view of the Court.⁹ The Commission, by a majority, had adopted the opposite view, which was applied in the text of article 2 of the draft Convention on the Law of Treaties provisionally adopted by the Commission at its 88th meeting (see footnote 15 in the summary record of the 88th meeting).

90. Mr. HUDSON pointed out that the judgments of the Court were accepted as authoritative.

91. The CHAIRMAN, on an observation by Mr. Scelle, proposed that the words "may be exercised" be replaced by the words "is exercised".

It was so agreed.

The Chairman put to the vote article 4, paragraph 1, thus amended.

Paragraph 1 was adopted as amended by 9 votes to none with 1 abstention.

92. Mr. SPIROPOULOS said that he had abstained because he did not accept the use of the word "competence".

Paragraph 2

93. Mr. HUDSON proposed that the last words of the paragraph be replaced by the phrase "is exercised by the Head of that State", thus repeating the expression adopted in the preceding paragraph.

94. Mr. SANDSTRÖM and Mr. AMADO considered that it would be better to leave the words "is deemed to reside in" as they were, while Mr. SCELLE saw no objection to the text.

95. Mr. HUDSON recalled the fact that the Constitution of Saudi Arabia,¹⁰ for example, did not specify who had the power to pledge the State.

96. Mr. EL KHOURY pointed out that the effect of the formula used in paragraph 2 was tantamount to identifying the State with the Head of the State. It was almost an echo of the famous remark: "L'Etat, c'est moi". In his opinion, it was unacceptable.

97. Mr. HUDSON thought that the text under consideration simply indicated that the capacity to make treaties was exercised by the Head of the State, unless the Constitution provided otherwise.

98. The CHAIRMAN put the text of paragraph 2 to the vote.

Paragraph 2 was adopted by 6 votes to 4.

Pursuant to the decision to set aside for the moment the question of the capacity of international organizations, paragraph 3 was automatically omitted.

⁸ See summary record of the 52nd meeting, para. 81.

⁹ *Ibid.*, para. 77.

¹⁰ Constitution of the Kingdom of the Hejaz, 29 August 1926.

ARTICLE 5: EXERCISE OF CAPACITY TO MAKE TREATIES

99. Mr. HUDSON considered that the whole question of the delegation of competence with regard to treaties was entirely a matter of domestic law. The Commission was not called upon to deal with it from the international standpoint.

100. Mr. LIANG (Secretary to the Commission) likewise considered that the article served no purpose. Furthermore, it raised a problem of terminology: it was impossible to say that a plenipotentiary had delegated to him the capacity to make a treaty.

101. Mr. HUDSON recalled that the United States Constitution gave the President the power to make treaties. There was no provision explicitly forbidding him to delegate such power, but American public opinion would be shocked if it learned that such delegation had been made.

102. Mr. SCALLE declared that, in France, delegation of power in the matter of treaties was not admitted.

103. Mr. AMADO recalled that article 5, as it appeared in Mr. Briery's report, was the outcome of a previous formulation in which exchanges of notes had been assimilated to treaties. It was a specific application of that doctrinal attitude. Executive agreements made as between Ministers, quite apart from the question of whether they were desirable or not, were a natural step in the development of international life. There was, however, no need to deal with delegation of powers in the draft Convention.

It was decided to delete article 5.¹¹

Press comment on the work of the Commission

104. Mr. HUDSON pointed out that an incorrect report had been given in a newspaper of the deliberations of the Commission on the question of defining aggression. The article in question contained unpleasant references to some members of the Commission. He considered that there was no occasion to give publicity to the work of the Commission, so long as it had not come to any final decisions. The Commission should decide whether it was desirable to issue press releases.

¹¹ The text of the articles tentatively adopted by the Commission at the present meeting read as follows (document A/CN.4/L.17):

“ Chapter II

“ Competence to Make Treaties

“ Article 3

“ All States have competence to make treaties, but the competence of some States and the exercise of such competence by all States may be subjected to limitation.

“ Article 4

“ (1) The competence of a State to make treaties is exercised by whatever organ or organs of that State its Constitution may provide.

“ (2) In the absence of provision in its Constitution to the contrary, the competence of a State to make treaties is deemed to reside in the Head of that State.

“ Article 5

(deleted) ”.

105. Mr. KERNO (Assistant Secretary-General) said that he had read the article in question in the Paris edition of the *New York Herald Tribune*. The information used in that article had not been supplied by the Secretariat of the Commission. The fact that the meetings were held in public explained the appearance of such reports.

106. The Journal of the United Nations, published in New York, received and issued each day a short summary of the Commission's meetings. Only that summary, which was communicated by the Secretariat, was official. Under a general rule, an account had to be sent to the *Journal* of the work of all the Commissions of the United Nations. Nothing in such reports could have been used by the newspaper in question as a basis for its comments, but it was conceivable that journalists might misinterpret them.

107. Mr. HUDSON was strongly of the impression that a fuller statement had been issued to the Press. He doubted whether it was wise to issue such press releases.

108. Mr. KERNO (Assistant Secretary-General) recalled that, at its previous session, the Commission had decided not to issue official press releases. The press releases issued by the New York or Geneva Information Centres were not official.

109. Mr. CORDOVA thought that a certain amount of publicity was inevitable, since the meetings of the Commission were public. It was a good thing, generally speaking, to keep the public informed of the Commission's work.

110. Mr. HUDSON, after examining the press release issued by the Geneva Information Centre, declared that it was accurate and beyond reproach.

111. Mr. CORDOVA asked that the members of the Commission should be supplied regularly with copies of the press releases relating to the Commission issued to the Press by the Information Centre.

112. Mr. KERNO (Assistant Secretary-General) said he would see that that was done.

The meeting rose at 1 p.m.

99th MEETING

Friday, 8 June 1951, at 9.45 a.m.

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