

Document:-
A/CN.4/SR.99

Summary record of the 99th meeting

Topic:
Law of Treaties

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

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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. SCELLE 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.

CONTENTS

	<i>Page</i>
Law of treaties : report by Mr. Briery (item 4 (a) of the agenda) (A/CN.4/23, A/CN.4/43, A/CN.4/L.5, A/CN.4/L.16) (continued)	
(a) Further action in respect of the tentative decisions adopted by the Commission during its third session . . .	144
(b) Consideration of a draft article on the acceptance of treaties	145
(c) Consideration of article 3 tentatively adopted by the Commission at its 88th meeting	150
(d) Consideration of the text of the articles tentatively adopted by the Commission at its 98th meeting . . .	150

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. 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. Briery (item 4 (a) of the agenda) (A/CN.4/23, A/CN.4/L.5, A/CN.4/L.16)
(continued)

(a) FURTHER ACTION IN RESPECT OF THE TENTATIVE DECISIONS ADOPTED BY THE COMMISSION DURING ITS THIRD SESSION

1. Mr. HUDSON felt that the Commission ought to decide what further action should be taken in respect of the decisions it was reaching on the various articles of the draft Convention.

2. At the previous meeting the Commission had transformed itself into nothing more nor less than a drafting committee. Many of the decisions taken had reflected the views of only a small majority. He personally had had to vote hastily on a number of occasions. He wondered whether the procedure that was being followed in drawing up the text of the draft Convention was really the best. It was in his opinion the Rapporteur's role to submit to the Commission the ideas that he had elaborated and to ask it for simple directives which would enable him to prepare a draft that reflected the views of the members as a whole.

3. On several occasions it had seemed to him that he was inadequately informed and needed detailed comments. It was inevitable that the members of the Commission could not keep all the different aspects of the questions under discussion before their minds. Many ideas had been suggested to him by the statements of other members, but he had not had the time to ponder them, particularly those in favour of substituting the word "competence" for the word "capacity" in the articles of chapter II of the Rapporteur's draft (A/CN.4/23).

4. He hoped therefore that the Commission did not regard the decisions it was taking as final and that it would request the Rapporteur himself to make a choice, in the light of the debates, between the variants suggested. He also hoped that the Commission would not submit its draft Convention to the General Assembly immediately after the present session. It should wait until the draft was complete.

5. The CHAIRMAN, speaking as Special Rapporteur, said that, although the Commission's debates on the draft Convention had led up to decisions, those decisions were in his view still tentative. The comments would

have to be completely re-written as a result of the changes which had been and which would be made to his draft by virtue of the Commission's decisions. Work on the draft Convention would not be completed until the comments had been drafted and approved, but it would be difficult to draft them without knowing the nature of the articles themselves.

6. Mr. HUDSON pointed out that, in addition to explaining the articles of the draft Convention, the comments should sketch in the historical background and describe the practice followed by States.

7. The CHAIRMAN stated that the comments he had included in his reports (A/CN.4/23 and A/CN.4/43) were intended for the Commission rather than for States, and would have to be entirely re-written.

8. Mr. SPIROPOULOS shared Mr. Hudson's doubts regarding the Commission's method of work. Its debates bore in part upon the substance of the questions, in part upon the drafting of the articles. Confusion was sometimes inevitable.

9. He would repeat that he regretted the decision to substitute the word "competence" for the word "capacity" in the articles of chapter II.

10. The tentative decisions so far reached had resulted in draft articles which it would be necessary to re-consider at a second, or even a third, reading in order to ensure concordance of terminology.

11. Mr. HUDSON said that he hoped it was clearly understood that it would be left to the Rapporteur to make amendments of form.

12. Mr. SPIROPOULOS recalled that at the second session, when the Commission had examined the text of the draft Code of Offences against the Peace and Security of Mankind drawn up by a sub-committee after an initial reading of the draft Code he himself had prepared, he had been authorized to submit to the following session a modified, or even a new, text.¹

13. He agreed that the comments accompanying the draft Convention on the Law of Treaties were apparently intended to assist the Commission to understand the text. For governments, new comments would have to be drafted and submitted to the Commission during the next session.

14. Mr. SCELLE observed that he would not wish to appear to Mr. Hudson to be irrevocably committed by the word "competence". Many French-speaking lawyers, however, would be shocked by the use of the word "capacity", which was traditionally reserved for private law cases. If the word "competence" was really distasteful to the Commission, he would agree to its deletion provided that, whatever word was used, there was no possible doubt as to its meaning.

15. Mr. KERNO (Assistant Secretary-General) said he understood from the discussion that the Commission as a whole considered that work on the draft Convention on the Law of Treaties was still unfinished. A practical question then arose namely, whether it could be completed during the present session. Most speakers had seemed to

¹ See summary record of the 75th meeting, para. 102.

envisage the necessity of continuing it during the session to be held in 1952.

16. The CHAIRMAN thought that the draft Convention could not be submitted to governments without the comments which clearly could not be ready before 1952.

17. In response to an observation by Mr. CORDOVA, Mr. SPIROPOULOS recalled that, at its second session, the Commission had tentatively adopted a draft Code of Offences against the Peace and Security of Mankind. After discussing the matter, it had decided not to submit that tentative draft to the General Assembly, in order to retain the possibility of altering it, if need be substantially. For the same reason, the draft Convention at present under consideration should not yet be submitted to the General Assembly. The Commission's authority must not be cheapened. It would be sufficient to inform the General Assembly that the Commission had tentatively adopted the substance of a number of articles, but without giving the text. In that way the Commission would remain free to change its mind.

18. The CHAIRMAN pointed out that members of the General Assembly who were curious to know the tentative decisions of the Commission would be able to consult the summary records of its meetings.

19. Mr. LIANG (Secretary to the Commission) recalled that in its report to the General Assembly on its second session, the Commission had reported on the progress made with each of the questions still on its programme. The report contained fairly detailed information on the question of arbitral procedure, but briefer information on the questions of the regime of the high seas and the law of treaties.

20. When the report had come before the General Assembly, the USSR delegation had requested the Sixth Committee not to discuss the substance of questions which the Commission was still engaged in studying. That wise proposal had met with the approval of a large number of representatives and had been adopted.²

21. From the Commission's point of view, it seemed that articles unaccompanied by comments would appear unscientific and might give rise to false interpretations. The work done to date on the draft Convention on the Law of Treaties was still fragmentary.

22. He therefore suggested that the Commission act as it had done the previous year and omit from its report on its third session the text of the articles that had been only tentatively adopted.

23. The CHAIRMAN asked whether that suggestion met with the general approval of the Commission.

It was so agreed.

(b) CONSIDERATION OF A DRAFT ARTICLE ON THE ACCEPTANCE OF TREATIES (A/CN.4/L.16)³

24. The CHAIRMAN recalled that, in article 2 of the draft Convention on the Law of Treaties as adopted

² *Official Records of the General Assembly Fifth Session, Sixth Committee*, 225th meeting, para. 53, and 245th meeting, para. 33 and 37-63.

³ Doc. A/CN.4/L.16 read as follows:

"Acceptance of treaties

at the 88th meeting (A/CN.4/L.5),⁴ the question of acceptance had been reserved. Article 2 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, 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." It was the words "or any other means of expressing the will of the State" which related to acceptance.

25. In the draft article prepared by Mr. Liang at the request of the Special Rapporteur on the acceptance of treaties (A/CN.4/L.16), the words "in accordance with its constitutional law and practice" seemed to be unnecessary as they already appeared in article 2 which he had quoted, and enunciated a general principle governing the provisions which followed. The Commission had decided not to repeat them in connexion either with ratification (article 3) or with accession (article 8).

26. Replying to a question by Mr. SCALLE, the CHAIRMAN added that he would see no objection to including that explanation in the comment accompanying the draft Convention.

27. Mr. HUDSON wondered whether it was wise to give acceptance a place apart. He saw no difference, from the point of view of international law, between acceptance and ratification, which were two words for one and the same thing. Under international law there was no need whatsoever for ratification to be made in any one given way. Moreover, the Commission itself, in defining ratification (article 3 (1)), said that it was the act by which a State "confirms and accepts a treaty". It therefore used the word "accepts" in respect of ratification.

28. He was not unaware that at the request of certain countries, and in order to get round constitutional ratification procedure, in certain conventions setting up international agencies recourse had been had to acceptance as a means of bringing those conventions into force. But that means, which was practicable only for conventions setting up international agencies, had not been used, for example, in the conventions signed at Geneva in August 1949 or in the Convention for the Protection of Human Rights and Fundamental Freedoms signed at Rome on 4 November 1950.⁵

29. In his view, article 2 of the draft Convention (E/CN.4/L.5) was incorrectly headed "Application of treaties" and was purely tautological. All it amounted to was that a treaty became legally binding in relation to States which recognized its legally binding character. Article 7, "Entry into force of treaties", was sufficient and made it possible to delete article 2.

30. Mr. LIANG (Secretary to the Commission)³ denied trying to impose on the Commission an article embodying a new idea. As the Commission had previously been

⁴ "Where the treaty itself so provides, a State may, in lieu of signature or ratification or both, undertake a final obligation under the treaty, in accordance with its constitutional law and practice, by depositing an instrument of acceptance."

⁵ See summary record of the 88th meeting, footnote 15.

⁶ E/CN.4/554.

reminded⁶, acceptance procedure was provided, for instance, in the Constitutions of the World Health Organization and the International Refugee Organization and in the Bretton Woods Agreements.

31. Mr. HUDSON pointed out that all those instruments related to the creation of international agencies. Intrinsicly the word "acceptance" entailed nothing new. It was only a new form for facilitating the entry of treaties into force.

32. Mr. LIANG (Secretary to the Commission) observed that in the article which he had drafted, he had endeavoured to relegate acceptance to a secondary place, after the traditional methods of signature, ratification and accession. It was with that end in view that the draft article began with the words, "Where the treaty itself so provides", which clearly showed that such procedure could only be followed if it was explicitly provided for. Recourse to it was therefore to be regarded as unusual.

33. He might have stated in the draft article that acceptance was a supplementary procedure for enabling treaties to enter into force, over and above signature without reservation as to acceptance and signature subject to acceptance followed by acceptance, but he had found that representatives were often nonplussed by such a formula, which was obscure and at first sight incomprehensible.

34. It was also to allay any anxieties on the part of those who were unfamiliar with the new procedure that he had added the clause "in accordance with its constitutional law and practice". He agreed with the Chairman, however, that those words were unnecessary now that they were included in article 2, and he was prepared to accept their deletion.

35. Another way of mentioning acceptance in the draft Convention would be to include the references to it in the text of article 2 itself instead of in a separate article. That would be possible, but acceptance, which, though little employed in latter years, was a particularly flexible procedure for ensuring the entry of treaties into force, would appear to merit a separate article explicit enough in itself but which would, of course, be followed by a full comment.

36. Mr. FRANÇOIS shared Mr. Hudson's point of view on the uselessness of acceptance procedure. Once that new procedure had been admitted, however, it became necessary to take it into account. The definitions of ratification and of acceptance that would appear in the draft Convention would have to establish a clear distinction between the two procedures. At present they were interchangeable. The fault did not lie with the new draft article. It was article 3 (1) which was incomplete; as at present drafted, it appeared to define acceptance and it must be altered to show that ratification was a solemn act by the Head of the State. He did not wish, however, to enter into detailed points of drafting in connexion with that paragraph.

37. Mr. HUDSON believed that it was wrong to say that "acceptance" was a new word; it would doubtless

be found in a number of agreements dating from the 19th century. The United States Government had used it in the instrument in which it had stated that it subscribed to the constitution of the International Labour Organisation.

38. Mr. François had expressed the view that ratification implied an instrument of a special type. Even if that were so in practice, no solemn form of ratification was prescribed by international law, and a treaty could be ratified merely by saying "I ratify" or even "I accept".

39. To attach such importance to acceptance was to serve up an old dish as new.

40. Mr. AMADO observed that Mr. Hudson's remarks did not contradict what had been said by Mr. Liang in a recent study.⁷

41. He personally viewed with sympathy the efforts of the United Nations Secretariat to consecrate, as it were, the term in question.

42. Acceptance procedure would present advantages to Brazil. Under the Brazilian constitution, the Head of the State was obliged to submit treaties to Parliament and the approval of Parliament would be sought before acceptance. He saw no objections to the word "acceptance" or to what it signified.

43. Replying to a question by Mr. HUDSON, Mr. AMADO explained that in the case of treaties providing for the normal entry-into-force procedure, the Brazilian Parliament was consulted after signature, but that in the case of conventions whose entry into force was conditional upon their acceptance, Parliamentary approval was sought before they were accepted.

44. Mr. HUDSON saw no difference in practice between the two procedures.

45. Mr. KERNO (Assistant Secretary-General) agreed with Mr. Hudson that from the technical point of view there was no great difference between them and that there would be no necessity on that account to give acceptance a special place in the draft Convention. There were two practical reasons, however, for doing so.

46. In the first place, many delegations had pointed out that in their countries ratification was traditionally a very solemn act, and one which took time, and that the entry into force of multilateral conventions could only be speeded up if a more simple procedure were adopted, such as acceptance by virtue merely of a declaration by the head of the government or the Minister for Foreign Affairs.

47. The other advantage of such a procedure was that it made the signature ceremony unnecessary and combined in one and the same operation signature followed by ratification, and accession.

48. Under the traditional procedure it would be difficult for a single convention to be simply signed by some States and ratified by others. With acceptance procedure, States whose constitutions did not make ratification

⁷ See *American Journal of International Law*, vol. 44 (1950), pp. 342-349. Compare also extracts from this article contained in the summary record of the 88th meeting, paras. 71-72.

⁶ Summary record of the 88th meeting, paras. 60, 69 *et seq.*

subject to parliamentary approval could bind themselves at once, whereas the others could sign subject to acceptance.

49. In short, acceptance did away with certain formalities, combined the various traditional methods and made the entry into force of treaties a more flexible and speedy process.

50. Mr. EL KHOURY considered that the word "ratification" was universally known, whereas the word "acceptance" was not. He was still not convinced that it would not be better to keep to a word which was familiar to everybody. Moreover, the Law of Treaties laid down no special procedure for ratification, but allowed all procedures provided for in the constitutions of the various countries, inclusive, therefore, of those which were covered by "acceptance", as it had been defined.

51. The CHAIRMAN pointed out that it was the practice of States which had led to the introduction of acceptance procedure. There would be no innovation in referring to it.

52. Mr. SCALLE agreed with Mr. Kerno. Acceptance pure and simple could be distinguished from ratification and from accession. It could take place without the solemnity and without the action by the Head of the State which were, by definition, entailed in ratification and in accession — which was only ratification by States which had not collaborated in drawing up the convention.

53. The idea of acceptance was related to that of the "conventions in simplified form" referred to by Charles Rousseau in his *Principes généraux de droit international public*⁸ and which were simply concluded by the administrative authorities of a country.

54. Mr. LIANG, Secretary to the Commission, said that acceptance was not quite the same thing as the "simplified convention". In most cases it was indistinguishable from ratification; in others it was indistinguishable from accession; in still others it made unwieldy procedure and parliamentary action unnecessary.

55. The best example of that was provided by the agreements setting up the International Monetary Fund and the International Bank (the Bretton Woods agreements), which, in articles XX and XI respectively, provided for acceptance procedure.⁹

56. By virtue of that procedure the United States of America had been able to become a party to those agreements by depositing an instrument of acceptance as soon as the two houses of Congress had approved the necessary appropriations. The United States Government had not had to seek the approval of a two-thirds majority of the Senate, because ratification was unnecessary.

57. Mr. HUDSON explained that the United States constitution conferred upon the President the power to make treaties after obtaining the approval of the Senate, expressed by a two-thirds majority vote. It could happen

that the United States Government was not confident of obtaining a two-thirds majority in the Senate, but thought that it could obtain a simple majority in each house. In such a case it submitted to the two houses the financial commitments arising out of a convention, and when the House of Representatives and the Senate had approved those commitments by a simple majority, the President enacted an instrument by which he recognized the entry of the convention into force. In such cases, for psychological reasons and in order to avoid the necessity of obtaining a two-thirds majority in the Senate, the word "ratification" was not used.

58. That was the procedure which had been followed in 1934 to subscribe to the constitution of the International Labour Organisation. In that case acceptance by the President of the United States had been equivalent to accession. Acceptance had subsequently been explicitly provided for in a number of conventions setting up international specialized agencies.

59. From the point of view of international law, it did not matter much whether the word "acceptance" or the word "ratification" was used in those conventions. Basically, the procedure was that of ratification.

60. Mr. SCALLE asked whether such procedure was correct under constitutional law.

61. Mr. HUDSON replied that the practice was well established in the United States of America.

62. Mr. ALFARO considered that ratification and acceptance were two different procedures. As regarded the substance, he accepted the formula proposed by Mr. Liang. However, Mr. François' remarks concerning the need to make a greater distinction between the definitions of ratification and acceptance merited the Commission's serious attention. In article 3 (1) of the draft Convention, the word "solemn" might be added before the word "act" and the word "accepts" might be replaced by "declares", or alternatively the sentence might read: "... confirms a treaty and declares it to be binding on that State". In the new draft article on acceptance, the words "undertake a final obligation" might be replaced by "finally bind itself".

63. Mr. HUDSON pointed out that a number of treaties, such as, in particular, the Convention on the Privileges and Immunities of the United Nations, only provided for accession. In such cases accession and acceptance were one and the same.

64. Mr. CORDOVA said that he saw no difference between acceptance and accession as defined in article 8 of the draft Convention. In both cases States bound themselves without signature or ratification.

65. Mr. LIANG (Secretary to the Commission) considered that acceptance did not amount to the same as accession, except when, as in the example that had been quoted, the treaty provided for accession as the sole means of becoming a party thereto. In general, however, accession was reserved for States which had not signed the treaty and had not taken part in its drafting.

66. To revert to the example of the Bretton Woods Agreements, he pointed out that they made immediate entry into force possible and provided for one single

⁸ Paris, 1944, pp. 249-262.

⁹ "Each government on whose behalf this Agreement is signed shall deposit with the Government of the United States of America an instrument setting forth that it has accepted this Agreement in accordance with its law and has taken all steps necessary to enable it to carry out all of its obligations..."

method of entry into force, both for the Contracting States, which had drafted the Agreements, and for those States which had not taken part in the negotiations.

67. Moreover, acceptance enabled States whose constitutional practice so permitted to depart from the constitutional ratification procedure. In several countries, such as the United States of America, the practice of "executive agreements" existed, under which the President could by his own action bind the government. That was an established constitutional practice.

68. It was not the only virtue of acceptance that it made unnecessary the unwieldy ratification procedures laid down in constitutions; it afforded a flexible means of declaring treaties legally binding without violating the constitution.

69. Mr. KERNO (Assistant Secretary-General) repeated that, even if theoretically acceptance was indistinguishable from the traditional procedure, one of its main practical advantages was that it enabled treaties to enter into force rapidly. If a treaty provided for acceptance, the States whose constitutions did not preclude that procedure could become parties to it immediately, while States whose constitutions did preclude it would have to follow ratification procedure; in the case, however, of treaties which provided only for signature and ratification, all States would have to follow the traditional procedure. Mention of acceptance procedure would therefore be of real value, and the formula proposed contained no dangers.

70. Mr. HUDSON said he knew of large numbers of treaties which said in effect: "The present treaty shall enter into force either upon signature or upon signature followed by ratification." In such cases it was for each signatory to say whether or not his signature was subject to ratification. Those examples showed that there was no need for a new word to cover such an eventuality. It was not necessary to speak of acceptance.

71. Mr. SANDSTRÖM considered that a reader new to the question would have great difficulty in understanding the difference between ratification, accession and acceptance. Even in the light of the debate which had just taken place, the distinction remained a little obscure.

72. Like Mr. Hudson, he stressed the need for a strict sequence in the articles of the draft Convention. Ratification was defined in article 3 (1), accession in article 8. The new article on acceptance, unlike the other two, was not drafted as a definition. It did not bring out clearly the special features of acceptance, which appeared to overlap both ratification and accession. The article should explain clearly what was meant by acceptance.

73. Mr. SPIROPOULOS said that the discussion, which had been devoted at first to consideration of a new draft article on acceptance, had been gradually widened until it now embraced the whole draft Convention.

74. He thought the Commission should vote upon the article, on the understanding that its decision would only be a tentative one.

75. The CHAIRMAN asked the Commission to decide whether it wished to include an article dealing with acceptance.

76. Mr. HUDSON pointed out that the choice was not between having an article on acceptance and leaving that question aside, but between devoting a separate article to it and dealing with it along with the other, traditional procedures. He suggested that the latter solution be adopted and that the word "acceptance" be added after the word "accession" in article 2 (A/CN.4/L.5).

77. Mr. SPIROPOULOS recalled that in article 2 the words "or any other means . . ." referred to acceptance.

78. Mr. CORDOVA explained that the words "or any other means . . ." had been inserted in article 2 because the meaning of acceptance had not then been under discussion. The Commission must determine whether acceptance was a new method of becoming a party to a treaty.

79. Mr. KERNO (Assistant Secretary-General) recalled that the question had been the subject of very thorough discussion, the summary records of which could suffice to enlighten those members of the Commission who had not participated in it. He had at that time pointed out that if acceptance was to be mentioned, it must be mentioned alongside signature, ratification and accession. The Commission had decided, however, that that would be too complicated and that it would be preferable to give the article a simple form. That question should now be posed once again.

80. Mr. ALFARO thought that if the Commission decided to mention acceptance, it must define it as it had done in the case of accession. He would propose a text.

81. Mr. CORDOVA and Mr. HUDSON thought that, if the word "acceptance" were substituted for the words "or any other means . . .", acceptance must be defined in the same way as ratification and accession had been defined.

82. Mr. SANDSTRÖM wondered whether there was any contradiction between the Chairman's proposal and that of Mr. Hudson and Mr. Córdova.

83. The CHAIRMAN said that the question was indeed whether or not the Commission wished to devote a special article to acceptance. If so, it would consider Mr. Hudson's proposal for drafting the articles defining the three procedures in exactly parallel terms.

84. Mr. FRANÇOIS said that, in his opinion, an affirmative vote would not mean approval of acceptance procedure, but only recognition of the need for defining it because it was a procedure which was being used. The comments should show the views of the members of the Commission on it.

85. Mr. SCALLE said he was in favour of a special article, but could not accept the text proposed by Mr. Liang as it stood. He thought it had been very useful to follow up the explanations that had been given.

It was decided by 9 votes to include in the draft Convention an article relating to acceptance.

86. The CHAIRMAN said that now that it was decided in principle to have an article on acceptance, its wording must next be considered.

87. Mr. ALFARO believed that, in accordance with the suggestion that had been made in that respect, ratification and acceptance should be defined in parallel terms. On the basis of the draft article prepared by Mr. Liang, he had drafted a definition reading as follows:

“Acceptance of a treaty is an act by which a State, in lieu of signature or ratification or both, deposits an instrument declaring that it undertakes finally to assume the obligations of the treaty in accordance with its constitutional law and practice.”

88. In drafting that parallel definition he had tried to bring out clearly the difference between each of the concepts.

89. Mr. KERNO (Assistant Secretary-General) drew Mr. Alfaro's attention to the fact that acceptance did not always take the form of a formal instrument, but was often effected simply by signature.

90. The CHAIRMAN and Mr. HUDSON suggested that the text read: “an act by which a State . . . declares”, and Mr. ALFARO accepted that suggestion.

91. The CHAIRMAN pointed out that the essential difference between Mr. Alfaro's and Mr. Liang's proposals was that the former was in the form of a definition. He personally had no objection to that form. He proposed the following text: “A State may, in lieu of signature or ratification or accession . . .”

92. Mr. HUDSON preferred Mr. Alfaro's formula because it defined acceptance in parallel terms to those used for ratification and accession.

93. He proposed that the words “subject to the treaty entering into force” be added to the article. The same words would have to be included in various other places in the articles. He also proposed that the word “finally” be omitted because a State could withdraw its acceptance before a treaty entered into force.

94. He considered the words “in accordance with its constitutional law and practice” superfluous, as they already appeared in article 2.

95. Mr. SANDSTRÖM suggested that Mr. Alfaro's draft article and the amendments to it be referred to the Special Rapporteur for him to draft the text.

96. The CHAIRMAN thought that, as the Commission had very clear views on the question, it should itself draft the text. He thought that the wording proposed by Mr. Alfaro might be used if amended to read: “Acceptance of a treaty is an act by which a State, in lieu of signature or ratification or accession or any of these procedures, . . .”, or else “. . . or all of these procedures . . .”.

97. Mr. KERNO (Assistant Secretary-General) said that there was one thing which was worrying him. The proposed wording read: “A State . . . declares that it undertakes finally to assume the obligations”; but a treaty comprised rights as well as obligations. He suggested that the words used should be “becomes a Contracting Party,” or else “accepts a treaty as binding upon that State”. That would cover rights as well as obligations.

98. The phrase relating to constitutional requirements

and the entry into force of the treaty must either appear in all the definitions or in none of them.

99. The CHAIRMAN suggested that Mr. Hudson's point would be met by saying “declares its willingness to be bound by the treaty”. That would make addition of the words “subject to the treaty entering into force” superfluous.

100. Mr. HUDSON fully approved the Chairman's suggestion. He pointed out that, in the majority of cases, a treaty would contain a protocol clause which provided that a certain number of accessions would be necessary for it to enter into force. A State then accepted the treaty on condition that there was the necessary number of ratifications or accessions, and before the treaty entered into force it could withdraw its acceptance.

101. Mr. SPIROPOULOS thought it was preferable to say “considers that the treaty is binding upon that State”. The various formulae amounted to the same thing. The usual formula was that a State accepted the treaty as binding upon it, but there was no one formula which was used to the exclusion of all others. The Commission was splitting hairs, however, and the text which had been proposed seemed satisfactory to him.

102. Mr. AMADO, recalling that it had been at his suggestion that the words “as binding” had been included in article 3 (A/CN.4/L.5), said he agreed with what Mr. Spiropoulos had just said.

103. The wording proposed by Mr. Liang corresponded to the new trend towards securing the final conclusion of treaties at conferences. Signature could then make ratification unnecessary provided States were authorized by their parliaments to proceed in that way. To look at the question of accession from another point of view, it was obvious that accession was only possible where a treaty was already in force. He had been about to accept the new wording, but if different shades of meaning were introduced into it he would abstain or vote against it.

104. The CHAIRMAN pointed out that article 2 (A/CN.4/L.5) already contained the words “in accordance with its constitutional law and practice” and that those words covered every case. It was therefore as unnecessary to repeat them in connexion with acceptance as in connexion with ratification and accession.

105. Mr. SCALLE said that if the article were prefaced by the words “Where the treaty itself so provides,” the words “in accordance with its constitutional law and practice” must be added so as to avoid implying that the treaty could of itself authorize a State to adopt the procedure of acceptance; but if the former words were deleted the latter became superfluous.

106. After an exchange of views between the CHAIRMAN, Mr. ALFARO, Mr. HUDSON, Mr. SCALLE and Mr. SPIROPOULOS on the choice of a term to indicate that the State did not give the undertaking in question unless the treaty entered into force, *the following wording was adopted by 9 votes:*

“Acceptance of a treaty is an act by which a State, in lieu of signature or ratification or accession or all of these procedures, declares its willingness to be bound by the treaty.”

It was also decided that the same expression "declares its willingness to be bound" would be used in the articles relating to ratification and accession.

(c) CONSIDERATION OF ARTICLE 3 TENTATIVELY ADOPTED BY THE COMMISSION AT ITS 88TH MEETING (A/CN.4/L.5)¹⁰

107. Mr. ALFARO proposed that paragraph (1) be reworded as follows: "Ratification is a solemn act by which a State, in a written instrument, confirms a treaty and recognizes it as binding on that State."

108. Mr. HUDSON suggested that the Special Rapporteur be made responsible for co-ordinating the articles on ratification, accession and acceptance.

It was so agreed.

(d) CONSIDERATION OF THE TEXT OF THE ARTICLES TENTATIVELY ADOPTED BY THE COMMISSION AT ITS 98TH MEETING (A/CN.4/L.17)¹¹

109. The CHAIRMAN stated that the articles adopted at the previous meeting (A/CN.4/L.17) should be inserted in document A/CN.4/L.5. He suggested that the Commission look again at the text of article 3 in document A/CN.4/L.17.

Article 3

It was decided to substitute the word "capacity" for the word "competence".

110. Mr. EL KHOURY agreed that it was preferable to use the word "capacity" instead of the word "competence", as the convention would have to be published in all languages and in Arabic the word "competence" referred to the powers specially conferred upon an organ while "capacity" referred to natural aptitudes. Capacity was something that was innate in States.

111. Mr. SCELLE wished to emphasize that he had abstained in the vote that had just been taken, and Mr. AMADO that he had voted against.

112. Mr. SCELLE asked that it be made clear that the capacity of certain States could be modified by international law and that the exercise, of that capacity could be modified by a convention concluded between States. He believed that the enjoyment of their capacity by States could, in fact, only be modified by international law.

113. The CHAIRMAN was not sure whether that was true.

114. Mr. AMADO said that when, by virtue of its status as a permanently neutral State, Switzerland forwent the conclusion of treaties of alliance, it was the community of nations which so decided. It was still, however, a question of international treaty law, and it was not correct to speak simply of "international law".

115. Mr. SCELLE added that international customary law also came into play. The existence of semi-sovereign States had never yet been questioned; in the Middle Ages

there had been vassal States and at the present time there were dependent States.

116. The CHAIRMAN, supported by Mr. CORDOVA, said that even if Mr. Scelle were correct in saying that capacity could only be limited by international law, it was not necessary in the draft Convention to indicate by what or by whom it could be limited.

117. Mr. YEPES said he was in favour of the proposed article. The present text, however, was very vague and did not make clear by what or by whom capacity could be limited. He would support the wording proposed by Mr. Scelle.

118. Mr. SCELLE stated that every legal system itself determined what constituted capacity and that no-one could alter it in the slightest. Besides capacity, there was, however, the exercise of capacity, and a person could limit the exercise of his capacity. China was still a sovereign State, and neither it nor anybody else could place it in the category of dependent States or in that of neutral States or in that of confederated States; it could, however, give up its right of administration. Turkey, which had always been declared a sovereign State, could not simply decide to cease to be one, but it had been able to give up to Austria the administration of Bosnia and Herzegovina. Everything depended on the distinction between enjoyment and exercise of capacity. At the law faculty in Paris, one was taught that capacity was determined by law. The age of majority was reached at 21, whether one wished it or no. In that case it was a question of the enjoyment of capacity, *scilicet* the possession of capacity. Its exercise one could delegate to anybody. Why should not the same be true in international law? It was the same rule, and the Commission would run no risk in adopting it.

119. Mr. SPIROPOULOS said that in his opinion the text before the Commission was a legal monstrosity. At the previous meeting Mr. Hudson had proposed a very simple formula: "Each State has the capacity to make treaties, but the exercise of that capacity may be limited." That formula seemed to cover all aspects of the question, and was simple and logical.

120. Mr. KERNO (Assistant Secretary-General) recalled that the Commission had already discussed the question at the previous meeting and agreed to leave to the Rapporteur the responsibility for improving the style of the article in the light of the Commission's decision. All States had the capacity to make treaties, but that capacity and its exercise could be limited.

121. Mr. AMADO, supported by Mr. SPIROPOULOS, pointed out that most of the "monstrosities" that had been brought into the text arose from the fact that the Commission had departed from the Harvard draft, article 3 of which read 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" (A/CN.4/23, appendix A). That was the wording that should be adopted.

It was decided to adopt the wording of article 3 of the Harvard draft.

¹⁰ See summary record of the 88th meeting, footnote 15.

¹¹ See summary record of the 98th meeting, footnote 11.

*Article 4**Paragraph (1)*

122. By Mr. AMADO's asking why the expression used in the Harvard draft should not be retained in article 4 also and the words "to enter into treaties" substituted for "to make treaties", the CHAIRMAN accepted those amendments.

123. Mr. HUDSON suggested that the paragraph read:
"The capacity of a State to enter into treaties is exercised by the organ or the organs of that State competent for that purpose under its constitution."

124. The CHAIRMAN thought that the words "for that purpose" were superfluous.

Paragraph (2)

124. Mr. HUDSON said he would prefer the paragraph to read:

"The Head of the State is competent to exercise the State's capacity to enter into treaties."

126. Mr. SPIROPOULOS wondered whether, even if all the members of the Commission were agreed to use the word "capacity" instead of "competence", the form should be used in all the articles. Would it not be better in the paragraph under discussion to use the expression "treaty-making power"? Even in civil law a person was not said to have the capacity to do something, he was said to have the right to do it.

127. Mr. HUDSON, supported by the CHAIRMAN and by Mr. ALFARO, objected to Mr. Spiropoulos' suggestion on the grounds that it was a matter of principle always to use the same term in a legal text to denote the same thing. Otherwise there was a risk of its being inferred that something different was meant.

128. Mr. SPIROPOULOS wondered whether it was exactly the same thing. Capacity denoted a situation before the law, and the exercise of capacity was treaty-making power. Naturally he agreed that the same term must always be used to denote the same thing.

129. The CHAIRMAN read out the text of paragraph (2) amended to read:

"In the absence of provision in the constitution to the contrary, the Head of the State is competent to exercise treaty-making power."

130. Mr. AMADO preferred the wording adopted at the previous meeting. He thought that the Commission should not go back too often on what it had already decided.

131. Mr. LIANG (Secretary to the Commission) agreed with Mr. Spiropoulos, In his opinion it was not capacity that was referred to in the paragraph under discussion, but the exercise of treaty-making power, which was a quite different thing. Capacity resided in the State. In saying that the Head of the State was competent to enter into treaties, it was assumed that the constitution granted him the exercise of that power.

132. Mr. SANDSTRÖM said that the capacity to enter into treaties, referred to in article 3, and the capacity of organs of the State to enter into treaties, referred to in article 4, meant two different things.

133. The CHAIRMAN proposed that the two paragraphs be combined to read: ". . . by whatever organ or organs of that State its constitution may provide, or, in the absence of provision in its constitution, by the Head of that State".

134. Mr. EL KHOURY suggested that the second paragraph be deleted. Why indeed should one bestow that power upon a man on whom his people did not wish to bestow it?

135. Mr. HUDSON pointed out that article 4 referred to the constitution of a State, but that its constitution might be silent on that point. It was possible that it was the law of the country which determined it.

136. Mr. SPIROPOULOS suggested using the expression "its constitutional law in general".

137. Mr. HUDSON recalled that in article 1 of the Rio de Janeiro draft (A/CN.4/23, Appendix F) the words "internal law" were used. In the United States of America, only the President could enter into treaties, but postal conventions had for a long time past been concluded by the Postmaster-General.

138. Mr. SPIROPOULOS remarked that the same was true in many States.

139. The CHAIRMAN stated that he would choose between the two expressions "internal law" and "constitutional law and practice".

The meeting rose at 1. p.m.

100th MEETING

Monday, 11 June 1951, at 3 p.m.

CONTENTS

	<i>Page</i>
Law of treaties : report by Mr. Brierly (item 4 (a) of the agenda) (A/CN.4/23; A/CN.4/L.5, A/CN.4/L.17) (<i>continued</i>)	
(a) Consideration of articles tentatively adopted by the Commission at its 88th meeting	152
(b) Consideration of articles tentatively adopted by the Commission at its 98th meeting	158
General Assembly resolution 478 (V) of 16 November 1950 : Reservations to multilateral conventions (item 4 (b) of the agenda) (A/CN.4/L.18)	
Discussion of Mr. Brierly's draft report	159

Chairman: Mr. James L. BRIERLY

Present:

Members: Mr. Ricardo J. ALFARO, Mr. Gilberto 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.