

Mr. H. D. White

9
May 3, 1944

Mr. Luxford

In connection with the appointment of delegates to the proposed financial and monetary conference, I asked a couple of my people to examine the authority vested in delegates to the previous conferences so that we might have some guides in the instant case.

I think you will be interested in examining the memorandum they prepared.

Copies to Messrs. O'Connell and Bernstein.

Re: Status of Delegates to Financial and Monetary Conference
of the United and Associated Nations

In connection with the proposed financial and monetary conference of the United and Associated Nations, the question has been raised as to whether it will be necessary for the delegates to the convention to have the status of plenipotentiaries. It has been suggested by the State Department that the delegates should be plenipotentiaries and that they sign any agreement reached by the conference "ad referendum." The further question has arisen as to whether a legal or moral obligation would be imposed upon all or any of the governments whose delegates sign in such a manner to adopt or ratify the agreement.

I. Discussion of Terms "Plenipotentiary" and "Full Powers"

Formerly, all intercourse between governments was of a political or diplomatic nature and all public international conferences were composed of delegates who represented their governments as political units.^{1/} It has been the practice to confer what are described as full powers upon these delegates or diplomatic agents to whom the negotiation and signature of a treaty or convention is entrusted.^{2/} The term "diplomatic agents" does not refer exclusively to members of the diplomatic profession "but includes any representative equipped with 'full powers' to act on behalf of his government in the matters for which he is appointed (that is, a 'plenipotentiary')."^{3/} Thus, a public conference has been defined as "meetings of plenipotentiaries (that is, official government representatives armed with full powers) for the discussion and settlement of international affairs."^{4/}

The following is an example^{5/} of the "full powers" given by the United States:

"Know ye, that reposing special trust and confidence in the integrity, prudence and ability of [names omitted], Delegates of the United States of America to the International Conference on Load Lines to convene at London on May 20, 1930,

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- ^{1/} Dunn, *The Practice and Procedure of International Conferences*, (1929) 44.
^{2/} Hackworth, *Digest of International Law*, 39; 2 Hyde, *International Law* (1921) 36, 37.
^{3/} Dunn, *op. cit. supra* note 1.
^{4/} 1 Scott, *The Hague Peace Conferences of 1899 and 1907*, 37.
^{5/} Sir Ernest Satow, *A Guide to Diplomatic Practice* (1932) 84.

I have invested them jointly and severally with full and all manner of power and authority, for and in the name of the United States of America, to meet and confer with any persons duly authorized by the Governments of the States represented at the said International Conference, being invested with like power and authority, and with them to negotiate, conclude and sign a Convention on the subject of load lines, the same to be transmitted to the President of the United States for his ratification subject to the advice and consent thereto of the Senate of the United States.

"In testimony whereof * * *."

It has been deemed expedient to make these powers as broad and extensive as possible.^{6/} Governments have been known to decline to deal with a foreign representative found to be lacking in this regard. In 1894 Japanese plenipotentiaries declined to accept the powers of the Chinese plenipotentiaries who met them with a view to concluding peace on the grounds that their powers did not authorize the latter to conclude or sign anything, and were silent on the subject of ratification.^{7/} Our Department of State refused to recognize as a full power "a certificate signed by the Minister for Foreign Affairs of Estonia that you are duly authorized by the Estonian Government to negotiate and conclude a treaty." The Department stated that it did not "constitute a full power in due and proper form" and required that a "full power * * * be executed by the President of Estonia."^{8/}

II. Modern View of Full Powers Requirement

1. Change in Trend of Public Conferences

The actual trend of world events, however, has been away from the conception that all public conferences are diplomatic congresses, the participants of which are plenipotentiaries equipped with full powers. There has been growing emphasis on what have been categorized as "non-political" or "technical" conferences, i.e., conferences dealing with the regulation of international activities of a specific nature, such as international commerce, postal, telegraph, and radio communication, public health, labor, agriculture, etc. Delegates to such conferences

^{6/} 1 Keith, *Wheaton's Elements of International Law* (6th English Ed. 1929) 493.

^{7/} 5 Moore, *International Law Digest* (1906) 179.

^{8/} Hackworth *op. cit. supra* note 2, 39.

"do not in substance represent the political department of their governments so much as they do the actual public interested in the activity under discussion, and in some cases they derive their instructions from that public rather than from the political heads of their states. More often than not they are experts in the technology of the subject matter to be regulated rather than in the technique of the political regulations of the state."^{9/}

There have been many such public international conferences. For example, the delegates to the International Economic Conference of 1927 did not primarily represent their governments as political units. "They were not equipped with full powers * * *; yet this gathering was essentially a public international conference in the sense that it was convened by governments for governmental purposes and derived its competence solely from governments."^{10/} The food conference of the United and Associated Nations held in May 1943 would appear to be a recent example of an international conference at which the delegates were not equipped with full powers.^{11/} Thus, since the reason for the "full powers" requirement is no longer present in this type of conference, it may be and frequently has been dispensed with. In summing up this change in attitude, Dunn states:

"Of course, all delegates who claim to represent a political entity or organization should be equipped with evidence of their authority to do so, and this authority should be sufficiently extensive to permit them to carry out the purpose of calling the conference. But under present conditions it is not essential that such authority should include the specific power to sign conventions. In recognition of this fact, the term 'full powers' is now being supplanted in some conferences by the word 'credentials,' which carries no implications as to the specific character of the powers granted to representatives."^{12/}

^{9/} Dunn op. cit. supra note 1, 38.

^{10/} Id. at 43.

^{11/} The Department of State Bulletin, Vol. VIII, No. 195 (1943) 271 -- It may be noted that the invitation to this conference asked that "a small number of appropriate technical and expert representatives" be sent; and that the New York Times of June 3, 1943, stated "None of the Governments is legally bound by the action of their delegates."

^{12/} See op. cit. supra note 1, 206.

2. Diminishing Importance of Act of Signing International Agreements

The fact that the "plenipotentiary" or "full powers" concept has lost significance is further shown by the diminishing importance attached to the act of signing international agreements. At one time the signing of a convention by the delegate was a most important step because that signature would bind the delegate's government. However, in more recent times, the practice has arisen of signing instruments ad referendum, that is, subject to ratification.^{13/} It is now well established though that the signature of a delegate, even though not stated to be ad referendum, and no matter how broad his "full powers" may be, is subject to ratification and involves no legal obligation of ratification by the state.^{14/}

In fact, the importance attached to signature is now so negligible that the requirement of signature has in some cases been expressly eliminated in the formulation of international conventions. Such a procedure is established for the International Labor Conference under Article 405 of the Versailles Treaty.^{15/} That article provides that the conference may adopt draft international conventions by a majority of two-thirds of the votes cast by the delegates to the conference. This draft convention is submitted to the member governments for such action as may be necessary for adoption and becomes binding upon the members who ratify it. A similar procedure was followed in connection with the adoption of the General Act of 1928 for the Pacific Settlement of International Disputes. This convention was adopted by the Assembly of the League of Nations, signed by the President and Secretary of the League and then submitted to the members for ratification.^{16/}

^{13/} 5 Hackworth, Digest of International Law (1943) 46; 1 Hudson, International Legislation (1931) xlv, lxvi.

^{14/} 1 Keith, Wheaton's International Law (6th English Ed. 1929) 490; Hall, A Treatise on International Law (1924) 385 et seq.; 1 Oppenheim's International Law (5th Lauterpacht Ed. 1937) 715; 2 Hyde, International Law (1922) 41.

^{15/} 3 Malloy, Treaties, etc. (1923) 3329, 3508. The President of the United States ratified International Labor Conventions Nos. 53, 54, 55, 57, and 58 after having received the advice and consent of the Senate. Hackworth, op. cit. supra note 13, 53.

^{16/} Hudson, op. cit. supra note 13, 2529. For a discussion of the attempt to adopt a similar procedure for the Communications and Transit organization, see Dunn op. cit. supra note 1, 176 et seq.

III. Effect of Signature of Plenipotentiary to International Agreements

As was stated above, the modern writers on international law are in unanimous agreement that there is no legal obligation upon a state to ratify a treaty which has been signed on its behalf by its plenipotentiary.^{17/} However, there is a considerable body of authority to the effect that there is a moral obligation to ratify such a treaty. It has been said that "the weight of opinion holds that a moral obligation to ratify exists."^{18/} Several writers have made a distinction between those governments in which ratification is delegated to the same domestic authority which negotiates the treaty; and those governments under whose domestic law the ratification of a treaty or the consent to ratification is placed in a separate body from that negotiating the treaty. Thus, it is stated that if the domestic law of a state requires ratification by the legislative branch of the government, the other countries are presumed to know this requirement and accordingly, there is no moral obligation on that government to ratify the treaty. When the treaty making power and the ratifying power are vested in the same hands, these writers say that there is some moral obligation to ratify and ratification may not be arbitrarily withheld.^{19/} Oppenheim comments on the moral obligation to ratify a treaty as follows:

"It is difficult, however, to see the value of such a moral, in contradistinction to a legal, duty. The fact upon which everybody agrees is that International Law does in no case impose a duty of ratification upon a contracting party. A state refusing ratification will always have reasons for doing so which appear just to itself, although they may be unjust in the eyes of others. In practice, ratification is given or withheld at discretion."^{20/}

It may be noted that in the case of the treaty of January 22, 1903, with Colombia as to the Panama Canal, the United States attempted to force its ratification. After the treaty had been rejected by the

^{17/} See op. cit. supra note 13.

^{18/} Harley, The Obligation to Ratify Treaties, 13 Am. Journal of International Law (1919) 389, 405.

^{19/} Lawrence, The Principles of International Law (7th Winfield Ed. 1923) 300-301; Hall op. cit. supra note 14, 386-388.

^{20/} Oppenheim op. cit. supra note 13, 715.

Colombian Senate, the Secretary of State justified the attempt to force ratification by the argument that signature made the treaty binding so that pending ratification, the Colombian Government should not have acted in contravention of its terms.^{21/}

It would appear, therefore, that if an agreement of the monetary and financial conference were signed by the delegates as plenipotentiaries of their governments, there is substantial authority that some at least of those governments could not refuse to ratify without justification even though the United States would not be under a similar "moral" obligation.

IV. Conclusion

While the proposed monetary and financial conference has certain underlying political implications, it is believed to be primarily a technical conference similar to the World Economic Conference of 1927, discussed above. Accordingly, to designate the delegates as "plenipotentiaries" would appear to be contrary to modern practice. Moreover, any agreement signed by delegates so designated may give rise to a moral obligation to ratify on the part of governments which do not have constitutional or fundamental limitations. Delegates not equipped with "full powers" may indicate their agreement in the convention drafted at the conference by signing as delegates, not as representatives of their respective governments. If this course is followed, it is doubted that there are any legal or moral grounds on which an obligation to ratify could be predicated.

^{21/} Oppenheim *op. cit.* *supra* note 13, 715.