

Document:-
A/CN.4/SR.485

Summary record of the 485th meeting

Topic:
Law of Treaties

Extract from the Yearbook of the International Law Commission:-
1959 , vol. I

*Downloaded from the web site of the International Law Commission
(<http://www.un.org/law/ilc/index.htm>)*

all conferences must make their own rules, since the States which attended them were sovereign. He was therefore in favour of the omission of the paragraph.

42. Mr. FRANÇOIS said that, although it was true that conferences established their own rules, it was important to decide whether they settled their rules by unanimity or by a simple majority. It might be better to wait for a revised text before taking a decision on the omission of the paragraph.

43. Mr. SCALLE thought that paragraph 2 might be retained, provided that a specific procedure of conclusion was provided for all cases where international organizations were involved, since the practice and rules of those organizations must have an effect on the rules of procedure of the conference.

44. Mr. TUNKIN agreed that the matter should be taken up again when a revised draft was available. If any provision were retained, he would favour some such text as that suggested by Mr. Yokota.

45. Mr. BARTOŠ said that under the provisional rules of procedure usually prepared by the Secretariat for conferences convened by the United Nations it was commonly provided that texts should be adopted by a two-thirds majority unless the conference decided otherwise. In view of that customary rule, the question raised in paragraph 2 was a practical one. The two-thirds majority rule had never been abolished in United Nations practice and was followed by all United Nations conferences. Although he did not insist that the two-thirds majority should be required by the code, he felt it his duty to stress that the Commission should lay down no definite and compulsory rule on the matter; and he further categorically opposed any provision stating in absolute terms that decisions should be reached by a simple majority, since that was not an existing rule of international law. The whole question lay outside the scope of technical experts and jurists and was still subject to considerations of political balance. Accordingly, such an absolute rule might deter some States from participating in conferences, since they might hesitate to place themselves in a position in which they would have to bow to the majority rule.

The meeting rose at 6 p.m.

485th MEETING

Tuesday, 28 April 1959, at 10 a.m.

Chairman: Sir Gerald FITZMAURICE

Law of treaties (A/CN.4/101) (continued)

[Agenda item 3]

ARTICLES 1 AND 2* (continued)

1. The CHAIRMAN, speaking as Special Rapporteur, introduced his redraft of articles 1 and 2 which read as follows:

"Article 1. Scope of the present Code"

"1. The present Code applies to all international agreements comprised by the definition given in article 2, irrespective of their particular form or designation or of whether they are expressed in a single instrument or in two or more related instruments.

"2. Although normally denoting an international agreement embodied in a single formal instrument, the term "treaty" is deemed for the purposes of the present Code to include any type of international agreement to which the Code applies, without prejudice however to the status or character of any particular international agreement, as being or not being a treaty for the purposes of the domestic constitutional processes of any of the Parties.

"3. By reason of the provisions of article 2, the present Code does not, as such, apply to international agreements not in written form; nor does it apply to unilateral declarations or other statements or instruments of a unilateral character, except where these form an integral part of a group of instruments which, considered as a whole, constitute an international agreement, or have otherwise been expressed or accepted in such a way as to amount to or form part of such an agreement.

"4. The mere fact that, by reason of the provisions of the preceding paragraph, the present Code does not apply to agreements not in written form, or to certain kinds of unilateral instruments, does not in any way prejudice such obligatory force as any agreement or instrument of this kind may possess according to general principles of international law.

"Article 2. Definition of an international agreement"

"For the purposes of the present Code, an international agreement (irrespective of its name, style, or designation) means an agreement embodied either

(a) in a single formal instrument (treaty, convention, protocol etc.), or

(b) in two or more related instruments constituting an integral whole (exchange of notes, letters, memoranda, mutual declarations, etc.);

provided that the agreement is between two or more States, or other entities, subjects of international law and possessed of international personality and treaty-making capacity, and that the agreement is intended to create rights and obligations, or to establish relationships, governed by international law."

2. It had been suggested that articles 1 and 2 should be combined, but he had found it more convenient merely to transpose certain clauses from article 2 to article 1 and to change the title of article 2 to "Definition of an international agreement". The original method—that of defining the word "treaty" and then explaining that a treaty, for the purposes of the code, meant any international agreement in written form—had led to confusion and he hoped that the Commission would consider the redraft more logical.

3. The new article 1, paragraph 1, reproduced most of the first sentence of the former paragraph 1 and most of the former paragraph 2. The second sentence of the former article 1, paragraph 1, combined with the former article 2, paragraph 3, now constituted article 1, paragraph 3. The new article 1, paragraph 2, embodied the contents of the former article 2, paragraph 4. Article 2 was now substantially confined to the contents of the former article 2, paragraphs 1 and 2.

4. In article 1, paragraph 3, he had tried to take into account the argument that certain unilateral declarations might constitute part of an international agreement, either because they were related to other unilateral instruments forming part of such an agreement or through acceptance. Paragraph 4 qualified paragraph 3

* Resumed from the 480th and 481st meetings.

by stating that, though oral agreements and certain unilateral declarations were not treaties or international agreements for the purposes of the code, that fact did not affect their obligatory force.

5. Article 2 of the redraft was a simplified version of the original article 2, paragraphs 1 and 2. It should be borne in mind that the definition was only for the purposes of the code. The proviso at the end of the article was the only part that had not been fully discussed in the Commission. The wording of the proviso had been largely taken from the works of Professor Brierly and Sir Hersch Lauterpacht and the reasons for it were very fully explained in the latter's report (A/CN.4/63 and A/CN.4/87). He drew attention to paragraph 7 of his commentary on the articles (A/CN.4/101) and also to paragraph 10, which explained why he had not adopted Sir Hersch Lauterpacht's suggestion that registration with the Secretariat of the United Nations should be the test of whether an instrument was indeed a treaty or international agreement. Article 102 of the Charter provided that every treaty and every international agreement entered into by any Member of the United Nations should be registered with the Secretariat; accordingly, definition must antecede registration.

6. Mr. ALFARO thought that the Special Rapporteur's redraft provided some excellent solutions for the Commission's problems, but suggested that the second clause of article 1, paragraph 2, was not quite clear in relation to the first clause.

7. The CHAIRMAN, speaking as Special Rapporteur, said that, under some State laws and constitutions, the term "treaty" had a special significance. Accordingly, if an international agreement was deemed to be a "treaty", some countries, such as the United States, might require senatorial ratification, which would be unnecessary in the case of an executive agreement. The purpose of the provision was to make it clear that, whether or not ratification was required, the fact that an instrument was deemed to be a treaty at the international level did not prejudice its status for the purposes of the constitutional process of any party to it.

8. Mr. AGO agreed that certain difficulties might arise at the constitutional level, but believed that they were likely to arise at the international level also. The word "treaty" had a specific meaning, and to use it in the same code, sometimes in that meaning and sometimes in a more generic one, might be dangerous. It might perhaps be more prudent to refer to "international agreements" throughout, particularly in order to avoid the danger of misinterpretation of the term "treaty" under constitutional law.

9. The CHAIRMAN, speaking as Special Rapporteur, pointed out that the subject before the Commission was "the law of treaties", and that the term "treaties" had been used globally for many years. If the word were deleted from the whole code, the drafting would be considerably encumbered. An "international agreement" was now defined as covering a number of instruments, but he had included the provisions of article 2 in order to preserve the generic use of the word "treaty".

10. Mr. PADILLA NERVO said he had understood article 1, paragraph 3, to mean that, if a certain constitutional procedure, such as senate approval, were established by a State for the ratification of treaties, whereas international agreements such as exchanges of notes

were not subject to such approval, that fact did not mean that the provisions of the code would not apply to exchanges of notes merely because they were not regarded as treaties under the domestic law of a Party. For the purposes of the code, the terms "treaty" and "international agreement" might be regarded as synonymous.

11. Mr. AMADO disagreed with Mr. Ago. Indeed, the term "treaty" could apply to instruments not requiring ratification.

12. Mr. LIANG, Secretary to the Commission, pointed out that the word "agreement" could also be used in a concrete and an abstract sense; he preferred the use of the word "treaty" both in its generic and in its particular sense.

13. With regard to article 1, paragraph 2, he found that the first clause was somewhat too restrictive, for international agreements were not even normally embodied in single formal instruments; it might be more accurate to say ". . . although denoting in the formal sense an international agreement embodied in a single instrument".

14. In any case, the use of the word "treaty" to denote any kind of international agreement was so well established that the Commission should have no compunction in confirming that general usage.

15. Mr. YOKOTA suggested that, since many international instruments were entitled "agreement", that word should be inserted before the word "protocol" among the examples in article 2, sub-paragraph (a).

16. The CHAIRMAN, speaking as Special Rapporteur, said he would have no objection to including the word "agreement", which was quite clear in that context.

17. Mr. EDMONDS did not consider that references to treaties in the code necessarily meant that the instruments concerned were treaties for all purposes under domestic law. He would therefore not object to the omission of the first phrase of article 1, paragraph 2 ("Although normally denoting an international agreement embodied in a single formal instrument, . . ."). The fact that all types of international agreement came under the law of "treaties" in the generic sense would not, in his opinion, cause any inconvenience to the parties or bring specific instruments under other branches of law, such as constitutional processes. With the exception of the first phrase, the redraft seemed to be a great improvement.

18. The CHAIRMAN, speaking as Special Rapporteur, agreed with Mr. Edmonds' interpretation, but thought that a provision along the lines of the first phrase was necessary in order to qualify the generic use of the word "treaty". Otherwise, it might be argued in some countries that, for example, an executive agreement should be regarded as a treaty because the country concerned had subscribed to the code. A distinction must be established between international and domestic phraseology.

19. Mr. MATINE-DAFTARY requested further explanation of the purpose of the second clause of article 1, paragraph 2. He added that he would have preferred the word "*capacité*" to the word "*pouvoir*" as the French translation of the word "capacity" in article 2.

20. Mr. SCALLE said that, in the system of law that prevailed on the European continent (and also on other

continents) the word "treaty" did not have two meanings, but was used only in a specific sense. He therefore preferred the formula "treaties and other international agreements", both in the text of the code and in its title. Otherwise, the redraft of article 1 was acceptable. In the French translation of article 2 he would prefer the word "*entités*" to the word "*collectivités*" as the French translation of the word "entities". An international organization could not be described as a *collectivité*.

21. Mr. HSU said that he would have preferred the use of the word "treaties" as a generic term. He would not object to the use of the expression "treaties and other international agreements" if it did not result in cumbersome wording in practically every provision of the code. Since that expression implied that a treaty was a form of international agreement, it would be just as well to use the shorter form, "international agreement", throughout. While the world might not yet be accustomed to that usage, he did not think that it would cause confusion among international lawyers. The expression used in the Charter, "treaties and international agreements", was, of course, ruled out because it implied that treaties were not international agreements.

22. Mr. PAL foresaw some difficulty in the use of the word "treaties" in its broad sense. If "treaties" included "other international agreements" a problem would arise when, in connexion with such questions as ratification, the code had to make a distinction between treaties, in the narrow sense, and other kinds of international agreement. There the term would again require splitting up. It would therefore be better to defer a decision on the question of terminology until the problems that might arise in connexion with other parts of the code had been examined.

23. Mr. EL-KHOURI considered the Special Rapporteur's redraft acceptable. He did not think that the terms used would cause any difficulty when translated into other languages.

24. Mr. VERDROSS favoured Mr. Scelle's suggestion. The expression "treaties and other international agreements" was supported by Article 102 of the Charter.

25. He suggested that the latter part of article 2 could be simplified by omitting the reference to "entities" and amending it to read: "provided that the agreement is between two or more States, or other subjects of international law . . ."

26. Mr. AGO said that, after listening to the discussion, he would not press his suggestion that the word "treaties" should not be used. However, he still thought that it should not be used in different senses, for confusion would result if one provision used the word in the broad sense, and another used it in the narrow sense. He, therefore, proposed to use it always in the strict and proper sense of the term, and supported the use of the expression "treaties and other international agreements" in the text, although the title "Law of Treaties" might be retained.

27. He agreed with Mr. Verdross' suggestion regarding article 2, but would go a little further. It seemed to him that all subjects of international law were possessed of international personality and that the clause in question could consequently be further simplified by amending it to read: "provided that the agreement is between two or more States or other subjects of international law possessed of treaty-making capacity . . ."

28. The CHAIRMAN, speaking as Special Rapporteur, explained that he had used the word "entities" because there was a strong school of thought which held that an individual could be a subject of international law. It was in order to make it quite clear that individuals were not included that he had inserted the word "entities". As to the apparent tautology in the inclusion of the words "and possessed of international personality", there again his purpose had been to exclude individuals, who, even if regarded as subjects of international law, could not be claimed to possess international personality.

29. Mr. AMADO agreed with Mr. Scelle regarding the title. The expressions "subjects of international law" and "possessed of international personality" related to the same thing and one or the other could be omitted. Finally, he noted that it was now intended to use the word "agreement" in both a broad and a narrow sense, for the Special Rapporteur had accepted Mr. Yokota's suggestion that the word "agreement" be inserted in article 2 (a). Thus, the word "agreement" was to be used in the heading and in the first part of article 2 in a broad sense, and in sub-paragraph (a), in the narrow sense of a certain type of formal instrument. He suggested that such confusion should be avoided.

30. Mr. YOKOTA recalled that it had been decided that the Commission should begin by preparing a code limited to treaties between States and that, after completing the draft, it should consider whether to include articles relating to treaties with international organizations. He therefore questioned the wisdom, at the present stage of the Commission's work, of including in the definition references to subjects of international law other than States.

31. The CHAIRMAN, speaking as Special Rapporteur, said that, apart from other reasons, the definition should not be restricted to agreements between States, because there were entities, subjects of international law and possessed of treaty-making capacity, which were neither States nor international organizations. For example, the Vatican, between the time of the old Papal State and the conclusions of the Lateran Treaty in 1929, had had the capacity to conclude international agreements.

32. Mr. ALFARO agreed with the Special Rapporteur that it would be better to retain the word "entities" in order to ensure the exclusion of individuals. However, he suggested that the clause in question could be simplified by amending it to read: "provided that the agreement is between two or more States, or other entities possessed of international personality and treaty-making capacity . . .". If an entity was possessed of international personality, it was *ipso facto* a subject of international law.

33. Mr. BARTOŠ congratulated the Special Rapporteur on the redraft he had prepared. He was sure that no member of the Commission disagreed with the substance of articles 1 and 2 and that any criticism of the redraft was motivated by a desire to find the most suitable wording.

34. Although he was of the opinion that the word "treaty" could be used in both the broad and the narrow sense, he had no objection to the use of the words "treaties and other international agreements" if that expression was preferred by other members.

35. As to the specification of different types of instruments in article 2, he pointed out that any attempt to make a hierarchical classification *in abstracto* was bound to fail because there were cases in which the protocol to a treaty was more important than the treaty itself.

36. He favoured the retention of the word "entities" because under such instruments as the Convention on Genocide, individuals had international responsibility and were therefore subjects of international law and not objects in the classical sense. However, he would not oppose the omission of the word, since individuals were still excluded by the fact that the "subjects of international law" were limited to those "possessed of treaty-making capacity".

37. Another question that had occurred to him was the compatibility of the first clause of article 1, paragraph 3, which limited the scope of the code to international agreements "in written form", with international usage regarding such questions as the registration of treaties. There, reference was frequently made to agreements recorded in writing. He therefore suggested that the commentary should make it clear that the written form referred to was *ad probandum* and not *ad solemnitatem*.

38. Finally, he thought the new draft of article 1, paragraph 4, took the various views expressed concerning unilateral instruments into account.

39. Mr. VERDROSS agreed with Mr. Ago's suggestion that the proviso in article 2 should read "provided that the agreement is between two or more States or other subjects of international law possessed of treaty-making capacity". It was undeniable that, if individuals were recognized as subjects of international law, they also possessed international personality; but that did not mean that a private individual had the same capacity as a State, since he possessed personality in a very narrow sense and obviously did not have treaty-making capacity. The wording he had suggested would definitely exclude individuals and thereby overcome any difficulties of interpretation.

40. Mr. LIANG, Secretary to the Commission, suggested that it might be sufficient to say: "States or international entities possessed of treaty-making capacity". Very few international lawyers agreed on the subjects of international law. Unless a very exhaustive commentary was appended, the words would not mean a great deal in a code. A similar objection might be made to the phrase "possessed of international personality". Misgivings had always been expressed about the application of that phrase to international organizations and proposals to include it in the United Nations Charter had been rejected at San Francisco, for various reasons. The fact that no reference to the international personality of the United Nations was made in the Charter did not, of course, imply that it had no such personality; such a reference was in fact made in the constitutions of certain of the specialized agencies. Some international entities, such as alliances, did not possess and did not claim treaty-making capacity, and international entities other than States could only conclude treaties through States. A company with international affiliations obviously lacked the treaty-making capacity.

41. Mr. PADILLA NERVO said that article 1 referred to the scope of the code. An examination of all the articles would show that there were some general provisions, those on validity, for example, which certainly referred to all forms of international agreement,

but there were many provisions relating solely to treaties in the narrower sense. The word "applies" in article 1, paragraph 1, of the redraft would therefore seem to be unsuitable; and the word "relates", in the original draft, would be preferable.

42. The CHAIRMAN, speaking as the Special Rapporteur, agreed with Mr. Padilla Nervo. He would willingly restore the word "relates". He had not intended the use of the word "applies" to mean that every article of the code applied to every type of international instrument, but merely that the code itself was concerned with all international agreements.

43. Mr. AGO said that he preferred Mr. Verdross' formulation for the passage in article 2 to that suggested by the Secretary, since it was the classic formulation and was quite clear, although there was no great difference in substance. There was not a real difference indeed between the expression "international entities" and the expression "other subjects of international law" when the one or the other of those two expressions were coupled with the qualification "possessed of treaty-making capacity", which was the key to the question. He would not strongly object, however, if the Secretary's formulation was adopted.

44. Reverting to article 1, paragraph 2, he recognized that although the phrase "treaties and other international agreements" was more accurate, it could be extremely cumbersome if used in every article and even several times over in some articles. He would therefore be inclined to accept the use of the term "treaty" alone in the code, but with an explanation that it had been used only as an expedient for the sake of brevity.

45. He therefore suggested the insertion in article 1, paragraph 2, of words to the effect that whenever the term "treaty" was employed in the code, it should be understood to include not only treaties in the strict sense of the term, but also any other form of international agreement to which the code related; it should also be stipulated, however, that that should not prejudice any definition of an international agreement which might be adopted for the purposes of the domestic constitutional processes of any of the parties.

46. Mr. EDMONDS had some difficulty with the word "prejudice". It would be better to state that the meaning attached to the term "treaty" did not imply that any particular instrument would be a treaty within the meaning of the domestic law of any of the parties.

47. Mr. ALFARO observed that the purpose of the article should not be to safeguard domestic constitutional processes, but, on the contrary, to safeguard the rules of international law. It should be understood that the code referred not only to treaties in the strict sense, but to all international agreements, whatever the status given them by any of the parties under their constitutional law. The second part of Mr. Ago's amendment was not very clear. It should be stipulated that the code applied, irrespective of whether the domestic law of any country gave a particular status to any particular international agreement.

48. The CHAIRMAN, speaking as Special Rapporteur, replied that the object of the article was, precisely, to make it clear that whether a particular agreement was or was not a treaty for international purposes did not affect its status under the constitutional law of any of the parties. Mr. Alfaro apparently believed that the question whether an instrument was or was not called a treaty for constitutional purposes should not affect

its international status. Both views were undoubtedly justified, but no suggestion had been made that the position under constitutional law could affect the international status of an agreement. The danger lay rather in the other direction. The article had been framed in those particular terms in order to preserve the constitutional position, which was what was really necessary. If a treaty was defined as something that might be understood as including other forms of international agreement, it would have to be made quite clear that that did not prejudice the right of any of the Parties, for its own constitutional purposes, to regard that agreement as being a treaty or not being a treaty. That had certainly been clear in the original draft and was no less clear in Mr. Ago's amendment, which the Special Rapporteur was prepared to accept.

49. Mr. AMADO said that Mr. Ago's amendment was precisely what he himself would have suggested, and fully met the points raised by Mr. Edmonds and Mr. Alfaro.

50. Mr. YOKOTA thought that the words proposed by Mr. Ago, "whenever the term 'treaty' was employed in the code", went too far, since the term was sometimes used in the narrow sense as, for example, in article 2. That objection might be removed easily enough by inserting some such proviso as "unless the text otherwise requires".

Subject to drafting changes, Mr. Yokota's amendment was accepted.

51. The CHAIRMAN, reverting to the question of the title of the code, said that the phrase "law of treaties and other international agreements" had been proposed, but Mr. Ago had given cogent reasons for using the term "treaty" above in the text. Although the full phrase would be too cumbersome to use throughout the text, it might well be set out in the title. However, the law of treaties had become generally accepted, at any rate by international lawyers, as a term of art and would be construed as covering not only treaties, but also other international agreements.

52. Mr. MATINE-DAFTARY pointed out that, if Mr. Ago's amendment was adopted, the title might perfectly well remain "Law of Treaties", without any addition.

53. The CHAIRMAN observed that the sense of the meeting seemed to be that the title should remain unchanged, that the word "relates" should be substituted for the word "applies" in article 1, paragraph 1, of the redraft and that the word "two" should be substituted for "one" in the same paragraph; and that Mr. Ago's amendment to article 1, paragraph 2 be adopted, with Mr. Yokota's sub-amendment, subject to drafting changes. A redraft of article 1, paragraph 2, would be submitted to the Commission at a subsequent meeting.

It was so agreed.

The meeting rose at 1 p.m.

486th MEETING

Friday, 1 May 1959, at 9.45 a.m.

Chairman: Sir Gerald FITZMAURICE

Law of treaties (A/CN.4/101) (continued)

[Agenda item 3]

ARTICLE 1 (continued)

1. The CHAIRMAN invited the Commission to continue its consideration of the redraft of article 1 as sub-

mitted at the previous meeting and of Mr. Ago's amendment to paragraph 2 (485th meeting, para. 45) in the following terms:

"Unless the context otherwise requires, the term 'treaty' shall, wherever it occurs in this code, be construed to mean not only treaties proper but also any other form of international agreement to which the code relates. The foregoing provision shall be without prejudice to the definition of an international agreement for the purposes of the constitutional processes of any of the parties."

2. Speaking as Special Rapporteur, he said the first sentence of the amendment was acceptable, but doubted whether the second sentence of the amendment was as clear as the second part of paragraph 2 in the original text.

3. Mr. ALFARO said he did not regard Mr. Ago's text as an improvement and was opposed to the reference to "treaties proper", since the object of the provision was to establish the strict meaning of the term "treaty" as had been done by the Special Rapporteur in his redraft of article 2.

4. The CHAIRMAN pointed out that Mr. Ago's amendment referred solely to article 1, paragraph 2.

5. Mr. ALFARO, maintaining his objection to the amendment, said that the expression "single formal instrument" was clearer than the expression "treaties proper" and would be consistent with article 2.

6. Furthermore, he did not think that the "without prejudice" clause in Mr. Ago's amendment accurately reflected the intention of the corresponding provision in the Special Rapporteur's own redraft.

7. Mr. PAL said that as the Special Rapporteur's definition in article 1, paragraph 2, was intended to be an inclusive one, Mr. Ago's amendment might have been shortened and improved by the substitution of the words "include any type" for the words "be construed to mean . . . any other form" in the first sentence.

8. The second sentence of the amendment should refer to a treaty as well as any other international agreement because the term "treaty" was also used in national constitutions and in a different sense. The word "definition" should be avoided as the constitutions might not contain definitions of those terms.

9. Mr. MATINE-DAFTARY asked what was the reason for the addition of the somewhat confusing opening clause "Unless the context otherwise requires" in Mr. Ago's amendment.

10. The CHAIRMAN, speaking as Special Rapporteur, observed that the clause had been inserted at Mr. Yokota's suggestion (485th meeting, para. 50), on the grounds that some articles in the code, as for example those concerning ratification, applied only to treaties in the strict sense.

11. Mr. TUNKIN said that the difficulties raised by the two texts were somewhat intricate and would perhaps require more time to elucidate than could be devoted to the subject.

12. He favoured Mr. Pal's suggestion concerning the first sentence in the amendment.

13. However, he preferred the Special Rapporteur's version for the second part of paragraph 2 which, in his view, was concerned not with the definition of a treaty but with the status of certain international agreements in municipal law.