Document:-
A/CN.4/SR.50

Summary record of the 50th meeting

Topic:
Law of Treaties

Extract from the Yearbook of the International Law Commission:-
1950 ,vol. I

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

Copyright © United Nations

could not be thoroughly discussed in a short space of time. He agreed with the Assistant Secretary-General that the Commission might give the General Assembly its opinion, not on the draft as a whole, but on certain points.

75. Mr. KERNO (Assistant Secretary-General) repeated that it would be most desirable to reach definite decisions and conclusions; but he was sure that the Commission had no illusions as to the possibility of completing its agenda quickly. In regard to certain topics, it would be useful if a definite report could be submitted to the General Assembly—for example, on the Nürnberg principles, on the international criminal jurisdiction, and on the ways and means for making the evidence of customary international law more readily available. In regard to the law of treaties, the Commission might be well advised to try to agree on the basic principles and to examine certain particular points, with a view to enabling the rapporteur to submit a more concrete report and proposals at the next session. The Commission might, for example, discuss the possibility of drafting a convention on the law of treaties, or merely certain principles. It was certainly desirable that on this topic also the Commission should make progress.

76. The CHAIRMAN remarked that in conformity with the decision of the General Assembly, certain reports had priority. Mr. Brierly's report was not one of them. It might perhaps have been better to take up the study of the priority topics. He thought the Commission might have to limit the time it devoted to each report. At any rate, it hardly seemed possible for Mr. Brierly's report, which raised the most vital questions, to be examined carefully and thoroughly. Hence, it would be better to limit the discussions and to examine some of the principles laid down by Mr. Brierly. The point raised by Mr. Kerno had not been examined by Mr. Brierly—namely, whether the Commission was to draft a convention or merely a set of principles. There seemed to be no doubt that the Commission's task was to draw up draft conventions, but he did think there would be time to reach agreement on all the terms of a convention. As the Commission had seen, the standpoint taken by Mr. Amado was contrary to Mr. Brierly's; and his seemed to indicate that the study of article 1 alone would keep the Commission busy for days. Henee, he suggested that the current week be devoted entirely to the study of Mr. Brierly's report, and the report by Mr. Spiropoulos on the draft Code of offences against the peace and security of mankind be taken up the following week. He also reminded the Commission that it would have to discuss the report to be submitted by its general rapporteur. When it did so, it would certainly resume the discussion of a number of points it had examined previously.

The meeting rose at 6.5 p.m.

50th MEETING

Tuesday, 20 June 1950, at 10 a.m.

CONTENTS *Page*

Law of treaties: Report by Mr. Brierly (item 5 of the agenda) (A/CN.4/23) (*continued*)
Article 1 67

Chairman: Mr. Georges SCELLE.

Rapporteur: Mr. Ricardo J. ALFARO.

Present:

Members: Mr. Gilberto AMADO, Mr. James L. BRIERLY, Mr. Roberto CÓRDOVA, Mr. J. P. A. FRANÇOIS, Mr. Shuhsi HSU, Mr. Manley O. HUDSON, Mr. Faris el-KHOURY, Mr. A. E. F. SANDSTRÖM, Mr. Jesús María YEPES.

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

Law of Treaties: Report by Mr. Brierly (item 5 of the agenda) (A/CN.4/23) (continued)

ARTICLE 1

1. The CHAIRMAN did not think it possible for the Commission to embark on a thorough discussion, though it might take up some individual points. Article 1, paragraph (b), assimilated what were previously known as treaties to the simplified agreements which were exchanges of notes.

2. Mr. HUDSON had difficulty in understanding paragraphs 3, 4 and 5 of the Explanatory Note. The last sub-paragraph on page 5 read: " these rules[1] are so broad that if they were stated in reverse they would command scarcely less agreement ". He was unable to see how they could be stated in reverse. Paragraph 6, dealing with standard clauses, was important and he hoped the Commission would find it possible to revert to that matter. He was not clear as to the meaning of paragraph 7. What sort of depositories were contemplated ? In paragraph 8 he had indeed been surprised to find that the terms " ratification " and " accession " were not employed at all. He could not understand why tradition had been departed from there. The Genocide Convention and the 1949 Geneva Convention employed those words. He wondered what problem connected with exchanges of notes it would be appropriate for the Commission to discuss (paragraph 9). The Commission was not considering all types of agreements, and he had been pleased to see in paragraph 10 that purely unilateral engagements did not come within the purview of the draft

2 a. The title of Section C " Source of the Draft " was misleading. Paragraph 11 gave a list of drafts; but

[1] Articles 5 (b) and 7 of the Harvard Draft Convention; see A/CN.4/23, p. 52.

drafts were not sources. The proper sources would be the practice of States and of international organizations. There also appeared to be a slight misunderstanding about the Convention on Treaties adopted by the International Conference of American States at Havana in 1928; that Convention was no longer a draft since it had been ratified by at least fifteen States. It was an instrument of some importance. He questioned the relevance of Field's and Bluntschli's drafts. The Draft of the International Commission of American Jurists was merely a preliminary document prepared for the Havana Conference of American States.

3. Mr. BRIERLY remarked that he had confined himself to mentioning the documents on which his Draft Convention was based.

4. Mr. HUDSON pointed out that Mr. Brierly had referred to them as sources. The Havana Convention was a source in the strict sense of the term, but the other texts were mere suggestions.

5. Mr. BRIERLY stated that he would have occasion to revert to the words "ratification" and "accession". In connexion with the Secretary-General's depository functions he had been obliged to rely on the documentation provided by the Secretariat. Perhaps a representative of the Secretariat would be so good as to give further information on that matter immediately or at a later date.

6. The CHAIRMAN thought that a later date, when the Commission was discussing article 9, would be preferable.

7. Mr. BRIERLY had nothing to add to his Explanatory Note for the moment. He had endeavoured to explain the nature of the draft and had not attempted to define treaties in general. His definition merely outlined the limits of the subject-matter of the Report.

8. Mr. ALFARO complimented Mr. Brierly on his work but was unable to accept some of his proposals. Article 1, which the Commission was about to discuss, constituted a departure from the principles of international law and the established practice of States. To assert that an exchange of notes amounted to a treaty might be interpreted as indicating an intention to give governments the power to conclude international agreements of all the other categories without submitting them to the legislature for ratification. For example, the Senate of the United States might believe that it was the desire of the Commission to deprive it of its power of final decision on international treaties. He mentioned the American practice of making "Executive Agreements", which did not need to be ratified by Congress. Both those agreements and exchanges of notes, however, were of a secondary character and could not be regarded as treaties within the meaning given the word by the draft under discussion. The definition of a "treaty" was based on an idea which he was unable to accept. He proposed that Mr. Brierly's text be amended. Mr. Brierly had said that it was not his intention to define the term "treaty" for all purposes, but the Convention could become law for the signatory Powers. It was essential, therefore, to know what was meant by "treaty".

8 a. Article 1 (a) stated that a treaty was an agreement recorded in writing between two or more States or international organizations. Hence an agreement between, for example, the Universal Postal Union and the International Labour Organisation would be a treaty. He did not believe that definition tallied with the meaning of treaty in international law. The Trusteeship Agreements, important as they were, had never been called "treaties". The definition went on: "which establishes a relation under international law between the parties thereto". But there could be treaties which annulled or modified a relation under international law: for instance, the Hay-Pauncefote Treaty of 18 November 1901 on the Panama Canal brought to an end the regime instituted by the Clayton-Bulwer Treaty of 19 April 1850. Many contemporary writers were considering the possibility of creating, modifying or annulling an obligation, as appeared from the definitions given by Field (A/CN.4/23, Appendix C, para. 188) and Fiore (*Ibid.*, Appendix E, para. 744).

8 b. Regarding paragraph (b) of the article, he was unable to accept the principle that the term "treaty" included an agreement effected by an exchange of notes. He proposed that paragraph (a) be altered and redrafted as follows: "A treaty is a formal instrument of agreement concluded by two or more States with a view to establishing, modifying, regulating or extinguishing a relationship of international law". That combined the Harvard and the Fiore definitions. He had left out the words "recorded in writing" because he had used the words: "formal instrument". If the Commission thought it necessary to stipulate that treaties must be drawn up in writing, it could adopt a provision of the type appearing in the Havana text. A treaty was not only drawn up in writing but negotiated with some formality.

9. The CHAIRMAN stated that it was too soon to submit amendments. What was taking place was a general discussion to enlighten the rapporteur as to the Commission's views. He would retain Mr. Alfaro's proposal as an expression of his opinion.

10. Mr. SANDSTRÖM agreed with Mr. Brierly, in connexion with paragraph (a) of article 1, that definitions given in international conventions did not affect interpretation in municipal law. But if in a convention on treaties the generally accepted definition of the term "treaty" were altered, some misunderstanding might arise, particularly in States which made a distinction between treaties and other categories of international agreements. If the proposed definition was rejected, however, the ideas underlying it need not necessarily be rejected also.

10 a. He understood that Mr. Brierly proposed to bring agreements concluded by exchanges of notes and treaties under the same rule. Supposing it were thought necessary to bring exchanges of notes and treaties under the same rule, there were other ways of doing so than by a change of definition. It might for example be laid down that an agreement concluded by exchange of notes should in whole or in part come under the same rule as a treaty. It might also be decided that what was

said of treaties should apply in part to exchanges of notes.

11. Mr. CÓRDOVA thought that the definition of the term " treaty " in article 1 (" a treaty is an agreement . . . which establishes a relation under international law ") was incomplete. Many relations under international law, for example, relations arising out of a *modus vivendi*, did not bind States. The other drafts that had attempted to formulate the law of treaties confined themselves to agreements which created real obligations. He thought that the idea of creating a legal obligation should be included in the proposed definition.

12. Mr. FRANÇOIS was of the opinion that much misunderstanding might be avoided if it were stated at the outset that the Commission did not contemplate taking a decision that might affect the distinction made in various countries between treaties and other agreements, and that States would in no way be obliged to alter constitutional provisions in force.

12 a. In any case, he thought that the words " which establishes a relation under international law " in article 1 embraced too much. As Mr Córdova had said, there were relations under international law which were concluded in writing and yet were not treaties. If, for example, a State requested in writing the recognition of a diplomatic agent and the State to which the request was addressed also replied in writing, that would not constitute a treaty. He considered that it would be best to say " a relation under *public* international law . . .".

13. Mr. HSU agreed with Mr. Brierly that an exchange of notes constituted a treaty. If some exchanges of notes had results binding the parties, the Commission could not leave them out of account. The definition in question of the term " treaty " might not tally with the practice of some countries, but that was not material since the Commission was considering international, not constitutional, law. Clearly constitutional law must not be forgotten, but since there was considerable confusion about it it would be better to start on the right lines. Jurists could always find an explanation reconciling the provisions of municipal law with those of a convention.

14. Mr. HUDSON was rather doubtful about the words " recorded in writing "; they seemed to him to imply that an agreement existed apart from the instrument in which it was expressed. He wondered whether that ought to be accepted. In his opinion the written document was the expression of an agreement, not merely the record of it.

14 a. With regard to what should be registered (A/CN.4/23, para. 16) he thought that the limit set was not a satisfactory one. It was true that the word " agreement " appeared in article 102 of the Charter, but that article could hardly be said to be an improvement on Article 18 of the Covenant of the League of Nations.

14 b. He regretted that the Comment on paragraph (a) of article 1 said nothing about the terminology adopted for formal agreements. He failed to see the difference between many of the terms employed. At the previous meeting [2] Mr. Brierly, in reply to Mr. François, had stated that formulation of international law did not modify distinctions which might be established by a constitution. There was no point in discussing the distinctions that might be made by certain constitutions but it would be desirable to insert the provisions of some constitutions, in the form of an annex, to show their ruling on the matter. The Constitution of the United States, for example, made a distinction between treaties and agreements concluded by the executive (" executive agreements ").

14 c. He failed to follow the thread of the argument in paragraph 20. He agreed with Mr. Brierly (para. 21) about excluding oral agreements; but in his opinion it was not enough to mention the *Eastern Greenland Case* and other cases: it was necessary to state what was involved. He remarked that he had no recollection that the *Mavrommattis Case* had raised the question of the legal effects of oral agreements.

14 d. There could be an agreement between a State and an international organization; the terms used in paragraph (a) of article 1 therefore did not answer to the facts (A/CN.4/23, para. 26). To revert to the example mentioned by Mr. Alfaro, it was true that a treaty could supersede or modify another treaty, but the words " to establish relations " included superseding, modifying, etc. (*Ibid.*, para. 28). On the other hand, the example given by Mr. François did not appear to raise any difficulties.

14 e. The sentence in paragraph 30: " And it is of course the case that a draft for an agreement is frequently termed a 'treaty' . . ." involved a popular expression with which the Commission need not concern itself. The explanation given in paragraph 32 puzzled him. He was doubtful about the expression " contracts of international law ". The Hague Court had pronounced that the transactions dealt with in that paragraph could not be regarded as contracts of international law. He agreed with Mr. François about the inclusion of exchanges of notes in the definition of the term " treaty " (para. 33).

14 f. His reply to Mr. Hsu was that he saw no need for the Commission to consider a matter which did not come within its terms of reference and did not raise any special problems. In connexion with paragraph 34 he felt that account should be taken of the fact that real treaties had been signed by protectorates and colonies—by the African Postal Union, among others. Such entities, though perhaps not States, nevertheless concluded agreements of international scope.

14 g. Mr. YEPES desired to associate himself with the compliments paid to Mr. Brierly on his report, which set out the principles of the English school of international law. He did not know whether the Commission ought to accept those principles; but an attempt had been made to present the facts. He would revert later to the constitutional power to conclude treaties.

14 h. For the moment he would confine himself to article 1. He regretted the extreme vagueness of the

[2] See Summary record of the 49th meeting, para. 72.

terms of that article; when the Commission came to put it into final form, the question would have to be gone into more thoroughly. It involved consideration of the very nature of international agreements. Since the modern form of treaty was the multilateral treaty, it was advisable to explain the difference in form between bilateral and multilateral treaties and whether or not the nature of a treaty varied with its object. The same definition could not be adopted for a law-making treaty, which laid down a new rule of law, and a treaty concluded on the *do ut des* principle (" traité contrat ") by which two States undertook to respect a contractual obligation. Nor should sight be lost of the difference between a treaty adopted at an international conference and a treaty resulting from negotiations between two or more States.

15. Mr. KERNO (Assistant Secretary-General) pointed out, in connexion with the question whether international organizations could be parties to a treaty and the doubts expressed by Mr. Alfaro on the matter, which had caused him (Mr. Alfaro) to omit any mention of international organizations in the text he had proposed, that The Hague Court had observed that the Charter provided for the conclusion of agreements between the Organization and its Members (paragraph 26 of the Comment).

15 a. He drew the Commission's attention to the agreements concerning the Organization's Headquarters concluded between the United States of America and the United Nations. He had himself taken part in the negotiations leading to that agreement and could testify that it had been called an agreement and not a treaty, not because anyone had questioned the capacity of the United Nations to sign a treaty, but merely because ratification was easier if the agreement were called an agreement: in that case only a simple majority was required in Congress, whereas a two-thirds majority was required for ratification of a treaty by the Senate.

15b. He desired in conclusion to point out that Article 43 of the Charter provided for the contingency of certain agreements being concluded which would undoubtedly be treaties. He read out to the Commission paragraph 3 of article 43. He thought it necessary therefore that the definition appearing in article I should include international organizations among the parties to treaties.

16. Mr. el-KHOURY was of the opinion that international organizations could not be parties to a treaty if what was meant by an " international organization " was a specialized agency or non-governmental organization or even the United Nations, since cases of violation would be submitted to the International Court of Justice, which was only competent to deal with disputes between States. If agreements to which an international organization was party were called " treaties " by the Commission, the Court would have to consider them should occasion arise. In his opinion an international organization could only be party to a treaty if it were one of the regional agencies contemplated by the Charter, that is to say a group of States such as the Arab League or the Organization of American States.

16 a. An exchange of notes had its value, it created an obligation; but he was not sure whether it ought to be called a " treaty ", since under all constitutions treaties had to be ratified by special procedures. He did not think that exchanges of notes were subject to the same procedures; that did not mean, however, that the question of exchanges of notes should be ignored. Paragraph (c) of article 1 was acceptable, provided the words " or international organization " were deleted or those words were defined as meaning a regional agency in the sense in which that term was used in the Charter.

16 b. Regarding the general discussion on which the Commission was engaged, he thought it desirable that Mr. Brierly should be precisely informed of the Commission's views. If the Commission did not accept paragraph (a) for example, Mr. Brierly ought to know how it wished the term " treaty " to be defined. If the discussion continued as it had begun and first one member gave his views and then another contradicted them, Mr. Brierly would not be able to profit from it, and it would be of no help to him in making a fresh draft.

17. The CHAIRMAN remarked that Mr. Brierly would have the records of the proceedings at his disposal.

18. Mr. el-KHOURY was aware of that. But he proposed that Mr. Alfaro's proposal be adopted and that the words " or international organizations " be deleted. In that way Mr. Brierly would be informed of the Commission's view.

19. Mr. HSU wished to know precisely what Mr. Hudson meant by his statement that he saw no need for reference to be made in the report to exchanges of notes.

20. Mr. HUDSON stated that exchange of notes was a very general practice and he did not think it raised any legal problems germane to the subject of the discussion.

21. Mr. HSU thought it would be most desirable from a practical point of view for exchange of notes to appear in the draft, to avoid any misunderstanding. The matter might be dealt with by stating that an exchange of notes came within the same category as a treaty.

22. Mr. HUDSON asked to be given a concrete example.

23. Mr. LIANG (Secretary to the Commission) cited, as an example of the application of one of the principles of international law to an exchange of notes regarded as a treaty, what had occurred in the case of the notes exchanged between Japan and China in 1915, known as the " Twenty-one Demands ". China had maintained in international conferences that since the Chinese Parliament had not approved the exchange of notes, the agreement arising out of it was not operative. Cases might arise in which it would be of importance to determine whether the principles of international law concerning treaties applied to exchanges of notes.

24. Mr. BRIERLY realized that it was not desirable to include every exchange of notes in the term " treaty " since to do so might raise constitutional difficulties

in some countries, but he thought that to fail to mention exchanges of notes in the draft would leave it incomplete. Many of the rules of treaty law also applied to exchanges of notes. The question of application of the principle *rebus sic stantibus* and the question of reservations, for example, could arise in connexion with an exchange of notes. He thought that Mr. Sandström's suggestion might provide a way out of the difficulty. It was desirable to mention exchanges of notes, but to do so without including it in the concept of treaty. It might be stated that the draft applied to an exchange of notes unless otherwise specified.

25. The CHAIRMAN said that Mr. Brierly's reply was of considerable value.

26. Mr. CÓRDOVA thought that the Commission was skipping from subject to subject. In his opinion it would be better to exhaust one subject before passing on to discuss the next. Mr. Alfaro had expressed himself very clearly. The Rapporteur ought to state his views on each question.

27. The CHAIRMAN felt that the discussion was proceeding in the normal manner. The view of the Commission should emerge from the whole body of views expressed. The Rapporteur would note all the comments made on article 1 and reply whenever he thought fit, and then in due course make his reply to all of the comments as a whole. Everything that might be said about article 1 had not yet been exhausted and if he himself thought there were further remarks to be made he would submit them.

28. Mr. HUDSON declared himself satisfied by the statements of the rapporteur, Mr. Brierly. He thought, however, that it was important to settle the matter under discussion by the Commission. In his opinion the views expressed by members concerning exchanges of notes might be summarized as follows; it was preferable to state in paragraph (b): " In this Convention the term ' treaty ' does not include an agreement concluded by exchange of notes ". He realized the great importance of the question of agreements effected by exchange of notes but would prefer it to be dealt with separately.

29. The CHAIRMAN stated that Mr. Brierly had considerably modified the view adopted by him in his report.

30. Mr. HSU held that treaties and agreements effected by exchange of notes were of equal importance and that there was occasion to examine both; the criterion the Commission ought to adopt was that of law, since it was with law that it was concerned. If a treaty or an exchange of notes established law, the matter was of consequence. If it did not, it was immaterial whether a treaty or an agreement by exchange of notes was concluded.

31. Mr. AMADO was pleased to observe that the Rapporteur had altered his attitude towards exchanges of notes. If exchanges of notes were included among treaties the Commission would have to ponder very carefully its conclusions. It must be borne in mind that if it were made obligatory for exchange of notes to be ratified, as treaties had to be under the Constitutions of various States, the Commission would hardly be in a position to object to the inclusion of agreements in the term " treaty ", as article 1 of Mr. Brierly's Draft Convention provided. That article was the most important one in the report, and he noted with satisfaction that from its very first meeting the Commission appeared to have been progressing towards formulating the common view of its members.

32. Mr. BRIERLY, replying to a question from the Chairman, stated that he preferred at present not to reply to the various views that had been expressed. They were so numerous and so varied in character that it would be difficult for him to analyse them unless he were given time to think them over. He asked the Commission to allow him time. He was sure that he would then be able to clarify and analyse the different views, and so be able to give a reply. He felt certain that the interchange of opinions would enable concrete results to be achieved. But first he would like to ask all members of the Commission to make their views known.

33. Mr. el-KHOURY believed the Commission now took the view that a difference existed between an agreement effected by exchange of notes and a treaty. It was desirable that the Commission should examine that difference and be able to define it. In his opinion the term " agreements effected by exchange of notes " should be taken to mean agreements for settling matters within the competence of the Executive, and the term " treaty " to meaning an instrument within the competence of the legislature. If the Commission thought that such was the difference between the two instruments, it would be easy for it to reach agreement. It would, however, be advisable for all opinions to be made known and he thought that discussion was therefore necessary.

34. Mr. CÓRDOVA concluded from the discussion that views differed as to the meaning of the terms " treaty " and " agreements effected by exchange of notes ". In his opinion a treaty was a contract established in writing which contained legal provisions binding the contracting parties. An exchange of notes on the other hand merely settled certain matters of a technical character between the parties. Consequently if an agreement contained provisions binding the two parties it constituted a treaty. For example, the agreement concluded between Mexico and the United States by exchange of notes on 19 November 1941 contained provisions binding on Mexico.[3] That was a treaty in the strict sense of the term, whatever name it might be given. The difference between the two types of instrument lay in the presence or absence of binding provisions. He thought the Commission should therefore decide that an instrument was a treaty if it contained legal provisions binding the two parties.

35. Mr. BRIERLY repeated that it was necessary for the Commission to choose between the two points of view. In the Draft Convention appearing in his report he had adopted the view that agreements effected by

[3] *Agreement on Expropriation of Petroleum Properties.* U.S. Executive Agreement Series No. 234. Also in *American Journal of International Law,* Vol. 36 (1942) Supplement, pp. 182-184.

exchange of notes contained binding provisions. But the Commission now appeared not to be unanimous on the question. He would like therefore to be informed what its view was.

36. Mr. HSU asked the Chairman not to put the question to the vote for the moment. He would like the Commission to have time for reflection. For his own part the matter appeared clear in the sense that the Commission was debating the question of the form given to different instruments. The decision it would have to arrive at, however, was that any agreement which was binding must be regarded as a treaty. It would be necessary to find a common term applicable to both kinds of instrument; that would resolve the difficulty the Commission appeared to be in. He repeated that he saw no basic difference between the two kinds of instrument.

37. Mr. HUDSON understood that the Rapporteur desired to know the unofficial, provisional opinions of the members of the Commission. The discussion appeared to him highly desirable for that purpose, it being understood that each member might perhaps wish to modify his opinion in the light of the discussion.

38. Mr. BRIERLY expressed his agreement with that view of the matter.

39. The CHAIRMAN thought that it was indeed desirable for the Commission to be able to express its opinion, at any rate in a provisional manner. He asked the Commission to allow him to state his own opinion, not as Chairman but as a member of the Commission.

39 a. In the first place he would like to explain why he was unable to accept the wording of article 1 in its present form. In paragraph (a) the great difficulty the Commission was experiencing in defining the term " treaty " appeared to arise from its indecision concerning the criteria it wished to adopt. There were two criteria: the formal and the substantial. In other words there was the criterion " instrument " and the criterion " substance or content of the agreement ". In his definition Mr. Brierly had employed both. Mr. Brierly stated that the essence of a treaty lay in the " agreement "; that did not mean that an agreement existed in every case, since a treaty could be concluded without the parties being free to express their disagreement on certain points. Mr. Brierly also stated that a treaty must be an agreement " recorded in writing ". It followed from those two criteria that a treaty was an " instrument containing an agreement ".

39 b. He was glad Mr. Brierly had used the two criteria, but in reading the report he observed that Mr. Brierly also stated that a treaty was a contract, and there he disagreed. An agreement would be a treaty, but a contract was not. Many conventions were not contracts and many agreements were not treaties. He believed everyone was in agreement about the differences between those two kinds of instruments. The distinction was moreover a very old one and attempts had frequently been made to establish the distinction between law-making treaties—conventions—and treaties concluded on the *do ut des* principle (" traités-contrat "). The difference was as follows: a law, even when established on the basis of mutual consent, was a lasting rule of law applicable to an infinite number of cases. There were, for instance, establishment treaties concluded between two countries, such as the convention in force between Switzerland and France. That convention enabled Swiss citizens entering France to settle there, do business, etc. So long as it lasted, the convention, which was a treaty, remained in force and constituted law for the two countries, not only for their governments or ministries but for the courts, administrative authorities and even individuals. That was a typical example of a convention, a law-making treaty.

39 b. A contract, on the other hand, disappeared immediately it had been fulfilled. In municipal law a bill of sale, for example, was a contract that was fulfilled when the goods were delivered by one of the parties and paid for by the other. From that moment the bill of sale was dead and no further obligation existed for the parties. The same applied to treaties concluded on the *do ut des* principle (" traités-contrat ") in international law. Many legal instruments established by agreement had nothing in common with a contract. Collective labour conventions provided an example. They all dealt with labour questions, such as working hours, wages, holidays etc. But they never provided a rule of law stipulating that the employer must engage a worker or that the worker must become employed. (In the same way an establishment treaty did not oblige any national of one contracting party to settle in the territory of the other.) Such conventions constituted laws applicable to labour relations between employers and workers, but were not contracts. A contract settled the details of a transaction between individuals. That was the basic difference. Also called treaties were instruments into which governments introduced whatever they pleased, rules of law and laws: for example, the Covenant of the League of Nations. Those instruments sometimes contained provisions concerning judgments and even judicial procedure; for example, the Treaty of Versailles, which contained provisions concerning sanctions against Wilhelm II.

39 c. To return to the scope and content of a treaty: a treaty established a rule of law. It was concluded by a Government and was law for all who were subject to the law of the signatory States. The real criterion of a treaty was the instrument. It was a solemn transaction. And because it contained important matters it had to be embodied in a written instrument, solemnly signed. In municipal law a deed executed before a notary was, similarly, a solemn transaction containing provisions of importance for the parties. One did not have a deed executed before a notary for buying an umbrella, but one did for selling or buying real estate.

39 d. He could not agree that an exchange of notes should in all cases be assimilated to a treaty; a treaty was too important. It was necessary to consider the reasons for such an exchange of notes. It frequently occurred when the agreement concerned did not deal with matters of great consequence. For example, the ministries of public works of two countries might agree upon certain special points which came within their

particular province. In that case there would be an agreement between the two administrations on matters of secondary importance and, usually, of a technical character. That was why agreements effected by exchange of notes did not require ratification. There was no need to consult the public on such matters. At one time indeed the public had not asked to be consulted. But great progress had been achieved since then. Nowadays the public desired to know what a treaty contained. In many countries even ratification was not regarded as sufficient. Thus in the case of treaties of some importance certain peoples, such as the Swiss, had acquired the right of referendum. In the United States of America jurisprudence connected with treaties was based on the entirely correct view taken by the Senate of the importance of treaties. In short, the distinction between the different instruments lay in the importance of their content, and to some extent in their form.

39 e. For some time a lamentable deterioration had been taking place in the legal situation. To his regret Mr. Brierly's report sanctioned that deterioration. The world had fallen so low that agreements of the greatest importance were concluded without ratification and without the public being consulted. Among others there were the Munich, Yalta and Moscow agreements. If the practice continued, all progress would cease; strife, war would result. When they went to Munich, Daladier and Chamberlain did not know what they were going to do, and they finally accepted everything Hitler demanded. The scrap of paper which was finally to have decided the fate of the Sudeten Germans and the Czechs was torn up by Hitler next day. Originally agreements were instruments that dealt with questions of minor importance. He could not agree to such agreements on details now being assimilated to treaties. But agreements existed which were of wide scope, and it was those which it was the duty of the Commission to examine. They had in reality the nature of treaties. It was for the Commission to explain the difference between law-making treaties on the one hand and agreements on the other. A law was sovereign because the legislator had included vital matters in it. To assimilate treaties and agreements concluded by exchange of notes would in his opinion be contrary to established usage, the development of international law and the interest of nations.

39 f. The wording used by Mr. Brierly at the beginning of his report could be regarded merely as stating the present condition of the law. He did not agree that it was correct so to regard it. But even if it was, he thought that the Commission, faced with a deterioration, ought to consider it its duty to restore the former and better situation. The Rapporteur, Mr. Brierly, had said that he did not wish to use the terms " ratification " and " accession " because the point did not appear to him important. There he entirely disagreed with the Rapporteur, for non-ratification and non-accession were a deplorable degradation of law. On that point he (the Chairman), a revolutionary in the field of international law, was conservative.

39 g. In conclusion he asked whether the Commission wished to accept in principle that agreements concluded by exchange of notes should be assimilated to treaties. Or did it desire definitely to rule there and then that an exchange of notes and a treaty should not be placed on the same footing ?

40. Mr. HSU expressed his agreement with the statements made by the Rapporteur. It was desirable to define the meaning of the terms to be used in the draft convention, but any artificial definition not in accordance with the rules of international law must be avoided. Reverting to the Chairman's statement, he thought that statesmen had not the right to bind their countries by treaties or agreements which were not submitted to the parliamentary procedures of ratification or approval. But it was not within the power of the Commission to modify existing procedures and customs. The only way to do so would be to exert influence on parliaments and public opinion to oblige them to take action to effect such modification.

41. Mr. el-KHOURY felt that the Commission ought to express its opinion as to whether or not the term " treaty " included agreements effected by exchange of notes. In his opinion the correct view was that it did not, but exchange of notes ought not to be left out of the report which Mr. Brierly was to draw up and submit to the Commission. In Syria, conclusion of agreements by exchange of notes was always effected by the Executive. Clearly the same was not true of other countries, and agreements frequently formed an integral part of treaties and were also subject to the procedure of ratification. The Commission might perhaps decide to include agreements in the term " treaty " if those agreements fulfilled certain legal conditions.

41 a. Passing on to the question of international organizations having the capacity to be parties to a treaty, he thought that certain international organizations, such as the Arab League for example, ought to be included among organizations recognized as having that capacity. But he did not believe that all international organizations in general could be accepted as parties to treaties or as having the right to appear before the International Court of Justice. He asked for the matter to be explained.

42. The CHAIRMAN stated that in his view an exchange of notes which had the same external form as a treaty and was subject to ratification ought to be regarded as a treaty. In that case the agreement undoubtedly was a treaty. In his last statement he had allowed himself to disagree with Mr. Brierly, because Mr. Brierly had not merely failed to take his stand on present practice but in his report had gone even further. Since the end of the war the world had reverted to the view, a view corresponding with social necessity, that the rules applying to the conclusion and ratification of an agreement or treaty should be observed. In other words it was necessary for the public to be informed of treaties, should it so wish, and to approve them, whereas Mr. Brierly desired to perpetuate the Yalta procedure. The theory that only the signature of a treaty bound States appeared dangerous. Moreover, the constitution of many States made ratification obligatory

and any treaty which did not correspond with the rules provided in their constitution was null and void for those States.

43. Mr. CÓRDOVA thought he was right in saying that a certain amount of confusion still existed among the members of the Commission. Mr. Brierly was of the opinion that it was not the terms employed which constituted a treaty, but the substance. Mr. Kerno, on the other hand, had stated that in the case of the agreement concerning the United Nations Headquarters the word " agreement " had been employed instead of " treaty " in order to make possible a simpler procedure of ratification.

43 a. A treaty which did not provide for ratification might be in conformity with the law of a country the constitution of which did not require ratification. The views expressed by the Chairman that conclusion of a treaty was not possible without the consent of the nation did not appear to him to be applicable in all cases. Ratification could not always be a criterion. In his view, the essential characteristic of a treaty was that its provisions were binding on the State.

44. Mr. KERNO (Assistant Secretary-General) said that whatever definition the Commission might adopt, it would not be necessary to employ the term " treaty " in each case in order to make applicable the rules which the Commission was engaged in drafting. In his opinion the term " convention " was very frequently synonymous with " treaty ".

44 a. As to the statement made by Mr. el-Khoury concerning international organizations and their inability to appear before the International Court of Justice, that difficulty had already been provided for and settled. He read out section 30 of the General Convention on Privileges and Immunities of the United Nations:

> " All difficulties arising out of the interpretation or application of the present convention shall be referred to the International Court of Justice, unless in any case it is agreed by the parties to have recourse to another mode of settlement. If a difference arises between the United Nations on the one hand and a Member on the other hand, a request shall be made for an advisory opinion on any legal question involved in accordance with Article 96 of the Charter and Article 65 of the Statute of the Court. The opinion given by the Court shall be accepted as decisive by the parties."

45. Mr. BRIERLY desired to know the view of the Commission concerning international organizations. Were they or were they not to be included in paragraph (a) of article 1 of his draft ? He would like the Commission to reach general agreement on the matter.

46. The CHAIRMAN summed up the discussion by saying that the Commission was faced with two questions: first, did it wish the report to deal with agreements concluded by exchange of notes or were exchange of notes or were exchanges of notes to be did it intend to regard international organizations as competent to conclude treaties within the meaning of article 1 of Mr. Brierly's draft ?

47. Mr. ALFARO asked Mr. Brierly what he meant by his reference to international organizations. The Commission ought to know what was meant by the reference to them in paragraph (a) of article 1: did it mean that those organizations were competent to conclude an agreement between one another, or that it was possible for them to conclude an agreement with other States ?

48. Mr. BRIERLY replied that the fundamental question was whether international organizations were regarded by the Commission as competent to conclude or to be parties to a treaty or agreement between one another, or whether it regarded them as also competent to conclude a treaty or agreement with a State.

49. The CHAIRMAN thought the latter question might be answered in the affirmative. There was the example of the treaty concluded between Greece and the Council of the League of Nations. In his opinion, if an international organization adopted a resolution or decision which was binding only on its own members, that was not a treaty, but if it concluded an agreement with a Government, the agreement had the nature of a treaty.

50. Mr. el-KHOURY asked the Commission to define which international organizations would be competent to be parties to a treaty.

51. Mr. BRIERLY stated that the definition appeared in paragraph (b) of article 2 of his draft.

52. The CHAIRMAN wished to know whether the definition Mr. Brierly had given applied to all international organizations, which were very numerous and which international organizations would be competent in character. Mr. Brierly's definition might perhaps apply to inter-governmental organizations such as the Universal Postal Union. But there was, for example, an International Organization for Bird Preservation; could such a body be regarded as an international organization within the meaning of article 2 ? Did Mr. Brierly think that a convention concluded between the International Organization for Bird Preservation and Liechtenstein was a treaty ?

53. Mr. BRIERLY replied that it was for the Commission to pronounce on such matters. He thought that the definition given in article 2, paragraph (b) would be adequate.

54. Mr. HUDSON asked what were the " common organs " which such organizations must possess according to article 2 in order to be international organizations. Did Mr. Brierly mean that such organs must be empowered to act on behalf of the members of their organization and to bind them ?

55. Mr. BRIERLY replied in the affirmative.

56. Mr. SANDSTRÖM would have preferred it to be stated that an organ within the meaning of article 2 of the draft must be empowered to represent its members.

57. Mr. ALFARO asked that the meaning of the term " common organs " should be illustrated by some concrete examples. Mr. Hudson had just proposed a criterion which might help to clear up the matter.

There was an International Office for the Publication of Customs Tariffs at Brussels. Was that organization competent to conclude treaties? There was also an International Lighthouse Association which had a permanent office and was in constant communication with governments. Could that organization be regarded as competent to conclude treaties? And could agreements concluded by such organizations be regarded as treaties? That was an important point which required explanation.

The meeting rose at 1 p.m.

51st MEETING

Wednesday, 21 June 1950, at 10 a.m.

CONTENTS

	Page
Press releases	75
Law of treaties: Report by Mr. Brierly (item 5 of the agenda) (A/CN.4/23) (*continued*)	
Article 1 (*continued*)	75

Chairman: Mr. Georges SCELLE.

Rapporteur: Mr. Ricardo J. ALFARO.

Present:

Members: Mr. Gilberto AMADO, Mr. James L. BRIERLY, Mr. Roberto CÓRDOVA, Mr. J. P. A. FRANÇOIS, Mr. Shuhsi HSU, Mr. Manley O. HUDSON, Mr. Faris el-KHOURY, Mr. A. E. F. SANDSTRÖM, 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).

Press releases

1. The attention of the Commission had been drawn to press release No. C.6 on the discussions at the previous meeting; and members had considered it unsatisfactory as lacking in precision and not giving an impartial account of the discussions. Mr. KERNO, Assistant Secretary-General, explained the system by which press releases were issued by the Information Centre.

It was decided that before being issued, the texts of press releases should be approved by the Secretary of the Commission.

Law of treaties: Report by Mr. Brierly (item 5 of the agenda) (A/CN.4/23) (continued)

ARTICLE 1 (*continued*)

2. The CHAIRMAN said that Mr. Brierly had furnished him with the text of two points on which he would like the Commission's opinion—namely:

" 1. Without pre-judging the extent to which exchanges of notes can be assimilated to formal treaties, is it the sense of the Commission that this draft should deal with the law relating to exchanges of notes?

" 2. Is it the sense of the Commission that agreements between an international organization and a State or between two international organizations should be treated in this draft? "

3. Mr. HUDSON was opposed to exchanges of notes being dealt with in the draft.

4. Mr. AMADO thought the Commission should follow the Harvard Draft, or should make no mention of exchanges of notes.

5. Mr. HUDSON preferred Mr. Amado's earlier proposal.

6. The CHAIRMAN thought it was conceivable for the draft to deal with exchanges of notes, without stating that such exchanges constituted treaties.

7. Mr. HUDSON preferred the way in which the Chairman had put the question at the previous meeting —namely, " Did the term ' treaty ' include exchanges of notes? If not, should that question be considered separately in the draft? "

8. Mr. BRIERLY thought the Commission was agreed that the term " treaty " did not include exchanges of notes.

9. The CHAIRMAN said it was a very awkward question. Although the Commission had not voted, he had the impression that it was of the opinion that exchanges of notes should not be assimilated to treaties, which did not mean that Mr. Brierly should not deal with exchanges of notes.

10. Mr. AMADO pointed out that the problem to be dealt with by Mr. Brierly was that of treaties. If he discussed exchanges of notes as well, there might be some confusion.

11. Mr. SANDSTRÖM thought that if the draft dealt also with exchanges of notes, its present title would have to be changed and another title decided on.

12. Mr. AMADO said that exchanges of notes would continue to be used as a procedure for inter-governmental agreements. The Commission must not prevent the development of international law. One day, possibly, exchanges of notes would become treaties, but that was not the case at present.

13. Mr. ALFARO considered that exchanges of notes were not covered by the term " treaty ", so that the draft Convention on the law of treaties should not deal with them. If the Commission mentioned exchanges of notes, it would also have to consider other types of international agreements.

14. Mr. AMADO urged the importance of keeping the expression " formal instrument of agreement " included in the Harvard draft. The form given to the agreement was of vital importance.

15. Mr. LIANG (Secretary to the Commission) suggested that it would be useful to find an empirical