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Summary record of the 51st meeting

Topic:
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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

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

solution in view of the diversity of scientific opinions. Some members of the Commission thought that the exchange of notes should be included in the term " treaty ", others thought the opposite. The best plan might be for the Commission not to pronounce on that academic issue. The fact that certain exchanges of notes amounted to treaties might prove to be of no importance for the work in hand.

16. Mr. HUDSON said that Mr. Brierly had intimated that he had not intended to formulate scientific definitions, but had merely explained the sense in which the terms were used in the draft Convention. The Commission should not attempt to draw up abstract definitions.

16 a. The CHAIRMAN proposed that the query raised by Mr. Brierly be put to the vote. If the Commission decided that exchanges of notes should not be mentioned in the draft, the implication would be that such exchanges did not constitute treaties.

17. Mr. HUDSON thought it should be made clear that nothing more than the draft was involved. The Commission would be expressing an opinion on the draft only.

18. The CHAIRMAN replied that in the view of several members of the Commission, to ignore the question of exchanges of notes would automatically signify that exchanges of notes were not treaties.

19. Mr. YEPES pointed out that in some countries treaties were concluded by means of an exchange of notes followed by ratification. The possibility of concluding a treaty by an exchange of notes should not be ignored.

20. The CHAIRMAN maintained that if notes were exchanged and then ratified, there was a treaty.

21. Mr. CÓRDOVA, said he had had experience of that problem. The Agreement of 19 November 1941 for payment of compensation by Mexico to the United States of America had been concluded by an exchange of notes. The question had then arisen whether the domestic law of Mexico and the United States required ratification of the notes. The Mexican Government had submitted the notes exchanged to the Senate, but the United States Government had not followed a similar procedure. Hence ratification was clearly a matter of domestic law and could not be used as a criterion in international law. Possibly, even in the case of a formal instrument—a treaty—the domestic law of one of the contracting parties might not require the procedure of ratification. In any case, many governments tried to avoid the necessity for submitting treaties to their parliaments for approval, by concluding such treaties in the form of exchanges of notes. Hence that type of agreement must be dealt with in the draft. In Mexico, when an agreement concluded affected legal relations, it was regarded as a treaty and submitted to the Senate. What mattered was the intention in the minds of the parties and the contents of the agreement. A concrete criterion must be adopted.

22. Mr. SANDSTRÖM said that the discussion had convinced him that exchanges of notes must be included in the draft. That would throw light on a great many problems. There was no difficulty involved; the title of the draft would of course have to be changed, but that was no drawback.

23. Mr. LIANG (Secretary to the Commission) thought that there had been a very important practical reason why the compilers of the Harvard Draft had not included the exchange of notes under the term " treaty ". He read out the following passage, stressing the last two sentences:

> " Unquestionably, agreements concluded in this form have the juridical force and effect of treaties as the term is usually understood; they are considered by many writers as falling within the category of treaties equally with protocols, arrangements, declarations, and other international agreements designated by other names. They are often published in official treaty collections, and they may be registered with the Secretariat of the League of Nations in conformity with the provision of Article 18 of the Covenant. But it would be difficult because of their peculiar form to formulate a body of general rules which would apply equally to them and other instruments having a different form. For that reason it has seemed desirable to exclude them from the category of instruments to which this Convention is intended to apply." [1]

He thought it would be helpful if Mr. Hudson would comment on that passage.

24. Mr. AMADO argued that the question of nomenclature had nothing to do with the nature of the agreement. If notes exchanged were submitted to a parliament, that did not alter the agreement; it was a treaty, and remained a treaty. The negotiation came under international law and constitutional law. The problem under discussion had been admirably set out in the Harvard Draft.[2] The question was whether, in its definition of the term " treaty " as used in the Brierly draft, the Commission intended to include the exchange of notes. If it did not, that would be tantamount to stating that at present, exchanges of notes did not come within the category of treaties. The question had been very clearly stated by Mr. Brierly.

25. Mr. CÓRDOVA thought that if the Commission regarded a treaty as an agreement recorded in writing, an exchange of notes could be a treaty. The report was based on the premiss that it was not merely the instrument, but the agreement recorded in writing that essentially constituted a treaty. Hence, the question what was meant by an exchange of notes must be studied. Possibly, it was an agreement recorded in writing; hence, the entire article must be altered.

26. Mr. AMADO pointed out that Mr. Córdova was concerned with the material aspect of the problem, the idea of unanimity of intent; but a treaty was a scientific apparatus. It was the formal recording of unanimity of intent. To become a treaty, an agreement must conform to a mould, to use Professor Scelle's expression.

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[1] *American Journal of International Law*, Vol. 29, (1935), Supplement, part III, Law of Treaties, p. 698.

[2] *Ibid.*

27. Mr. el-KHOURY said that international or intergovernmental agreements could take various forms—treaties, arrangements, protocols, exchanges of notes, undertakings or declarations. It would be better to call the report not " Report on Treaties ", but " Report on international agreements ", dividing it into various chapters dealing respectively with treaties, exchanges of notes, arrangements, protocols, etc., and giving definitions so that the result would be a comprehensive work. The question was whether the Commission was legislating for States, or recording the practices adopted by States. In the latter case, it was difficult to find a general formula covering all the categories used. But what was the point of recording the practices adopted by States ? The Commission's task was to draft a convention for ratification, and it must not regard itself as bound by previous practice, which was most complicated. It must draft new rules easy to apply. If the convention to be submitted to the General Assembly was approved, States would adopt it. He suggested that the part dealing with treaties be discussed, and that exchanges of notes be left over until later.

28. Mr. YEPES feared that the Commission was becoming involved in a discussion on mere terminology, and was more concerned with the form than the substance. What called for study was the substance, not the form. In the draft, the Commission was concerned mainly with the substance of the problem. If two States declared their intention to use the procedure of an exchange of notes for an important agreement, why prevent them ? Such an exchange must of course be regarded as a treaty. If the Commission excluded exchanges of notes from the definition of treaties, it would run the risk of appearing to authorize States to conclude treaties in the form of exchanges of notes, and so avoid submitting such treaties to their parliaments. States would maintain that they had concluded treaties only where a certain procedure had been followed, and would conclude treaties, calling them exchanges of notes. To obviate the danger of that anti-democratic practice, it must be stipulated that a treaty could take various forms, including the exchange of notes.

29. Mr. AMADO thought the Commission should not attempt to formulate the law regarding exchanges of notes, protocols, etc. The Harvard Draft—as Mr. Liang had pointed out—stated that " unquestionably agreements concluded in this form have the juridical force and effect of treaties as the term is usually understood; they are considered by many writers as falling within the category of treaties equally with protocols, arrangements, declarations, and other international agreements designated by other names ". Professor Basdevant spoke of such an agreement as being composed of two unilateral instruments.[3] The Harvard Draft went on to say that agreements concluded in that form " are often published in official treaty collections, and they may be registered with the Secretariat of the Leagne of Nations in conformity with the provision of Article 18 of the Covenant. But it would be difficult because of their peculiar form to formulate a body of general rules which would apply equally to them, and other instruments having a different form. For that reason, it has seemed desirable to exclude them from the category of instruments to which this Convention is intended to apply ". At present, no one could possibly formulate the rules covering exchanges of notes. That, incidentally, was the opinion expressed in the Harvard Draft.

30. Mr. el-KHOURY thought this was more or less what he himself had said. If the Commission was codifying the existing law, it would find it impossible to draft a formula covering all the various types of agreement; if, on the other hand, the Commission was legislating, it could lay down new rules which would be binding on States. During her mandate over Syria, France had concluded an arrangement with Turkey under which she ceded to the latter the Sanjak of Alexandretta. There must be room for agreements of that kind in the draft convention. They could not be ignored, since they would continue to be made unless it was suggested that they be prohibited.

31. Mr. HUDSON maintained that the arrangement in question could be termed a treaty.

32. Mr. el-KHOURY replied that it had not been ratified.

33. The CHAIRMAN said he knew the details of the incident referred to by Mr. el-KHOURY, and he could state his opinion freely, since he was not representing his government. His impression was that France had committed an illegal act, by disposing of territory in which she had not a free hand. She had effected by means of an arrangement something for which a treaty was required. The question whether an agreement was a treaty or an arrangement was not a matter of domestic law. It must be determined in international law and for all parties. Governments were not at liberty to refer to an arrangement as a treaty. In the instance mentioned by Mr. Córdova, in which Mexico considered that a particular exchange of notes amounted to a treaty, whereas the United States maintained that it was not a treaty, one of the two governments was wrong. Unquestionably, there were obligations in either case; but what was open to question was whether such obligations should be contracted with certain formalities or otherwise. If an agreement was confused with a treaty, this meant suppressing a distinction essential to the definition of two different things. The rule of international law stipulated that in the case of a matter of some importance, the people must be consulted. If an agreement was negotiated and ratified, it became a treaty; hence, he would define a treaty as an international undertaking requiring certain formalities. He agreed with Mr. Amado.

34. Mr. CÓRDOVA pointed out that he had said that ratification was a rule of domestic law.

35. The CHAIRMAN contended that ratification was a matter of international law. He thought it would be difficult to put the question as formulated by Mr. Brierly to the vote. It seemed impossible to vote on the

[3] *Recueil des Cours,* Academy of International Law, Vol 15, 1926, V, p. 610.

first phrase " without prejudging the extent to which exchanges of notes can be assimilated to formal treaties ". None of the members of the Commission could decide whether an exchange of notes could be a treaty or not.

36. Mr. BRIERLY explained that he was enquiring whether the draft should deal with exchanges of notes. In his own opinion, an exchange of notes was a treaty. Other members held different views. He was not calling for a decision on the point; he merely inquired whether the draft should deal with the law relating to exchanges of notes. The first phrase was merely explanatory.

37. Mr. HUDSON thought the Rapporteur had every right to consult the Commission on the question at issue. He himself would be inclined to ask two questions: First, should the draft deal with exchanges of notes ? Secondly, if so, should the term " treaty " be used to cover exchanges of notes ? Mr. Brierly wished to see the second question postponed for another year, and he saw no objection.

38. The CHAIRMAN put to the vote the question: Is it the sense of the Commission that this draft should deal with the law relating to exchanges of notes ?

By 6 votes to 5, the Commission decided that the draft should deal with exchanges of notes.

39. Mr. HUDSON took it that the vote represented the unofficial view of the Commission. In fact, Mr. Brierly had not asked for a formal decision.

40. The CHAIRMAN confirmed that the decision did not prejudge the question whether exchanges of notes could be assimilated to treaties. He asked whether he might put to the Commission the question: Should the term " treaty " be used to cover exchanges of notes ?

41. Mr. YEPES thought it would be better to say " can " rather than " should "; there were occasions when, because of their subject matter, exchanges of notes could be assimilated to treaties; whereas, in other instances, there was no reason for doing so.

42. The CHAIRMAN recalled that the report was entitled " Report on Treaties ". If the Commission decided simply that the Convention should deal with the exchange of notes, it would imply that treaties and exchanges of notes belonged essentially to the same category. On that point, the Commission appeared to be divided. Did an exchange of notes constitute a treaty ? If so, this meant that the distinction between treaties and agreements was being disregarded.

43. Mr. KERNO (Assistant Secretary-General) agreed with the Rapporteur and various members of the Commission that the question might be left over until later. The Commission must be consulted.

44. Mr. el-KHOURY felt strongly that exchanges of notes should have a place in the draft. This did not mean, however, that he was in agreement with the Chairman's second question.

45. The CHAIRMAN thought the question was sufficiently important for the Commission to take a decision on it.

46. Mr. YEPES asked whether the Rapporteur was anxious for the question to be put.

47. Mr. BRIERLY said he would prefer to leave it over for the moment.

48. Mr. YEPES thought that, as the question referred to the special report for the following year, the Commission had no reason to insist if the Rapporteur did not.

49. The CHAIRMAN thought that, in point of fact, the Commission had no right to insist. He suggested that the following sentence be added to the recent decision: " This decision does not prejudge the extent to which exchanges of notes can be assimilated to formal treaties."

50. Mr. ALFARO thought that proposals should be made in an unequivocal form. The special rapporteur was to deal with exchanges of notes in the report on treaties. His personal opinion had been that treaties did not cover exchanges of notes. Mr. Yepes had urged the Commission to declare that treaties could include exchanges of notes. Hence, there were three proposals before the Commission: (1) that the term " treaty " covered agreements concluded by exchanges of notes; (2) that the term " treaty " did not include agreements concluded by exchanges of notes; (3) that the term " treaty " could include agreements concluded by exchanges of notes. He thought the Rapporteur had a right to know what was the sense of the Commission; and he asked the Chairman to consult the Commission on the second proposal at least.

51. The CHAIRMAN said that the Rapporteur had agreed that the question should be adjourned, and that the Commission should state that it did not prejudge the extent to which exchanges of notes could be assimilated to formal treaties. He proposed to put Mr. Brierly's second point to the vote.

52. Mr. HUDSON thought Mr. Brierly would like to be allowed a certain latitude, and he suggested that the Commission comply with that wish.

53. The CHAIRMAN also felt that Mr. Brierly should be given time to consider the matter.

The Commission decided to leave the question open.

54. The CHAIRMAN invited the Commission to pass on to the second question put by the Rapporteur: " 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 ? "

55. Mr. HUDSON said that a year previously he had supported the opinion of other members of the Commission that the law of treaties should be one of the priority topics. There was some confusion in the minds of a great many people, and there were many discrepancies in the practices of the various States. He did not know how many treaties of that type were in force, but there were a great many. Twenty-five years ago, one of his American colleagues had estimated that they amounted to at least 15,000. He had no idea how many there were today, or whether there were fewer or more of them. Possibly there were 25,000 or 30,000. As the law on international instruments was the issue before the Commission, he hoped that the

draft convention to be prepared would help to get rid of the confusion, and to make the practice in the various countries more uniform.

55 a. The question of international agreements which international organizations might conclude was of great interest. He knew of only two or three such agreements, which had been concluded by the League of Nations. One was a convention concluded with Switzerland concerning the broadcasting station; another was a convention concluded with the Canton of Geneva concerning the Ariana grounds, where the new building was to be put up. The other day, the Chairman had also mentioned a treaty concluded between the League of Nations and Greece. At any rate, there were not many of them. He was glad to find a document expressly recognizing the League of Nations' capacity to make treaties. No one could deny that that capacity was shared by other international organizations—e.g., the International Labour Organisation. There was also an agreement between the United Nations and the United States of America on the United Nations Headquarters in New York. Then there was the general Convention on the Privileges and Immunities of the United Nations; there were formal agreements between the United Nations and the specialized agencies; and there were the trusteeship agreements. All those agreements together amounted to some twenty-five conventions or so, concluded between international organizations and States, or among themselves.

55 b. With regard to agreements between governments, there was a great deal of experience over many years to fall back on. But there was little experience of agreements concerning international organizations, and the Commission could not rely merely on that restricted experience for its constructive work. He wondered whether it would not be better to await future developments before laying down a set of rules. If the Commission agreed, it might decide that the draft convention should not deal with agreements to which international organizations were parties. But it could state in its report that it recognized such organizations as capable of making treaties, though it awaited more information on future developments before taking a decision on specific points.

55 c. He had no desire to minimize the capacity of the United Nations to make treaties, and he referred to the admirable account given to the International Court of Justice some time previously by Mr. Kerno, the Assistant Secretary-General. He suggested, therefore, that the draft convention be confined to the essential question of agreements between States, and that the question of international organizations be postponed until developments permitted a closer examination.

56. The CHAIRMAN said that if he had understood the position correctly, Mr. Hudson did not in any way question the capacity of international organizations to make treaties, but felt it would be wise for the draft convention not to deal with that question, and for the Commission to await future developments before committing itself.

57. Mr. YEPES said that he had not been convinced by Mr. Hudson's argument. He saw no reason why the lack of precedent or experience should prevent the Commission from examining the question and laying down rules. On the contrary, the Commission would be all the more free to lay down such rules if it were not hampered by experience or precedent. Hence, the question of the capacity of international organizations to make treaties should be examined at once.

58. Mr. el-KHOURY said that Mr. Hudson had referred not to treaties, but to agreements, and had mentioned agreements dealing exclusively with administrative matters, not with political questions. He wondered whether treaties of a political nature had been concluded by international organizations.

59. Mr. HUDSON replied that his intention had been to use a comprehensive term, and in speaking of agreements he had, of course, had in mind not merely agreements in the strict sense, but conventions like the general Convention on Privileges and Immunities. That convention, in his opinion, was a treaty, even though it was called a convention.

60. Mr. el-KHOURY did not question that there were international organizations which had the power to make treaties. But apart from those already mentioned, he could think of only two others which also had that power—namely, the Arab League, and the Organization of American States. For the sake of precision, he asked the Commission to define the term " international organizations ", Reading article 2 (b) of the draft convention, he had wondered what was the meaning of the expression " with common organs ", and he would like to have a definition of that expression also.

61. Mr. HUDSON said that if the Commission followed his suggestion, it would not need to give the definitions asked for by Mr. el-Khoury. The difficulties raised by Mr. el-Khoury were precisely those which had occurred to him, and because of which he had suggested that the Commission omit all mention of international organizations.

62. Mr. SANDSTRÖM took it for granted that the United Nations had the power to make treaties, and that other international organizations could have the same capacity under their constitutions and within the limits of those constitutions. Hence, he thought it was hardly possible to ignore that point, and to make no mention of it in the report, especially as the General Assembly had asked the Commission to deal with it. The Commission must comply with that request. It was, of course, most difficult to define what was to be understood by " international organizations ", and to establish the principles determining their capacity to make treaties. At the same time, the problem called for examination; and it should be borne in mind that there were other international bodies like the one which dealt with the publication of customs tariffs, and the one concerned with lighthouses referred to at the previous meeting. Those bodies were in permanent contact with governments, but in all probability they did not possess the power to make treaties. It was surely self-evident that certain other international organizations—e.g., the

International Committee for Bird Preservation—most probably would not come within the category of international organizations as defined in the draft convention.

63. Mr. ALFARO thought the Commission should decide to deal with the capacity of international organizations to make treaties. Actually, a few international organizations undoubtedly had that capacity. They were associations of States expressly authorized to conclude agreements which from every point of view constituted treaties. The difficulty arose from the fact that many other international organizations did not possess that capacity. They might conclude agreements on administrative or domestic matters, but they were not capable of concluding treaties or agreements binding on Member States. Hence, the Commission should avoid a sweeping statement applicable to all international organizations, and should explain that the provisions it intended to make would apply to international organizations as far as was feasible. With that proviso, he was in favour of including the point in question in the draft convention.

64. Mr. BRIERLY said he had been much impressed by Mr. Hudson's reasoning, and he attached great importance to the fact that the Commission recognized that international organizations such as the United Nations had the capacity to make treaties; but he agreed that it was both necessary and difficult to determine which international organizations could be regarded as having that capacity. In view of the opinions expressed, and of the fact that the Commission had not sufficient background material at present, he thought it would be wiser not to include the point at issue in the draft convention, but simply to insert in the report a commentary stating that in the Commission's opinion that capacity did exist in the case of certain international organizations, and had been confirmed by the International Court of Justice. The commentary should add that the Commission was anxious for the time being to avoid examining the possible legal consequences of the capacity granted to certain organizations to make treaties.

65. Mr. YEPES thought it was most important to specify the meaning given by the Commission to the term " international organizations " and their capacity to make treaties. He referred the Commission to article 2 (b) of the draft convention, giving a definition of the expression. As far as international organizations as defined there were concerned, he was in favour of including them in the draft convention.

66. Mr. FRANÇOIS was in favour of the proposal made by Mr. Hudson and supported by Mr. Brierly, to proceed by stages, on the basis of future experience not yet possessed by the Commission.

67. Mr. CÓRDOVA said that the debate showed clearly that there were opinions for and against the inclusion of the question. Mr. Hudson was against it, while Mr. el-Khoury had expressed doubts and called for further information. He himself supported the idea that a distinction should be made between the various international organizations with regard to their capacity to make treaties. In the case of an association of individual members, that capacity could not possibly be admitted. In the case of an association established by a group of States, and expressly granted by those States the capacity to make treaties, there was no doubt that such an organization did possess that capacity. That applied, for example, to the United Nations. The States which set up an organization were competent to declare in its charter that it would have that capacity. The capacity depended therefore on the constitution given to the organization. Hence, the question should be dealt with by the Commission in a restricted sense—not comprehensively.

68. Mr. HUDSON agreed with the idea put forward by Mr. Córdova on the capacity of organizations to make treaties. He still thought, however, that it would be preferable to postpone study of the question.

69. Mr. LIANG (Secretary to the Commission) felt that there were two issues involved, whereas the problem as stated by Mr. Brierly contained only one. The latter question could not fail to be agreed upon by the Commission, since the rules to be drafted by the Commission must apply not only to treaties concluded among States, but to treaties concluded between States and international organizations as well. The question put by Mr. Brierly did not relate to the capacity of international organizations to make treaties. Yet that was the problem at issue, since no one in the Commission had maintained that all international organizations should be empowered to make treaties. This question of capacity involved the formulation of principles. Possibly, there were rules in the draft convention which could not apply to international organizations.

70. Mr. AMADO thought that the Commission should bear in mind the terms of article 1 of its Statute, under which it was instructed to deal with the codification of law. That procedure involved the formulation of practice. Practice developed gradually, but it was a long, slow process. There was no question but that an evolution was taking place towards a situation where international organizations could make treaties. The problem had been very well expounded by Mr. Brierly in his report, and he wondered whether it was advisable to take up that question, which was still in its infancy, of whether it would not be better to await further developments so that the decision could be based on more complete data. The task which the Commission should keep before it was the formulation of an opinion as to which international organizations already possessed the capacity to make treaties. In view of the lack of experience, he would vote for postponement of the question to a later stage, with the proviso that mention be made in the report of the reasons why the Commission had not wished to take a decision immediately.

71. Mr. KERNO (Assistant Secretary-General) thought the Commission might adopt Mr. Liang's suggestion that an affirmative reply be given to the question put by Mr. Brierly—namely, that agreements between an international organization and a State or between two international organizations should be dealt with in the

present draft. There was still, of course, the difficulty of determining which those international organizations were; but the decision on that point could come later. As Mr. Hudson had pointed out, there was no doubt that certain international organizations did possess the capacity to make treaties—e.g., the United Nations. The Harvard Draft had considered that agreements between international organizations were an anomaly.[4] In his opinion, the Commission could not accept that view. Nowadays, it could no longer be argued that agreements as important as those concluded by the United Nations could be regarded as anomalies.

72. The CHAIRMAN said he would like to give his opinion. Before doing so, he had given much thought to the problem and had reached the conclusion that international organizations should be included in the draft convention for the simple reason that such organizations actually were confederations, and in some cases possessed common organs with the capacity and authority to take decisions binding upon their members. There were organizations whose capacity to make treaties was unquestioned, since their constitutions expressly gave them that capacity. In doubtful cases, the International Court of Justice could decide. Since the days of the Harvard Draft, an evolution had taken place. It was true that the treaties concluded by international organizations were still few in number, but they could and would increase. The Charter of the United Nations itself contained provisions specifying the treaties to be concluded by international organizations. The International Labour Organisation and the International Civil Aviation Organization had concluded treaties involving real obligations with respect to the United Nations. The Commission must therefore deal with the question. But it could not declare that all the provisions of the draft convention would automatically apply to international organizations, for the simple reason that the draft was concerned first and foremost with States. The Commission must specify the particular cases. Hence, he was in favour of Mr. Brierly's proposal.

73. Mr. HSU was in favour of the majority view. The only valid argument advanced against the inclusion of international organizations was that of novelty, and such an argument could not be taken seriously.

74. Mr. BRIERLY said he would like to give his personal view, and to explain that he would vote in favour of the inclusion of international organizations on the assumption that the decision was a provisional one. Indeed, at the present time, it would be unwise to exclude international organizations, though he reserved the right to vote against their inclusion at a later stage.

75. The CHAIRMAN thought there was no necessity for a vote, since the majority of the Commission were in favour of including international organizations in the draft convention and continuing the study of the question. It was nevertheless a provisional conclusion, like all directives given to the Rapporteur.

76. Mr. el-KHOURY hoped that in the course of its discussions the Commission would also find a definition for the term " international organization ".

77. Mr. KERNO (Assistant Secretary-General) explained that it was understood that the report would make mention of the conclusions just reached by the Commission.

78. Mr. BRIERLY, answering the remarks made by Mr. Alfaro at the previous meeting[5] to the effect that a treaty not merely " established " a relation under international law, but could also modify or annul such a relation, agreed that the term " established " as found in article 1 (a) of his draft might be supplemented by the words " or modified ". Mr. Córdova had maintained that relationships of international law established by a treaty were binding, and that the terms of article 1 (a) should be clarified by the introduction of the concept of obligation. He was agreeable to that question also being discussed by the Commission.

79. Mr. CÓRDOVA said that the point he had raised could be settled by merely adding the word " obligatory " to the word " relationship ".

80. Mr. HUDSON and Mr. SANDSTRÖM thought that idea was already expressed in the draft as it stood. In fact, a relationship of international law was always binding.

81. The CHAIRMAN agreed. Perhaps Mr. Córdova was thinking of agreements in which there was no express stipulation. Nevertheless, the conclusion of a treaty always involved an obligation. To meet the suggestion made by Mr. Córdova, he suggested that the word " established " be replaced by the word " regulated ".

82. Mr. SANDSTRÖM wondered whether that word reflected the true position. It presupposed the existence of an international agreement, which was not always the case.

83. The CHAIRMAN emphasized that the text of the draft convention spoke of " relation under international law ". There were, however, relationships of an international character which were not relations under international law. But the moment relation in law was spoken of, as in the draft, there was no doubt possible on the point, since a law was always binding.

84. Mr. HUDSON remarked that the Commission was not drafting a text, but merely expressing opinions for the benefit of the Rapporteur.

85. The CHAIRMAN agreed with Mr. Hudson. The Commission was merely examining Mr. Brierly's report. For the moment, it was not called upon to draft texts.

86. Mr. ALFARO had no objection to the words " relation under international law ". In his view, a relation under international law invariably constituted an obligation. He merely wished to amplify the term " established " to include the modification or abrogation of a relation under international law.

87. The CHAIRMAN thought the word " regulated " might equally reassure Mr. Alfaro.

[4] *American Journal of International Law*, Vol. 29 (1935), Supplement, part III, p. 692.

[5] See Summary record of the 50th meeting, para. 8a.

88. Mr. BRIERLY stressed the fact that he had stated that a treaty was an " agreement recorded in writing ". He asked the Commission whether it considered that a treaty was constituted by the instrument, or rather that the substance constituted the essence of the treaty. In paragraph 19 of his report, he had stated that the essence of a treaty " lies in the agreement or *consensus* brought into existence by the act of its formal conclusion." In his view, the instrument was no more than the evidence that the treaty existed. It was true that the Chairman did not share this opinion, and that the current view was that a treaty was formally constituted by the written instrument, but that the essence of the matter was *consensus*.

89. Mr. FRANÇOIS asked what, for practical purposes, was the difference between those two concepts.

90. The CHAIRMAN thought there was no treaty where there was nothing in writing. He also thought that a written agreement which did not stipulate obligations was not a treaty; moreover, a treaty must be formally concluded. The formality was an essential. Here, there was an analogy between a contract and a deed executed before a notary—by no means one and the same thing. A marriage contract without the notarial instrument was null and void. A marriage contract was only created by the fact of its having been formally concluded before a notary. There was no treaty where there was no formality; on the other hand, there was no treaty where there was no *consensus*.

91. Mr. HUDSON thought the first and second sentences of paragraph 19 of Mr. Brierly's report were perhaps not very well drafted. They stated that the term " treaty " was used in the sense of an instrument or document recording an agreement which already existed before the act formally recording it. The Harvard Draft stated that a treaty was a formal instrument. He personally thought that there must be *consensus* before the conclusion of the formal act; and he had always regarded a treaty as the instrument. Hence, he suggested altering the second sentence of paragraph 19 of the report, the word " by " being replaced by " before " in the phrase " brought into existence by the act of its formal conclusion " (in the French text he suggested that the words " accord ou consensus *auquel donne naissance* l'acte . . ." should read " accord ou consensus *aui a pris naissance avant l'acte* par lequel il est formellement réalisé ").

92. Mr. BRIERLY agreed to that alteration, since a treaty was an agreement existing prior to the act of its conclusion.

93. Mr. HUDSON said he would prefer to speak merely of a " formal instrument ".

94. Mr. ALFARO did not see how the concept of *consensus* could be separated from the concept of *instrument*. Both were essential before a treaty could exist. If the concept of *consensus* or that of *instrument* were eliminated, there would be no treaty. He thought that whether the terms of the Harvard Draft or the terms of Mr. Brierly's draft were used, the result was the same. The term " treaty " meant an agreement by *consensus* and recorded in writing. It was impossible for the Commission to separate the two concepts.

The meeting rose at 1 p.m.

52nd MEETING

Thursday, 22 June 1950, at 10 a.m.

CONTENTS

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 (*continued*)

1. Mr. HUDSON observed that Mr. Brierly had asked a question which the Commission had not answered.

2. Mr. BRIERLY was not asking the Commission to vote on the question he had put, but he did think that discussion might be useful.

3. Mr. HUDSON said he had pointed out that the words " a treaty is an agreement recorded in writing " meant that unanimity of intent was independent of the instrument. At the previous meeting, he had given his opinion that that notion was too subtle. He would now like to go further and to contend that it was incorrect. To take an example from private law, could a deed transferring lands be regarded as mere evidence of the transfer ? He doubted it. In some countries, agreements of that kind must be drawn up in writing before the transfer became effective. Paragraph 19 of the report showed that international agreements could exist which were not recorded in writing, and that would apply to treaties if they were merely defined as agreements. It was more correct to say, in accordance with the Harvard Draft: " A treaty is a formal instrument of agreement."