Document:-
**A/CN.4/SR.52**

**Summary record of the 52nd meeting**

Topic:
**Law of Treaties**

Extract from the Yearbook of the International Law Commission:-
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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.*

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## 52nd MEETING

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

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*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."

3 a. The use of the expression " agreement recorded in writing " could only be explained by the possibility of international agreements being made verbally; but the Rapporteur had explained to him why verbal agreements should be excluded. He hoped Mr. Brierly would take up that question again. He would like to see the word " instrument " used, and the word " recorded " deleted. If that were done, the text would be less open to criticism.

4. Mr. HSU supported Mr. Hudson's suggestion that the word " recorded " be deleted, although it was a minor point. He was sorry to see that there was some fundamental disagreement between Mr. Hudson and Mr. Brierly, since the Commission was called upon to take a decision, and he personally was not altogether happy at having to choose between the opinions of two such eminent authorities.

4 a. He was opting for the solution proposed by Mr. Brierly for a fundamental reason. Mr. Alfaro had urged that the form should be borne in mind when the substance was discussed, since the two could not be separated; but he would surely admit that it was possible to go further and to discuss both. Nevertheless, for the sake of clarity the Commission should concentrate either on the substance or on the form, and the substance must prevail rather than the form. But where was the substance in the case in point ? The form was the written instrument. At present, all agreed that treaties must be written down; but for a long time it had not been considered that agreements of that kind must necessarily be written down. For 4,000 years in China, contracts had not necessarily had to be in writing. The definition should revolve round the substance; hence he was in favour of Mr. Brierly's suggestion.

5. Mr. SANDSTRÖM said that he too had pondered whether the question of form in relation to treaties was parallel to that in certain types of private law contracts which required a specific form; and he had reached a conclusion contrary to Mr. Hudson's. Where a particular form was required under contract law, it could be maintained that it was an integral part of the contract. That was not true of treaties. No doubt the form of a treaty dictated certain consequences of some importance for the domestic law of particular countries, and those consequences might have repercussions in international law; but it could not be argued that the form was an integral part of the treaty.

5 a. The question whether the text should refer to an instrument or to an agreement was a matter of terminology. He was inclined to Mr. Alfaro's opinion, that either of the two courses could be followed. He personally preferred to stress the aspect of *consensus,* while not disregarding the formal aspect, and to use the formula " a treaty is an agreement recorded by means of a formal instrument ".

6. Mr. ALFARO considered that the result would be the same either way. The agreement could no more be separated from the instrument than the body from the soul. The soul of a treaty was the unanimity of intent. The body was the formal written instrument. The agreement without the instrument was nothing, and vice versa. The Harvard Draft stated that a treaty was " a formal instrument of agreement ". Mr. Brierly's draft called a treaty " an agreement recorded in writing ". What constituted a treaty was an agreement converted into an instrument. It was better to refer to the written instrument, but whatever term was used, the result was the same. He nevertheless preferred the Harvard text.

7. The CHAIRMAN supported the view expressed by Mr. Hudson and the general rapporteur. But the question was more important than Mr. Alfaro thought. There were many ways of drawing up a convention, i.e., of adopting a rule binding on two or more States. The question might arise as to whether a convention was involved. The binding rule existed where there was no treaty, but if an instrument which was not a formal instrument was drawn up in circumstances where international law required a formal instrument, the treaty was null and void. The question of nullity of treaties was common knowledge. How could such a question exist if the form was of no importance ? In some countries marriage did not require any formality; but where the law did require certain formalities, there would be no marriage where they were not complied with. If the formalities required for a treaty had not been fulfilled in a case where a treaty was called for, the treaty would not exist, and in many cases there would not even be a convention.

7 a. It was very difficult to find out when international law called for a treaty and when it did not; but it was not impossible. International law had made tremendous progress in the matter of customary law. Until the recent troubled times, international law required a treaty whenever an important convention was made. Whenever a government wished to bind its people by an undertaking on an important subject, it had to conclude a formal treaty. That was a general norm, as Kelsen would put it; and the authorities to which all constitutions gave the power to make treaties were the organs competent to conclude them under international law. The definition of a treaty must be a formal definition. Where the Commission was wrong was in assuming that every convention was a treaty.

7 b. The established rules for the conclusion of a treaty were negotiation by duly acrredited plenipotentaries, and signature—which under international law was not binding upon States. What was binding was the ratification. Wherever those formalities required in a formal—as opposed to a consensual—instrument, had not been complied with, the result was an agreement by *conscensus* and not a treaty. He thought therefore that the expression used in the Harvard draft convention was more correct than the expression " agreement recorded in writing ".

8. Mr. HSU asked whether there was any difference between a formal instrument of agreement and a formal agreement. He thought every one could accept the principle of a record in writing; that was not the point of disagreement. A treaty must be a formal instrument. If a treaty was a formal instrument of agreement, it

included exchanges of notes, and the problem was back again.

9. The CHAIRMAN pointed out that there were many written conventions which were not treaties; hence the fact that an agreement was recorded in writing was not what made it a treaty. " An agreement recorded in writing " was not the same thing as " a formal instrument of agreement ". The latter expression signified that a number of conditions must be fulfilled apart from the record in writing.

10. Mr. HSU asked what was meant by " formal instrument ". Did it mean ratification by parliament; or was the recording in writing and the mutual exchange by the two ministries sufficient ?

11. The CHAIRMAN observed that, as he had already stated, the fulfilment of that latter condition was not sufficient; other principles laid down in the various constitutions must also be observed.

12. Mr. el-KHOURY thought that the point on which a treaty differed from any other agreement was that it could only be international, whereas other agreements could be either national or international. With regard to the term " formal ", he did not know of any definition. Could it be said to mean " official " ?

13. The CHAIRMAN recalled that even in Roman law there was a distinction between consensual contracts and formal contracts.

14. Mr. el-KHOURY asked why the expression " recorded in writing " should not be used. The word " instrument " meant document. Hence it could be maintained that a treaty was a formal document which recorded in writing an international agreement. The sense of the expression was similar in all the other drafts in which the terms " formal ", " in writing ", " international ", were to be found.

15. Mr. BRIERLY did not think that any vote was necessary. So far his opinion remained unshaken, though when he prepared his report for the next session he would bear in mind all the opinions expressed.

16. There was an exchange of views between the CHAIRMAN, Mr. CÓRDOVA, Mr. HUDSON, Mr. el-KHOURY, Mr. BRIERLY, Mr. AMADO and Mr. HSU, as to whether it was desirable for the Commission to indicate by vote its preference for Mr. Brierly's text or the Harvard Draft, with a view to giving the special rapporteur a more precise clarification than the summary records of the meetings would provide.

17. At the end of the discussion, the CHAIRMAN said he would put the question to the vote, though Mr. Brierly would be allowed full latitude. The opinion of the Commission should be crystallized, since Mr. Brierly would have to take it into account. He asked whether the Commission had decided to accept the idea as formulated in Mr. Brierly's report or whether it preferred the wording of the Harvard Draft; in other words, whether it favoured the expression " agreement recorded in writing " or the expression " formal instrument ".

*By 6 votes to 4, with one abstention, the Commission decided in favour of the Harvard text.*

18. Mr. SANDSTRÖM said he had abstained because, although he would like to see the words " formal instruments " in the text, he preferred the formula " an agreement concluded by means of a formal instrument ".

19. The CHAIRMAN was of the opinion that the vote need not have been taken, since without it the result had been much the same; nevertheless he was anxious to meet the wishes of members of the Commission.

20. Mr. HUDSON and Mr. BRIERLY felt that as the Commission's time was limited, it should go straight on to a discussion of the main problems, e.g., capacity to make treaties (articles 3 and 4 of the draft, and in particular A/CN.4/23, para. 43).

Following a discussion in which Mr. el-KHOURY, Mr. CÓRDOVA and Mr. YEPES took part, *the Commission, by 5 votes in favour and 5 against, upheld its previous decision to discuss the draft article by article.*

ARTICLE 2

21. Mr. el-KHOURY pointed out that the Commission had not defined the term " State ". Article 2 (a) stated that " A State is a member of the community of nations ". A year previously, when discussing the Draft Declaration on Rights and Duties of States, the Commission had not defined the term " State ". He would like to know when it intended to do so.

22. The CHAIRMAN said it was not the function of the Commission to define the word " State ". He himself had been active in international law for more than fifty years, and still did not know what a State was; and he felt sure that he would not find out before he died. He was convinced that the Commission could not tell him.

23. Mr. HUDSON observed that the Rapporteur had said he thought some of the members of the Commission were not satisfied with paragraph (b) of article 2, and had proposed re-casting it. Mr. Hudson thought that the Commission would complicate the problem of the wording of the draft by raising the question of agreements signed by an international organization. The Rapporteur would have difficulty in explaining the words " international organizations ". With some reservations, he suggested the following definition:

" An international organization is a body established by a number of States, having permanent organs with capacity to act within the field of its competence on behalf of those States ".

24. Mr. BRIERLY said the proposed text included some useful ideas which might very well be adopted. For the moment, that was all he wished to say.

25. Mr. KERNO (Assistant Secretary-General) admitted that the precise definition of an " international organization " possibly raised certain difficulties; but there was no necessity to conclude that because of those difficulties the Commission should do nothing. Since the object of the discussion was to help the Rapporteur, the latter would be assisted by the expression of a general feeling that the definition called for

recasting. The suggestions put forward by Mr. Alfaro, Mr. el-Khoury and Mr. Hudson would be most helpful.

26. Mr. ALFARO did not feel that the Commission should embark on a discussion aiming at a comprehensive definition of the expression " international organization "; at the same time, without losing sight of the fact that the Commission wished to avoid giving the impression that international organizations like the International Organization for Bird Preservation, already mentioned, were to be considered competent to make treaties, he would like to offer a definition for what it was worth. His definition laid special stress on the purpose for which an international organization had been set up, and on its status:

" An international organization is an association of States which exercises political or administrative functions concerning vital common interests of the associated States and which is constituted and recognized as an international person. "

27. Mr. CÓRDOVA thought the Commission would have the same difficulty in defining an international organization as in defining a State. An attempt should, however, be made to clarify the capacity of such organizations. It might be stated, for example, that the capacity of an international organization to make treaties must be defined in its constitution. It was hardly appropriate for the Commission to specify what an international organization could or could not do. If the contracting States had given it in its charter the power to make treaties, it possessed that power.

28. The CHAIRMAN pointed out that Mr. Córdova had said was in keeping with the provisions of article 3, which he read out.

29. Mr. el-KHOURY thought Mr. Córdova's statement was at variance with paragraph (3) of article 4, which stated: " In the absence of provision in its constitution to the contrary, the capacity of an international organization to make treaties is deemed to reside in its plenary organ. "

30. Mr. CÓRDOVA did not see any contradiction. If under its constitution an international organization had the power to make treaties, and the constitution did not specify what organ would be competent to exercise that power, article 4, paragraph (3) indicated that the organ empowered to make treaties would be its General Assembly. Article 4, paragraph (1) stated that the capacity of an international organization to make treaties might be exercised by whatever organ its constitution might provide. The question was what happened when the constitution did not specify any organ. That question was answered in article 4, paragraph (3).

31. Mr. el-KHOURY thought there could be no question but that the organs of an organization could make treaties if its statutes made no stipulation to the contrary.

32. Mr. BRIERLY thought the organs must be specifically invested with that capacity. Once that question was settled, the next thing was how was it to exercise that capacity ?

33. Mr. HUDSON thought the draft called for a definition of the meaning of the expression " international organization "; but it would be sufficient to indicate the sense in which the expression was being used in the draft.

34. Mr. CÓRDOVA thought it would be better merely to define capacity, and to describe the situation of the organization with regard to that capacity, which would be defined by its constitution.

35. The CHAIRMAN said that was what he had understood. There was no question of defining a State or an international organization.

36. Mr. BRIERLY suggested that the Commission pass on to article 3, as it had gone as far as was possible in regard to article 2 (b).

ARTICLE 3

37. Mr. HUDSON remarked that the scope of the text was explained in paragraph 41 of the Comment, which began: " This article deals exclusively with the rules of international law respecting capacity to make treaties ". The Rapporteur might find it useful to divide the text of article 3 into two paragraphs: (1) " All States have capacity to make treaties, but the capacity of a State to enter into certain treaties may be limited. " That text was similar to article 3 of the Harvard Draft, which he personally did not much care for. The Rapporteur might add the three words " by international regulation ". Paragraph 2 would read: " An international organization (it must be understood that that would not apply to all international organizations) may be endowed with the capacity to make treaties. " He put that suggestion to the Rapporteur as one which was based on recent developments.

38. Mr. CÓRDOVA supported Mr. Hudson's text.

39. Mr. BRIERLY explained that in article 2 (b) he had tried to single out international organizations having the capacity to make treaties; but he had not succeeded.

40. Mr. HUDSON thought the question should be left to article 3, article 2 indicating the type of organization referred to. It would be a good thing to add to the second paragraph he had proposed, following the word " endowed ", the words " by the States creating it ".

41. The CHAIRMAN said that in the case in point the State was the legislator.

42. Mr. CÓRDOVA said he would like to have the views of the members of the Commission on the necessity for a definition of the expression " international organization ". He felt the definition would be difficult.

43. Mr. HUDSON asked whether it would be in accordance with Mr. Brierly's intention to say that he had not wished to give any definition but merely to explain the sense in which the expression was used in the draft convention.

44. Mr. BRIERLY said that was what he had meant by " Use of certain other terms ".

45. Mr. ALFARO said he had had in mind the words introducing article 2, and because of them he was not so much attempting to define international organizations, as to indicate what organizations had the capacity to make treaties.

46. The CHAIRMAN thought the Commission had been wise in not attempting to define the terms " state " and " international organizations ". As to the question of capacity to make treaties, that belonged to all States, except where the capacity was limited, as stated in article 3. With regard to protectorates, they were authorized to make treaties. If, for example, a question affecting Tunisia called for a treaty, the treaty would be made by Tunisia and not by France. Any State could make a treaty, including the Swiss Cantons. But their capacity to make treaties might be limited by their constitutions, or by international law. The individual States of the United States of America made treaties daily—e.g., for the settlement of questions relating to the utilization of rivers forming the boundaries between them. He thought it could be concluded from this that such States had the capacity to make treaties. Incidentaly the Harvard Draft gave a long list of treaties made by the various States of the United States of America.

47. Mr. HUDSON pointed out that those States could not make treaties without the consent of the Federal Government. But they could make " Interstate Contacts ", though they had not the right to make treaties. Thus the State of New York could not make a treaty with Canada for the settlement of questions of waterways and their utilization. Such questions came within the competence of the Federal Government of the United States and Canada. But it was feasible for the State of New York to establish an Interstate Contact with the State of Massachusetts for agreement on technical matters.

47 a. Replying to a question put by the Chairman, he said that arbitration between two States of the United States of America could never be regarded as international arbitration.

48. The CHAIRMAN thought that in Switzerland the Cantons had the capacity to make treaties. For instance, the Canton of Geneva and the Département of Haute Savoie could conclude a treaty on matters of common interest. He was sorry though that he had raised that issue, which was outside the Commission's orbit.

49. Mr. HUDSON and Mr. AMADO thought the draft convention prepared by Mr. Brierly did not cover treaties or agreements of that kind.

50. The CHAIRMAN invited the Commission to proceed with the examination of article 3 of the draft convention, and suggested that it be examined in two parts as Mr. Hudson had proposed.

50 a. The first part of Mr. Hudson's proposal read: " All States have the capacity to make treaties, but the capacity of a State to enter into certain treaties may be limited (by international regulation). " He invited Mr. Hudson to give a few examples in illustration of what he had in mind.

51. Mr. HUDSON said that unfortunately he could not call to mind a series of concrete examples to illustrate the point made in his text. The question implied in the text was important and called for reflection on the part of the Commission. But to cite a single example, he had had in mind the Free City of Danzig which was probably not authorized to make certain types of treaties. He did not know whether that limitation was laid down in the constitution given to the town or by other agreements. He had been thinking also of Switzerland whose neutrality had been proclaimed in 1815 by the Pact of Vienna; and he could not say whether by that Pact Switzerland was free to make treaties contrary to the neutrality guaranteed therein. He would like to be better documented than he was at the moment to give more precise information. Possibly, too, the General Assembly of the United Nations might one day decide to set up a new State, stipulating that it should never have the capacity to conclude a treaty under which it was obliged to go to war.

52. Mr. FRANÇOIS had understood Mr. Hudson to say that the Free City of Danzig had not had the capacity to conclude certain treaties. He himself was under the impression that Danzig had not had the power to make treaties of any description. That capacity had been delegated to Poland, which concluded treaties for and on behalf of Danzig. The case of Tunisia was different. Tunisia could conclude treaties. There the limitation of the capacity to conclude certain types of treaties did not apply, though he understood that the exercise of that capacity was to some extent limited.

53. The CHAIRMAN said it was true that there were certain restrictions with regard to Tunisia. In virtue of treaties concluded with France, Tunisia could only exercise its capacity with the authorization of the Resident-General; and there were other treaties that it could not conclude at all. There were of course States not authorized to conclude treaties of any kind.

54. Mr. HUDSON thought the Commission was discussing both the question of capacity and the question of exercise of capacity. Those were two quite different questions, and must be examined separately. In the case of Danzig and Tunisia, he was not quite sure whether it was the capacity or the exercise of the capacity that was involved. He was inclined to think that Poland exercised the capacity on behalf of Danzig. Without a more thorough study he could not take a definite stand. He had inserted the last three words " by international regulation " solely for the convenience of the Rapporteur. Hence he had not intended that the Commission should take a decision on the point. He wanted to leave the Rapporteur free to delete or keep the expression, to give his comments on it.

55. Mr. el-KHOURY remarked that the capacity of States might be limited not only by international regulation but by the existence of undertakings previously concluded by the State and constituting by their very existence a limitation of that capacity. In the case of

Tunisia, he thought that limitation existed under the treaties and agreements binding Tunisia and France.

56. The CHAIRMAN pointed out that the treaty between France and Tunisia crystallized the application to Tunisia of the status of Protectorate. That treaty had been recognized by all States and therefore constituted international law.

57. Mr. el-KHOURY observed that England would like to make a treaty with Egypt limiting Egypt's capacity to conclude treaties where such treaties were at variance with the contractual obligations binding Egypt and Great Britain.

58. Mr. HSU asked for the deletion of the words " by international regulation ". If the Commission kept them, the draft convention would be less wide and less general in scope. He would like to put the case of a non-self-governing State on the way to acquiring its independence. Had such a State the capacity to make a treaty during that transition period, and could such a treaty be regarded as valid ? He would be glad to hear opinions on that point.

59. Mr. HUDSON referred back to Mr. el-Khoury's statement on the validity or non-validity of a treaty concluded by a State and including provisions at variance with previous undertakings by which the State was bound. He would give an example: State A concluded an agreement or a treaty with State B, under which State A undertook never to transfer any portion of its territory to other States. Later on, State A concluded a treaty with State C, under which it ceded to the latter a portion of its territory. There was thus an obvious violation of the treaty concluded between States A and B. Was the new treaty valid or not ? A case of that kind had arisen between the United States and Cuba. He found it difficult to answer the question, since he was not sure whether in the example he had mentioned, the treaty concluded between A and C was valid or not under international law.

60. The CHAIRMAN said that the problem of repugnant norms which might be found in treaties was most complicated. Fuller documentation would be needed in order to study the case and to reach any conclusions. In any case, the Commission was not called upon to take any stand on that point. The words " by international regulation " placed in parentheses in Mr. Hudson's text were optional and could be deleted.

61. Mr. el-KHOURY's opinion was that the treaty concluded between States A and C was invalid.

62. The CHAIRMAN shared that view, though for different reasons. By entering into a treaty with State B, State A had renounced its right to cede territories, and had thus voluntarily restricted its own capacity. If Mr. Hudson interpreted the term " treaty " as being a contract, he was right, but if a treaty was regarded as a law, he was wrong.

63. Mr. YEPES said that the question of inconsistent norms contained in agreements and the consequences thereof for the validity of treaties, was not mentioned in the draft convention. They were getting close to the problem of the illicit motive. As the problem was important, he proposed to raise it again at a later stage.

64. Mr. KERNO (Assistant Secretary-General) thought that certain objections to Mr. Hudson's text could be eliminated by a slight amendment. All that was necessary was to delete the word " certain " from the expression " enter into certain treaties ".

65. Mr. AMADO also suggested the deletion of that word; indeed he would like to see the entire article omitted. It was better not to make a distinction between treaties which States could or could not conclude. Moreover, the examples cited so far were very restricted. Hence, failing fuller information it would be better to omit any reference to the limitation of the capacity to make treaties.

66. Mr. LIANG (Secretary to the Commission) emphasized that the first two examples mentioned by Mr. Hudson concerning the capacity of the Free City of Danzig and of Switzerland were pertinent to the question under discussion. The Harvard Draft on that aspect of capacity gave other examples which were not closely connected with the question of capacity to conclude treaties. They were concerned rather with the question whether a treaty concluded at a later date than, but incompatible with, the earlier treaty, could be considered as valid. The Harvard draft mentioned Article 20 of the Covenant of the League of Nations, which under the interpretation which the draft appeared to favour, limited the capacity of States Members of the League of Nations by forbidding them to contract agreements incompatible with the terms of the Covenant. A provision similar to that of Article 20 of the Covenant could be found in Article 103 of the Charter of the United Nations. From one point of view, it could be argued that those two instruments were of a constitutional nature, and hence were endeavouring to limit the capacity of Member States. In that connexion, he mentioned two articles by Professor Lauterpacht; " The Covenant as the Higher Law " [1] and " A Contract to Break a Contract " [2] (*Law Quarterly Review*). It would be preferable nevertheless to deal separately with the question of validity of a treaty incompatible with a previous treaty concluded by the same State on the same subject. The Commission was now discussing not the question of validity of treaties but the capacity to make treaties.

67. Mr. BRIERLY supported Mr. Liang's statement. The problem of the validity of treaties would have to be studied at a later stage. But the examples of Danzig and Switzerland certainly referred to the limitation of capacity. It was tenable theory—though he had his doubts about it—that under Article 20 of the Covenant the States Members of the League of Nations had limited their capacity to make treaties. There seemed to be an impression that he proposed to omit article 3 entirely. That was not so; he felt that the article was essential and must be kept. What he felt somewhat doubtful about were the words " by international regulation ".

68. Mr. HUDSON said that the Rapporteur was at liberty to treat his proposal as he thought fit; but the

[1] *British Yearbook of International Law*, Vol. XVII (1936), pp. 54-65.

[2] *Law Quarterly Review*, Vol. 52 (1936), pp. 494-529.

question of limitation by international regulation did seem to him sufficiently important to warrant discussion.

69. Mr. CÓRDOVA said that a State had always the capacity to conclude a treaty; but it had also the power to limit that capacity by a voluntary act. It was therefore a mater for the State concerned, involving individual obligations on its part. But its capacity to make treaties was not affected. With regard to the effect of previous commitments, he agreed with Mr. Liang that it was a question of validity of treaties, not of capacity to make treaties.

70. The CHAIRMAN asked the Commission if it agreed to adopt the following text, from which the words " by international regulation " had been deleted:

> " All States have the capacity to make treaties, but the capacity of certain States to enter into treaties may be limited."

71. Mr. HUDSON asked the Commission not to take a formal decision, so as not to prejudge the issue.

72. The CHAIRMAN said that in that case he would suggest that the Commission pass on to paragraph 2 of Mr. Hudson's proposal:

> " An international organization may be endowed with the capacity to make treaties."

72 a. In the absence of any objection, he said that the sense of the Commission was that article 3 as proposed by Mr. Hudson and amended by the Commission could be inserted in the draft convention.

ARTICLE 4

73. The CHAIRMAN asked the Commission to pass on to the examination of article 4, paragraph (1).

74. Mr. BRIERLY explained that in parargraphs 47 and 48 of his report (A/CN.4/23) he had outlined various theories regarding the exercise of the capacity to make treaties. Having studied them closely, he had decided to settle on the formula he had used in his own article 4, paragraph (1)—namely, that the capacity to make treaties could be exercised by whatever organ or organs of a State or organization its constitution might provide.

75. Mr. HUDSON admitted that the exercise of the capacity to make treaties was a knotty problem. To illustrate the difficulty he cited a hypothetical case of the Chairman going to the United States to negotiate a treaty with the United States on behalf of France. One fine day he might wonder what person or what organ in the United States had the power to negotiate and conclude such a treaty. If the Chairman asked him personally who or what was that person or organ, he would hand him the American Constitution of 1787, asking him to read it, as it determined what persons or organs were invested with the power to negotiate or conclude treaties. But he must not merely read the Constitution; he must read it in the light of the 340 volumes containing the judgments of the Supreme Court, and in the light of agreements concluded over a period of nearly 170 years. The Chairman would go back home and study all that documentation. He would be obliged to do so, since he would be unable to form a clear opinion on the point in question until he had digested the documents. It was a question which Mr. Hudson had been engaged in studying for a long time; and he had often been asked his opinion on the subject. He had also found that the question was settled quite differently in the various countries. According to one interpretation the constitutional provisions relating to treaty-making capacity were of concern to the State in question alone, and not to other States with which it negotiated treaties. At the moment he thought it would be impossible for the Commission to give an accurate and unanimous opinion on that point.

76. Mr. BRIERLY confessed that he too had frequently been puzzled by that problem. In view of its extremely complex nature, he had taken the view in his report and in the draft convention, that the capacity to make treaties could be exercised by whatever organ or organs of the State or organization its constitution might provide. He did not think that States would accept the theory that treaties concluded by them in violation of their constitutional capacity were nevertheless valid.

77. Mr. FRANÇOIS said he had always been in favour of the theory of Judge Anzilotti, who held that a treaty concluded by the Head of a State or a Foreign Minister was valid even if they had acted in violation of the constitution; and that the State was bound by the treaty. Anzilotti's view was that it was more just for the State to be the victim of the violation of the constitution by its own organ than that the other contracting State should suffer, since the second State could not be conversant with the law of the first, or aware that its constitution had been violated. There were two types of limitation found in national constitutions. The first was a limitation of the internal capacity of the authority empowered to make treaties; the second had to do with the constitutional provisions affecting the validity of treaties, and those could hardly be known to other States. He favoured Anzilotti's theory as giving a more effective guarantee and greater security from the point of view of international law.

78. The CHAIRMAN thought the question was almost insoluble. It was difficult to hold that a government could decide of its own accord whether a treaty was valid or not.

79. Mr. CÓRDOVA thought the question was bound up with relations between States, a question as difficult as that of relations between individuals. The acts performed by a State were and must be based on its constitution. If the Head of a State did not possess the capacity to make certain treaties, other States should be aware of the fact; and if he made a treaty in spite of not having that capacity, the treaty was null and void. The Commission should abide by the text of article 4 as drafted by the Rapporteur and should act similarly in regard to the treaty-making capacity of international organizations. In both instances, the exercise of capacity was determined and limited by the constitution.

80. Mr. BRIERLY agreed.

81. Mr. HUDSON recalled that in the Eastern Greenland case, the Permanent Court of International Justice, without studying the terms of the Norwegian Constitution, had taken it as a rule of international law that the words of the Norwegian Foreign Minister constituted an undertaking binding on Norway. He referred again also to the example of the Executive Agreement which the United States of America had concluded with Mexico on 19 November 1941.[3] The Mexican plenipotentiaries had been uncertain during the negotiations what organ of the United States had the capacity to negotiate and treat with them. The problem of which organs were competent to exercise the capacity to make treaties was certainly most complicated. That was why he had been rather surprised when Mr. Brierly had asked the Commission to take a decision on the point. He himself had felt on the contrary that the question should not be discussed at all; and the present debate must be regarded as no more than a preliminary survey.

82. Mr. BRIERLY said he would certainly like to have the Commission's opinion, since he himself hesitated to commit himself to one theory rather than another. At any rate, the text he had drafted struck him as the most acceptable from a legal standpoint. Mr. Francois' point of view might be more logical, but it was not practical, because States would not be prepared to admit that treaties concluded by them which violated constitutional provisions were valid.

83. Mr. CÓRDOVA thought the Commission should try to solve the problem. If it bypassed all the obstacles one after another it was not fulfilling any useful purpose.

84. Mr. AMADO said he would like to read to the Commission a passage from the book *The Ratification of International Treaties* by a young Brazilian lawyer, José Sette Camara, which stated: " A purely theoretical solution to this problem cannot be satisfactory. As Basdevant says, each particular case must be examined on its merits. In fact, international *bona fides* establishes a presumption that the Head of State is the regularly authorized agent to express the will of the State in the conclusion of a treaty. A State cannot scrutinize the constitutional provisions of every other one with whom it negotiates, to verify that ratification by the latter is good and valid. It would involve an interference in the domestic affairs of the other contracting party, which could be repelled as unwelcome. On the other hand, where it is clear and evident that the other party is acting *ultra vires*, it would not be fair to hold the pact to be valid and binding, to the detriment of the other State. Such is the case when the Constitution of a State, as, for example, the Charters of El Salvador and Guatemala, forbids the approval and ratification of certain kinds of treaties. A Head of State, in ratifying such treaties, is obviously acting *ultra vires*, and, therefore, the agreements should not have binding force."

84 a. It was undoubtedly a most difficult question, but the Commission should nevertheless examine it closely. It presented no difficulty of course for the Chairman, since Article 26 of the French Constitution of 1946 expressed itself quite clearly on the matter. The arguments put forward on both sides were justified, and showed how difficult it was to solve the problem. The Commission must therefore discuss it more thoroughly before reaching a conclusion.

85. Mr. ALFARO agreed that the rule as drafted by the Rapporteur was a simplification for practical purposes. States invariably asked for information as to the capacity of the other party to make the treaty under negotiation. Suppose a given country wished to make a treaty with Mongolia, but, like everyone else, knew nothing about the Mongolian constitution. Nevertheless it might be assumed that there must be some provision in its constitution or in some text stipulating what organ was competent to make treaties, and research would have to be made.

86. Replying to a question by Mr. Amado as to what should be done at present in the case of China, Mr. Alfaro replied that in such cases it would be advisable to abstain from negotiating.

87. Mr. HUDSON pointed out that there were States which had no constitution. In such instances, paragraph (2) of article 4 would apply.

He thought Mr. Amado's suggestion should be studied carefully, precisely because of the contrary opinions revealed within the Commission.

88. The CHAIRMAN thought that the text as drafted by Mr. Brierly had the great virtue of being based on the legal principle that any act performed by a person who was not competent to perform it was null and void. At the present time the International Court of Justice was the proper body to decide in case of doubt. Certainly it would frequently be faced with a very difficult task; at other times the difficulty would not be so great. In practice, the question of the exercise of the capacity to make treaties would arise in the case of conflicts. Conflicts could be submitted to a tribunal or to arbitration; incidentally cases where was no constitution were extremely rare. If Mr. Brierly maintained that in the absence of provision in its constitution to the contrary, the competent entity was the Head of the State (article 4 (2)), he could not agree. The position was the same in the case of a State or of an international organization; in both instances, competence belonged to the organ which actually wielded sovereignty. In certain cases, it might be the Head of the State; in others the parliament.

89. Mr. BRIERLY, replying to a remark made by the Chairman, said that in the United Kingdom there was no formal constitutional provision conferring on the Crown competence to exercise the capacity to make treaties; but the King was invested with the treaty-making capacity, even though for political reasons he frequently did not ratify treaties until Parliament had given its approval. He mentioned a historic instance— at the end of the last century, when the island of Heligoland was ceded by Great Britain to Germany, that had been done after consultation with Parliament. Gladstone, the head of the Opposition at the time, had

[3] *U.S. Executive Agreement Series*, No. 234.

raised objections against that consultation, declaring that the cession should have been made by the Crown without reference to Parliament.

*The meeting rose at 1 p.m.*

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## 53rd MEETING

*Friday, 23 June 1950, at 10 a.m.*

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*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.4/3) *(continued)*

1. The CHAIRMAN said he was sure the Commission would not be able to complete its discussion of the draft convention during the present meeting. At the same time, Mr. Kerno, the Assistant Secretary-General, had to be away the following week, and he would like to have Mr. Kerno's opinion on the question of reservations. Mr. Brierly being agreeable, he therefore proposed to take up that technical matter, which might be completed by the end of the meeting.

2. Mr. YEPES said he had made a suggestion on those lines the previous day. He hoped the Commission would resume the discussion of Mr. Brierly's report. On that understanding he supported the Chairman's proposal.

*The Commission decided to examine the question of reservations.*

ARTICLE 10

3. Mr. BRIERLY said he had nothing to add to the full commentary he had given. He emphasized the importance of the statement that a reservation was " part of the bargain between the parties and therefore required their mutual consent to its effectiveness " (A/CN.4/23, para. 87).

4. Mr. KERNO (Assistant Secretary-General) read out a series of passages from Mr. Brierly's report which he thought contained the salient points, and on which the Commission might be consulted:

(a) Point I. " A reservation is part of the bargain between the parties and therefore requires their mutual consent to its effectiveness." (*Ibid.*, para. 88)

He felt that in the English text the word " bargain " might be replaced by some other word. It was desirable to know whether the Commission approved the fundamental principle concerned—namely, that a reservation was an integral part of a treaty, and must be accepted before the treaty could be valid.

(b) Point II. " The text of a proposed reservation must be authenticated in formal fashion." (*Ibid.*, para. 92)

The reservation must be presented in a particular form, especially in the negotiation of multilateral treaties.

(c) Point III. " The acceptance of a treaty with a reservation is of no effect unless or until the necessary consents are forthcoming. " (*Ibid.*, para. 93)

(d) Point IV. " The necessary consents may be implied as well as express." (*Ibid.*)

(e) Point V. " If a proposed reservation relates to a projected treaty not yet in force " it is effective only if " consented to by all States and international organizations which have taken part in the negotiation of the projected treaty." (*Ibid.*, para. 96)

(f) Point VI. A reservation presented after the entry into force of a treaty must be consented to " by everyone of the then parties to that treaty." (*Ibid.*, article 10 (4), para. 95)

(g) Point VII. " A State or international organization accepting a treaty impliedly consents to every reservation thereto of which that State or organization then has notice." (*Ibid.*, article 10 (5), para. 100)

Those were the points on which he thought the sense of the Commission might be taken.

*Point I*

5. Mr. HUDSON referred to article 13 of the Harvard Draft (*Ibid.*, Appendix A), showing that a reservation consisted in making willingness to treat subject to a condition. He did not know what was to be understood by " parties " in point I. If it meant that a reservation must be accepted by certain States, he agreed. There was no point in saying that " the text of a proposed reservation must be authenticated in formal fashion ". What did the word " authenticated " mean ? It would be better to say " stated in a formal manner "; but he was not sure how far formality should be taken. A text formulated in writing was sufficient.

6. Mr. BRIERLY thought it was difficult to conceive of any other method.

7. Mr. KERNO (Assistant Secretary-General) said that on the subject of South-West Africa, the delegation of the Union of South Africa had given the San Francisco Conference its views in a document which was sometimes referred to as a " reservation ". Yet when