Document:-
A/CN.4/SR.645

Summary record of the 645th meeting

Topic:
Law of Treaties

Extract from the Yearbook of the International Law Commission:-
1962 , **vol. I**

100. He interpreted sub-paragraph (*e*) as implying that a signatory to a treaty might dispense with ratification with regard to certain parts of it, if it was expressly stated in the treaty itself that those parts did not require ratification. If that was the correct interpretation, he would have no difficulty in accepting the provision.

The meeting rose at 1.5 p.m.

645th MEETING

Thursday, 17 May 1962, at 10 a.m.

Chairman: Mr. Radhabinod PAL

Law of treaties (A/CN.4/144 and Add.1) (item 1 of the agenda) (*continued*)

ARTICLE 9. LEGAL EFFECTS OF A FULL SIGNATURE (*continued*)

Paragraph 2 (continued)

1. The CHAIRMAN invited the Commission to continue its discussion of paragraph 2 of article 9.

2. Sir Humphrey WALDOCK, Special Rapporteur, said that he did not himself share the view of some of the speakers in the discussion, that in his draft he had been unduly faithful to the texts prepared by previous special rapporteurs. In fact, the Commission had not previously considered the questions covered by article 9, and the fruitful discussion which had taken place had shown that it had been useful to set out the detailed proposals of his predecessors for the Commission's consideration. The discussion now enabled him to outline a new formulation for article 9.

3. Paragraph 1 could easily be redrafted, in accordance with the Commission's decision at the previous meeting, so as to take into account the various observations during the discussion, which had all related to drafting points.

4. The position was, on the whole, similar in regard to the introductory portion of paragraph 2, which could be re-worded so as to refer to article 10 and article 16.

5. The fact that the term "acceptance", like many others used in international practice, had two meanings should not deter the Commission from using it throughout paragraph 2, for it was clear that in the context it could only mean acceptance equivalent to ratification.

6. The right set out in sub-paragraph (*a*) was undisputed and that was a good reason for including it in the draft; he saw no merit in the suggestion that because a point of law was undisputed it should be omitted from the draft.

7. Emphasizing the importance of the right of a state to participate in a treaty, he said the aspect of that right mentioned in sub-paragraph (*a*), the right to proceed to ratification after signature, was perhaps sufficiently obvious as not to be essential to the draft, but other aspects of that right, such as the right to sign or to accede to a treaty, were of greater significance.

8. A matter of importance had arisen in regard to sub-paragraph (*b*). He had at first hesitated to include the provisions of that sub-paragraph, which related to an obligation of good faith of a very tenuous kind, but had finally decided to follow the example of his predecessors and retain it; a provision on the subject was desirable in order to encourage states to ratify treaties which they had signed. Such an encouragement was necessary in view of the disappointingly large number of cases in which treaties were signed by states but not ratified. That experience went back to the time of the League of Nations and the situation had unfortunately not improved since the establishment of the United Nations.

9. The Commission should decide whether it wished to retain a provision on the subject of that obligation of good faith. If it decided to retain it, the provision should set out the obligation not of the signatory state itself but, as Mr. Bartoš had suggested, of its authorities — not necessarily its government — to examine in good faith the question whether to follow up signature with ratification or not.

10. The discussion had emphasized the differences between the two portions of sub-paragraph (*b*). The first portion set out the obligation of good faith in general terms; the second set out an obligation which had its source not in the law of treaties but in the constitutional law of the international organization concerned. If the first portion were retained, it would be possible to keep the second in an amended form. He could not, however, accept the suggestion that the first should be deleted and the second retained, since the latter did not properly belong to the law of treaties. The only justification for including the second sentence was that it reserved the position of the ILO conventions if the rule set out in the first sentence were maintained.

11. Sub-paragraph (*c*) also set out an obligation of good faith and he saw much force in the suggestion that a separate article should be formulated to include all the provisions of the draft on the subject of the rights and obligations of states prior to the entry into force of a treaty. That new article could be placed at the end of the chapter on the conclusion of treaties, so as to precede the chapter on entry into force. It would cover three types of rights and obligations: first, the obligations, if any, of states which adopted the text of a treaty, obligations dealt with in article 5, paragraph 3; secondly, the rights and obligations of signatory states during the period between signature and ratification, dealt with in article 9, paragraph 2; and thirdly, the rights and obligations of a state which was a full party to a treaty, pending the entry into force of that treaty. There were cases, in modern practice, where a state could accept a treaty, or even accede to it, before the treaty came into force. A state which thus committed itself to a treaty which was not yet in force was entitled to expect that its objects would not be frustrated. The matter was dealt with in article 9, paragraph 3.

12. He drew attention, however, to the different formulations of the obligations of a state during negotiations, in article 5, paragraph 3, and after signature, in article 9. In the first case, the Commission had adopted a negative formulation; it had not taken any decision on the question of substance whether any obligation existed; it had merely agreed on a saving clause concerning a possible obligation which might exist at international law. For the purpose of article 9, however, the Commission was considering a positive formulation which would set out the obligation of good faith incumbent upon a state which had actually signed a treaty.

13. He could not accept the redraft proposed by Mr. Castrén for sub-paragraph (*c*) which would take the heart out of the obligation of good faith. The obligation not to frustrate the objects of a treaty, if it was to have any meaning, should exist before the treaty actually came into force.

14. Sub-paragraph (*d*) should, he thought, be redrafted so as to cover not only the rights, but also the obligations of a signatory state. He also agreed that it was desirable to find a better expression than "the right to insist upon the observance" of the clauses of the treaty in question.

15. The provisions of sub-paragraph (*d*) were of real significance, but did not properly belong to article 9 as it was now conceived. The purpose of the sub-paragraph was to emphasize that the clauses of a treaty which regulated such matters as signature, ratification, acceptance, accession and reservations should be observed even before the treaty came into force as a treaty. In particular, the whole authority of the depositary state depended on those clauses, which were usually final clauses of a mainly procedural character, although Mr. Bartoš had correctly pointed out that those relating to reservations could also affect matters of substance.

16. As he saw it, the real legal basis of such final clauses was the consent of the participating states at the time of adoption of the text of the treaty. That consent created rules of objective law governing participation in the treaty; it was only on the basis of those rules that states could sign, accept, accede to, or make reservations to the treaty. The contents of sub-paragraph (*d*) came within the scope of treaty law and not of general international law, and should therefore appear in the draft articles.

17. Signature was not, however, the only act which might give rise to rights and obligations pending the entry into force of the treaty; acceptance and accession might also do so. There was, therefore, a strong case for placing the contents of sub-paragraph (*d*) in the separate article on the rights and obligations of states pending the entry into force of a treaty in the preparation of which they had participated.

18. He had included sub-paragraph (*e*) largely because of the provisions of sub-paragraph (*d*). During the discussion, some members had suggested that the provisions of sub-paragraph (*e*) could be useful to cover the question of provisional entry into force. He agreed that that was so, but pointed out that provisional entry into force was dealt with in article 20, paragraph 6, and article 21, paragraph 2.

19. In fact, the question of provisional entry into force could be said to belong to that of the rights and obligations of states prior to the entry into force of a treaty. From the drafting point of view, however, it was convenient to deal with "provisional entry into force" immediately after "entry into force" itself.

20. If all the questions relating to rights and duties prior to entry into force were to be transferred to the suggested new article on the subject, the residual paragraph 3 would be very brief: it would, in fact, resemble article 14 of the 1959 draft,[1] the language of which, moreover, needed improvement. He could not accept the formulation: "signature operates as a provisional consent to the text, as constituting an international agreement"; it could easily lead to misunderstanding.

21. Mr. de LUNA repeated his suggestion for the deletion of sub-paragraph (*b*).

22. An additional reason for deletion, apart from those mentioned earlier in the discussion, was that the contents of the sub-paragraph were a historical reminiscence from the time when an agent's signature was always subject to ratification by the sovereign whom he represented, because the sovereign had to satisfy himself that his agent had not acted *ultra vires*. In the days when rulers had had absolute powers the signature affixed to a treaty had had the effect of creating rights. Ratification had had merely a declaratory effect: it was evidence that the agent had not acted *ultra vires*. The state on behalf of which a treaty had been signed had then been under an obligation to ratify it if its agent had acted within his powers. But with the spread of democratic institutions, and constitutional government, parliamentary control over treaty-making by the Executive had become general. Ratification was no longer a declaratory act; it was, in fact, the act which bound the state. Any suggestion that a state could have obligations apart from "service of the convention", prior to ratification, would represent a return to ideas belonging to the era of the absolute power of Heads of State. Those remarks applied to the first sentence of sub-paragraph (*b*).

23. The second sentence referred to obligations arising from the constitutional law of international organizations; but the Secretary had pointed out that the conventions of the International Labour Organisation, the example given, did not involve signature. It was difficult, therefore, to see how a provision relating to "the signatory state" could apply in the circumstances.

24. Mr. LIU said that it would be regrettable if the contents of paragraph 2 were not retained in the draft. It was true that most of the obligations set out in that paragraph were imperfect obligations, but many examples could be cited of imperfect obligations in international law.

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[1] *Yearbook of the International Law Commission 1959*, Vol. II (United Nations publication, Sales No.: 59.V.1, Vol. II), p. 105.

25. The paragraph contained two important ideas: first, an obligation on the signatory state to submit the treaty to its competent organs for ratification or rejection; secondly, an obligation on the signatory state to refrain from acts calculated to frustrate the objects of the treaty or to impair its implementation.

26. It was very important to retain some provision along those lines in order to give meaning to the act of signature. In modern times, ease of communications enabled a representative to keep the authorities of his state fully informed of all the stages of negotiations. If those authorities allowed him to sign the treaty, they obviously undertook to proceed to the next stage, and to take steps to submit the treaty to the competent organs for ratification.

27. Mr. TSURUOKA said that, if the Commission decided to include in a single article all the imperfect obligations which states might have prior to the entry into force of a treaty in the preparation of which they had participated, emphasis should be placed on the degree of consent to the treaty by the state concerned.

28. The suggested article would have to cover three different situations: first, the obligations, if any, on a signatory state which had participated in the negotiation of a treaty at which a text to which it was opposed had been adopted; secondly, the obligations of a signatory state prior to ratification; and thirdly, the obligations of a signatory state which had ratified a treaty which had not yet entered into force.

29. An example that had been cited by way of illustration was that of a text adopted at a disarmament conference. In such a case, although in theory the consent of the government would be required, in practice the negotiators would be in such close touch with the highest authorities in their home countries that there could never be any doubt as to the intention of a participating state to accept any given proposal.

30. The problem in the case of technical conferences, which often adopted by a simple majority rules of procedure whereby a simple majority sufficed for the adoption of a substantive text, was rather different. If the rules of procedure were adopted by 51 votes to 49 and then a text were adopted by the same narrow majority, it could hardly be said that a country belonging to the minority was acting in bad faith if it took any action likely to hamper the implementation of a text which it had strenuously opposed and which had been adopted under a rule of procedure which it had also strenuously opposed.

31. The CHAIRMAN said there appeared to be general agreement to accept the proposal, originally made by Mr. Briggs, for a separate article combining the provisions of article 5, paragraph 3, and those of article 9 on the rights and obligations of a state participating in the preparation of a treaty pending the entry into force of the treaty. If there were no objection, he would take it that the Commission agreed to invite the Drafting Committee to formulate such an article and to include in it the provisions of article 5, paragraph 3, and those of article 9, paragraph 2, sub-paragraphs (*c*) and (*d*), as suggested by the special rapporteur.

It was so agreed.

32. The CHAIRMAN said that, since all the comments on the introductory portion of paragraph 2 and sub-paragraph (*a*) related to drafting points, if there were no objection, he would consider that the Commission agreed to refer that part of paragraph 2 to the Drafting Committee.

It was so agreed.

33. The CHAIRMAN invited the Commission to consider sub-paragraph (*b*). There had been a division of opinion on the question whether the incomplete obligations stated in that sub-paragraph should be mentioned in the article.

34. He therefore called for a vote on the question whether the first sentence of sub-paragraph (*b*), commencing with the words "The signatory state" and ending with the words "for ratification or acceptance;" should be retained.

The first sentence of sub-paragraph (b) was rejected by 8 votes in favour to 8 against, with 3 abstentions.

35. Mr. YASSEEN urged the Commission, in view of the closeness of the vote, to ask the Drafting Committee to consider all the comments of members on the rejected passage and to try to formulate a text acceptable to the Commission.

36. Mr. AMADO proposed that the whole of article 9 should be referred to the Drafting Committee, with instructions to prepare a simplified and more precise text. The article was of great importance, for the legal effects of a full signature was one of the essential questions of the law of treaties. A state which signed a treaty was under no obligation whatsoever to submit that treaty to its competent organs with a view to ratification.

37. In thus reconsidering the whole text of article 9, the Drafting Committee would examine the question of the suitable placing of the various provisions included in the special rapporteur's draft of the article, particularly sub-paragraph (*e*), which was stated in the commentary to relate to reservations and which would therefore be more appropriately placed in the provision on reservations.

38. Mr. AGO, supporting Mr. Amado's proposal, said there had not been a majority in the Commission in favour of sub-paragraph (*b*) in the form in which it had been submitted, but the Drafting Committee should be able to formulate a text acceptable to the Commission.

39. He hoped the Drafting Committee would be allowed sufficient latitude in its consideration of article 9, as proposed by Mr. Amado. It should be empowered not only to amend the text of the various provisions contained in the article, but also to delete some of them and to decide which would be included in the article and which would be removed from it; with regard to the latter type of provision, it would also consider the question of their proper place in the draft.

40. Mr. TABIBI said that, if the Commission intended to reverse its decision to reject the first portion of sub-paragraph (*b*), it should observe its rules of procedure.

41. Mr. AGO pointed out that no such reversal was intended. The Commission had rejected the first portion of sub-paragraph (*b*) in the proposed formulation, but that did not prevent it from inviting the Drafting Committee to prepare a new text on the subject for possible inclusion either in the draft articles or in the commentary.

42. Mr. TSURUOKA said he would have no objection if the Commission instructed the Drafting Committee to prepare a more suitable text. The draft articles which the Commission adopted on first reading would be submitted to governments for their comments and one possible course of action would be to include a text in the commentary, so as to obtain government comments upon it.

43. The CHAIRMAN said that, since the Commission was formulating a draft only on first reading, it would be unfortunate not to make a further attempt to cover the subject-matter of sub-paragraph (*b*) by asking the Drafting Committee to prepare a more acceptable text.

44. The Commission had rejected only the first sentence of sub-paragraph (*b*); it had taken no decision regarding the second. If there were no objection, he would consider that the Commission agreed to refer sub-paragraph (*b*) as a whole to the Drafting Committee, with the comments made during the discussion, so that the Commission could reconsider the whole matter when the Drafting Committee formulated a text.

It was so agreed.

45. Sir Humphrey WALDOCK, Special Rapporteur, said he strongly supported Mr. Amado's proposal that the whole of article 9 should be referred to the Drafting Committee. The Commission's decision to remove the contents of sub-paragraphs (*c*) and (*d*) from paragraph 2 and place them in the new article on obligations prior to entry into force was bound to affect the terms of paragraph 3. If the provisions concerning the obligations of a signatory state pending a treaty's entry into force were removed from paragraph 3, that paragraph would be considerably shortened, and the Drafting Committee should have no difficulty in formulating it.

46. Mr. BARTOŠ said he had invariably opposed any suggestion to entrust the Drafting Committee with decisions on questions of substance. Questions of substance, important legal points, should always be settled by the Commission itself. He maintained that position, but would not object, in the present instance, to certain questions of substance being referred to that committee, but only for preliminary or supplementary study, along with matters of drafting relating to article 9. Once the Drafting Committee began to deal with questions of substance, it would no longer be a drafting committee properly so-called. In the present instance it would be an *ad hoc* committee with the same membership and it could be required merely to suggest a solution, not to decide a question of substance.

47. Mr. VERDROSS joined the special rapporteur in supporting the proposal that article 9 as a whole should be referred to the Drafting Committee. Since the special rapporteur was a member of that committee, there would be no procedural difficulty; the text prepared by the Drafting Committee would in fact be, as far as the Commission was concerned, a revised draft submitted by the special rapporteur.

48. The CHAIRMAN said that the Commission would take a decision on paragraph 3 later.

49. As far as paragraph 2 was concerned, the Commission had decided to remove sub-paragraphs (*c*) and (*d*) and to place them in a new article concerning the obligations of states pending the entry into force of treaties.

50. He invited the Commission to consider Mr. Amado's proposal that article 9 as a whole should be referred to the Drafting Committee, in so far as that proposal affected paragraph 1 and 2 of the article.

Mr. Amado's proposal was adopted unanimously.

Paragraph 3

51. The CHAIRMAN invited the Commission to discuss paragraph 3.

52. Mr. BRIGGS submitted a redraft of paragraph 3 in the following terms:

> "Except where signed *ad referendum,* the signature of an instrument by a duly authorized representative of a state binds that state [or: constitutes an acceptance by that state of the provisions of the treaty] upon the entry into force of the treaty:
>
> "(1) where the instrument provides that it shall enter into force upon signature; or
>
> "(2) where the instrument provides that it is not subject to ratification or subsequent acceptance as a condition precedent to its entry into force; or
>
> "(3) where the form or nature of the instrument or the attendant circumstances indicate an intention to dispense with the necessity for ratification as a condition precedent to its entry into force."

53. In view of the special rapporteur's suggestion for the transfer of the provisions contained in paragraphs 2 (*c*), 2 (*d*) and 3 (*b*) from article 9 to a separate article, he would like his own text to be considered by the Drafting Committee as an alternative to article 9 as a whole.

54. Mr. LACHS said he had no objection to paragraph 3 being referred to the Dratfing Committee, but pointed out that sub-paragraph (*b*) (i) concerned the important question of principle, whether a state could consider itself no longer bound by the obligation in question if, after the lapse of a reasonable time from the date of signature, the treaty had not yet come into force.

55. Sir Humphrey WALDOCK, Special Rapporteur, said that the question mentioned by Mr. Lachs might be discussed in connexion with the new article to be prepared by the Drafting Committee.

56. Mr. CASTRÉN said that the obligation stated in sub-paragraph 3 (*b*) (i) was analogous to that stated in sub-paragraph 2 (*c*). What would be the position of a state which, under sub-paragraph 3 (*b*) (i), notified the other signatory states that it no longer considered itself bound in good faith to refrain from any action calculated to frustrate the objects of the treaty? Clearly it was not free to take any action it wished while remaining a party if, contrary to all expectations, the treaty eventually came into force. The only possible way of regulating the matter was to stipulate that states had the right to withdraw their signature before the treaty entered into force and that they would then be exonerated from any obligation regarding the objects of the treaty. He accordingly proposed that the words "it withdraws its signature" be substituted for the words "it no longer considers itself bound by such obligation", in sub-paragraph (*b*) (i).

57. He realized that the amendment was a radical one, but it offered the only means of retaining the special rapporteur's useful proposial.

58. It would remain for the Commission to define what was meant by "the lapse of a reasonable time".

59. Mr. BARTOŠ said that it would be wrong and at variance with the Commission's practice to refer paragraph 3 to the Drafting Committee without full discussion. He protested at such a course.

60. The CHAIRMAN pointed out that there was no question of depriving members of the opportunity to express their views on the whole of article 9. What had happened was that the special rapporteur had withdrawn his draft, which would be replaced by a new text for consideration by the Commission.

61. Mr. BARTOŠ said the Commission ought to keep to its traditional practice of debating issues of substance in plenary meeting before referring texts to the Drafting Committee.

62. Mr. AGO said that the position was not quite as described by Mr. Bartoš; had it been so, his protest would have been well founded. The special rapporteur had already mentioned that the discussion on paragraph 2 had provoked doubts in his mind about paragraph 3. Once the Drafting Committee had prepared a new text for paragraph 2, the special rapporteur would be in a position to submit a new text for paragraph 3.

63. Sir Humphrey WALDOCK, Special Rapporteur, said he could assure Mr. Bartoš that there was no question of trying to short-circuit the Commission's normal procedure. Paragraphs 2 and 3 evidently needed thorough redrafting, and although he could redraft them on his own, his task would be easier if he worked in concert with the Drafting Committee.

64. The CHAIRMAN said that the new draft for paragraph 3 would be debated by the Commission in due course; in the meantime he suggested that article 9 as a whole be referred to the Drafting Committee and that the Commission pass to article 10.

It was so agreed.

ARTICLE 10. TREATIES SUBJECT TO RATIFICATION

65. Sir Humphrey WALDOCK, Special Rapporteur, said that he had explained in the commentary why he had drafted article 10 in detailed form.

66. There were two different currents which crossed each other. The first, which had its sources in the past but had survived as convenient for ensuring democratic processes of treaty making, was that in principle treaties were subject to ratification unless they provided otherwise, or unless some special circumstances surrounding their adoption made ratification unnecessary. The second was one which had appeared during the past fifty years with the development of the practice of concluding less formal agreements, for which the presumption was that there was no obligation to ratify unless the treaty itself required it or the circumstances indicated that ratification had been contemplated. Those two currents of practice had given rise to controversy as to the correct residuary rule when the treaty itself did not indicate whether or not it was subject to ratification. Sir Hersch Lauterpacht had taken the line that, having regard to the need to safeguard constitutional requirements in some states, the residuary rule should be in favour of the need for ratification; Sir Gerald Fitzmaurice had taken the opposite view. He himself had suggested that probably the truth was that there were two different presumptions according as the treaty was formal or informal; but he felt that the Commission had to take account of the constitutional position in many states and start from the same general position as Sir Hersch Lauterpacht.

67. Mr. JIMÉNEZ de ARÉCHAGA, referring to paragraph 1, said that in international practice, there were cases, such as the International Labour Conventions, where ratification took place although the treaty had not been signed.

68. He did not greatly favour the view that there should be one residual rule for formal treaties *stricto sensu* and another for treaties in simplified form. It would be preferable to establish a single rule for all, based on the view, upheld by Sir Hersch Lauterpacht, that if there was silence on the matter and no intention was expressed to dispense with it, ratification was required. The opposite view, that in principle treaties did not require ratification, seemed to him heterodox.

69. Most Latin American countries were required by their constitutions to obtain parliamentary approval for treaties on important matters and so would find it difficult to accept the residuary rule proposed for the less formal type of treaty, because it would debar them from that useful practice of an exchange of notes.

70. Mr. VERDROSS said he welcomed the distinction drawn by the special rapporteur between formal treaties and those of the types listed in sub-paragraph 2 (*a*) (iv). The fundamental difference between them was procedural. The first category normally involved three stages: negotiation and signature, submission to the competent organs for approval, and ratification by the Head of State, and in his opinion, all treaties which, under the constitution of the state concerned, could only be

concluded by the Head of State required ratification. With that first category of treaty, the organ which negotiated and signed the treaty and the organ which ratified it were always separate; with the second category, however, the same organ both negotiated and concluded the treaty.

71. As was indicated in the commentary, the informal type of treaty was very much on the increase and the constitutions of certain states had taken account of that new development of international law. For example, the Austrian Constitution authorized the President of the Republic to delegate power to conclude treaties to the Council of Ministers or to an individual minister.

72. Paragraph 1 was entirely consistent with international practice and was wholly acceptable, but he had some doubts about paragraph 2. In particular, he was unable to accept the proposition in sub-paragraph 2 (*a*) (i), which belonged to the era of absolute monarchies when the Head of State had possessed *jus representationis omnimodae*; that theory no longer corresponded to modern practice.

73. Mr. BARTOŠ said he agreed with the comment of Mr. Verdross on sub-paragraph 2 (*a*) (i); such signature had perhaps been traditional in the era of absolute monarchies but had since become obsolete in most countries.

74. With regard to sub-paragraph 2 (*a*) (iii), he doubted whether ratification could always be dispensed in the case of a treaty amending an earlier treaty which had not itself been subject to ratification, though in the case of treaties with certain kinds of content that rule might apply. It was quite possible that the original treaty fell in the category of treaties not subject to ratification, whereas the amendments took it outside that category. He would therefore express a reservation on that provision and simply state that it was the content, not the historic procedure, which should be decisive in such cases.

75. With regard to sub-paragraph 2 (*a*) (iv), he agreed with Mr. Jiménez de Aréchaga that it depended on the substance, not on the form, whether ratification was necessary or not. If it framed a different rule, the Commission might be in danger of causing considerable international perturbation. It was hardly the Commission's business to intervene in the everlasting struggle between bureaucracy and parliamentarianism or to take up the position adopted by certain diplomatists who wished to rid themselves of parliamentary control. He would therefore also make a reservation on sub-paragraph 2 (*a*) (iv), which required more thorough consideration and possibly redrafting.

76. Mr. AGO said that article 10 was one of the most important in the draft and would require very careful thought.

77. He agreed with previous speakers that paragraph 1 clearly stated the existing rule, subject to some drafting amendments.

78. Some drafting rearrangement might also prove advisable for sub-paragraphs 2 (*a*) and 3 (*a*); they should be combined so that the general rule that ratification was required was stated first, followed by provisions indicating the cases where it was not required, which were more in the nature of exceptions.

79. He agreed with the exception stated in sub-paragraph 2 (*a*) (i), but had doubts about that in sub-paragraph 2 (*a*) (ii). There was a growing practice of including in treaties which were subject to ratification an article stating that the treaty was subject to ratification in accordance with the constitutional procedures of the states concerned, but entered into force on signature. It would be dangerous to state, even as a simple presumption, that with all such treaties there was no need for ratification.

80. The second possibility envisaged in sub-paragraph 2 (*a*) (ii), that of treaties coming into force upon a particular date or event, posed even more delicate problems. Though the entry into force of such a treaty would be contingent on the occurrence of the event, it might nevertheless need ratification. The provision needed further study.

81. In general, he agreed with the exception contained in sub-paragraph 2 (*a*) (iii), but there might be certain other cases that would have to be covered.

82. Perhaps the term "intergovernmental agreement" used in paragraph 2 (*a*) (iv) should be avoided because some treaties using such a term, for example, the constitution of the Intergovernmental Committee for European Migration, had been subject to ratification.

83. Sub-paragraph 2 (*b*) was acceptable.

84. If his suggestion for the amalgamation of sub-paragraph 3 (*a*) with sub-paragraph 2 (*a*) were adopted, the exception stated in sub-paragraph 3 (*b*) should be added to those in the previous paragraph.

85. Paragraph 4 was linked closely with the question, discussed in connexion with article 9, whether signature entailed an obligation to examine in good faith the question of ratification. The Drafting Committee could consider the two provisions together.

86. Mr. PAREDES said that he could not accept any general rule that a treaty did not require ratification except where the treaty itself expressly contemplated it. In most cases the rule should be precisely the opposite.

87. The rule stated in paragraph 1 would hold good in the case of treaties drawn up in international organizations, because a state in joining the organization accepted its constitution, the provisions of which would prevail over any conflicting provisions of municipal law. In other types of treaty, however, involving the basic interests of a state, ratification would be essential as an expression of the democratic principle of representation and of the position of the Head of State as vested with competence through that representation. In most democratic legal systems, ratification was regarded as an indispensable part of the treaty-making process because it expressed the will of the people. Thus, the rule should be understood that every treaty was subject to ratification, unless otherwise provided.

88. Every international agreement should be thoroughly considered by the representatives of the people; sub-paragraph 2 (*a*) (i) was therefore not acceptable. Heads of State, much less Ministers for Foreign Affairs, could not bind their states on basic matters. They might negotiate, but they could never sign a binding agreement without the consent of parliament.

89. Mr. TSURUOKA said that the exact meaning of the term "ratification" should be made clear in paragraph 1, as well as in article 1, paragraph (i); it should be explained that a Head of State not only ratified a treaty but also promulgated it.

90. Treaties drawn up in international organizations were subject to ratification; the term was used in article 19, sub-paragraph 5 (*d*), of the constitution of the International Labour Organisation. He was not sure, however, whether the word had the same connotation in that context as it was intended to have in the draft articles on the law of treaties.

91. With regard to sub-paragraph 2 (*a*) (iv), in Japanese practice the criterion for determining whether a less formal treaty did or did not require ratification was content rather than form. Some exchanges of notes were subject to ratification.

92. The expression "intergovernmental agreement" was not clear; if it meant treaties concluded in the name of governments, he must point out that many such agreements required ratification.

93. Sub-paragraph 2 (*b*) was open to the same objection as that he had raised against article 4, paragraph 2. The definition of the term "full-powers" should be co-ordinated in the two contexts in order to prevent any possibility of confusion. The same difficulty arose with the use of the term "full-powers" in sub-paragraph 3 (*b*). The Drafting Committee might usefully consider the definition of full-powers in article 1, paragraph (*e*), in the light of those provisions.

94. Sub-paragraph 3 (*b*) was the complement of sub-paragraph 2 (*b*). In some cases the full-powers or other instrument indicated clearly that the holder was authorized to ratify by signature, whereas in others no such indication was given. A clause was needed to cover the case where the full-powers did not vest such authority in the representative.

95. If sub-paragraph 4 (*a*) were amended in the same way as sub-paragraph 2 (*a*), the difficulties might be solved. It might even be possible to delete sub-paragraph 4 (*a*).

96. Mr. VERDROSS noted that Mr. Ago appeared to agree with the view of the special rapporteur that Heads of State could sign an agreement which would enter into force immediately on signature. But surely the position was somewhat different. For example, if the President of Austria visited the President of Italy and they agreed on the settlement of some legal dispute between their states, in his (Mr. Verdross') opinion they could not by their signatures alone conclude a treaty binding their states. For in all parliamentary systems, all acts of the Head of State needed the counter-signature of the government or a minister. Therefore the signature of the Head of State alone could not create an obligation of the state.

97. An example of cases where the act of ratification could be unilateral was provided by article 43 of the United Nations Charter, paragraph 3 of which stipulated that agreements to make available to the Security Council armed forces, assistance and facilities were subject to ratification by the signatory states but not by the Security Council. Other examples could be cited.

98. He fully agreed with the rule laid down in paragraph 1 that treaties were subject to ratification by signatory states in cases where the treaty itself expressly so provided. He wondered whether the special rapporteur would be willing to go further and add a statement that the same was true of treaties which, under the constitution of the contracting states, could be concluded only by Heads of State. In his own opinion, ratification would always be necessary for formal treaties, even if the text was silent on the point; he accordingly suggested that a provision should be added to the draft to the effect that ratification would be necessary except in cases where the full-powers authorized the representative to conclude a treaty without the reservation "subject to ratification".

99. Mr. de LUNA said that he agreed with the special rapporteur's distinction between treaties *stricto sensu* and the less formal treaties referred to in sub-paragraph 2 (iv).

100. The point made by Mr. Jiménez de Aréchaga was well taken, but it would hardly be wise to establish an obligation to ratify in all cases where the treaty itself was silent. Such a rule would be quite contrary to international practice. The determining factor was not so much the form of the treaty, but the will of the parties. In the United States of America, Executive Agreements depended on the will of the United States Executive, which might not wish to submit certain matters to the two-thirds ratfication rule of the Senate. The part of the draft article which covered such practices should be very carefully worded.

101. He entirely agreed with Mr. Ago's suggestions for the redrafting of paragraphs 2 and 3; the principle should be stated first and then the exceptions. One exception which had not been contemplated by the special rapporteur covered conventions of belligerency, such as armistices and truces, which were concluded without ratification.

102. He agreed with the observations of Mr. Verdross concerning agreements made by Heads of States. The Yalta agreements might not come precisely under that head, but agreements existed and were in fact operative, by which Heads of States bound themselves effectively, even if anti-constitutionally.

103. Mr. GROS said that the special rapporteur was right in dealing in his draft with both formal treaties and less formal treaties. Paragraph 1 was not only correct but indispensable; indeed, the title of the article should be simply "Ratification". The special rap-

porteur had first stated in what cases ratification was necessary, and his commentary on that point was sound and exhaustive. It was quite right, as explained in paragraph 5 of the commentary, that total silence on the subject was exceptional; in fact, in such cases it was due to oversight. Nearly all treaties which were subject to ratification contained a provision stating as much, but it was true that the Commission was not absolved from the obligation of formulating a rule for the small residuum of cases in which the parties had left the question open.

104. He had been attracted by the rule put forward by Sir Gerald Fitzmaurice, quoted in paragraph 6 of the commentary, and he had the impression that the special rapporteur had also leaned towards it, namely, that when a treaty expressly contemplated that it should be subject to ratification, there was no problem, but when it was silent, the question arose whether it was a formal treaty, in which case it was subject to ratification. In the case of less formal treaties, it could be argued that if the parties had used that form, they had usually done so because they had wished to avoid ratification, and if nothing was said in the agreement, that presumed wish should form the core of the rule. If in certain cases one of the parties was constitutionally bound to ratification or acceptance, it would have to state so even in the case of less formal treaties. The Commission was engaged on a somewhat hypothetical exercise, but he rather favoured the rule proposed by Sir Gerald Fitzmaurice, although he would accept the other solution if the majority so wished.

105. It was not easy to draw a distinction between formal treaties and less formal treaties merely on the basis of ratification, since a number of constitutions included a special definition of the latter type. One example was the "Executive Agreement" in the United States of America. On the other hand, some constitutions required parliamentary or government approval for less formal treaties in specific cases.

106. Finally, the term "parliamentary ratification", which was occasionally used, was erroneous. Parliament simply authorized the Head of State to ratify a treaty and ratification was always an act of the executive power.

The meeting rose at 1 p.m.

646th MEETING

Friday, 18 May 1962, at 10 a.m.

Chairman: Mr. Radhabinod PAL

Law of treaties (A/CN.4/144 and Add.1) (item 1 of the agenda) *(continued)*

ARTICLE 10. TREATIES SUBJECT TO RATIFICATION *(continued)*

1. The CHAIRMAN invited the Commission to continue its discussion of article 10.

2. Mr. ROSENNE said the Commission should bear in mind that, in the draft articles, references to ratification were references to the international act of ratification within the meaning of the definition in article 1.

3. Ratification was necessary in three cases. First, where the treaty expressly provided for ratification; in such cases, as the International Court of Justice had said in its judgement in the Ambatielos case,[1] ratification was an indispensable condition for bringing it into operation, not a mere formal act. Secondly, where a treaty was made by virtue of another treaty which required treaties made under it to be ratified, for example, agreements under Article 43 of the United Nations Charter and International Labour Conventions. Thirdly, where the full-powers of the representative who signed the treaty themselves specified that the signature would be subject to ratification. The full-powers thus constituted the link between the international treaty-making process and the requirements of domestic law and constitutional practice. Much more attention might be paid, incidentally, to the drawing up and examination of full-powers, so that the negotiators would be able to satisfy themselves that what they were intending to do would have legal effect. The question how far one party could be presumed to have knowledge of the constitution of the other party had been well treated by Lord McNair.[2]

4. The next question was when was ratification not necessary. The answer was that it was not necessary if the text of the treaty, or the text of the full-powers, expressly stated that it was not necessary.

5. That left the residuary problems. The first of those concerned treaties for which no full-powers were required, as, for example, under the terms of article 4, paragraphs 3 (*a*) and (*b*). It had not been the Commission's intention — and that might be mentioned in the commentary — to imply that, because evidence of full-powers was not required in those cases where the signatories acted *ex officio,* the international treaty-making process could be concluded in disregard of the requirements of domestic law.

6. The second residual problem arose where the text of both the treaty and the full-powers was silent. It would be proper to state the presumption that in such cases ratification was required in principle, unless anything to the contrary had been said during the negotiations. The decisive factor should always be the intention of the parties. The Commission should, therefore, avoid undue rigidity on that point, since the question where, when and how a treaty was signed was purely a matter for the will of the parties.

7. An attempt should be made to transfer the emphasis from the text of the treaty — with all the attendant problems of interpretation — to the full-powers or their equivalent. If the Commission succeeded in introducing greater legal discipline so far as full-powers were concerned, it would have rendered a major service. International law could not be concerned with the many

[1] *I.C.J. Reports,* 1952, p. 43.

[2] *The Law of Treaties,* 1961, p. 61.