Document:-
A/CN.4/SR.646

Summary record of the 646th meeting

Topic:
Law of Treaties

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

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.

refinements of domestic constitutional law and the rules for the incorporation of treaties into domestic legal systems. In dealing with article 3, an attempt had been made to divorce international treaty-making from considerations of municipal law, and a similar approach was appropriate for article 10. The conclusion to be drawn was that the question of parliamentary approval did not really fall within the Commission's purview. Paragraph 7 of the special rapporteur's commentary was impressive, but the point raised there should be reflected in the full-powers and not incorporated in a draft convention on the law of treaties itself. The obligation was on the negotiators and their advisers to satisfy themselves that the signatories were duly and fully empowered to sign a treaty.

8. It would be impossible to legislate in general terms at the international level on the substance of treaties requiring ratification or on questions of form, and it would be desirable to avoid making any rule based merely on the form of the treaty or on the rank, personality or position of signatories, since those factors were frequently of political or diplomatic but not of legal relevance.

9. The key provisions of article 10 were therefore paragraph 1, sub-paragraph 2 (*a*) (ii), and paragraph 3 (*b*). If those could be combined as a point of departure, the solution would have been virtually reached.

10. Sub-paragraph 2 (*a*) (i) did not quite tally with article 4, since frequently it was the Head of Government rather than the Head of State who signed treaties. Sub-paragraph 2 (*a*) (iii) should be omitted, since the substance of the provision did not lend itself easily to generalization. Sub-paragraph 2 (*a*) (iv) should be retained, as it took into account the greater flexibility needed in the case of exchanges of notes, but it should not give the impression that form was the determining factor.

11. He doubted whether paragraph 3 (*b*) was entirely applicable to multilateral treaties, since, in principle, all signatories to such treaties should be placed under the same legal rule; it would be inconvenient if some parties had to ratify and some not. That question did not, of course, arise with regard to bilateral treaties, as Mr. Ago had pointed out.

12. Paragraph 4 (*b*) could either be referred to the drafting committee, since it might conflict with the final phrase in paragraph 4 (*a*), or preferably be relegated to the commentary.

13. Reference had been made in the discussion to the case of agreements signed by military commanders in time of war. The special rapporteur had rightly not attempted to deal with that very special case; at the first session, the majority of the Commission had declared itself opposed to the study of the laws of war at that stage.[3] A sentence might perhaps be added in the commentary noting that case and dealing with some of the other special problems involved.

14. The beginnings of a United Nations practice with regard to the inclusion of express dispensation from the need for ratification might be noted in article XII of the Egyptian-Israeli General Armistice Agreement of 24 February 1949.[4] For that treaty, the powers of the negotiators had been verified by representatives of the United Nations, under whose auspices it had been drawn up.

15. Mr. LACHS congratulated the special rapporteur on his drafting of article 10 and especially on his commentary, in which he had steered a course between the theses of Sir Hersch Lauterpacht and Sir Gerald Fitzmaurice, and arrived at a safe destination.

16. Paragraph 1 of the article called for no comment; where the treaty itself provided for ratification, the position was clear.

17. The position would also be clear if the treaty expressly said that it did not require ratification, but governments could hardly be expected to include an express clause to that effect in every treaty which did not need ratification. In order, therefore, to cover cases where the treaty was silent on that point, the Commission would have to make certain presumptions, as the special rapporteur had done in paragraph 2.

18. With regard to paragraph 2, he had a number of suggestions to make, both of substance and of drafting. Sub-paragraph 2 (*a*) (ii), so far as it concerned entry into force upon signature, should be interchanged with sub-paragraph 2 (*a*) (i), so as to establish as a principle in the first line that the treaty should not require ratification if it itself provided that it should come into force upon signature, because that was the most obvious case of presumption. So far as the remainder of sub-paragraph 2 (*a*) (ii) was concerned, however, he shared Mr. Ago's doubts. The mere fact that a treaty provided that it would come into force when a particular event occurred did not necessarily mean that the treaty did not require ratification. The Hague conventions on the laws and customs of war had required ratification, while article 10 of the treaty concerning the Archipelago of Spitsbergen of 9 February 1920[5] had provided that article 8 should come into force on ratification and the remaining articles after certain legislative changes had been made by Norway. Those articles had not in fact come into force till five years later. The final phrase of sub-paragraph (*a*) (ii) should therefore be deleted.

19. Sub-paragraph 2 (*a*) (i) was acceptable and should become sub-paragraph 2 (*a*) (ii). He agreed with Mr. Verdross that it was doubtful from the point of view of domestic constitutional law whether a Head of State could always both sign and ratify a treaty, but there would be no harm in suggesting that if the Head of State signed the treaty, the conclusion might be drawn that he had been authorized to ratify, and that, consequently, ratification might be dispensed with.

[3] *Yearbook of the International Law Commission, 1949* (United Nations publication, Sales No.: 57.V.1), p. 281.

[4] United Nations *Treaty Series*, Vol. 42, p. 268.

[5] League of Nations *Treaty Series*, Vol. 2, p. 14.

20. Sub-paragraph 2 (*a*) (iv) should become sub-paragraph 2 (*a*) (iii) and the term "less formal treaty" should be replaced by the term used by the Drafting Committee, "treaty in simplified form". The question arose whether the fact that the simplified form had been used presupposed that ratification was dispensed with. That was obviously so when such treaties concerned minor issues only; but they frequently dealt with important issues, and there was usually a particular reason in each case why the simplified form had been used. One reason might be the time factor; the parties might wish to avoid the comparatively slow processes of ratification and to bring the agreement into force immediately, even though fully aware that under domestic law the ratification with which they had dispensed would be required. That was why the inclusion of sub-paragraph 2 (*a*) (iv) was fully justified.

21. Sub-paragraph 2 (*a*) (iii) should be placed last, because it dealt with all other cases. Some parts of it might be omitted, because they referred to a very special case, but he still had some doubts about the substance. To link two instruments by reason of their substantive relationship was not justified.

22. With regard to paragraph 2 (*b*), he would suggest that some place should be found for an indication of the frequent practice resulting from constitutional provisions for simplifying ratification, such as approval. In Polish practice treaties were divided into two classes, one requiring ratification, the other simply governmental approval. He would request the special rapporteur to decide how that was to be done.

23. Paragraphs 3 (*a*) and 4 (*b*) were redundant and should be deleted.

24. Mr. TABIBI said that at one time ratification had been a most important act as the final stage in the treaty-making process, but was now losing ground in the legal literature. The main reason was the development of intercourse between nations and the expansion of economic relations, with the concomitant need for speed and informality. Ratification should, however, be recognized as necessary in so far as it rendered a treaty binding. The figures given by the learned Mr. Blix, quoted by the special rapporteur in paragraph 5 of his excellent commentary, showed a tendency to dispense with ratification in the case of informal agreements, but the number of treaties subject to ratification registered with the United Nations proved that the importance of ratification had not entirely vanished. An article in line with that drafted by the special rapporteur was therefore necessary, but the draft should be considerably simplified. He fully agreed with Lord McNair that ratification provided the appropriate government department with an interval for reflection on the implications of the text of the treaty. If, after reflection, a state was convinced of the value of the treaty, it would be the more willing to support its enforcement.

25. While he had no objection to paragraph 1, he had some reservations with regard to sub-paragraph 2 (*a*) (i) because of the declining role of Heads of States, and to sub-paragraphs 2 (*a*) (ii), (iii), and (iv) similar to those expressed by other speakers.

26. Paragraph 3 did not seem to cover all types of treaty, whether subject to ratification or not.

27. He had already stated his views on paragraph 4 in connexion with article 9.

28. Mr. AGO, in reference to some remarks by Mr. Verdross at the previous meeting, said he agreed with Mr. Lachs that sub-paragraph 2 (*a*) (i) was acceptable, for, as other members had pointed out, the reference to ratification meant, in the context of the draft, solely ratification by the Head of State and never what was sometimes also improperly called "ratification", namely, the authorization to ratify given to the Head of State by another organ. In the exchange of instruments of ratification, it was the Head of State who took the responsibility of expressing the final consent of the state at the international level. If the Head of State signed a treaty, he normally engaged his responsibility at that time, and unless the treaty itself required otherwise, it would be otiose to require him to sign a second time by way of ratification. If in fact his signature was not authorized or not valid as ratification under domestic law, that was no concern either of the international legal order or of the Commission.

29. Mr. BRIGGS said that he doubted the correctness of the reference to the confirmation of consent in the definition of ratification in draft article 1 (i) as it stood. Article 11, paragraph 1 (*a*), stated that idea more baldly and it recurred in article 10, paragraph 1. The definition of ratification seemed to assume that consent had already been given by the act of signature. He would prefer a new definition on the following lines: "For the purpose of international law, ratification means the international act by which the provisions of an instrument are formally accepted (approved and confirmed) by a signatory State, so as to become binding when the treaty enters into force." The change in phraseology reflected his opinion that it was the provisions of the treaty which were ratified, not the previous signature.

30. He submitted the following simplied redraft of article 10:

"The ratification of an instrument is required before a state can become a party to a treaty:

"(1) Where the instrument provides that it shall be ratified; or

"(2) Where the instrument makes no provision for its entry into force prior to ratification; or

"(3) When the form or nature of the instrument or the attendant circumstances do not indicate an intention to dispense with the necessity for ratification."

31. That redraft parallelled the redraft of article 9, on the legal effects of signature, which he had submitted at the previous meeting. He believed that the two redrafts together covered all points of importance in articles 9 and 10 as prepared by the special rapporteur.

32. The special rapporteur's paragraph 1 of article 10 was covered by paragraph 1 of his redraft. The special rapporteur's sub-paragraph 2 (*a*) (ii) really belonged in article 9, and was covered by his redraft of that article. The remainder of paragraph 2 (*a*) and paragraph 3 were

covered by implication in his redraft of article 9, and paragraph 2 (*b*) was covered by the clause introducing his redraft of that article. The special rapporteur's paragraph 3 was covered by paragraphs 2 and 3 of his redraft of article 10. He had retained the presumption that the residual rule was that, where a treaty was silent, ratification was required. The special rapporteur's paragraph 4 should preferably be placed in the new article which would deal with the rights and obligations of states pending the entry into force of a treaty in the preparation of which they had participated.

33. He had used the term "instrument" because the conclusion to be drawn from the redraft of article 1 prepared by the Drafting Committee was that the phrase "which is concluded" meant "which had entered into force". Strictly speaking it was the draft treaty, not the treaty as such, which was ratified.

34. Though his redrafts covered most of the ground covered by draft articles 9 and 10, one question to be settled was whether the draft should contain a provision concerning full-powers, a subject touched on by Mr. Rosenne; a model for such a provision might be found in article 7 (*c*) of the Harvard draft.

35. Mr. PESSOU, on a question of procedure, said that a more convenient and methodical approach might be to revert to the suggestion, made earlier in the session, that bilateral and multilateral treaties and treaties in simplified form should be dealt with separately. In particular, treaties in simplified form differed considerably from formal treaties, in that the latter were made in solemn form, by a process which was necessarily longer and more complex. To deal with all three forms together seemed to have caused unnecessary confusion and to have laid an undue burden on the drafting committee. He believed that Mr. Ago and Mr. Lachs were also in favour of a simpler procedure for dealing with the draft articles.

36. Mr. CASTRÉN commended the special rapporteur for having, in his draft article 10, steered a middle course between the views of the two previous special rapporteurs in respect of certain important points.

37. Article 10 was formulated as a series of rules, to which a number of exceptions were set out. The draft was a very full one, although it could not cover all possible cases. For example, it did not cover the case of conventions entered into by a military commander in time of war, which, it had been claimed, were exempt from the requirement of ratification. In fact a convention such as an armistice could contain political as well as military provisions and might therefore be subject to ratification. That example showed that there were exceptions to every rule.

38. Only one member of the Commission, Mr. Jiménez de Aréchaga, had spoken in favour of rendering the ratification requirement more stringent. Mr. Gros, on the other hand, had urged a return to the proposal of the previous special rapporteur, Sir Gerald Fitzmaurice, that the absence of provisions regarding ratification meant that ratification was not necessary.

39. He was inclined to share the views of Mr. Gros, for the reasons given by Sir Gerald Fitzmaurice. The main reason was that if, because of constitutional requirements or for any other reason, ratification was necessary, the representative of the country concerned should either insist on the inclusion of an explicit provision in the treaty, or make a clear declaration to the effect that his signature was subject to ratification. State practice supported that view.

40. It had been suggested that the distinction between treaties subject to ratification and those not subject to ratification should depend on the importance of the contents of the treaty. That suggestion did not provide any objective criterion; provisions of constitutional law varied considerably from country to country as to what matters were considered important. A distinction based on the form of the treaty would be equally uncertain, because, as noted by Rousseau,[6] contemporary practice made no rigid distinction between formal treaties and informal agreements and the transition from one to the other was often imperceptible.

41. He suggested that article 10 should be redrafted to begin with a provision modelled on paragraph 1, followed by the other provisions which set out the other cases in which ratification was necessary, including the contents of paragraph 2 (*b*). The other provisions of paragraphs 2 and 3 would be dropped. If so desired, it could also be mentioned that ratification was necessary where the requirement was specified in another treaty, where the treaty had been drawn up as a formal instrument, or where the contents of the treaty or the circumstances attending its conclusion showed that the signature was subject to ratification; but the latter were not objective criteria.

42. With regard to the definition of "ratification" in article 1 (i), he proposed the deletion of the term "international" before the words "act whereby a state..." It did not appear either in article 6 of the Harvard draft, or in the corresponding provisions of Professor Brierly's second report, or in Sir Hersch Lauterpacht's two reports. Unless it were deleted, the definition in article 1 would conflict with article 10, which dealt with ratification as an act under domestic constitutional law. The international act of ratification, in other words the deposit or exchange of instruments of ratification, was dealt with in article 11.

43. If the Commission decided to retain the structure of the special rapporteur's draft, it would be better to retain also sub-paragraph 2 (*a*) (i), which specified that ratification was not required for a treaty signed by a Head of State. Cases of such treaties were not unknown in modern practice; to the examples already given, he would add the Potsdam Agreement of 1945. Any provision on the subject should, however, be qualified along the lines indicated in the relevant passage in Oppenheim, which read: "... treaties concluded by Heads of State in person do not require ratification, provided that they

[6] *Principes généraux du Droit international public*, p. 250.

do not concern matters in regard to which constitutional restrictions are imposed upon Heads of State." [7]

44. Mr. Ago and Mr. Lachs would like to change sub-paragraph 2 (*a*) (ii) on the ground that the contracting parties might consider ratification necessary in that case also. That was possible, but why not then mention it in the treaty as had been done, for example, in the Moscow Treaty of Peace of 12 March 1940,[8] between Finland and the Soviet Union.

45. In sub-paragraph 2 (*a*) (iii), he found the reference to "other circumstances" unduly vague in the absence of any clarification as to what those circumstances might be.

46. With regard to sub-paragraph 2 (*a*) (iv), he shared the views of those members who had criticized the expression "intergovernmental agreement"; the agreements which it was intended to cover were in fact agreements between the administrations of the states concerned.

47. To sum up, if the special rapporteur's structure for article 10 were retained, paragraphs 1 and 2 (*b*) should be combined while paragraph 3 (*b*) should be deleted because its contents were covered by the reference to "other circumstances" in sub-paragraph 2 (*a*) (iii).

48. Paragraph 4 served a useful purpose.

49. Mr. YASSEEN said he supported the special rapporteur's general approach in article 10. The requirement of ratification remained the rule. Ratification in modern practice served to maintain and strengthen parliament's control over the acts of the executive; it thus provided one more example of a legal institution surviving while changing its purpose.

50. Those who took a different view pointed to the increasing number of modern treaties concluded in simplified form. He did not believe that undue weight should be attached to mere numbers; the criterion should be the relative importance of treaties signed as formal instruments or in simplified form.

51. Under the constitutional law of many countries, ratification was required for all treaties dealing with certain important matters; as other members had mentioned, such treaties could be concluded in simplified form for practical reasons.

52. In view of those considerations, the principle of the requirement of ratification should be laid down in any general convention on the law of treaties. Opponents might object that their own approach would simplify the drafting of the articles, but the desire for simplification should not prevail where the essential interests of states had to be protected.

53. Mr. VERDROSS said that he had been impressed by Mr. Ago's argument that a rule requiring ratification in the case of a treaty signed by a Head of State would mean that the Head of State would sign the treaty twice over. That argument was not, however, decisive. President Wilson had signed the Treaty of Versailles, and if the United States Senate had given its consent to the ratification of that treaty, the President would have had to sign it a second time for purposes of ratification.

54. There was, however, a more important reason for his criticism of sub-paragraph 2 (*a*) (i). Some constitutions authorized a Head of State to bind the state by his signature, but those constitutions were the exception and not the rule. In all countries with a parliamentary system of government, all acts signed by a Head of State had first to be approved by the government, possibly also by Parliament, and then countersigned by a competent minister. Under that system, the Head of State alone could never sign the treaty.

55. As he saw it, Mr. Ago was defending the idea once put forward by Anzilotti that rules of constitutional law were irrelevant to international law.

56. His own view was that, in the matter of the ratification of treaties, international law referred to the provisions of constitutional law. That reference was illustrated by Article 110 (1) of the United Nations Charter:

> "1. The present Charter shall be ratified by the Signatory States in accordance with their respective constitutional processes."

57. Of course, the reference was to the rules of constitutional law actually applied by states, not to those merely existing on paper.

58. Mr. ELIAS suggested that article 10 be rearranged so that paragraph 1, which dealt with the case where there was an express provision for ratification, became paragraph 1 (*a*); paragraph 3 (*a*), which covered cases where no such provision existed, became paragraph 1 (*b*); while paragraph 2 (*a*), as suggested by Mr. Ago and Mr. Lachs, was redrafted so as to contain exclusively a list of exceptions. Its opening sentence would be re-worded to read: "In the following cases, a treaty shall not require ratification by the signatory States:" followed by the enumeration of the cases specified in sub-paragraphs 2 (*a*) (i) to (iv).

59. With regard to the existing sub-paragraph 2 (*a*) (i), he shared the doubts expressed by Mr. Verdross, although there was substance in the proposition that a Head of State might be authorized to bind his state by his signature. However, he strongly supported the suggestion of Mr. Castrén that, if the provision were retained, it should be qualified by a proviso along the lines indicated in the passage quoted from Oppenheim. Particularly from the point of view of the new nations, which would pay great attention to the International Law Commission's draft, it was highly desirable that such a proviso should be included.

60. With regard to sub-paragraph 2 (*a*) (ii), he supported the suggestion of Mr. Lachs that the final phrase "or upon a particular date or event" should be deleted.

61. He also supported the suggestion of Mr. Lachs that in sub-paragraph 2 (*a*) (iii) the reference to a treaty

---

[7] *International Law*, eighth edition, 1955, Vol. 1, p. 906.

[8] *British and Foreign State Papers*, Vol. 144, p. 393.

which modified or annulled a prior treaty itself not subject to ratification should be deleted.

62. With regard to sub-paragraph 2 (*a*) (iv), there was some danger for the newly independent states of Africa in the suggestion that informal treaties should not require ratification. At a previous meeting, he had referred to treaties taken over by Nigeria at the time of independence. In the case both of his country and of Ghana, Tanganyika and Sierra Leone, rights and obligations arising from a number of such treaties had been taken over by exchanges of notes. Some heavy responsibilities had thus been accepted on the eve of independence in a somewhat casual manner and it had later been found that many of the treaty provisions in question would have required, under the constitutions of the newly independent states concerned, parliamentary approval for their ratification. The legislature had in many cases taken the government to task for having signed the treaties and had claimed the right to discuss the questions of substance involved in them. He accordingly supported the simplified text suggested by Mr. Lachs, with a proviso that in some cases informal treaties should be made subject to ratification. Otherwise, a situation could arise in which a state was held bound by a treaty, although the majority of its inhabitants were unwilling to accept the obligations arising from the treaty.

63. He agreed with Mr. Ago that the case mentioned in paragraph 3 (*b*) constituted an exception to the rule set out in paragraph 1. He therefore supported the proposal that paragraph 3 (*b*) should be placed in paragraph 2, immediately after sub-paragraph 2 (*a*) (iv).

64. Paragraph 4 (*b*) should be deleted as unnecessary.

65. Mr. AMADO said that ratification was always an act of the Head of State. The only modern constitution which provided an exception to that rule was that of Turkey, which specified that parliament ratified treaties.

66. There had been cases of so-called imperfect ratification, where a treaty had been ratified by the Head of State whose action had subsequently not been approved by the parliament of his country. In practice, ratification in all those cases had been recognized as having the same effect in international law as a perfect ratification.

67. In the practice of all civilized countries, if the president signed a treaty, he did so subject to approval by parliament. Alternatively, the president would obtain prior authority from parliament to sign the treaty; in that case, his signature would bind the state.

68. The final signature and ratification which made a treaty a reality was invariably an act of a Head of State.

69. Mr. de LUNA said he agreed both with the general tenor of article 10 and with the special rapporteur's commentary; he also agreed with the special rapporteur's approach to the problems of the relationship between ratification and signature.

70. However, the language used not only in article 10 but also in article 12, paragraph 4, and article 9, paragraph 3, should be carefully reviewed. As they stood, those provisions could suggest that the Commission supported one or the other of two obsolete doctrines in regard to ratification.

71. The first of those doctrines was the historical one which treated ratification by a Head of State of the signature of his representative almost on a par with ratification by a principal of his attorney's act when executing a power-of-attorney in private law. Grotius and many other early writers had viewed ratification in that light. Under that ancient doctrine, subsequent ratification could be held to have a retroactive effect, because it confirmed and validated the signature given by the representative. The consent given to a treaty by the signature was deemed to be conditional upon ratification.

72. A more recent but also obsolete doctrine, held by only one contemporary writer, Pallieri, regarded signature and ratification as two stages of a single operation.

73. Modern doctrine regarded signature and ratification as two separate acts. Signature had the effect of giving final form to the text of the treaty; ratification was the act by which the state bound itself to observe the treaty.

74. Although, like Mr. Amado, he did not favour theoretical discussions, he thought that the Commission should do nothing that might suggest that it supported either of the two obsolete doctrines to which he had referred.

75. He accordingly urged that paragraph 1 of article 10 should be redrafted so as to eliminate the conditional element contained in the words "shall be subject to ratification".

76. In article 9, paragraph 3, a similar adjustment should be made in regard to such expressions as "subject to ratification" and "conditional upon subsequent ratification or acceptance".

77. For similar reasons, it would be necessary to examine carefully the provisions of article 12, paragraph 4, which referred to the possible "retroactive effects of ratification".

78. All the provisions to which he had referred should be reviewed for the purpose of eliminating any suggestion that consent to a treaty could be given in two stages, once at the time of signature and again at the time of ratification.

79. He believed that the adjustments of language he had suggested were in keeping with the intentions of the special rapporteur in article 10, so lucidly set out in his commentary, and with the views of the Commission as a whole.

80. Mr. AGO said that the Commission should not enter into theoretical controversies. The theory that in the matter of ratification of treaties there was a reference by international law to municipal law could have the most dangerous consequences, because it would mean that a treaty ratified by a Head of State who had not

obtained prior authority from the legislature, or a treaty which the legislature refused to approve, would be void, whereas all members agreed that in such instances a treaty existed and an international obligation had been validly assumed.

81. Mr. BARTOŠ said he agreed with Mr. Verdross that in the case of treaties signed by a Head of State a distinction should be drawn between the act of signature and the act of ratification. The Head of State could not finally bind his state until he exercised his right of ratification, but if he did ratify, it had to be presumed that he had acted in accordance with the constitutional requirements of his country. The other party must consider that the will of the ratifying state had been regularly and validly expressed by the Head of State. It was not open to the other party to question it.

82. He did not share Mr. Verdross' view on the question of the reference to constitutional law by the text of the convention, even although he based his argument on article 110 of the Charter. It was a general principle of international law that ratification was carried out in accordance with the requirements of the constitution, and the instrument of ratification emanating from the Head of State or the competent organ established an absolute presumption to that effect.

83. There was in fact no great difference between Yugoslav practice and the "internationalist" theory expounded by Mr. Gros at the previous meeting. In Yugoslavia, ratification was a parliamentary act, but the instrument certifying that ratification had taken place was issued by the President of the Republic who represented the state vis-à-vis other countries. That was the only sense in which it could be said that there was any reference to internal constitutional law, whereas the instrument of ratification was presumed sufficient to produce the effects in international law.

84. It would be dangerous to allow the possibility of other parties questioning whether ratification had complied with constitutional requirements, or claiming that their partner in good faith had committed some irregularity, or even nullified the act of ratification through some breach of constitutional law.

85. On the other hand it should be noted that there had been instances, during the second world war for example, of agreements which violated such requirements through being ratified under duress. In those cases the partners in bad faith were not protected against objections of irregularity of substance, even although the instruments of ratification were in good and due form.

86. Commenting on paragraph 3 of Mr. Briggs' redraft, he said that the text was too vague; it would be no contribution to international law to leave open the question what forms of instrument did not require ratification. What were the circumstances which "do not indicate an intention to dispense with ratification"? Such wording might open the door to conflicting interpretations and the kind of controversies that arose from the differing conceptions in Europe and the United States of what was meant by an "executive agreement" and what by a treaty.

87. The special rapporteur had not dealt with the interesting legal question whether treaties existed which required ratification by one party and not by the others. There had been instances in which, although no provision concerning ratification appeared in the treaty, Yugoslavia had notified the other parties that it had ratified and was ready to proceed to an exchange of the instruments of ratification. The other parties, which had been the Benelux countries, had signified that no ratification by them was needed. He wondered whether that particular matter was ready for codification. In any event, it was a question which should at least be mentioned in the commentary.

88. Mr. CADIEUX said that, though impressed by the special rapporteur's commentary and some of the proposals he had put forward as a solution to a number of controversial and difficult problems, he believed the article could be simplified by the Drafting Committee, which would have a fairly clear idea of the Commission's views on matters of substance.

89. The essential principle was that stated in paragraph 3, which he fully endorsed, that in the absence of any express provision in the treaty, ratification was required.

90. The intention to dispense with ratification might be inferred from the form of treaty adopted, but the presumption could not be regarded as an absolute one.

91. The problems raised by sub-paragraph 2 (*a*) (i) might be avoided by changing the wording or inserting an explanation in the commentary. Perhaps the question of the intention to dispense with ratification in the case of treaties signed by a Head of State might be treated as analogous to the case covered in sub-paragraph 2 (*a*) (iii).

92. Mr. TSURUOKA said it seemed that the special rapporteur had taken a far firmer view than his predecessor on the questions dealt with in paragraph 2. That paragraph would require fundamental modification if Mr. Ago's suggestions were adopted.

93. Sir Humphrey WALDOCK, Special Rapporteur, replying first to observations on the structure of the article, said he was quite prepared to amalgamate paragraphs 2 (*a*) and 3 (*a*), as suggested by Mr. Ago; the provision would begin with a statement of the cases in which ratification was not required, followed by a list of exceptions.

94. That change would make it desirable to transfer paragraph 2 (*b*) to a position immediately after paragraph 1, since it also dealt with instruments which provided express evidence of the intention to ratify on the part of one or both parties.

95. He found Mr. Lachs' suggestions about changes in the order of the various sub-paragraphs of paragraph 2 acceptable.

96. Replying to observations on the substance, he agreed with Mr. Briggs and Mr. de Luna that the definition of

ratification could be improved. The definition given was derived partly from that proposed by Sir Gerald Fitzmaurice and others. Since it was not easy to express the notion of confirmation without running into difficulties as to what exactly it was that was being confirmed, it would be best to abandon it and to define ratification as the expression of the consent of states to be bound by the treaty. Mr. Briggs' proposed redraft had certain advantages, but he thought it was over-simplified and that the Commission should try to preserve something of the structure of articles 9 and 10.

97. The Drafting Committee might be invited to consider whether or not cases in which "ratification" took place even though there had been no signature, as in the ILO Conventions, should be covered, or whether it would be enough to mention them in the commentary.

98. It should be kept clearly in mind that the purpose of paragraph 2 was neither to lay down rules obliging states to choose a particular form of treaty, nor to lay down rules on ratification, but to provide a residual rule for cases where no provision concerning ratification had been included in the treaty itself or in the full powers or in other instruments. Essentially, what had to be established was intention.

99. Although internal constitutional requirements might be present in the background, Mr. Ago and Mr. Amado were quite right in stressing that it was impossible to refer to the constitutional law of the parties. That was particularly undesirable when the constitutional requirements in regard to ratification were not fully stated in the constitution but depended on the nature or content of the treaty; for then the international rule in regard to ratification might depend on subjective judgements as to those questions and the security of treaties might be endangered. In effect, the Commission was engaged in trying to state what would be the position if states acted in their treaty-making in a particular manner, and it would be helpful, especially to new states without long experience, if the draft were as specific as possible.

100. With regard to the cases covered in sub-paragraph 2 (*a*) (ii), it seemed to be generally agreed that it was possible to presume that, if a treaty itself provided that it came into force upon signature but said nothing about ratification, ratification had not been contemplated. He himself thought that the same presumption could properly be made when the treaty was expressed to come into force upon a particular date without a word being said about ratification. But if other members of the Commission thought that the presumption was not strong enough, the paragraph would need to be reconsidered. Perhaps the reference to a provision stating that it would come into force upon the occurrence of an event was too broad in scope.

101. With regard to the controversial question of treaties signed by Heads of State, the Commission should refrain from laying down rules that sought to control matters which pertained to the domestic affairs of states. If there were any danger in Heads of State possessing treaty-making powers, it was for the states themselves to exercise such control as was necessary. The Commission should assume that such persons would not act *ultra vires* and should not seek to anticipate irregularities on the domestic plane; otherwise it might nullify treaties made in that way by certain states, without being subject to ratification. In general, the technique of treaty-making between Heads of State was comparatively uncommon and when it occurred in democratic countries with a modern constitution, was so exceptional that it could be assumed that the Head of State would obtain any necessary authority for his acts from the legislature.

102. The first part of sub-paragraph 2 (*a*) (iii) dealt with the more delicate problem of inferring intention from circumstances. For example, intentions concerning ratification might be discussed during the negotiations but not expressly referred to in any instrument, either the treaty itself or full-powers; a reference to that problem should be retained, though perhaps in a modified form.

103. As for the latter part of sub-paragraph 2 (*a*) (iii), the presumption that, if a prior treaty was not subject to ratification, an amending treaty would also not be subject to ratification, was United Kingdom practice and the position was so stated by Lord McNair.[9] If, however, the Commission took the view that the presumption was not strong enough, the passage might have to be dropped.

104. The provision in sub-paragraph 2 (*a*) (iv) contained the strongest element of presumption. He had not stated that all that category of instruments did not require ratification — for sometimes the parties provided otherwise — but that resort to such an informal type of treaty was obpective evidence of intention to dispense with ratification. In fact, more than ninety per cent of such treaties came into force without any reference to ratification, and he knew of no instance of the practice being contested by a legislative organ. Practice thus provided a sound basis for the presumption which, however, was in no sense an absolute rule.

105. There seemed to be general opposition to the inclusion of paragraph 4 (*b*) but some mention of the point dealt with there should be made at least in the commentary.

106. He agreed with Mr. Ago that paragraph 4 (*a*) was closely linked with the obligation to proceed in good faith to ratification; the provision should therefore be transferred to the new article which the Commission had in mind to cover the rights and obligations of states prior to the entry into force of a treaty.

107. The CHAIRMAN suggested that article 10 be referred to the Drafting Committee in the light of the discussion, it being understood that the position of all members was reserved on such matters of substance as had not been fully debated.

It was so agreed.

The meeting rose at 1 p.m.

---

[9] *The Law of Treaties*, 1961, p. 138.