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**A/CN.4/SR.783**

**Summary record of the 783rd meeting**

Topic:  
**Law of Treaties**

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adoption of the text of a treaty and authentication as a residuary step. Perhaps the concept of authentication could be incorporated in article 6.

95. The CHAIRMAN said that, if there were no objection, he would, consider that the Commission accepted Mr. Ago's proposal, together with Mr. Lachs's suggestion as to the order of discussion of articles 7-11.

*It was so agreed.*

The meeting rose at 12.50 p.m.

### 783rd MEETING

Thursday, 13 May 1965, at 10 a.m.

Chairman: Mr. Milan BARTOŠ

Present: Mr. Ago, Mr. Amado, Mr. Briggs, Mr. Castrén, Mr. El-Erian, Mr. Jiménez de Aréchaga, Mr. Lachs, Mr. Pal, Mr. Paredes, Mr. Pessou, Mr. Reuter, Mr. Rosenne, Mr. Tabibi, Mr. Tsuruoka, Mr. Tunkin, Sir Humphrey Waldoock, Mr. Yasseen.

#### Law of Treaties

(A/CN.4/175 and Add.1-3, A/CN.4/177 and Add.1, A/CN.4/L.107)  
(continued)

[Item 2 of the agenda]

ARTICLES 7 (Authentication of the text) (continued),<sup>1</sup>  
10 (Signature and initialling of the treaty) and 11 (Legal effects of a signature)

#### Article 10

##### Signature and initialling of the treaty

1. Where the treaty has not been signed at the conclusion of the negotiations or of the conference at which the text was adopted, the States participating in the adoption of the text may provide either in the treaty itself or in a separate agreement:

(a) That signature shall take place on a subsequent occasion; or

(b) That the treaty shall remain open for signature at a specified place either indefinitely or until a certain date.

2. (a) The treaty may be signed unconditionally; or it may be signed *ad referendum* to the competent authorities of the State concerned, in which case the signature is subject to confirmation.

(b) Signature *ad referendum*, if and so long as it has not been confirmed, shall operate only as an act authenticating the text of the treaty.

(c) Signature *ad referendum*, when confirmed, shall have the same effect as if it had been a full signature made on the date when, and at the place where, the signature *ad referendum* was affixed to the treaty.

3. (a) The treaty, instead of being signed, may be initialled, in which event the initialling shall operate only as an authentication of the text. A further separate act of signature is required to constitute the State concerned a signatory of the treaty.

(b) When initialling is followed by the subsequent signature of the treaty, the date of the signature, not that of the initialling, shall be the date upon which the State concerned shall become a signatory of the treaty.

#### Article 11

##### Legal effects of a signature

1. In addition to authenticating the text of the treaty in the circumstances mentioned in article 7, paragraph 2, the signature of a treaty shall have the effects stated in the following paragraphs.

2. Where the treaty is subject to ratification, acceptance or approval, signature does not establish the consent of the signatory State to be bound by the treaty. However, the signature:

(a) Shall qualify the signatory State to proceed to the ratification, acceptance or approval of the treaty in conformity with its provisions; and

(b) Shall confirm or, as the case may be, bring into operation the obligation in article 17, paragraph 1.

3. Where the treaty is not subject to ratification, acceptance or approval, signature shall:

(a) Establish the consent of the signatory State to be bound by the treaty; and

(b) If the treaty is not yet in force, shall bring into operation the obligation in article 17, paragraph 2.

1. The CHAIRMAN invited the Commission to consider the group of articles 7, 10 and 11 together, as agreed at the previous meeting. The Special Rapporteur had already introduced article 7; he would now ask him to introduce his revised text of article 10, which read:

#### Article 10

##### Signature and initialling of the text

1. Signature of the text takes place in accordance with the procedure prescribed in the text or in a related instrument or otherwise decided by the States participating in the adoption of the text.

2. Subject to articles 12 and 14.

(a) Signature of the text shall be considered unconditional unless the contrary is indicated at the time of signature;

(b) Signature *ad referendum*, if and when confirmed, shall be considered as an unconditional signature of the text dating from the moment when signature *ad referendum* was affixed to the treaty, unless the State concerned specifies a later date when confirming its signature.

3. (a) If the text is initialled, instead of being signed, the initialling shall

(i) in the case of a Head of State, Head of Government or Foreign Minister, be considered as the equivalent of signature of the text;

(ii) in other cases operate only as an authentication of the text, unless it appears that the representatives concerned intended the initialling to be equivalent to signature of the text.

(b) When initialling is followed by the subsequent signature of the text, the date of the signature, not of the initialling, is the date on which the State concerned shall be considered as becoming a signatory of the treaty.

<sup>1</sup> See 782nd meeting, paras. 70-71.

2. Sir Humphrey WALDOCK, Special Rapporteur, said that as suggested by Mr. Lachs, the Commission had decided to take article 10 as the starting point of its enquiry, bearing in mind the need to refer to other articles, especially articles 7 and 11, in the course of the discussion.

3. Mr. Ago had suggested that it would be more logical and useful to start with the question of legal effects. In fact, that question was dealt with primarily in article 11 ; article 10 only laid down certain rules—some of which had a certain substantive content—regarding the various forms of signature.

4. In the light of the discussion and of Mr. Ago's suggestion, it would be appropriate to consider what was the substantive content of articles 7, 10 and 11 on the question of signature. Those articles covered four forms of signature : first, signature pure and simple ; secondly, signature *ad referendum*, which was a conditional signature, subject to confirmation ; thirdly, initialling, the effects of which varied according to whether it was done by a Head of State, Head of Government or Foreign Minister on the one hand, or by a lesser representative on the other ; and fourthly, signature subject to ratification, acceptance or approval. Some treaties were expressly stated to be subject to ratification, acceptance or approval, but it was quite common for a reservation of that kind to be attached to a signature to a treaty which did not contain such a stipulation.

5. Distinct from those four forms of signature was what might be described as a representative signature by the President of the Assembly or the Executive Head of an international organization ; such a signature was attached to the text for the purpose of authentication on behalf of all the States Members of the organization, but it was not a signature in the accepted sense, because no State could base thereon any claim to have signed the treaty.

6. With regard to the legal effects of signature, all members were agreed that all four forms of signature constituted an authentication of the text of a treaty, if the text had not previously been authenticated in some other manner, such as by initialling, incorporation in a final act or through the special procedures of an international organization.

7. Where there had been prior authentication of the text and the treaty was subject to ratification, acceptance or approval, signature had only minimal effects. First, it qualified the State concerned to be considered as a signatory and to proceed to ratification, acceptance or approval in accordance with the terms of the treaty ; in the absence of such signature, it could only become a party to the treaty by accession, if at all. Secondly, signature gave rise to the obligation of good faith set forth in article 17. Thirdly, signature as a voluntary act of the State could be considered as having a certain significance as expressing general and provisional support of the text. Fourthly, it was arguable that signature conferred on the signatory State a certain status for such purposes as being informed by the depositary of all subsequent acts concerning the treaty.

8. In the case of a treaty which was not subject to ratification, signature had wider effects : it established

the consent of the State to be bound, unless the signature itself reserved ratification.

9. Signature *ad referendum* only had the effect of authenticating the text of the treaty. Moreover, when confirmed it became a full signature, dating from the moment when the signature *ad referendum* was affixed to the treaty.

10. With regard to initialling, it was proposed in paragraph 3 (a) (i) of his revised text that it should be considered as the equivalent of signature in the case of a Head of State, Head of Government or Foreign Minister. In the case of a lesser representative, in the absence of any contrary indication by him initialling would operate only as an authentication of the text, so that its effects would be similar to, but not identical with, those of signature *ad referendum*.

11. A signature which was expressed as being subject to ratification would produce the same effects as the signature of a treaty which was by its own terms subject to ratification, acceptance or approval. That particular case had not been specifically covered in the Commission's draft articles and the need to fill the gap should be borne in mind.

12. He had revised the text of article 10 in the light of government comments. Paragraph 2 of his revised text stated the rules which he had just described regarding signature pure and simple and signature *ad referendum*. Paragraph 3 stated the rules on initialling, which were not purely procedural in character : they involved some points of substance, although operating on a procedural plane.

13. With regard to the suggestion that articles 7, 10 and 11 should be combined, it should not prove difficult to eliminate article 7 and transfer its contents to articles 10 and 11 ; beyond that, any effort to combine the contents of articles 10 and 11 in a single provision would involve some very complex drafting problems.

14. Mr. BRIGGS said that certain provisions of article 7 should be retained, in particular those on the authentication of the text of a treaty by signature or by incorporation in the final act of the conference at which the text was adopted or in a resolution of an international organization ; so should some of the provisions of article 11.

15. On the other hand, he doubted the usefulness of article 10. Paragraph 1 of the Special Rapporteur's revised text was of an expository character ; it was more suited to a code than to a draft convention and should be dropped.

16. He was not entirely clear as to the significance of the opening words of paragraph 2, " Subject to articles 12 and 14 ". In paragraph 2 (a), the use of the word " unconditional " made the provision ambiguous : it could be taken as meaning that reservations were precluded or that ratification could not be reserved. With regard to paragraph 2 (b), he could see no special advantage in conferring retroactive effect on a signature *ad referendum* when it was subsequently confirmed. Moreover, he doubted whether signature *ad referendum* and initialling were sufficiently important to merit separate provisions, as in paragraphs 2 (b) and 3.

17. Care should be taken to avoid any suggestion that a signature could be subject to ratification; it was the instrument, the draft treaty, not the signature, that was subject to ratification.

18. Sir Humphrey WALDOCK, Special Rapporteur, said he agreed with the last remark. However, it was quite common for a treaty not to be subject to ratification, but for a State, on signing the treaty, to make a reservation regarding ratification. Since the practice was quite common, the gap in the Commission's draft should be filled.

19. Mr. LACHS said his views were similar to those of Mr. Briggs.

20. He was in favour of combining articles 10 and 11 in a single article; elements omitted from the new article could then be transferred to article 7. With that rearrangement, there would be two sets of provisions, the first dealing with signature and its legal effects, the second with authentication and initialling.

21. Article 10 covered, in a single set of provisions, the three functions of signature, initialling and authentication. Its provisions consisted largely of descriptions and did not specify the legal effects; hence they served practically no useful purpose.

22. Article 10 drew a distinction between two classes of initialling; one was assimilated to signature, while the effects of the other did not go beyond authentication. He suggested that the provisions on the first class should be included in the article on signature and those on the second in the article on authentication.

23. The structure of the Special Rapporteur's revised text could give rise to a number of difficulties. The proposed title would tend to weaken the article because it referred to signature and initialling of the text, instead of signature and initialling of the treaty itself. Another defect was the opening phrase of paragraph 2, which made the provisions of that paragraph conditional on those of articles 12 and 14; that proviso was not justified because the paragraph did not refer to legal effects, but merely described certain functions and labelled them accordingly.

24. He would like to have a more substantive article on signature, which, while descriptive, would at the same time cover the legal effects; there should be a separate article on authentication, incorporating some of the elements of the present article 7.

25. Mr. CASTRÉN thought that the Commission should first discuss articles 7, 10 and 11 one by one, beginning with article 10. It would then be able to judge whether they could be combined, for each article contained some elements that should be retained; the Drafting Committee could be entrusted with that task. As redrafted by the Special Rapporteur the articles were clearer and more concise; governments had made few comments on them, so it could be concluded that they were satisfied.

26. On article 10, four governments had submitted comments. Their criticisms were certainly justified in several respects, and to meet them, the Special Rapporteur had almost completely recast the text. The new version had the advantage of being less descriptive and

more concise than the former one. He was not sure that the title of the article should be changed as the Special Rapporteur proposed. It was usual to speak of the signature of a treaty, not of the signature of its text, and according to the new draft, initialling could sometimes have the same legal effect as signature. If the title was to be changed, it should become "Signature and initialling of the text of the treaty". The words "of the treaty" would also have to be added after the word "text" in the first line of paragraph 1, and the words "a related instrument" in the same paragraph would have to be amended to read "an instrument related to the treaty".

27. He approved of the inclusion of the words "Subject to articles 12 and 14" at the beginning of paragraph 2. In paragraph 2 (b) the word "unconditional" seemed rather ambiguous. Moreover, instead of referring only to "signature *ad referendum*", if and when confirmed", the meaning of signature *ad referendum* should be explained, as had been done in the 1962 draft.

28. With regard to paragraph 3, he proposed that the words "instead of being signed" in sub-paragraph (a) should be deleted, since initialling or signature were not generally alternatives; in most cases initialling was followed by signature. Sub-paragraph (a) (i) was acceptable, but with the addition of the proviso "unless the contrary is stated", since practice was not uniform in all countries. If that addition were not made, sub-paragraph (b) should be linked to sub-paragraph (a) (ii).

29. Mr. AGO thought that, to find a way out of the difficulty, the Commission must choose between two systems: the descriptive system, which was that of article 10—a remnant of earlier drafts that had preceded the Special Rapporteur's—and the substantive system, which would concentrate on the force of the acts and their legal effects and would not retain much of the existing article 10.

30. The two essential legal effects which should be mentioned were, first, authentication, which consisted in establishing that the text adopted was considered to be definitive and *ne varietur*, and which could take place by signature pure and simple, by signature *ad referendum*, by initialling or by insertion in a final act or resolution; and secondly, establishment of the final consent of a State to be bound by a treaty; in some cases that function would be performed by signature, in others an act of ratification, acceptance or approval would be required.

31. In his opinion the Commission should take article 11 as a basis for drafting another article embodying the essential points of articles 7 and 10, to be placed earlier in the draft. Unlike Mr. Lachs, however, he thought the logical order would be to place authentication before the provision that signature could, in certain cases, express the consent of a State to be bound by a treaty.

32. Mr. PESSOU said there were certain discrepancies in the text which led him to oppose article 10.

33. With regard to the question whether the essential element was signature or ratification, he reminded the Commission that sometimes, when a Head of State

or Head of Government had signed a convention, the legislative organs of the government refused to ratify it. Consequently, he thought ratification was the more important, since it alone produced legal effects. It was true that paragraph 1 of draft article 10, as adopted by the Commission, provided that where the treaty had not been signed at the conclusion of the negotiations or of the conference, the States participating might provide that signature should take place on a subsequent occasion, or that the treaty should remain open for signature either indefinitely or until a certain date; and according to paragraph 3 (b), the State concerned became a signatory of the treaty on the date of signature. He was convinced, however, that the real date was the date of ratification.

34. The right to become a party to a treaty did not really correspond to a precise legal concept; it was not because one State invited another State to participate in a conference at which a treaty was drawn up that the latter had the right to become a party. Signature certainly had some effects, but they were provisional. It was possible that between the time when the text was drawn up and the time when the treaty was finally concluded, reservations or other circumstances might oblige the State to revoke the signature already appended. Thus effective participation resulted not from the signature, but from the final ratification which brought the treaty into force.

35. Mr. ROSENNE said the Special Rapporteur's introduction had been most illuminating. In his own practical experience, he had been struck by the fact that the distinction between signing and initialling a treaty, or even signing it *ad referendum*, very often had political rather than legal implications. It was often difficult to determine the exact legal significance of the political nuances.

36. On the general approach to article 10, his views were very close to those of Mr. Ago. As to the title, the difficulties that had arisen could perhaps be avoided by adopting the very short title "Signature and initialling".

37. Mr. TUNKIN said that articles 7, 10 and 11 were examples of provisions containing descriptive elements and unnecessary detail. Those provisions should be simplified, the descriptive material eliminated and the contents couched in terms suited to legal norms.

38. What had to be formulated was a residuary rule on the legal effects of the acts of authentication, signature and initialling. It should be a residuary rule because practice varied widely. Signature and initialling could perform many functions and, as indicated by Mr. Rosenne, certain nuances were sometimes more political than legal in character.

39. He supported Mr. Lachs's suggestion that articles 10 and 11 be combined. In the introductory paragraph to the new article, it might be appropriate to make a proviso to the effect that the rules therein set out applied unless otherwise agreed by the States concerned, or unless otherwise provided by the rules of the international organization concerned.

40. The structure of articles 7, 10 and 11 should reflect the various stages in the treaty-making process. The

first of those stages was the authentication of the text. The other stages were initialling and signature, which in many cases overlapped.

41. It was desirable to avoid laying down any very rigid rules on signature and initialling. The only legal rule in the matter, and one which was well worth stating in the draft articles, was that if a treaty did not provide for ratification, signature constituted the final act by which a State established its consent to be bound by the treaty. The statement of that rule should be followed by a provision on the legal effects of signature *ad referendum*, which was an exception to the rule.

42. For the sake of elegance in drafting, the provisions on initialling could be made the subject of a separate article. In international practice, initialling performed a number of different functions, but he had some misgivings over the statement in paragraph 3 (a) (i) of the revised text that initialling by a Head of Government or Foreign Minister was to be considered as the equivalent of signature. That was not always the effect, so that the provision did not accurately reflect existing practice.

43. The rule should be stated in very cautious terms and should express the idea that initialling could be equivalent to signature or constitute authentication, as the parties might agree; he did not think it was possible to go further.

48. Article 7 was not absolutely indispensable, but in order to trace out all the stages of the conclusion of a treaty, it would be useful to include in the draft articles some provisions on the authentication of the text; but they should not go into undue detail.

49. Mr. REUTER said that, after long hesitation, he had come to the conclusion that the Special Rapporteur's proposals should be taken as the basis for discussion.

50. If the Commission was to be logical, it must recognize that once the clauses constituting rules of international law had been removed from articles 7, 10 and 11 very little would be left; it would therefore be wise not to carry pruning too far.

51. Mr. Ago had mentioned two methods, one functional and the other formal. If the second method were adopted, the Commission must consider only the acts of initialling, voting and signing, and describe them.

52. If the functional method were adopted, it would be necessary to consider what were the main functions in international law. The first was that of establishing the substance of the treaty: it was "authentication", a convenient term, but one which, in French, applied only to a document and not to its substance. The second was that by which a State expressed its genuine, though provisional, will to be bound. The third was that by which the State in fact bound itself. Sometimes a long procedure comprising the three functions was used, but there was also a shorter procedure comprising only the first two, and a very short procedure in which the three functions were reduced to a single act.

53. The Special Rapporteur had adopted the functional method, by dealing first with authentication, and then the organic method. His solution was not extremely satisfactory from the intellectual point of view, but it

was the most practical, and he (Mr. Reuter) supported it, though still convinced that the drafting should be simplified as much as possible.

54. Mr. TSURUOKA said that Mr. Reuter had put his finger on the source of the Commission's difficulties. In the articles under discussion the Commission referred to authentication, signature and ratification, but at the same time to initialling. And whereas "authentication" designated the result to be achieved, the acts of initialling and signature were not accompanied *ipso facto* by their results. Thus there was an inconsistency of expression that was intellectually unsatisfactory. He hoped that the Drafting Committee would overcome that difficulty in the choice of words.

55. With regard to the method of work, since nearly all the members of the Commission were in agreement on the substance of the three articles, their examination would probably prove more fruitful after they had been recast by the Drafting Committee.

56. Mr. PAL said that all the matters under consideration had been discussed in 1962 when the text of articles 7, 10 and 11 had been adopted. One of the great difficulties was that several different acts were involved and their effects sometimes overlapped.

57. He could support Mr. Ago's suggestion on the understanding that the content of articles 7, 10 and 11 would not be materially affected. Nothing material should be added to or taken away from the substance of those articles; they should merely be rearranged, with a view to minimizing the extent of overlapping of the legal effects of the several acts involved.

58. Mr. YASSEEN observed that the opinions of members of the Commission were converging on a new draft. The articles raised no new question of substance; the rules they laid down were generally correct and faithfully reflected the practice; but there was a feeling that they should be drafted differently, omitting a number of details.

59. He had some doubts, however, about the rule laid down in the Special Rapporteur's revised text of article 10 concerning initialling by Heads of State, Heads of Government and Foreign Ministers. He did not believe there was any such rule in positive international law. From a logical point of view, he could not regard it as a reasonable interpretation of the act; if a President, a Prime Minister or a Foreign Minister really wished to sign, he would do so; if he merely initialled, it was because he wished to do something other than sign. Hence that rule should not be retained.

60. Mr. AGO thought it important for the Commission to choose between the two methods referred to by Mr. Reuter, for it would not be able to produce a clear text by trying to combine them. And if an unclear text was submitted to a diplomatic conference, it was to be expected that it would give rise to prolonged discussions and that its chances of acceptance would be jeopardized. As the Special Rapporteur and Mr. Reuter had pointed out, the problem was a difficult one, but that was an additional reason why the Commission should try to solve it itself.

61. If the Commission thought it more convenient to deal with the various acts one after the other by the descriptive method, stating the conditions under which they took place and their effects, it should start with initialling and acts having the same effect, then take signature and then ratification and similar acts. If it preferred the functional approach, which meant considering the legal effects of the acts, it should deal first with authentication and then with establishment of the final consent of the State.

62. With regard to substance, he found little to eliminate from articles 7 and 11, but he would be tempted to shorten article 10 considerably.

63. The Drafting Committee ought to be able to produce a satisfactory text, but the Commission should first give it instructions on the method to be followed.

64. Mr. REUTER said he did not wish to divert the Commission's attention from Mr. Ago's question, but he had a brief comment to make on the matter of initialling by a Head of State or Government. In fact, a Head of State did not initial a document, for only the solemn act of signature was consistent with the dignity of his office. If a series of documents were annexed to a treaty, however, a Head of State might sign the principal document and merely initial the others. Initialling was then obviously equivalent to signature. But in his opinion that was the only case in which it could be said that initialling by a Head of State was equivalent to signature.

65. The CHAIRMAN, speaking as a member of the Commission, said that the Commission had two tasks: to draw up a text and to set out international obligations. The Drafting Committee should take good care to distinguish between those two tasks.

66. As to the method to be adopted, the Commission should decide whether it wished to propose only norms having legal effects or whether it wished to add some interpretative norms to clarify certain legal ideas.

67. Interpretative norms also had direct legal effects, and it was dangerous to rely entirely on judges to draw inferences from the norms which established obligations and rights. There were general principles and ideas that ought to be defined. Experience showed that most of the difficulties which arose in the application of international law were due to the fact that certain institutions were not well defined. Too much latitude was left to case-law. The judgements of international courts showed great differences in the understanding and interpretation of certain ideas.

68. As to the distinction the Special Rapporteur proposed to make in paragraph 3 of article 10, according to the office of those who appended their initials, he agreed with Mr. Reuter that a Head of State rarely confined himself to initialling a treaty. Nevertheless, he had known cases of that kind in which it had even been provided that the treaty should take effect immediately, without subsequent confirmation. That applied to certain instruments concluded at conferences of Heads of State.

69. With regard to paragraph 3(b) of the revised text, he pointed out that a very important instrument, which had preserved peace by settling the relations between

Italy and Yugoslavia, namely, the London Memorandum of Understanding regarding the Free Territory of Trieste,<sup>2</sup> had been merely initialled by the ambassadors of the countries concerned, who had been duly authorized to make a settlement. The instrument had taken effect immediately, with an indication that the governments would confirm the agreement thus concluded. That example showed that it was dangerous to give definitions which were too categorical. Mr. Tunkin had been right in saying that the Commission should try to draft residual rules, because the practice was very varied.

70. Without making any formal proposal for the moment, he would urge the Commission to settle the question of method in regard both to the order of the provisions and to their substance, and in particular to decide whether the draft should only state rules of law or should also contain provisions of a descriptive character.

71. Mr. TUNKIN said that the difficulties should not be exaggerated. It was true that signature might have two different functions. When ratification was stipulated in a treaty, signature was a stage in its conclusion ; when there was no ratification, signature was the final act by which a State signified its consent to be bound. There was thus necessarily some overlapping, but for practical purposes the Special Rapporteur's method was quite acceptable.

72. Article 7 should come first ; articles 10 and 11 should be combined, giving priority to article 11, since it was concerned mainly with the legal effects of signature and initialling. The Drafting Committee could consider whether initialling and signature should be dealt with in the same article or in two separate articles.

73. Mr. CASTRÉN said that after hearing the comments of Mr. Reuter and the Chairman, he felt bound to express the view that it would be difficult to make a complete change of method at that stage. The Special Rapporteur had prepared texts based on practical considerations which had led him to combine two methods. The Commission had reached the second reading of its draft and had already made a choice. It had, for example, adopted the definition of a " treaty " in principle ; for as the Chairman had pointed out, it was impossible to omit all definitions from the draft. Furthermore, it had referred article 5, which was an entirely descriptive article, to the Drafting Committee ; it should be noted that those who were asking the Commission to choose a new method had supported article 5. He therefore urged the Commission to continue on the lines it had followed up to the present.

74. Mr. LACHS, referring to initialling, said that after meetings between Heads of State the document issued sometimes took the form of a declaration and sometimes that of a communiqué. Some such documents were initialled and not signed. The question of initialling was one of substance and should not be disregarded.

75. The Drafting Committee should be asked to prepare a new text, which might consist of three articles or of two, on authentication, initialling, and signature ; it should then submit a report on the subject.

76. Mr. AGO said he had no wish to provoke a long discussion on method. Personally, he could accept Mr. Tunkin's proposals. If the Commission referred the three articles to the Drafting Committee, with instructions to draft two articles on the basis of articles 7 and 11, adding to one or the other of them what ought to be retained of article 10, the Committee would probably be able to find a satisfactory solution. What would be incongruous would be to add an article on initialling, when authentication had been dealt with in article 7. The Commission would certainly find it useful to resume its discussion on the basis of the more elaborate text which the Drafting Committee would submit to it.

77. Sir Humphrey WALDOCK, Special Rapporteur, said he would not take up the specific points made on article 10, since it was clear that the article in its existing form would disappear.

78. With regard to the method to be followed, he did not think that in drafting a codifying convention there was any reason to exclude one method altogether in favour of the other ; nor did he think that there would be any great difficulty in arriving at the kind of result which members of the Commission appeared to desire.

79. Articles 7 and 11 should be retained ; anything that ought to be retained of article 10 could be incorporated in article 11 or perhaps partly in article 7. He agreed that, provisionally at all events, there was no case for a special article on initialling ; the point could be covered in article 7 or in article 11.

80. It was certainly somewhat unusual for a Head of State to initial a document with the idea that it would afterwards be referred to someone else for investigation. But on a point of that kind it was wise to be very cautious, and his new draft was rather too strongly worded. It might be better to treat both forms of initialling—by superior organs of the State, or by one of the lesser representatives—as essentially a matter of intention, in which case the only question was whether a residuary rule was required to cover cases in which the intention had not been made clear. The matter was not purely procedural ; it could be vitally important in establishing whether a State was bound by a treaty or not. The Commission would have noticed that governments had not opposed the idea of a residuary rule.

81. He suggested that articles 7, 10 and 11 should be referred together to the Drafting Committee for re-formulation in the light of the discussion.

*It was so agreed.*<sup>3</sup>

## ARTICLE 12 (Ratification)

### *Article 12* *Ratification*

1. Treaties in principle require ratification unless they fall within one of the exceptions provided for in paragraph 2 below.

2. A treaty shall be presumed not to be subject to ratification by a signatory State where :

<sup>3</sup> For resumption of discussion on article 7, see 811th meeting, paras. 95-103. For resumption of discussion on article 11 (incorporating article 10), see 812th meeting, paras. 1-34.

<sup>2</sup> United Nations *Treaty Series*, Vol. 235, p. 100.

(a) The treaty itself provides that it shall come into force upon signature;

(b) The credentials, full powers or other instrument issued to the representative of the State in question authorize him by his signature alone to establish the consent of the State to be bound by the treaty, without ratification;

(c) The intention to dispense with ratification clearly appears from statements made in the course of the negotiations or from other circumstances evidencing such an intention;

(d) The treaty is one in simplified form.

3. However, even in cases falling under paragraphs 2 (a) and 2 (d) above, ratification is necessary where:

(a) The treaty itself expressly contemplates that it shall be subject to ratification by the signatory States;

(b) The intention that the treaty shall be subject to ratification clearly appears from statements made in the course of the negotiations or from other circumstances evidencing such an intention;

(c) The representative of the State in question has expressly signed "subject to ratification" or his credentials, full powers or other instrument duly exhibited by him to the representatives of the other negotiating States expressly limit the authority conferred upon him to signing "subject to ratification".

82. The CHAIRMAN invited the Special Rapporteur to introduce his proposals for the revision of article 12 (A/CN.4/177).

83. Sir Humphrey WALDOCK, Special Rapporteur, said that the question whether a treaty was to be considered in principle to be subject to ratification unless a contrary intention was disclosed, or whether the rule was the reverse, was a great subject of controversy in legal literature, in the Commission and among governments. The 1962 draft really satisfied no one, since even the majority in favour of stating the general principle did not approve of the way in which the paragraphs were arranged. However, if that majority view was accepted, the question of formulating the limits to the rule still remained.

84. Moreover, although in 1962 the Commission had undoubtedly been right to recognize the importance of treaties in simplified form and the significant role they played in reducing the importance of the article, it had perhaps been over-optimistic in thinking that such treaties could be defined—as they were in article 1 (b)—without producing either an unsatisfactory definition or one that begged the question of ratification.

85. Article 12 had been fairly strongly criticized by governments. Some disagreed with the basic rule, others wished the presumption to be reversed. The Government of Israel wanted the Commission to state the law pragmatically, without taking up a position; most governments wished the article to be simplified; some took exception to the concept of treaties in simplified form. It was therefore clear that the drafting would have to be modified considerably; at the next meeting he would submit a paper giving, in consolidated form, the various proposals on article 12 which he had made in his report.

86. The Commission had to make up its mind either to lay down a basic residuary rule or to dispense with it, if it could set out in intelligible form the circumstances

in which, in principle, ratification was or was not required. If the Commission preferred to state a rule, then it must decide whether to do so in the form used in the existing text—"Treaties in principle require ratification"—or in the opposite form.

87. Again, did the Commission still wish to use the concept of treaties in simplified form as an element in the drafting? His view was that it should no longer do so; in his new proposal he had used the formula "unless a contrary intention appears from the nature of the treaty . . .", which did not exclude treaties in simplified form, since it allowed recourse to the form of the treaty as an element, but on the other hand did not specifically state that there was a distinct concept in international law of treaties in simplified form.

88. The CHAIRMAN observed that it would be very dangerous for the Commission to take into consideration only the opinions expressly stated by Governments. Only about twenty Governments had commented, so it could not be concluded that the others did not approve of the articles or were at least indifferent. Thus the Commission could not compile statistics of the opinions received, but it should weigh them and give an opinion on the arguments put forward.

89. Two major questions of principle arose in connexion with article 12. The first was whether the requirement of ratification should be the general rule or the exception, in which case the wording would have to be reversed. The second question, which was equally important, related to the concept of a treaty in simplified form. In 1962, the Commission had taken the view that the non-requirement of ratification could be linked with that question of form.

90. Sir Humphrey WALDOCK, Special Rapporteur, said he endorsed what the Chairman had just said. It was hard to decide how much weight should be attached to the absence of comments by a government, or to the absence of comment on a particular article when a government had commented on others. As Special Rapporteur, he had considered that the only course was to take the expressions of opinion generally into account, but to treat every suggestion on its merits. It should be remembered that a point made by only one government might later be seen by others to be significant and might thus sway opinion at a conference.

91. Mr. TABIBI said that the Commission should not conclude that governments took no interest in the articles simply because relatively few of them had submitted comments.

92. Article 12 dealt with a most important stage in the conclusion of a treaty, since it marked the point at which the treaty came to life. It was particularly important for the new nations, which needed all the stages from negotiation to ratification to allow time for reflection. Most of the comments received had been from Europe, where States were better equipped to answer quickly.

93. In view of the increasing importance of treaties in simplified form, he thought that the Commission should define them. He would await the Special Rapporteur's text before giving his views at length.



94. Mr. REUTER said that after a superficial reading of the article he had come to the conclusion that the Commission could not propose a text of that kind. The article was so worded as to determine, not the cases in which a treaty was or was not subject to ratification in general, but the cases in which a treaty was or was not subject to ratification by one of the signatory States. Thus the Commission recognized in the article that a treaty could be subject to ratification by one State, but not by another—which was in conformity with practice. Consequently, it could not lay down a rule of general international law on the subject, since it recognized that it was governed by constitutional law.

95. The problem was to determine the conditions under which the representative of a State could consider that the treaty he had signed was or was not subject to ratification by another State. That was the problem the Commission had tried to solve by the parallel provisions of paragraphs 2 and 3 of article 12, which it had drafted in 1962. Personally he thought that, in the absence of any other indication, and more or less as a last resort, the form of the treaty could perhaps be taken as the criterion. If the Commission went further, it would greatly embarrass governments which, in practice, did not like to be explicit on that point and preferred to keep their constitutional law rather flexible in order to meet the needs of international life.

96. If the Commission laid down a rule, whatever it was it would embarrass governments. It would be better to lay down principles according to which each contracting State could interpret the position of the other contracting States. He would support the majority view, but he thought that if the Commission departed from that approach, it would rule out the mixed cases in which the same treaty was subject to ratification by one State and not by another.

97. The CHAIRMAN, speaking as a member of the Commission, said there had been an agreement concluded between France and Yugoslavia, which illustrated Mr. Reuter's point. Since in Yugoslavia every treaty was subject to ratification, that agreement had entered into force by an exchange of very dissimilar instruments: Yugoslavia had produced an instrument of ratification, and the Ministry of Foreign Affairs of the French Republic had produced a declaration to the effect that under the rules of the Constitution and in accordance with practice, ratification by France was not necessary for entry into force.

98. It was probable that many Governments had not reached a decision in the matter and that many others still thought that the need for ratification depended on the denomination of the instrument. In the United States, however, it was solely the content of the agreement which determined whether it was subject to ratification. Some treaties were considered to be "executive agreements", while a mere exchange of notes was sometimes subject to a formal act of ratification. In his view, it was not the form but the substance which should decide whether ratification was necessary or not.

The meeting rose at 1 p.m.

## 784th MEETING

Friday, 14 May 1965, at 10 a.m.

*Chairman* : Mr. Milan BARTOŠ

*Present* : Mr. Ago, Mr. Amado, Mr. Briggs, Mr. Castrén, Mr. El-Erian, Mr. Jiménez de Aréchaga, Mr. Lachs, Mr. de Luna, Mr. Pal, Mr. Paredes, Mr. Pesou, Mr. Reuter, Mr. Rosenne, Mr. Tabibi, Mr. Tsuruoka, Mr. Tunkin, Sir Humphrey Waldock, Mr. Yasseen.

### Law of Treaties

(A/CN.4/175 and Add.1-3, A/CN.4/177 and Add.1, A/CN.4/L.107)

(continued)

[Item 2 of the Agenda]

#### ARTICLE 12 (Ratification) (continued)

1. The CHAIRMAN invited the Commission to continue consideration of article 12.

2. Sir Humphrey WALDOCK, Special Rapporteur, said that, as promised at the previous meeting, he had prepared a consolidated text showing the changes he proposed in article 12; it read:

##### " Paragraph 1

###### ALTERNATIVE A

1. A treaty in principle requires ratification by the States concerned unless

(a) The treaty itself provides that it shall come into force upon signature or specifically provides for a procedure other than ratification;

(b) A contrary intention appears from the nature of the treaty, the form of the instrument or instruments in which it is embodied, the terms of instruments of full powers, the preparatory work of the treaty or the circumstances of its conclusion.

###### ALTERNATIVE B

1. A treaty requires ratification where

(a) The treaty itself expressly contemplates that it shall be subject to ratification;

(b) The intention that it shall be subject to ratification appears from the nature of the treaty and the form of the instrument in which it is embodied, the terms of the representatives' instruments of full powers, the preparatory work of the treaty or the circumstances of its conclusion.

##### Paragraph 2

2. Among the circumstances which may be taken into account under paragraph 1 (b) is any established practice of the States concerned in concluding prior treaties of the same character between themselves.

##### Paragraph 3

3. Notwithstanding anything in the foregoing paragraphs

(a) Unless a treaty expressly provides that it shall be subject to ratification, a particular State may consider itself bound by its signature alone where it appears from