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Summary record of the 784th meeting

Topic:
Law of Treaties

Extract from the Yearbook of the International Law Commission:-
1965, vol. I

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. Pessou, 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

the terms of the instrument of full powers issued to its representative or from the preparatory work of the treaty that the other States concerned were informed that its signature was intended to be binding without ratification.

(*b*) Unless a treaty expressly provides that it shall come into force upon signature, a particular State may consider the treaty as subject to ratification by that State, where it appears from the terms of the instrument of full powers issued to its representative, or from the preparatory work of the treaty, that the other States concerned were informed that its signature of the treaty was intended to be conditional upon a subsequent ratification."

3. Alternative A for paragraph 1 followed the lines decided on by the Commission at its fourteenth session. It simplified the text then adopted[1] and made no reference to treaties in simplified form as a separate concept of international law.

4. Alternative B stated the reverse position, in case the Commission should feel that the rule was better phrased in that way. He had explained his reasons in paragraphs 4 and 5 of his observations on article 12 in his report (A/CN.4/177).

5. Paragraph 2 arose out of the comments by the Danish and United States Governments on constitutional practices and was explained in paragraph 7 of his observations.

6. Paragraph 3 dealt with a material point which was more difficult to formulate as a general rule, namely, the case in which a treaty was negotiated subject to ratification by one of the parties, whereas the other parties were bound by a simple signature. The paragraph was an attempt to formulate a provision covering that practice.

7. Mr. TSURUOKA said he would try to answer the two main questions put by the Special Rapporteur at the previous meeting concerning article 12.

8. The Special Rapporteur had first asked the Commission to decide what it wished the presumption to be where a treaty contained no express provisions on ratification: that the treaty entered into force without ratification, or that it entered into force only after ratification. His own impression was that the question was of little practical importance; disputes rarely arose on that point and they would probably become even rarer in the future. For while it could happen, when a bilateral treaty was concluded, that both parties forgot to include provisions on entry into force, in the case of multilateral treaties, which were now the commonest, the more parties there were, the more likely it was that at least one of them would think of raising that question.

9. From the theoretical point of view, the question was more one of interpretation. It was a case in which the will of the parties must be ascertained, since the fundamental rule was that it was the parties which must decide the conditions for entry into force of the treaty.

10. Where the parties had not expressed their will, the traditional solution was that the treaty would enter into force only after ratification. That solution certainly promoted the security of international transactions; but according to another theory there was a presumption in such cases that signature sufficed to bring the treaty into force. That theory also had the considerable advantage of increasing the effectiveness of diplomatic activity.

11. In view of the uncertainty of practice and doctrine, if the Commission chose between those two opposite theories it would be developing rather than codifying international law. But the progressive development of international law called for much caution and reflection. The Commission must be sure that it was advisable to make a choice one way or the other.

12. It was also necessary to consider the effectiveness of the rule to be chosen. In speaking of the effectiveness of a rule of international law he was thinking mainly of the number of countries that would accept it; if the number was too small, the rule would not be applied widely enough and would therefore not be very effective.

13. Instead of trying to settle the question by laying down a rule of legal interpretation, it would be better to adopt a strictly practical viewpoint and deal only with what was essential. The Special Rapporteur had said at the previous meeting that if the Commission did not take a position on the matter it would be difficult to arrive at a reasonable form of words. But in fact, if the Commission refrained from taking a position and decided to treat the question as one of interpretation, its task would become much easier and the Drafting Committee would certainly find a suitable formula.

14. If it was recognised that it was only a question of interpretation, the simplest course might be to refer to the articles on the interpretation of treaties and to consider whether some particulars concerning ratification should be added to them.

15. The second question he wished to refer to was whether treaties in simplified form should be mentioned. There, too, the problem became easier if it was treated as one of interpretation. In the case of a treaty not in written form, the form itself suggested that the treaty would enter into force without ratification. At least there was a very strong presumption to that effect.

16. Mr. ROSENNE said he had stated his position on the principle and on some aspects of the drafting at the 646th, 660th and 668th meetings;[2] at the 668th meeting he had felt it necessary to express his complete dissent from the article (then article 10) as adopted. Despite careful consideration of the whole problem, his general position remained unchanged.

17. It was quite clear that, from the point of view of doctrine and of State practice, the same weight could be attached to either theoretical approach. It would therefore be necessary for the Drafting Committee to produce a text which attracted the maximum support and preserved a balance between the two doctrinal points of view. That was probably what the Government of Israel had had in mind when it had said that it was essentially for the negotiators to establish whether ratification was necessary or not, and that the question of ratification might itself be part of the negotiation, or be conclusively determined by the terms of the full

[1] See 783rd meeting, following para. 81.

[2] *Yearbook of the International Law Commission, 1962*, Vol. I.

powers of one or both of the negotiators (A/CN.4/175, section I.9, para. 13). It was always necessary to establish in a concrete case, whether ratification was necessary and by whom. That idea appeared in paragraphs 2 and 3 of article 12 and was left untouched in principle in the Special Rapporteur's new proposals. Mr. Tsuruoka had gone to the heart of the matter by referring to the question of interpretation.

18. A very important point had been raised by the Danish Government regarding the relevance of the constitutional practice of individual States (A/CN.4/175, section I.7). It was a point which might cause trouble and misunderstanding in practice and it would be useful if the Commission could establish the rule on the lines proposed by the Special Rapporteur in paragraph 2 of his new text. The very existence of the problem played havoc with the abstract doctrinal approach evident in the phrase " a treaty in principle requires ratification ".

19. In view of the difficulty of defining treaties in simplified form, he had no objection to an attempt being made to draft the article without referring to them in so many words. It must be remembered, however, that the inclusion of the notion of treaties in simplified form in the 1962 draft had been a central part of the compromise solution.

20. If a definition of ratification were still thought necessary, it should in substance remain as it was in article 1, paragraph 1 (*d*) (A/CN.4/L.107), but he would prefer it to be incorporated in article 12.

21. Then there was the question of the " orientation " of the article, a term he preferred to " residual rule ". He preferred alternative B, but hoped it would not be necessary to choose between the two alternatives by a formal vote.

22. Since the question was largely one of theoretical and doctrinal controversy, he hoped it would be possible, without a lengthy debate, to refer the article to the Drafting Committee, which should be given a very general directive to evolve the least controversial text it could, emphasizing practical requirements. The Drafting Committee should begin by listing the situations in which ratification was required and those in which it was not required. The real problem would be how to deal with what remained after the list had been made. If necessary, there could be a debate when the Drafting Committee reported back.

23. Mr. CASTRÉN said that the article on ratification which the Commission had adopted in 1962 was defective in several respects. In trying to work out a compromise, it had drafted a provision categorically requiring ratification in cases where the treaty was silent on the subject, and not even distinguishing between treaties of different kinds. But it had been obliged immediately to mention numerous exceptions, some of which were in turn subject to certain exceptions. It was not surprising, therefore, that nobody was really satisfied with the article, particulary where its drafting was concerned; that was clear from the comments submitted by governments and seemed to be the general opinion of the members of the Commission.

24. Of the two alternatives proposed by the Special Rapporteur for paragraph 1, he preferred alternative B, which was more neutral inasmuch as it merely enumerated the cases in which a treaty required ratification, either because the treaty itself expressly provided for it or because there was a presumption that that was the intention of the parties. In accepting that alternative the Commission would not, he thought, be opting in favour of the principle that ratification was not necessary, for the formula proposed in the text was applicable to a large number of treaties, including the most important ones.

25. Another advantage of that formula was that it could hardly be construed as an attempt to settle the problem of ratification through internal law. As had been pointed out at the previous meeting, every State had the sovereign right to lay down the conditions for ratification in its constitution. But if the treaty itself provided, either expressly or by implication, that it needed to be ratified, or if it appeared from the circumstances in which it had been concluded that the parties had intended it to be ratified, then all the States concerned were bound at the international level by that fact or by that presumption of law and could not demand that the treaty should enter into force until all the formalities of ratification had been completed, both at the internal and at the international level. Thus it seemed that alternative B contained all that need be said about ratification; no purpose would be served by going further and giving detailed rules for a few special cases.

26. Consequently, he could not support the paragraph 2 which the Special Rapporteur had proposed in response to the suggestions made by the Governments of Denmark and the United States of America. If the Commission accepted the idea expressed in that paragraph, it should incorporate it in the preceding paragraph.

27. Nor did he approve of the paragraph 3 proposed by the Special Rapporteur to meet the other points made by the Danish Government. It only repeated the principal rules stated in paragraph 1 (*b*). The only new element was that the other States concerned had to be " informed " that it was the intention of a State to be bound, either as soon as it signed the treaty, or only subject to subsequent ratification. In particular, subparagraph 3 (*a*) was not much use, for if a State considered itself bound by its signature alone, that was its own business, and the other States concerned could only be gratified at not having to wait for ratification.

28. As to the question whether it was necessary to reconsider the definitions of a " treaty in simplified form " or of " ratification ", he thought it would be hard to improve on the definitions adopted. Treaties in simplified form varied so much that there were no common criteria applicable to them; that was probably why, in 1962, the Commission had merely cited a few examples without giving any real definition. As the text proposed by the Special Rapporteur did not expressly mention such treaties, a definition was not necessary for the moment. The definition of ratification adopted in 1962 was not complete either, but in view of the purpose of the draft he thought it was sufficient to emphasize, as was already done, that the act by which a State expressed its consent to be bound by a treaty was performed on the international plane.

29. Mr. YASSEEN said that the main reason why the wording of article 12 was rather cumbersome was that it was based on a distinction between formal treaties and treaties in simplified form. If that distinction was abandoned it should be possible to arrive at a satisfactory formula.

30. He approved of the general arrangement of the revised version submitted by the Special Rapporteur. For paragraph 1 he preferred alternative A, because he was convinced that the general rule in international law was that ratification was necessary for a treaty's entry into force. There was no denying that many treaties entered into force upon signature alone, but if the importance rather than the number of treaties was considered, it would be found that all treaties which were important to States were subject to ratification. Hence the fundamental interests of States should be safeguarded by laying down the general principle applicable where a treaty did not expressly provide that ratification was necessary.

31. However, in view of the modern tendency to simplify the formalities of treaty-making, it was well to provide for exceptions to that principle. To be able to state that a treaty did not require ratification, it was necessary first to refer to the text of the treaty itself. If the text contained no express provision on the subject, the general method of interpretation formulated by the Commission in articles 69 and 70 could be applied, which meant that elements extrinsic to the text of the treaty would be taken into consideration.

32. Paragraph 1 (*b*) was open to question because of the reference to the preparatory work of the treaty. For the preparatory work could not be the basis of an obligation binding the parties if the intention suggested by that work did not find some expression in the text of the treaty itself. That had been the finding of the Permanent Court of International Justice, which in its advisory opinion on the question of " Access to, or anchorage in, the port of Danzig, of Polish war vessels " had stated that " The Court is not prepared to adopt the view that the text of the Treaty of Versailles can be enlarged by reading into it stipulations which are said to result from the proclaimed intentions of the authors of the Treaty, but for which no provision is made in the text itself. "[3] In its articles on the interpretation of treaties, the Commission had given the preparatory work a very minor role, and its provisions on ratification should be in keeping with those articles.

33. Paragraph 2 of the Special Rapporteur's proposal was sound and very useful. He would have preferred it to include a specific reference to constitutional requirements, but since that seemed likely to meet with objection, he thought the Commission could legitimately refer to " any established practice of the States concerned in concluding prior treaties of the same character between themselves "; for such practice was generally based on constitutional requirements.

34. With regard to paragraph 3 of the Special Rapporteur's proposal, he agreed with Mr. Castrén that sub-paragraph (*a*) had hardly any practical value. Sub-paragraph (*b*), on the other hand, seemed to be justified, for in the case contemplated it was important for the State concerned that the other States should take account of the circumstances which showed that it was not bound by its signature alone.

35. Subject to those comments, he could accept the revised version of article 12, with alternative A, subject to review of the text by the Drafting Committee.

36. Mr. PAREDES said that the Commission, in its anxiety to produce a universally acceptable set of rules, should not resort to compromises that substantially altered the meaning of the articles; it should take account of theory and of doctrine. Accordingly, it should not let itself be bound by the views expressed by certain governments; its responsibility was to the world community. The number of replies received from governments was small in relation to the total number of States. Moreover they were far from unanimous, especially in regard to article 12. Nevertheless, as the Special Rapporteur had shown, the majority accepted the requirement of ratification as a basic principle.

37. It was important to bear in mind the significance of ratification in the constitutional law of different countries. In Ecuador, for instance, the process of ratification required action by the legislature; in accordance with democratic principles, no treaty could be ratified without its consent.

38. Admittedly, the modern trend was towards greater simplicity in treaty-making. But it was necessary to distinguish between treaties of major national importance, which in his view called for the full process of ratification, and treaties in simplified form. In modern times, the range of simplified treaties—which might be commercial treaties on a particular question, or cover such subjects as hard currency loans or economic aid—was so wide and so varied that ratification might seem too cumbersome a process.

39. Countries should therefore be encouraged to amend their constitutions, as indeed it was their duty to do whenever they subscribed to an undertaking within the United Nations. To encourage them, the position regarding treaties of the more important kind should be safeguarded by means of a proviso to the effect that ratification was necessary except where the internal law of the country did not require it. He did not think it wise to leave the matter to interpretation, since interpretation was always difficult and sometimes biased: it should only be resorted to when no other course was open.

40. He was in favour of alternative A, which also covered cases in which the treaty was silent on the question of ratification. It was true that it was open to States to depart from the general rule and to say that in a particular case a signature was sufficient and no ratification was necessary; but the rule should be formulated perfectly clearly, since otherwise there was some danger that a State might claim that such and such was the position, when in fact its constitutional law did not so provide. In his opinion a treaty concluded in those circumstances would have no validity whatsoever.

[3] *P.C.I.J.*, 1931, Series A/B, No. 43, p. 144.

41. Mr. TABIBI said that, in the light of the discussion held in 1962,[4] the Commission should accept the principle that ratification was required. However, both that discussion and the subsequent comments by governments showed that, if that principle were accepted, it would be necessary to provide for two exceptions, namely, treaties in simplified form and cases in which the parties agreed to dispense with ratification.

42. The rule and the exceptions must be stated clearly, for otherwise States might hesitate to accept the rule for fear that it might weaken the large number of treaties in force which had not been ratified.

43. A definition of treaties in simplified form was necessary. All that the Commission had done in 1962 had been to enumerate the types of treaty covered by that expression. Governments had also suggested that the article should be simplified.

44. He could support either alternative A or alternative B, provided that there was a clear reference in paragraph 1 (*b*) to treaties in simplified form.

45. There were many reasons why the general principle of the need for ratification should be accepted. Until the nineteenth century, the signature of the sovereign or of his representative had been regarded as sufficient to bring a treaty into force. In modern times, with the appearance of constitutional governments, it was necessary to respect the will of the people as expressed by the legislature, and that will was reflected in the requirement that a treaty should be ratified.

46. Mr. LACHS said that on the whole he agreed with the reasoning which had led the Special Rapporteur to redraft the article.

47. With regard to the question of treaties in simplified form, it should be noted that the number of such treaties was constantly increasing; indeed, they now represented an overwhelming majority of all the treaties and instruments signed by States. That created a new situation, and for purely practical reasons, the Commission should not let itself be tempted to establish any rule to the effect that ratification was required. Former principles were being abandoned and a new practice was developing.

48. In the case of bilateral treaties there were four possible situations. In the first, both parties ratified; in the second, one party ratified and a signature sufficed for the other; in the third, one party ratified and the other adopted a process of " approval " as a substitute for ratification; in the fourth, both parties considered a treaty to be binding on them by signature only.

49. He agreed with Mr. Reuter that governments did not wish to be committed one way or the other. The Commission should express itself in favour of a principle of interpretation rather than a rule.

50. Alternative A should be dropped; but alternative B provided a basis for an acceptable draft.

51. He could also accept paragraph 2, apart from the words " between themselves " : prior treaties of the same character, not necessarily concluded between the same parties might still be relevant for the purposes of that paragraph.

52. He had serious doubts about paragraph 3, on which he shared Mr. Castrén's view. Cases in which the signature alone established a binding obligation for the parties should be dealt with in article 10 and in the context of the whole issue of signature and its legal effects; article 12 should be confined to ratification.

53. Mr. TUNKIN said that the main problem was that of determining whether there existed in international law a rule that treaties required ratification. In 1962, the Commission had adopted a provision stating that in principle ratification was required; he himself had opposed that provision and he still believed that no such rule existed in international law.

54. Of the theoretical problems involved, it might be appropriate to dwell briefly on that of the modes by which the will of a State was expressed and what relevance they had in international law. In practice, ratification was one of the modes of expressing a State's final consent to be bound by a treaty, but it was not the only one. It was for the constitution of each country to determine by whom the final consent of the State could be expressed and in what form. In current practice, many treaties were concluded merely by ministers and he did not believe that international law could prescribe to States the manner in which they might express their will to be bound by a treaty. It was for States themselves to decide through which organ, when and how they wished to express that will.

55. From the practical standpoint, it was a fact that the great majority of treaties being concluded at the present time did not require ratification and that not all those treaties were in simplified form; many were quite formal in character and had all the attributes of a treaty, both in form—under the definition adopted by the Commission—and in substance.

56. Hence, the Commission should not adopt a provision according to which States would be deviating from the requirements of international law if they concluded a treaty that was not subject to ratification. The Commission would come much closer to existing practice if it stated the rule that ratification was required only where the treaty itself stipulated that requirement. He therefore, favoured the Special Rapporteur's alternative B so far as paragraph 1 (*a*) was concerned. That text stated the main thesis that ratification was required where such was the will of the parties to the treaty.

57. In conformity with that same thesis, the text of paragraph 1 (*b*) should be simplified and reformulated so as to provide that manifestations of the will of the State or States concerned were to be considered relevant. The present text of alternative B was unduly complicated and attempted to discern a will of the State which had hardly been expressed at all; its vague formulation would be of no assistance in practice. He thought it would be advisable to confine paragraph 1 (*b*) to a statement that a treaty required ratification in two cases: first, where a representative's full powers limited his authority in that manner and, secondly, where all or some of the parties to the treaty stated that ratification was required where they were concerned. The provisions

[4] *Yearbook of the International Law Commission, 1962*, Vol. I, p. 100 *et seq.*

of paragraph 1 would thus specify that ratification was required where the will of the States concerned was clearly expressed and not merely implied.

58. With regard to treaties in simplified form, they too might or might not require ratification, according to the will of the parties as clearly expressed by them. A statement of the rule along those lines would leave room for compliance with the requirements of internal law, in particular the requirement of parliamentary approval for ratification. It should be remembered that constitutional provisions on the subject varied from one country to another; a formulation such as he had suggested would enable representatives of States to act in accordance with national constitutions.

59. With regard to approval, he supported the view expressed by the Japanese Government (A/CN.4/175, section I.11) that it should be dealt with together with ratification and on the same principles. Many treaties signed by the USSR had been stipulated as entering into force on communication of approval by both parties. An examination of the various aspects of approval clearly showed that it could only be dealt with on the same basis as ratification; in fact, approval of a treaty might mean ratification by one country and approval by another, according to their respective constitutions.

60. Mr. de LUNA said he was largely in agreement with Mr. Lachs and Mr. Tunkin. One of the main difficulties arose out of the evolution of ratification, which had originated as a means of control by a monarch over the acts of his representative in an international transaction. Since the French Revolution, however, ratification had changed in character and had become a means of enabling parliaments to control the acts of the executive in treaty-making. It should be remembered that what a parliament did was to give its consent to ratification; it did not ratify a treaty signed by the executive, as was sometimes rather loosely stated.

61. Another point to be remembered was that it was not for international law to remedy imperfections in the internal organization of a State or the shortcomings of its government; nor was that possible, for if international law were to attempt to do so it would be interfering in the internal affairs of a State.

62. Some four-fifths of international obligations were at present contracted through instruments which were not subject to ratification. Consequently, the Commission could not state that ratification was required, as had been the case some thirty years ago. Nor could it state that ratification was not required. As Mr. Rosenne and Mr. Lachs had said, the Commission should avoid laying down any rule one way or the other, so as not to interfere with the development of international law on the subject, which was in process of evolution.

63. International practice provided many examples of delays in international relations due to the requirement of ratification and the need to obtain parliamentary approval. Faced with such problems, pragmatists in certain countries had found the empirical solution of calling a treaty an " executive agreement " and using the term " approval " instead of " ratification ". By that simple change in terminology, they had succeeded in avoiding the need for parliamentary approval. He could cite two well known examples of executive agreements concluded by the United States : the 1898 Peace Treaty with Spain[5] and the 1940 agreement with Britain on the exchange of destroyers for bases.[6] As executive agreements, those important instruments had not required to be submitted to the Senate, in accordance with the United States Constitution, for its consent to ratification by a two-thirds majority.

64. In the light of those developments, the Commission should adopt a purely practical approach. It could not go into the question of parliamentary control of governmental acts under the constitution of a State. During the French Third Republic, when the constitutional laws of 1875 had been in force, France had entered into between 4,000 and 5,000 treaties, the constitutionality of which under those laws had been disputed by French constitutional lawyers. Surely, a foreign State could not be expected to know more about the interpretation of the French constitution than French jurists themselves.

65. He accordingly supported the Special Rapporteur's alternative B. He also favoured the simplified language proposed by Mr. Tunkin, but had some doubts about the suggestion that the will of States should be expressly stated. The vast majority of international agreements were silent on the subject of ratification, but that was precisely because the States concerned did not wish to say anything : their object was to avoid having to comply with constitutional provisions requiring parliamentary approval for ratification. He therefore doubted whether it was advisable in practice to lay down the rule that States must declare their will in the matter expressly.

66. Mr. AGO said he gathered from the discussion that there was still some dissatisfaction with article 12. One of the reasons was that the question whether the consent of a State to be bound should be expressed by an act of ratification or by a signature depended on two kinds of law : international law and internal law. International law was involved in that the treaty itself might provide that it should be ratified; the need to ratify was then established, or at least confirmed, by an international agreement. Internal law might provide that a treaty should not bind the State until it had been ratified, or, on the contrary, that ratification was not required and that consent to be bound by the treaty was definitively expressed by signature.

67. Another reason was that alternative A contained the words " in principle ". In his opinion those words were not appropriate : there were cases in which ratification was required and cases in which it was not, and they were determined either by international law or by internal law. Moreover, from the point of view of international law, it was not very wise to use the words " a treaty ... requires ratification " since that requirement was normally established by internal law. It would be better to start with a phrase such as : " The consent of a State to be bound by a treaty is expressed by ... ".

[5] *British and Foreign State Papers*, Vol. XC, p. 382.

[6] League of Nations *Treaty Series*, Vol. CCIII, p. 202.

68. Lastly, the dissatisfaction felt by some members of the Commission also derived from their idea that it would be necessary to choose between two formulas: the treaty in simplified form or a more formal treaty. But the Commission was not called upon to express any preference or even to give the impression that, in its opinion, the future trend would be towards one form rather than another. Practice might well shift more and more towards the simplified form, but States might not wish to say so expressly, especially as the increased use of treaties in simplified form was sometimes due to a tendency on the part of the executive to try to increase the number of cases in which it could conclude treaties without ratification, which usually had to be authorized by the legislature.

69. How could the Commission get out of that difficulty? He approved of the substance of the Special Rapporteur's proposals, though he thought the Commission could express the same ideas in a slightly different way.

70. He would prefer an article in two paragraphs—or two articles—the first covering the case in which the treaty had to be ratified, the second the case in which signature was sufficient. The first paragraph would read:

"The consent of a State to be bound by a treaty is expressed by an instrument of ratification if

(*a*) the treaty itself expressly provides that it shall be ratified;

(*b*) the intention that it shall be subject to ratification appears from the nature of the treaty and from the form of the instrument in which the treaty is embodied;

(*c*) it appears from the full powers of the representatives of the State in question, from the preparatory work or from the circumstances in which the treaty was concluded, that the other States concerned were informed of that State's intention that the treaty should be subject to ratification."

71. That formula avoided the pitfalls of the Special Rapporteur's proposal; it stressed that it was the State's consent which was expressed in that way, and thus also met the points raised by Mr. Reuter. It was in fact possible that some particular treaty might come into force on being ratified by one State and only signed by the other.

72. Paragraph 2, which was the counterpart of paragraph 1, would read:

"The consent of the State to be bound by a treaty is expressed by signature of the treaty if

(*a*) the treaty itself expressly provides that it shall enter into force on signature;

(*b*) the intention that the treaty shall enter into force on signature appears from the nature of the treaty and from the form of the instrument in which the treaty is embodied;

(*c*) it appears from the full powers of the representatives of the State in question, from the preparatory work or from the circumstances in which the treaty was concluded, that the other States concerned were informed of that State's intention to bind itself by signature without ratification."

73. The Commission, which should not express a preference for either of the two possibilities, would thus be taking a perfectly objective position between them. However, if the Commission still found it absolutely essential to insert a residual clause concerning ratification—although he personally was not in favour of it—it would be easy to add at the end of the article a clause providing that in the cases not covered by the paragraph on signature, there was a presumption that ratification was required.

74. Of course, if article 11 included, as it should, a statement of the cases in which consent was expressed by signature, article 12 could be greatly simplified and merely state the cases in which consent was expressed by ratification.

75. For the time being he had kept to the terms of the Special Rapporteur's proposal so far as instruments, full powers and circumstances were concerned, but he thought the Drafting Committee would be able to simplify the provision further.

76. Mr. REUTER said he fully agreed with the comments made by Mr. Castrén and Mr. Lachs, as amplified by Mr. Tunkin and Mr. de Luna; he thought the Commission could work out a sound text from the proposals submitted by the Special Rapporteur in his alternative B for paragraph 1.

77. It was possible to distinguish three relevant rules of international law. First, public international law recognized several procedures for the conclusion of treaties, and there it must be admitted that the major difficulty was how to say so. It could, of course, be merely implied. The Commission could refer to international practice without specifying the various procedures. Or, as Mr. Ago had suggested at the previous meeting, it could say that international law recognized three ways of concluding treaties: a very short procedure comprising a single act, a short procedure comprising two acts—the establishment of the text and the definite undertaking—and a long procedure consisting in establishing the text, expressing the intention to be bound, and becoming bound. It might not be wise to describe those different procedures in detail, though it would have the advantage of settling the question raised by Mr. Tunkin; for, from the point of view of international law, approval and ratification had exactly the same effect, since they were both declarations of a definitive undertaking.

78. Secondly—and that should also be stated somewhere—it was for every State to make clear, with respect to a given agreement, what form of procedure it would itself adopt. There was a right involved—the right of every State to prescribe in its constitution, in general terms, the procedure it adopted in each particular case—and an obligation (not yet stated), for a State must clearly indicate its choice. That might be considered to be a mandatory rule, in which case the third rule would not be necessary. As Mr. Tunkin had said, the most important elements for determining a State's choice were the text of the treaty and the full powers; that was clear, for it was through them that the State fulfilled its obligation to its partners to indicate the procedure it intended to follow. It would, of course,

be possible to go even further and say that the two rules he had just mentioned were sufficient; once a State was required to indicate the choice it had made, if it did not do so the presumption was that the agreement was valid.

79. The third rule was implied in the Special Rapporteur's attempt to specify certain criteria for determining the choice made. It would be for the Drafting Committee to enumerate those criteria; the problem of a residuary rule would then disappear. In his opinion, the Commission should not even touch on the question; the use of such an expression as " a treaty in simplified form ", which was not to be found in constitutional law anywhere and which, although perhaps useful in some cases, introduced an element of confusion in the present context, should be deliberately avoided.

80. He agreed that the Commission should choose alternative B proposed by the Special Rapporteur, but he was not sure that it should not also state other rules.

81. Mr. EL-ERIAN said that in 1962, in stating his position on ratification,[7] he had urged that the Commission should formulate a general residuary rule requiring ratification unless it was dispensed with explicitly or implicitly.

82. Some members now suggested that the Commission should adopt a pragmatic approach and avoid taking a position on issues of principle. In his opinion, the present instance was not one in which issues of principle should be avoided. Paragraph (4) of the commentary on article 12 said that total silence on the subject of ratification was exceptional, and that the number of cases that remained to be covered by a general rule was very small.[8] It was accordingly clear that, if a general residuary rule were formulated on the matter, it would not, in practice, lead to the difficulties which some members feared.

83. The United Kingdom Government had commented that the complicated provisions of the article, as at present worded, might give rise to difficulties which did not at present exist (A/CN.4/175, section I.20). The issue was therefore not one of solving any existing difficulties in a pragmatic spirit, but rather one of principle. That issue of principle should be approached bearing in mind the role played by the institution of ratification in the relationship between the executive and the legislature in the treaty-making process. The requirement of parliamentary approval for ratification permitted parliament to control the acts of the executive in treaty-making. The Commission's draft should reflect constitutional developments with regard to treaty-making.

84. A number of questions had been put to the Commission by the Special Rapporteur. To the question whether it should state the residuary rule that ratification was required unless it was expressly or impliedly dispensed with, he would reply in the affirmative.

85. To the question whether the classical rule had now been so far eroded by the enormous growth of treaties concluded by simplified procedures that it should not be retained as the basic rule, he would reply that treaties in simplified form should not be given greater importance than they deserved. The expansion of intercourse between States, especially in economic and technical matters, had undoubtedly led to increasing use of the less formal types of treaty. However, those developments ought not to be allowed to affect the position of ratification as an institution.

86. The rules to be adopted should allow some flexibility. Certain treaties provided for provisional entry into force on signature and final entry into force on ratification. Even an exchange of letters or other informal agreement employed for convenience was often made subject to ratification, so that the conclusion of a treaty in simplified form did not necessarily imply an intention to dispense with ratification. For those reasons, he supported the Special Rapporteur's conclusion that there was no need to base the rules on a distinction between formal and informal treaties.

87. Paragraph 2 of article 12 in its revised form specified some of the circumstances of the conclusion of a treaty which could be taken into account in interpreting the intention of the parties with regard to ratification. In his opinion, that paragraph complicated the article unnecessarily; it dealt with a question of interpretation, which should be left to the courts. The task of the Commission was to draw up rules, not to try to interpret the intention of the parties.

88. The article should be simplified, but not by drawing a distinction between formal and informal treaties, as some governments had suggested, or by reversing the presumption stated in the article, as suggested by other governments. The purpose of the simplification should be to avoid drafting detailed provisions covering a complex set of specific situations and exceptions to them, and to state instead a general rule subject to certain exceptions.

89. He had listened with interest to the statements by Mr. Tunkin and Mr. Ago, but would reserve his position on their suggestions until he had seen them in writing.

The meeting rose at 12.55 p.m.

785th MEETING

Monday, 17 May 1965, at 3 p.m.

Chairman: Mr. Milan BARTOŠ

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

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[7] *Yearbook of the International Law Commission, 1962*, Vol. I, pp. 95-96, paras. 96-100.

[8] *Op. cit.*, Vol. II, p. 172.