

Document:-
A/CN.4/SR.669

Summary record of the 669th meeting

Topic:
<multiple topics>

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

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164. The Secretariat would meanwhile proceed with a series of preparatory studies, and submit a questionnaire to States Members of the United Nations, inviting them to submit essential information on the subject, derived from treaties, diplomatic correspondence, judicial decisions and arbitration. The Secretariat itself would prepare a paper on the problem of succession in relation to membership of the United Nations, a paper on the succession of states under multilateral law-making treaties of which the Secretary-General of the United Nations was the depositary, and a digest of the decisions of international tribunals on the succession of states. Members of the Sub-Committee had been asked to submit to the Secretariat papers outlining their views on the essential issues of scope and approach not later than 1 December 1962 for circulation to the other members of the Sub-Committee. In order to provide guidance for the Sub-Committee, the Chairman of the Sub-Committee would, on the basis of those papers of members, prepare a working paper summarizing their views in time for translation and circulation before the Sub-Committee's session in January 1963.

165. Between that session and the fifteenth session of the Commission, the Chairman would prepare a paper summarizing the various stages of the Sub-Committee's work, which would constitute a preliminary report for the Commission's approval. That implied, of course, that the item of state succession would be discussed at the Commission's fifteenth session, and that guidance would thus be provided for the special rapporteur who would be appointed to deal with the question.

REPORT OF THE SUB-COMMITTEE ON STATE RESPONSIBILITY

166. Mr. AGO, Chairman of the Sub-Committee, said that the Sub-Committee had held one meeting, at which it had been agreed that, in a study of the topic of state responsibility, it was necessary to separate the essential principles of responsibility from all the subjects with which it had been traditionally associated. The Sub-Committee could not go further than that so far as substance was concerned, but had reached agreement on procedure.

167. It had been decided to meet again on 7 January 1963 and that its session should last for at least one week, but not beyond 16 January. Possibly the plenary Sub-Committee would meet for a week, and a small group for a few days longer. Preliminary studies had already been submitted by Mr. Jiménez de Aréchaga, Mr. Paredes and Mr. Gobbi, observer for the Inter-American Juridical Committee. It had been thought desirable that each member should submit a written *exposé* giving his general views on the subject and, in particular, should submit proposals for "chapter headings" of topics to be discussed. Those preliminary *exposés* should be sent to the Secretariat in time for translation and circulation before the January 1963 session of the Sub-Committee. No specific programme of work was yet envisaged for the Secretariat, but when the preliminary *exposés* had been received and views on them exchanged, the Sub-Committee would be in a

position to decide what research should be requested from the Secretariat and from members, how it should proceed with its work and how it should report to the Commission on its progress.

168. The CHAIRMAN suggested that the reports of the subsidiary bodies of the Commission should be summarized in the Commission's report.

It was so agreed.

The meeting rose at 1.20 p.m.

669th MEETING

Wednesday, 27 June 1962, at 9.30 a.m.

Chairman: Mr. Radhabinod PAL

Draft report of the Commission on the work of its fourteenth session (resumed from the previous meeting)

CHAPTER II. — LAW OF TREATIES (A/CN.4/L.101/ Add.1) (resumed from the previous meeting)

1. The CHAIRMAN invited the Commission to resume its consideration of the draft report.

COMMENTARY TO ARTICLE 3. — CAPACITY TO BECOME A PARTY TO TREATIES

Paragraph (1)

Paragraph (1) was adopted.

Paragraph (2)

2. Mr. TUNKIN proposed first, that in accordance with the Commission's decision at the previous meeting, the term "insurgent community" used in the third sentence, should be replaced by "insurgent".

3. He proposed, secondly, the deletion of the last three sentences, reading:

"As to the Holy See, treaties entered into by the Papacy are normally entered into not in virtue of its territorial sovereignty over the Vatican State, but on behalf of the Holy See, which exists separately from that state. On the other hand, both in the Geneva Convention on the Law of the Sea, and the Vienna Convention, the Holy See appears in the list of 'States' parties to the Conventions. At any rate the Holy See possesses treaty-making capacity and is certainly comprised either within the term 'States' or within the term 'other subjects of international law'."

Those sentences were redundant in view of the statement in the immediately preceding sentence that the phrase "other subjects of international law" was intended to remove any doubt about the Holy See's capacity to conclude treaties.

4. Mr. BARTOŠ, supporting Mr. Tunkin's second proposal, said that by the Lateran agreement of 1929, the Vatican State had been established with a very small territory. Many states however, still preferred to consider the Papacy as a spiritual Power, as the Holy See. Regardless, however, of whether it was considered as the Vatican State or as the Holy See, all agreed that it

possessed international juridical personality and the capacity to conclude international treaties. It was therefore unnecessary to refer to those controversial issues seeing that there was no practical difference between states with different theoretical ideas.

5. Sir Humphrey WALDOCK, Special Rapporteur, said that he had taken the passage from the 1959 commentary,¹ and added the indication, supplied by the Secretariat, that at the Geneva Law of the Sea 1958 and Vienna Diplomatic Relations 1961 Conferences, the Holy See had appeared in the list of "states" parties to the Conventions.

6. However, he was prepared to accept both of Mr. Tunkin's amendments.

Paragraph (2) as thus amended was adopted.

Paragraph (3)

7. Mr. VERDROSS proposed that the term "federation" should be replaced throughout by "federal state" and the term "component states" by whatever term was finally adopted for the text of the articles.

It was so agreed.

8. Mr. CADIEUX proposed the deletion of the sentence: "Examples are the Swiss cantons and the states of the Soviet Union". The treaty-making capacity of the Swiss cantons was open to controversy.

It was so agreed.

Paragraph (3) as thus amended was adopted.

Paragraph (4)

Paragraph (4) was adopted.

COMMENTARY TO ARTICLE 4. — AUTHORITY TO NEGOTIATE, SIGN, RATIFY, ACCEDE TO OR ACCEPT A TREATY

Paragraph (1)

9. Mr. ROSENNE proposed that in the second sentence, the expression "being entitled to have some assurance" should be amended to read "being entitled to assurance", and that in the third sentence, the phrase "there is normally a right to call for some evidence of authority" should be amended to read "there is normally a right to call for evidence of authority".

It was so agreed.

Paragraph (1) as thus amended was adopted.

Paragraph (2)

10. Mr. VERDROSS said that for states with a parliamentary system of government, it would not be correct to say that the Head of State possessed an "inherent" authority to act for the state. For in fact he could not act alone; he always needed the concurrence of the government or the parliament. All that could be said was that declarations by the Head of State with respect to other states were considered as authorized by the competent organs of the state in accordance with its municipal law.

11. Mr. BARTOŠ said that the word "assume" was inappropriate; it suggested that the assumption was

open to rebuttal. It was better to state straight out in so many words, as an affirmative note, that Heads of State, Heads of Government and Foreign Ministers were considered as possessing the necessary authority.

12. Sir Humphrey WALDOCK, Special Rapporteur, said he would drop the term "inherent" and redraft the phrase to state that the persons concerned were "considered", in virtue of their offices and functions, to possess the authority in question.

Paragraph (2) as thus amended was adopted.

Paragraph (3)

13. Mr. TUNKIN proposed that the first sentence of paragraph (3) should be reworded in the same way as the first sentence of paragraph (2).

14. Mr. ROSENNE proposed that the reference in the fourth sentence to the practice of establishing permanent diplomatic representatives should be replaced by a reference to the establishment of permanent missions; the sentence would then read:

"The practice of establishing Permanent Missions at the Headquarters of certain international organizations... and to invest the Permanent Representative..."

15. Mr. BARTOŠ, criticizing the phrase "to represent the state in matters concerning the work of the organization", said that in his opinion, the permanent representative was authorized to represent the state in its relations with the organization but not, for example, to negotiate with other states concerning the work of the organization.

16. Mr. LACHS, to meet the point raised by Mr. Bartoš, proposed the deletion of the words "in matters concerning the work of the organization".

17. Sir Humphrey WALDOCK, Special Rapporteur, said he could accept the amendments proposed by Mr. Tunkin, Mr. Rosenne and Mr. Lachs.

Paragraph (4) as thus amended was adopted.

Paragraphs (5) and (6)

Paragraph (5) was adopted.

Paragraph (6) was adopted.

Paragraph (7)

18. Mr. TUNKIN proposed the deletion from the first sentence of the words "in the case of treaties in simplified form".

It was so agreed.

Paragraph (7) as thus amended was adopted.

19. Mr. de LUNA proposed that the end of the third sentence which read: "... wide full-powers which, without mentioning any particular treaty, confer on the Minister general authority to sign treaties or categories of treaties on behalf of the state" should be amended to read: "...wide full-powers which confer on the Minister authority to sign certain categories of treaties on behalf of the state". In the course of the discussion both he and Mr. Bartoš had agreed that, in international law, the general power of attorney of municipal law did not exist; so-called "general full-powers" were merely full-powers for the purpose of signing a specific group

¹ Yearbook of the International Law Commission 1959, Vol. II (United Nations publication, Sales No.: 59.V.1. Vol. II), p. 96.

of treaties, or the documents which might emerge from a particular conference.

20. Mr. ROSENNE proposed the deletion of the fifth sentence which read:

"It also appears that during regular sessions of the General Assembly the Permanent Representatives are sometimes given general full-powers with respect to agreements which may be concluded during the session (see Summary of the Practice of the Secretary-General (ST/LEG/7, paragraph 35))."

21. Sir Humphrey WALDOCK, Special Rapporteur, said he would accept the amendments proposed by Mr. de Luna and Mr. Rosenne.

Paragraph (8) as thus amended was adopted.

Paragraph (9)

Paragraph (9) was adopted.

COMMENTARY TO ARTICLE 5. — ADOPTION OF THE TEXT OF A TREATY

Paragraph (1)

22. Mr. BRIGGS proposed that, in the third sentence, the words "agreement to be bound by the text" should be replaced by "agreement to be bound by the provisions of the text".

It was so agreed.

Paragraph (1) as thus amended was adopted.

Paragraphs (2) and (3)

Paragraph (2) was adopted.

Paragraph (3) was adopted.

Paragraph (4)

23. Mr. TUNKIN said that paragraph (4) dealt at excessive length with the question of the voting rule for the adoption of the draft rules of procedure of a conference. In fact, the Commission had decided to refer in article 5 to the two-thirds majority rule for the adoption of the text of the treaty itself.

24. Sir Humphrey WALDOCK, Special Rapporteur, said that his intention had been merely to reflect the debate and to explain the considerations which had led the Commission to discard any distinction between conferences convened by an international organization and conferences convened by the states concerned.

25. The intention of the Commission had been to enact provisions concerning the voting rule both for the adoption of the text and for the adoption of procedural rules.

26. Mr. LIANG, Secretary to the Commission, suggested that Mr. Tunkin might be satisfied if the paragraph were shortened by the omission of the passage reading:

"...it is in theory possible that the organization should itself prescribe in advance the voting rule to govern the adoption of the text at the Conference. But it is believed to be the invariable practice to leave the decision as to the voting rule to be taken by the states themselves at the Conference. Thus, according to the Secretary of the Commission, the practice of the Secretariat of the United Nations, when the General Assembly convenes a conference, is, after consultation with the groups and interests mainly concerned...."

The first sentence would then read:

"As to the first question, the Commission recognized that, when a conference is convened by an international organization for the purpose of drawing up a treaty, the Secretariat prepares provisional or draft rules of procedure for the conference, including a suggested voting rule for adoption by the conference itself."

27. Sir Humphrey WALDOCK, Special Rapporteur, said he would accept that suggestion.

Paragraph (4) as thus amended was adopted.

Paragraph (5)

28. Mr. TUNKIN said that as drafted, paragraph (5) appeared to place undue emphasis on the majority required for the decision on the voting rule. That approach was reminiscent of the original draft of article 5 but was not consistent with the text finally adopted by the Commission.

29. In order to reflect the provisions of the new text, he proposed that the final portion of paragraph (5), commencing with the sentence, "The rule proposed in paragraph (a) of the present article is that a two-thirds majority should be necessary for the adoption of a text", should be moved to the beginning of paragraph (5).

Paragraph (5) as thus amended was adopted.

Paragraph (6)

Paragraph (6) was adopted.

Paragraph (7)

30. Mr. BARTOŠ observed that the phrase "small number of states" was unduly vague.

31. Mr. ROSENNE suggested its replacement by the expression used in article 18 *bis*, "small group of states".

It was so agreed.

Paragraph (7) as thus amended was adopted.

COMMENTARY TO ARTICLE 6. — AUTHENTICATION OF THE TEXT

Paragraph (1)

Paragraph (1) was adopted.

Paragraph (2)

32. Mr. AMADO, criticizing the opening words "Previous drafts and codes of the law of treaties...", said the so-called "codes" were merely drafts prepared by academic bodies.

33. Mr. ROSENNE suggested that the first sentence should open:

"Previous drafts on the law of treaties...".

It was so agreed.

Paragraph (2) as thus amended was adopted.

Paragraph (3)

Paragraph (3) was adopted.

Paragraph (4)

34. Mr. ROSENNE proposed that the second sentence should contain a reference to articles 24 and 25, which contained the relevant provisions.

35. Sir Humphrey WALDOCK, Special Rapporteur, said he would insert the reference.

Paragraph (4) as thus amended was adopted.

COMMENTARY TO ARTICLE 8. — THE SIGNATURE OR
INITIALLING OF THE TREATY

Paragraph (1)

36. Mr. TUNKIN proposed that, in the second sentence, the expression "a restricted number or group of states" should be replaced by the expression "a small group of states".

It was so agreed.

Paragraph (1) as thus amended was adopted.

Paragraph (2)

37. Mr. ROSENNE proposed that, in the fifth sentence, the words "are not in possession of authority to sign the treaty" should be replaced by the words "may not feel able to sign the treaty"; there could be a subjective element on the part of the representative concerned.

It was so agreed.

Paragraph (2) as thus amended was adopted.

Paragraph (3)

38. Mr. TUNKIN said the statement in the third sentence that initialling operated "only as an act authenticating the text" was too narrow; in many cases, especially of treaties in simplified form such as agreed minutes, initialling was equivalent to full signature. He accordingly proposed the substitution of the words "in most cases" for the word "only".

39. Mr. TSURUOKA supported Mr. Tunkin's view that the present text was too narrow.

40. Sir Humphrey WALDOCK, Special Rapporteur, said he could accept Mr. Tunkin's amendment; it would involve deleting the footnote which stated: "In rare cases, initialling by a Head of State, Head of Government or Foreign Minister has been accepted as a full signature, where the intention that it should be such was manifested at the time of initialling".

Paragraph (3) as thus amended was adopted.

41. Mr. ROSENNE pointed out that, like the commentary, the text of article 8 did not contain the element of flexibility which Mr. Tunkin was rightly requesting, hence it did not make any exception for treaties in simplified form.

42. That could be covered when the Commission resumed its consideration of the draft articles in the light of the comments of governments.

Paragraph (4)

43. Mr. AGO said that the use of colloquialisms such as "*faire quelque chose à l'égard du texte*" in the French text of the last two sentences of paragraph (4) was to be deprecated; more technical language was needed.

44. Sir Humphrey WALDOCK, Special Rapporteur, suggested that the wording should be changed to "authenticate the text".

It was so agreed.

45. Mr. BARTOŠ drew attention to the practice of having the annexes to the treaty initialled by experts, while the text of the treaty itself was initialled by negotiators.

46. Mr. TUNKIN observed that any legal effect which such annexes might have was derived from the main instrument.

47. Mr. CADIEUX pointed out that the practice referred to by Mr. Bartoš was covered by the second sentence of paragraph (4) "Initialling is employed for various purposes".

Paragraph (4) as thus amended was adopted.

COMMENTARY TO ARTICLE 9. — LEGAL EFFECT OF
A FULL SIGNATURE

Paragraphs (1), (2) and (3)

Paragraphs (1), (2) and (3) were adopted without comment.

Paragraph (4)

48. Mr. TUNKIN proposed that the quotation from Sir Hersch Lauterpacht's report given in the third sentence should be transferred to a footnote.

It was so agreed.

49. Mr. TUNKIN proposed the deletion of the eighth sentence, which read "But to state such a rule in the draft articles would be almost meaningless, because it would relate to a process which was entirely internal to the government concerned and it would make it impossible to ascertain whether the obligation had or had not been observed", and the amendment of the beginning of the next sentence, to read: "The Commission, however, hesitated to include such a rule...".

50. Sir Humphrey WALDOCK, Special Rapporteur, said that although the argument stated in the sentence it was proposed should be deleted had been heard often enough during the discussion, he was prepared to accept the amendments proposed by Mr. Tunkin.

51. Mr. AGO pointed out that the penultimate sentence should be in less categorical terms. The obligation on states was to submit the treaty to their respective constitutional authorities within a certain time-limit or, if that were not done, to give reasons.

52. Sir Humphrey WALDOCK, Special Rapporteur, said he would amend the wording.

Paragraph (4) as thus amended was adopted.

Paragraph (5)

Paragraph (5) was adopted without comment.

COMMENTARY TO ARTICLE 11. — ACCESSION

Paragraph (1)

53. Mr. TUNKIN proposed the deletion of the third sentence, which read: "Thus in modern practice a multi-lateral treaty often provides that it shall be open to signature by a limited category of states or within a prescribed time limit and also to accession by states which either were not entitled to sign the treaty or failed to do so within the time limit." Such cases did occur in modern practice, but the matter was controversial and should not be implicitly approved by the Commission.

It was so agreed.

Paragraph (1) as thus amended was adopted.

Paragraph (2)

54. Mr. TUNKIN, referring to the passage quoted from the report of Sir Hersch Lauterpacht, said that the Commission's reports should not contain quotations from individual authors.

55. Sir Humphrey WALDOCK, Special Rapporteur, pointed out that the quotation in fact came from the report submitted to the Commission by Sir Hersch Lauterpacht, in his capacity as special rapporteur. The observation was both well expressed and useful; it could be attributed to "a previous special rapporteur" instead of to Sir Hersch Lauterpacht by name.

It was so agreed.

Paragraph (2) as thus amended was adopted.

Paragraph (3)

56. Mr. ROSENNE asked that the appropriate references to the passages quoted in paragraph (3) should be added in a footnote.

It was so agreed.

57. Mr. TUNKIN proposed the deletion of the second sentence which read: "Accession is an act which is, by its very nature, final and not capable of being made subject to ratification so that an instrument of accession drawn up 'subject to ratification' cannot rank as an accession". The statement went too far: he was inclined to think that accession subject to ratification was very close to signature, if given subject to ratification.

58. He also doubted whether the statement in the sentence beginning with the words "Such an instrument is neither an accession..." was consistent with the terms of article 11 itself.

59. Sir Humphrey WALDOCK, Special Rapporteur, said it was clear from the Secretary-General's practice that accession "subject to ratification" was not treated as signature, and the other states were therefore not notified of the receipt of such an instrument. That point ought to be made known particularly to states with less experience of treaty making.

60. As the commentary indicated, the procedure of accession "subject to ratification" had originated in the time of the League of Nations which had neither encouraged nor discouraged it. Although some reference had been made to the point in his original draft, Mr. Tunkin was right in saying that there was nothing in article 11 on the matter, since the Commission had agreed that it should not be mentioned.

61. The CHAIRMAN said he doubted whether the point should be mentioned in the commentary if there was nothing about it in the article itself.

62. Mr. TUNKIN said that the purport of the sentence he wished to have deleted was that a note or some other instrument signifying accession "subject to ratification" was contrary to international law, which was by no means the case.

63. Sir Humphrey WALDOCK, Special Rapporteur, pointed out that "accession" was defined in article 1 as an act whereby a state established its consent to be bound by a treaty; consequently, accession could not be subject to ratification.

64. Mr. BRIGGS and Mr. CADIEUX said they agreed with the special rapporteur.

65. Mr. ROSENNE suggested that Mr. Tunkin's point be met by the deletion of the second sentence and of the word "therefore" in the third sentence.

66. Sir Humphrey WALDOCK, Special Rapporteur, said that he would have no objection to the deletion of the second sentence since the point at issue was covered in article 1 (d).

67. He was also willing to omit the antepenultimate sentence which read: "Such an instrument is neither an 'accession' nor a 'signature' but at most a notice of a probable future accession". The last two sentences, however, should remain so as to explain why the matter was not covered in the article itself.

It was so agreed.

Paragraph (3) as thus amended was adopted.

COMMENTARY TO ARTICLE 12. — ACCEPTANCE
OR APPROVAL

Paragraph (1)

68. Mr. TUNKIN suggested that in the fourth sentence the expression "almost indistinguishable" should be toned down and the idea expressed in more cautious terms.

69. In the penultimate sentence, the opening phrase, "It is, perhaps, unfortunate from a scientific point of view that the same name should be given to different procedures", was hardly necessary.

70. Sir Humphrey WALDOCK, Special Rapporteur, said that the passage could be deleted.

It was so agreed.

71. Mr. BARTOŠ, agreeing with Mr. Tunkin's first suggestion, said that the institution of acceptance was new and that there was no call to pronounce either for or against it. It should be left to be settled by practice whether it was a necessary and desirable institution or not.

72. Sir Humphrey WALDOCK, Special Rapporteur, suggested that the beginning of the sentence should be amended to read: "Accordingly, the same name was given to two different procedures". A clarification of that kind would serve a useful purpose because of the confusion that existed about the nature of acceptance.

It was so agreed.

Paragraph (1) as thus amended was adopted.

Paragraph (2)

73. Mr. LIANG, Secretary to the Commission, said that the first half of the penultimate sentence, which read: "Admittedly the draftsmen of some modern multilateral treaties are not always very precise in their choice of procedures", should be deleted because of the criticism it implied.

It was so agreed.

74. Mr. BARTOŠ proposed the deletion of the last sentence because it did not accurately reflect practice. Acceptance was a method whereby a state gave final consent to be bound and it should be expressed in the form of a solemn declaration.

75. Mr. ROSENNE suggested that Mr. Bartoš's point would be met by the substitution of the word "procedure" for the word "form".

76. Mr. BARTOŠ supported that suggestion.

It was so agreed.

Paragraph (2) as thus amended was adopted.

Paragraph (3)

77. Mr. LACHS proposed the deletion of the word "parliamentary" in the penultimate sentence, for it was not necessarily always the legislative body which "approved" treaties. In some countries no precise constitutional provision existed for the purpose, but a certain procedure had been developed for the purpose.

78. Sir Humphrey WALDOCK, Special Rapporteur, suggested that the words "constitutional procedures or practices for approving treaties" might replace the words "constitutional procedure of parliamentary approval of treaties".

79. Mr. BARTOŠ observed that the ratification of bilateral technical treaties was often, in bilateral relations, subject to governmental approval, but as far as he was aware, that procedure was not followed in the treaty practice of international organizations. The current practice of international organizations was always to ask for formal ratification.

80. He also drew attention to the new practice of tacit approval. In the case of certain protocols of mixed commissions, whose validity, in accordance with the statutes establishing the commissions, was conditional on the approval of the governments concerned, there were provisions which laid down a time-limit for approval; if approval was neither expressly signified nor expressly refused within the specified time, once the time-limit had expired it was deemed to have been given tacitly, in the absence of notice to the contrary by the state concerned. He did not, however, insist on mention being made of that point, but thought it should be mentioned in the commentary.

81. Sir Humphrey WALDOCK, Special Rapporteur, said that the United Nations *Treaty Series* provided numerous examples of treaties concluded between states and international organizations which had been submitted for approval. He was nevertheless willing to delete the last sentence.

Paragraph (3) as thus amended was adopted.

COMMENTARY TO ARTICLE 13.—THE PROCEDURE OF RATIFICATION, ACCEPTANCE, ACCESSION AND APPROVAL

Paragraph (1)

82. Mr. VERDROSS, said the second part of the first sentence which read "and in practice the instrument is usually signed by the head of state" was true only of ratification and so should be deleted; an instrument of approval could be signed by a member of the government.

It was so agreed.

Paragraph (1) as thus amended was adopted.

Paragraph (2)

83. Mr. TUNKIN proposed the deletion of the last two sentences, which read: "It is, of course, possible to imagine cases when the line between subscribing to a treaty subject to reservations and subscribing to parts only of the treaty might appear to be one of form rather than of substance. But juridically the two acts are different and reservations have their own special rules", because they were too speculative.

84. Sir Humphrey WALDOCK, Special Rapporteur, said he could agree to that deletion, though the point might very well come up for discussion.

85. Mr. LACHS, supporting Mr. Tunkin's amendment, said the paragraph was concerned with the procedure of ratification and not with the question of reservations.

Mr. Tunkin's amendment was adopted.

Paragraph (2) as thus amended was adopted.

Paragraph (3)

Paragraph (3) was adopted without comment.

Paragraph (4)

86. Mr. TUNKIN proposed that the words "appears to be strong authority for this way of looking at the matter" should be deleted from the last sentence so as to refer simply to the International Court's decision in the Right of Passage Case without drawing any conclusion from it.

Mr. Tunkin's amendment was adopted.

87. Mr. AGO proposed the substitution in the first sentence, for the words "is rendered legally effective" of the words "produces effects on the international plane".

88. The term "effective date" in the penultimate sentence seemed hardly appropriate: it was certainly not acceptable in the French version.

89. Sir Humphrey WALDOCK, Special Rapporteur, said that Mr. Ago's points could be covered by appropriate drafting changes.

90. Mr. ROSENNE said he reserved his position on paragraph (4); he was not satisfied that the rule therein stated was a desirable one.

91. At a later stage in the Commission's work he might suggest, in the interests of progressive development, a general rule providing for a short time-lag between the date of the deposit of the instrument and the date when the instrument became effective.

Paragraph (4) as thus amended was adopted.

COMMENTARY TO ARTICLE 14.—ACCEPTANCE
OR APPROVAL

Paragraph (1) was adopted subject to review of the French text.

Paragraph (2)

92. Mr. de LUNA said he disliked the words "*en gros*" (English, "in general terms") in the second sentence, as they had a rather commercial flavour and made for clumsy drafting in Spanish; he suggested that they could be deleted.

It was so agreed.

Paragraph (2) as thus amended was adopted.

Paragraph (3)

93. Mr. AGO asked whether the statement made in the second sentence which read "Formerly, when ratification was regarded as obligatory and a mere confirmation of the authority to sign, it was generally said to operate retrospectively and to make the treaty effective as from signature", was correct.

94. Sir Humphrey WALDOCK, Special Rapporteur, said that historically it was true to say that in former times ratification was confirmation of authority to sign. States had no discretion in the matter if full-powers had been issued.

95. Mr. GROS suggested that the words "and a mere" should be deleted. In fact ratification had been more than confirmation of the authority to sign; it had expressed the state's actual consent to be bound.

96. Mr. BARTOŠ said he disagreed; in former times ratification had been regarded as confirmation of the act executed by the plenipotentiary or agent.

97. Nowadays, in his opinion, the act of ratification was a legal act whereby a state gave positive expression to its will with regard to the binding force of the treaty.

98. Mr. LIANG, Secretary to the Commission, suggested that the beginning of the sentence should be changed, since it might convey the impression that ratification was not regarded as obligatory in modern times. It was not necessary in the commentary to touch upon the question of the obligatory or non-obligatory character of ratification, and it would be enough to say that in the past it had been considered as a confirmation of authority to sign.

99. Mr. BRIGGS said there was certainly some ambiguity in the sentence, seeing that, for the purposes of the draft, ratification was regarded as obligatory.

100. Sir Humphrey WALDOCK, Special Rapporteur, suggested that the beginning of the sentence should be redrafted to read: "Formerly, ratification was regarded as confirming the act of signature".

It was so agreed.

Paragraph (3) as thus amended was adopted.

CHAPTER V. — OTHER DECISIONS AND CONCLUSIONS OF THE COMMISSION (A/CN.4/L.101/Add.4 and Corr. 2)

I. — Co-operation with other bodies

101. The CHAIRMAN announced that the Secretary had not yet been informed of the place and date of the forthcoming sessions of the Asian-African Legal Consultative Committee and the Inter-American Council of Jurists. The Commission should therefore authorize someone to appoint its observers to the next sessions of those bodies.

102. In reply to a question by Mr. TUNKIN, Mr. LIANG, Secretary to the Commission, said that he had sent a telegram of inquiry to the Secretary of the Asian-African Legal Consultative Committee two weeks previously and had now received a reply that neither the place nor the date of the next session had yet been decided.

103. Mr. EL-ERIAN suggested that the Chairman should be authorized to appoint observers to attend the sessions of both bodies.

It was so agreed.

II. — Date and place of the next session

104. The CHAIRMAN said that, at a private meeting on 1 June, the Commission had decided that its fifteenth session would be held from 6 May to 12 July 1963. The Commission should now decide on the items to be placed on the provisional agenda for that session.

105. Mr. TUNKIN said it was obvious that the law of treaties would be the main item on the agenda of the next session and that the subsidiary items would be state responsibility and the succession of states and governments, since the sub-committees established to deal with these two items would be submitting their reports to the session.

106. The Secretariat should bear in mind that it was unsatisfactory when members of the Commission did not receive the main report on the principal item on the agenda till two weeks after the opening of the session. At the present session, for example, it should not have taken six weeks to issue the special rapporteur's report on the law of treaties in the original language.

107. Mr. BRIGGS thought that the provisional agenda for the fifteenth session should consist of three main items: the law of treaties, the report of the sub-committee on state responsibility and the report of the sub-committee on the succession of states and governments. Since no special rapporteurs had yet been appointed for the two items last mentioned, it would be best to list them in the provisional agenda as the sub-committees' reports.

108. The CHAIRMAN noted that the Commission seemed to be agreed on the first three items. It had, however, also been suggested that two more items — special missions and relations between states and inter-governmental organizations — should be added to the list. It had further been suggested that no special rapporteur should yet be appointed for special missions, on which the Secretariat should submit a preliminary report, but that the Commission should appoint a special rapporteur for relations between states and inter-governmental organizations.

109. Mr. TUNKIN said that the Commission had agreed in principle that only one main item should be dealt with at each session. It seemed unnecessary to include two more items in the provisional agenda when the Commission would in any case have to consider the reports of the two sub-committees, in addition to its work on the law of treaties.

110. Mr. AGO said that, if a fourth main item was to be put on the agenda, a special rapporteur should be appointed for the question of special missions.

111. Mr. CADIEUX said that, while it might not be essential to include the two additional items in the provisional agenda, it would be wiser to appoint special rapporteurs for both, so that the Commission should have something to work on if it had time to spare.

112. The CHAIRMAN pointed out that it had been the Commission's practice always to keep one item in abeyance, in case it were unexpectedly prevented from continuing its work on the main item. The value of that practice had been proved in 1959, when the special rapporteur on consular intercourse and immunities had been unable to attend a large part of the session, and the Commission had filled in the time by discussing the law of treaties. That was why it had been suggested that a special rapporteur should be appointed for the topic of relations between states and inter-governmental organizations.

113. Mr. TUNKIN said that, while he agreed with Mr. Cadieux and the Chairman regarding the appointment of special rapporteurs, he did not consider it essential to include the questions of special missions and relations between states and inter-governmental organizations in the provisional agenda.

114. The CHAIRMAN said it had been suggested that Mr. El-Erian should be appointed special rapporteur on the topic of relations between states and inter-governmental organizations.

It was so agreed.

115. The CHAIRMAN asked whether the Commission wished to appoint special rapporteurs on state responsibility and the succession of states and governments.

116. Mr. TUNKIN thought that that decision could be deferred until the next session, when the reports of the sub-committees would be considered.

117. Mr. CADIEUX pointed out that, in the absence of special rapporteurs on the two subjects, the chairmen of the sub-committees concerned would have to assume many of the responsibilities of special rapporteurs, and that their position might be somewhat ambiguous from the material and financial point of view.

118. The CHAIRMAN said that the sub-committees had already been set up by a decision of the Commission. He suggested that the Commission should decide to appoint the special rapporteurs on those two subjects at its next session.

It was so agreed.

119. Mr. BRIGGS asked what were the implications of the last sentence in section II, which read: "In the circumstances, the first Monday in May was decided on as a most convenient opening date for the session...". The Commission had indicated a date that it had decided was the most convenient. Would that be brought to the attention of the General Assembly when it reconsidered its five-year plan of conferences, and by whom?

120. Mr. LIANG, Secretary to the Commission, replied that the decision referred to would be included in the Commission's report to the General Assembly, and considered by the Fifth Committee of the General Assembly. It would be taken into account again in the General Assembly's review of the five-year "pattern of conferences", of which the current five-year period ended in December. The Chairman of the Commission would no doubt be asked to explain in detail the considerations which had led to the Commission's decision.

121. Mr. ROSENNE said he assumed that the decisions taken by the Commission on Mr. El-Erian's appointment and on the question of special missions would also be recorded in the report.

122. A more serious matter was the absence from draft chapter V of any reference to members expressing dissatisfaction with the technical services provided by the European Office of the United Nations.

123. Mr. LIANG, Secretary to the Commission, referring to the question of special missions, said he understood that the paper which the Secretariat was asked to draft would merely be a survey of the question.

III. — Representation at the seventeenth session of the General Assembly

124. Mr. BRIGGS moved the adoption of section III.

Section III was unanimously adopted.

Chapter V was adopted.

Law of treaties (A/CN.4/144 and Add.1) (item 1 of the agenda) (*resumed from the previous meeting*)

DRAFT ARTICLES SUBMITTED BY THE DRAFTING COMMITTEE

(*resumed from the previous meeting*)

ARTICLE 7. — PARTICIPATION IN A TREATY, and 7 *bis*.

— THE OPENING OF A TREATY TO THE PARTICIPATION OF ADDITIONAL STATES (*resumed from the previous meeting*)

125. The CHAIRMAN said the special rapporteur had explained at the previous meeting that, in the light of the text of article 7 as adopted by the Commission at its 667th meeting, some residual cases still remained to be dealt with in paragraphs (2) and (3) of article 7 *bis*.²

126. Speaking as a member of the Commission, he said he agreed in substance with the special rapporteur. The adoption of Mr. Elias's proposal as amended by the addition to paragraph (1) of the words, "unless the treaty provides otherwise" had meant that certain cases were not dealt with by article 7 so that article 7 *bis* should be left in the form in which it had been submitted by the Drafting Committee.³

127. Mr. TUNKIN suggested that, in view of the new text of article 7, the opening proviso of paragraph 2 of article 7 *bis* could be omitted, since it virtually repeated the "unless" clause which had now been added to Mr. Elias' original proposal for article 7.

128. Mr. BRIGGS pointed out that the Commission had taken no decision on the observation he had made at the previous meeting that, in the light of the wording of article 7, article 7 *bis* would open participation to states which were not sovereign.⁴

129. Mr. BARTOŠ said that, while he had no objection to the retention of article 7 *bis*, he did have to such phrases as "or otherwise appears from the circumstances of the negotiations", in paragraph 2. Such

² 668th meeting, paras. 54-55, 59-61.

³ 660th meeting, para. 51.

⁴ 668th meeting, para. 56.

vagueness could give rise to endless disputes and hamper the application of the article.

130. Mr. TUNKIN said that his suggestion for omitting the opening proviso of paragraph 2 had been a little premature, in view of the provision in sub-paragraph 2 (*b*). The words “unless a contrary intention is expressed in the treaty” should be retained, but the words to which Mr. Bartoš had objected should be deleted.

131. Mr. BRIGGS suggested that both articles 7 and 7 *bis* should be referred back to the Drafting Committee, with the request to reconcile the two texts in the light of the discussion.

132. Mr. de LUNA, supporting Mr. Briggs’ suggestion, urged that in reconsidering article 7, the Drafting Committee should also take into account the question raised by Mr. Ago⁵ and decide to include in the “unless” clause of paragraph 1 the words “or the rules in force in the international organization within which the treaty was concluded”.

133. The CHAIRMAN observed that the only suggestion in connexion with article 7 with which the Commission seemed to be prepared to deal was Mr. Tunkin’s suggestion for the deletion of the word “sovereign”.⁶

134. Sir Humphrey WALDOCK, Special Rapporteur, said he shared Mr. de Luna’s views. The absence of a provision along those lines could expose the Commission’s draft of article 7 to serious criticism; as Mr. Ago had pointed out, such an omission would completely disrupt the practice of the ILO in the matter of conventions concluded under its auspices. The position of international organizations had been safeguarded in other articles, and there was no reason to proceed differently in article 7.

135. Mr. TUNKIN pointed out that the Commission had already voted on article 7; the question of the wording of article 7 *bis* was quite a separate one.

136. Mr. ROSENNE said that the connexion between articles 7 and 7 *bis* was so close that they should be referred back to the Drafting Committee together for redrafting.

137. Mr. TUNKIN said he categorically opposed that view. A vote had already been taken on article 7 at the previous meeting and a two-thirds majority of the Commission would be required to reverse that decision.

138. The CHAIRMAN said he had supposed that Mr. Briggs’ suggestion involved only the deletion of the word “sovereign” from article 7. It appeared, however, that the actual substance of that article would be affected if it were referred back to the Drafting Committee.

139. Mr. AGO said that sub-paragraph 2 (*b*) of article 7 *bis* safeguarded the situation of treaties drawn up in, or under the auspices of, international organizations. That made it even more absurd to omit a similar

safeguard from article 7. He could see no reason for such strong opposition to a perfectly logical step.

140. Mr. LACHS said that, since the Commission had approved article 7 with the omission of the word “sovereign”, the question arose whether article 7 *bis* was necessary. The only case to which it really applied was the residual one of treaties which expressly stated that additional states were not admitted to participation.

141. He could not agree with Mr. Ago that the case of treaties concluded within international organizations should be dealt with in article 7, since that case represented the exception, whereas article 7 stated the rule.

142. Mr. AGO said that the question whether the treaty was or was not silent on the matter of participation was not the only issue. A large number of treaties, including all the International Labour Conventions and International Sanitary Conventions, were silent on the subject of participation, but were open only to states members of the organizations concerned, according to the rules of those organizations. If the Commission decided to adopt a provision stating that all states could participate in a treaty which was silent on the question of participation, it would be clearly acting in a manner at variance with the constitution and rules of certain international organizations. The particular features of such a large number of instruments should be taken into account.

143. Sir Humphrey WALDOCK, Special Rapporteur, pointed out that the addition suggested by Mr. de Luna and Mr. Ago would in no way affect the substance of article 7 as adopted by the Commission.

144. Mr. TUNKIN said that, although he still had considerable doubts on the matter, he would accept Mr. de Luna’s and Mr. Ago’s suggestions as an interim solution.

145. Mr. de LUNA stressed that his suggestion implied no change in his opinion on the universal character of general multilateral treaties. Nevertheless, sub-paragraph 2 (*b*) of article 7 *bis* conflicted with the principle that such treaties by their very nature should be open to all states; the Commission should take existing practice, however imperfect, into account. The addition he had suggested merely represented an extension of the compromise that he and Mr. Elias had agreed to in respect of article 7.

146. Mr. ROSENNE, expressing his appreciation of the spirit of conciliation shown by Mr. Tunkin in accepting Mr. de Luna’s and Mr. Ago’s suggestion, said he himself had abstained from voting on article 7 at the 667th meeting, not because he was opposed to the principle but because he found the drafting awkward; he would now however be able to support the article as amended.

147. Mr. TUNKIN said that he had accepted the new wording in order to expedite the Commission’s work, but still thought it contradictory for one and the same draft to contain a provision stating that general multilateral treaties, expressly defined as those dealing with

⁵ 667th meeting, paras. 42 and 50.

⁶ 668th meeting, para. 57.

matters of general interest to all states, were open to participation by all states, and another provision allowing for limitations to participation.

148. Mr. AGO thanked members for the effort they had made to reconcile opposing views and said that he would be able to vote in favour of article 7 as revised.

149. Mr. CADIEUX said that, while he would accept the compromise in a spirit of conciliation, he was not satisfied with it. In particular, he had serious doubts concerning the definition of general multilateral treaties, which were said to be of general interest to the community of nations. He could cite many examples of treaties concluded between a large number of Powers, which were of general interest, but which the parties had no intention of opening to all states.

150. The CHAIRMAN suggested that articles 7 and 7 *bis* should be referred back to the Drafting Committee for redrafting in the light of the agreement reached in the Commission.

It was so agreed.

The meeting rose at 1.5 p.m.

670th MEETING

Thursday, 28 June 1962, at 10.30 a.m.

Chairman: Mr. Radhabinod PAL

Draft report of the Commission on the work of its fourteenth session (resumed from the previous meeting)

CHAPTER II.—LAW OF TREATIES (A/CN.4/L.101/Add.1) (resumed from the previous meeting)

1. The CHAIRMAN invited the Commission to resume its consideration of the draft report.

COMMENTARY TO ARTICLE 10.—RATIFICATION

Paragraph (1)

2. Mr. BARTOŠ noted that the commentary to article 10 used two different expressions to reflect the same idea: "ratification on the international plane" and "ratification in international law"; he suggested that the same expression should be used throughout.

It was so agreed.

Paragraph (1) as thus amended was adopted.

Paragraph (2)

3. Mr. TUNKIN said he could not accept the first sentence. He doubted whether it was true to say that the modern institution of ratification in international law had developed "under the influence of France and the United States". The Commission, as an international body, should be careful not to make pronouncements of that type.

4. Mr. AMADO said the first sentence might have been unobjectionable in an academic treatise but was quite unsuitable in a report by the International Law Commission.

5. Mr. CADIEUX suggested that the words "under the influence of France and the United States" should be deleted.

It was so agreed.

6. Mr. BARTOŠ said that while the statement in the fourth sentence might be correct in the case of a great many countries, including Yugoslavia, in others treaty-making fell within the exclusive competence of the executive. He, therefore, proposed the insertion, after the words "ratification came, however, to be used", of some qualifying expression such as "in most cases".

It was so agreed.

Paragraph (2) as thus amended was adopted.

Paragraph (3)

7. Mr. TUNKIN said there appeared to be some confusion in the first sentence between inter-governmental agreements not requiring ratification and agreements in simplified form.

8. Mr. ROSENNE suggested the deletion of the second sentence reading: "Indeed, recourse is sometimes had to these less formal types of agreement for the very purpose of avoiding the delay involved in complying with constitutional procedures". That sentence was open to misinterpretation.

It was so agreed.

9. Mr. BARTOŠ suggested that, in the French version of the second part of the first sentence, the word "généralement" should be replaced by "habituellement" which was closer to the English "usually".

10. He reiterated his opposition to the majority view in the Commission regarding the requirement, or non-requirement, of ratification for treaties in simplified form.

11. Sir Humphrey WALDOCK, Special Rapporteur, in the light of Mr. Tunkin's remark, suggested the deletion of the words "and intergovernmental agreements" from the first sentence, which would thus end with the words "amongst which were exchanges of notes".

It was so agreed.

Paragraph (3) as thus amended was adopted.

Paragraph (4)

12. Mr. ROSENNE observed that in the third sentence the term "interdepartmental agreements" was used, presumably for "inter-governmental agreements".

13. Mr. BARTOŠ said he did not approve of the notion that there could exist "inter-governmental" or "inter-departmental" agreements; government departments were merely organs of the state, and all treaties were treaties between states.

14. He also had reservations regarding the use of the words "impliedly excluded" in connexion with ratification. In his opinion, the general and absolute rule was that ratification was necessary.

15. Mr. LACHS said the language of the first sentence, which stated that the general result of the developments described in the previous paragraphs had been "to obscure the law", was unsatisfactory.