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Summary record of the 659th meeting

Topic:
Law of Treaties

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forbidden. He thought that the treaties which the Commission had in mind were instruments of a constitutional type which limited capacity. If the paragraph were retained, he thought it should be transposed to the end of the article, as paragraph 4.

115. In principle, the Commission should retain an article on capacity, but in that case it might have to define "subject of international law". The Commission might be criticized for referring to subjects of international law without definition.

116. Mr. BRIGGS said that the special rapporteur's proposed revision of paragraph 3 did not meet his objection. He still felt that paragraphs 2 and 3 should be deleted, though an article on capacity should be retained in the draft.

117. The CHAIRMAN put to the vote the proposal that paragraph 2 should be deleted.

The proposal was rejected by 7 votes to 7 with 7 abstentions.

118. The CHAIRMAN put to the vote the proposal that paragraph 3 should be deleted.

The proposal was rejected by 12 votes to 8, with 1 abstention.

119. The CHAIRMAN put to the vote paragraph 3 as amended by the special rapporteur.

Paragraph 3, as thus amended, was adopted by 15 votes to none, with 6 abstentions.

120. Mr. EL-ERIAN said that, since paragraph 2 was to be retained, he hoped that the Drafting Committee would take into account Mr. Briggs' suggestion that the provision should relate to capacity to conclude certain types of treaties.

121. The CHAIRMAN suggested that article 3 should be referred back to the Drafting Committee for revision in the light of the decisions taken and of the comments made during the debate.

It was so agreed.

The meeting rose at 1 p.m.

659th MEETING

Thursday, 7 June 1962, at 10 a.m.

Chairman: Mr. Radhabinod PAL

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

DRAFT ARTICLES SUBMITTED BY THE DRAFTING COMMITTEE (*continued*)

ARTICLE 4. — AUTHORITY TO NEGOTIATE, DRAW UP, AUTHENTICATE, SIGN, RATIFY, ACCEDE TO OR ACCEPT A TREATY

1. The CHAIRMAN invited the Commission to continue its consideration of the provisional articles submitted by the Drafting Committee, whose redraft of article 4 read as follows:

"1. Heads of State, Heads of Government and Foreign Ministers are not required to furnish any evidence of their authority to negotiate, draw up, authenticate, or sign a treaty on behalf of their state.

"2. Heads of a diplomatic mission are not required to furnish evidence of their authority to negotiate, draw up and authenticate a treaty between their state and the state to which they are accredited.

"3. Subject to the provisions of paragraphs 1 and 2 above, a representative of a state shall be required to furnish evidence, in the form of written credentials, of his authority to negotiate, draw up and authenticate a treaty on behalf of his state.

"4. (*a*) Subject to the provisions of paragraph 1 above, a representative of a state shall be required to furnish evidence of his authority to sign (whether in full or *ad referendum*) a treaty on behalf of his state by producing an instrument of full-powers.

"(*b*) However, in the case of treaties in simplified form, it shall not be necessary for a representative to produce an instrument of full-powers, unless called for by the other negotiating state.

"5. In the event of an instrument of ratification, accession or acceptance being executed by a representative of the state other than the Head of State, he may be required to furnish evidence of his authority.

"6. (*a*) The instrument of full-powers, where required, may either be one restricted to the performance of the particular act in question or a general grant of full-powers which covers the performance of that act.

"(*b*) In case of delay in the transmission of the instrument of full-powers, a letter or telegram evidencing the grant of full-powers sent by the competent authority of the state concerned or by the head of its diplomatic mission in the country where the treaty is negotiated may be provisionally accepted, subject to the production in due course of an instrument of full-powers, executed in proper form.

"(*c*) Similarly, a letter or telegram evidencing the grant of full-powers sent by a state's Permanent Representative to an international organization may also be provisionally accepted, subject to the production in due course of an instrument of full-powers executed in proper form."

2. Mr. ROSENNE said that, although he was in general agreement with the Drafting Committee's redraft, he wished to suggest a few substantive changes. First, under paragraph 4 (*b*) representatives were not obliged to produce an instrument of full-powers in the case of treaties in simplified form. He thought that provision went too far, and that the exemption should be limited to the head of a diplomatic mission in the country to which he was accredited.

3. Secondly, paragraph 5, under which the Head of State was not required to furnish evidence of his authority to ratify, accede to or accept a treaty, did not

go far enough; the exemption should be extended to the other two classes of persons referred to in paragraph 1, as in the special rapporteur's original text. In some countries, such as his own, the Foreign Minister might execute instruments of ratification, accession or acceptance by virtue of a general government decision; consequently, the restriction laid down in paragraph 5 might cause considerable dislocation in existing treaty-making practices.

4. Next, the article could be drafted in considerably more precise form. For example, paragraph 1 might include the exception provided for in paragraph 5. Paragraph 2 might also deal with all the powers of a head of diplomatic mission in the country to which he was accredited, and the exceptions provided for in paragraph 4 (*b*) might be incorporated in that paragraph. In paragraph 3, it might be neater to delete the words "Subject to the provisions of paragraphs 1 and 2 above, a representative" and to replace them by the words "Other representatives".

5. The Drafting Committee might consider whether heads of permanent missions to international organizations should not be treated on a par with heads of diplomatic missions for the purposes of agreements with the organizations concerned. It would be somewhat anomalous if, for example, an ambassador accredited to the United Nations, who was often a senior diplomatic official, were placed on a lower level in that respect than a head of a diplomatic mission.

6. Finally, the expression in paragraph 5, "an instrument of ratification, accession or acceptance being executed", did not appear in the original draft; he asked whether it related to the signature or to the deposit of the instrument concerned.

7. Mr. VERDROSS said he wished to revert to a point which had been raised during the first reading of the article. He was not sure whether under existing international law the Head of State alone could negotiate, draw up, authenticate, and sign a treaty. He believed that the current practice in countries with parliamentary systems was that the negotiation, drafting, authentication and signature of treaties were functions performed by persons other than the Head of State, who ratified a treaty which had been negotiated, drafted and signed by other organs of the state; the situation was different in countries with presidential systems, where the Head of State was also the Head of Government. The old rule advocated by Anzilotti was that the Head of State under parliamentary systems had *jus representationis omnimodae,* but later writers had maintained that the constitutional limitations of the Head of State were also of importance at the international level. Personally, he had no strong objection to the Commission's codifying either of those rules but it should be clearly understood that, if it accepted the Drafting Committee's text, it would be confirming the old rule and not the modern one. In his opinion, it would be best to say that Heads of State were considered as so authorized by the rules of internal law, if they declared that they were acting on behalf of the state.

8. Mr. CASTRÉN considered that the redraft of the article was generally acceptable, though it might be advisable to place it after the articles on negotiation, signature and ratification, accession and acceptance.

9. With regard to "treaties in simplified form", referred to for the first time in the new paragraph 4 (*b*), the term should be defined in article 1 or in any case explained in the commentary.

10. Sir Humphrey WALDOCK, Special Rapporteur, said that a definition of agreements in simplified form would be submitted to the Commission.

11. Mr. TUNKIN said he was in general agreement with Mr. Rosenne that the structure of the article was not quite correct, while from the point of view of substance, he would go even further than Mr. Rosenne.

12. With regard to paragraph 5, the practice of requiring accredited officials to furnish evidence of authority to deposit or exchange instruments of ratification, accession or acceptance was not a desirable one, and there were very few instances when full-powers were in fact required. Existing practice would therefore be reflected if heads of diplomatic missions and permanent representatives to international organizations, such as the United Nations, were added to the three categories of persons exempted by paragraph 1 from the duty to furnish evidence of authority when depositing an instrument of ratification.

13. With regard to paragraph 6 (*b*), the letter or telegram evidencing the grant of full-powers referred to in that provision was usually accepted as sufficient pending the transmission of the instruments of full-powers. The Commission should therefore accept that useful practice as a rule of international law and encourage it by substituting the word "shall" for "may" in the fourth line.

14. Since both dealt with essentially the same question, paragraphs 6 (*b*) and (*c*) could be combined unless paragraph 6 (*c*) were omitted altogether and a reference to permanent representatives to an international organization included in paragraph 6 (*b*).

15. Sir Humphrey WALDOCK, Special Rapporteur, said that the word "executed" in paragraph 5 actually meant "signed", in the legal sense of a signature appended to make an instrument effective. Since the use of that word had given rise to difficulties, he suggested that the Drafting Committee should be asked to find a different wording to convey that meaning.

16. That interpretation of the word "executed" was particularly important in connexion with Mr. Tunkin's suggested amendment of paragraph 5. Instruments of ratification, accession or acceptance were normally signed by the Head of State and sometimes by a Head of Government or the Foreign Minister, but it was extremely unusual for the head of a diplomatic mission to sign such instruments, although he might be engaged in the exchange or deposit of such instruments. In drafting paragraph 5, the Drafting Committee had had in mind the occasional cases where, for example, a permanent representative to an international organiza-

tion might be instructed to sign an instrument; the paragraph was not, however, intended to cover the deposit of such instruments.

17. Mr. TUNKIN said that, if that were the case, there seemed to be some confusion in paragraph 5. A clear distinction should be made between the constitutional act and the exchange and deposit of instruments of ratification, which constituted international acts.

18. Mr. AMADO said that the use of the word "*établi*" in the French text of paragraph 5 struck him as curious, despite the special rapporteur's explanations. He could not conceive any representative of a state other than the Head of State signing an instrument of ratification. It was most important that the expressions used in the draft international convention being prepared by the Commission should be accurate. He recalled the strong objections which Mr. Hudson had raised to the term "authentication" in Mr. Brierly's first report on the law of treaties.[1] Mr. Hudson had said that it was hardly necessary to consider the question of authentication of texts of treaties and that the term "authentication" was only used when a treaty was drawn up in several languages; he had never heard it said that signature was one of the ways of authenticating the texts of treaties, and it was unnecessary to devote an article to authentication. Mr. Brierly, who had been Chairman of the Commission at the time, had agreed that the word "authentication" was somewhat ambiguous, and thought that Mr. Hudson had taken it in a sense different from that intended by the Commission.[2] He (Mr. Amado) would urge a return to more scrupulous attention to the exact meaning of words; he could not be satisfied with the way in which the verb "*établir*" was being given a juridical meaning which it did not in fact possess.

19. Mr. ROSENNE said he could not support Mr. Tunkin's suggestion for the amalgamation of paragraphs 6 (*b*) and (*c*). The idea reflected in paragraph 6 (*b*) was that the head of a diplomatic mission had certain powers in respect of the negotiation of a treaty in the country to which he was accredited, whether or not the treaty was being concluded with that country. On the other hand, under paragraph 6 (*c*), that right should be limited to treaties concluded within the framework of the organization to which the permanent representative was accredited. Accordingly, if the two clauses were merged, there would be no provision to cover the difficult situation which might arise in the United States, where a number of heads of diplomatic missions and permanent representatives to the United Nations could perform the same act. He therefore urged that the two provisions should be kept separate.

20. In view of the special rapporteur's explanation of the use of the word "executed", he thought that paragraph 5 as drafted might be unnecessary and could be amalgamated with paragraph 1.

21. With regard to Mr. Amado's comments on authentication, he said that he had been called upon to authenticate treaties, by initialling and by signature, and with or without production of full-powers.

22. Mr. LIU said that the instruments of ratification, accession or acceptance referred to in paragraph 5 became important in the final stage of the conclusion of a treaty. Paragraph 1, on the other hand, was concerned with the negotiating stage of treaty-making, where evidence of authority obviously had to be furnished. Paragraph 5 thus seemed to be confusing and unnecessary.

23. Mr. TSURUOKA asked if the special rapporteur would give his views on the question whether paragraph 5 should be retained.

24. Sir Humphrey WALDOCK, Special Rapporteur, said he had no objection to a provision placing Heads of Government and Foreign Ministers on the same level as Heads of State for the purpose of the execution of instruments of ratification, accession or acceptance. Such a provision would probably correspond to modern practice in the matter, particularly in the case of treaties in simplified form. Accordingly, paragraph 5 might be omitted, but he would suggest that a clause should be added to paragraph 1, stating that, in the event of the instruments concerned being executed by a representative of the state other than the Head of State, Head of Government or Foreign Minister, evidence of authority might be required. On the other hand, the Commission might consider that such a provision was unnecessary.

25. Mr. EL-ERIAN pointed out that rule 27 of the rules of procedure of the General Assembly provided that the credentials of representatives might be issued by Heads of State, Heads of Government or Foreign Ministers.

26. Mr. BARTOŠ said he considered the provision in paragraph 5 both necessary and useful. The classical rule that only powers issued by the Head of State were valid had largely given way to the modern national and international practice, whereby other representatives of the state were authorized to execute instruments of ratification, accession or acceptance; very often it was the Minister for Foreign Affairs who was so authorized. There was no contradiction between that practice and the rule in paragraph 5, because any such state representative was always able to furnish evidence, not necessarily in the form of a certificate, of his authority.

27. With regard to Mr. El-Erian's comment, he observed that the rules of procedure of the General Assembly related only to the right of certain persons to represent their countries in negotiations; accordingly, such representatives did not require full-powers issued by the Head of State.

28. The CHAIRMAN noted that the consensus of opinion in the Commission seemed to be that Heads of Government and Foreign Ministers should be placed on the same level as Heads of State for the purposes of paragraph 5; the paragraph should therefore be redrafted accordingly.

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[1] *Yearbook of International Law Commission 1951*, Vol. I (United Nations publication, Sales No.: 1957.V.6, Vol. I), p. 152, paras. 1 and 9.

[2] *ibid.*, p. 153, para. 19.

29. In view of the special rapporteur's explanation of the meaning of the word "executed" as used in that paragraph, an appropriate amendment should be made.

30. The Drafting Committee should also consider both Mr. Tunkin's suggestion for the merging of paragraphs 6 (*b*) and (*c*) and Mr. Rosenne's objection to that suggestion.

31. It seemed to be agreed that, as suggested by Mr. Tunkin, the word "may" in those two provisions should be replaced by the word "shall".

32. Mr. TUNKIN thought the Drafting Committee might be asked to consider also whether the reference in paragraph 5 to instruments of ratification should not be separated from the reference to instruments of accession or acceptance, since it was important to state clearly that full-powers should not be required from an ambassador or a representative of an international organization in the case of the exchange or deposit of instruments of ratification.

33. Sir Humphrey WALDOCK, Special Rapporteur, said that Mr. Tunkin's point would be met by the proposed amendment of the word "executed". The question of the deposit of the instruments did not arise, and in the cases referred to in paragraph 5 it would obviously be indicated in the instrument itself that it emanated from a sufficiently high authority.

34. With regard to Mr. Rosenne's comments on paragraph 6, he suggested that the Drafting Committee should use wording which would confine the scope of paragraph 6 (*c*) to treaties negotiated within the organization concerned.

35. Mr. ROSENNE asked whether there were any objections to his suggestion that heads of permanent missions to international organizations should be treated on a par with heads of diplomatic missions in paragraph 2.

36. Sir Humphrey WALDOCK, Special Rapporteur, said he had no objection to that suggestion, which seemed to correspond to modern practice.

37. Mr. ROSENNE asked whether his suggestion that the exemption provided for in paragraph 4 (*b*) should be limited to heads of diplomatic missions was acceptable to the Commission.

38. Sir Humphrey WALDOCK, Special Rapporteur, said he did not think it advisable to follow that suggestion. Treaties in simplified form were becoming increasingly common, and the position of the other negotiating state was entirely protected by the possibility of requiring the representative concerned to produce an instrument of full-powers, if called upon.

39. Mr. AMADO said he doubted whether a representative of the state other than the Head of State could actually ratify a treaty. If merely the exchange of instruments of ratification was involved, paragraph 5 would be satisfactory, but ratification was a sovereign act and, as such, could be performed only by the Head of State.

40. Sir Humphrey WALDOCK, Special Rapporteur, observed that, for less formal instruments such as inter-departmental agreements, instruments of ratification were often executed by the Foreign Minister. National practice in the matter differed, but it was impossible to exclude cases where instruments of ratification could be signed by representatives of a state other than the Head of State.

41. Mr. AMADO pointed out that whereas in British practice, signature was tantamount to ratification, a different practice was followed by many countries.

42. Mr. LIU, with regard to paragraph 5, said that since an instrument of ratification, accession or acceptance was executed or signed in accordance with the constitutional law of the state concerned, it was not clear to whom the representatives concerned were to furnish evidence of their authority. It was the international act of exchanging those instruments that required the production of full-powers, and not the act of signature, authority for which emanated from the signatory state itself.

43. Sir Humphrey WALDOCK, Special Rapporteur, said he thought that Mr. Liu's point might be met by a slight redrafting of the last phrase of paragraph 5.

44. Mr. ROSENNE said that he would not press his suggestion with regard to paragraph 4 (*b*), but that he formally reserved his position on that question.

45. The CHAIRMAN suggested that article 4 should be referred back to the Drafting Committee for redrafting in the light of the Commission's deliberations.

It was so agreed.

ARTICLE 4 *bis*. — NEGOTIATION AND DRAWING UP OF A TREATY

46. The CHAIRMAN said that the Drafting Committee had prepared an article 4 *bis* which read as follows:

> "A treaty is drawn up by a process of negotiation which may take place either through the diplomatic or some other official channel, or at meetings of representatives or at an international conference. In the case of treaties negotiated under the auspices of an international organization, the treaty may be drawn up either at an international conference convened by the organization, or in some organ of the organization itself."

47. Sir Humphrey WALDOCK, Special Rapporteur, said that as requested by Mr. Ago at the 642nd meeting it had been decided to insert a general article indicating the process of negotiating and drawing up the text of a treaty. Article 4 *bis* restated article 6, paragraph 1, of the text adopted by the Commission at its eleventh session,[3] which was based on and largely followed article 15 of Sir Gerald Fitzmaurice's first draft,[4] the only difference from the 1959 text being that the

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[3] *Yearbook of the International Law Commission 1959*, Vol. II (United Nations publication, Sales No.: 59.V.1, Vol. II), p. 98.

[4] *Yearbook of the International Law Commission 1956*, Vol. II (United Nations publication, Sales No.: 1956.V.3, Vol. II), p. 110.

adjective "convenient" had been omitted before the word "official" in the second line.

48. Mr. CASTRÉN said that the article was quite unnecessary in an international convention and that the special rapporteur had been right to omit it from his original draft. He would take a different view if the Commission were preparing a code; but states and governments were fully aware of the procedures of negotiating and drawing up treaties, and the practice of international organizations was also well-known. He proposed that the article be deleted.

49. Mr. AGO said he could not agree with Mr. Castrén. It seemed only logical to include such an article in an international convention which constantly referred to negotiations between states, whether conducted through diplomatic channels or at international conferences or in the assembly of an international organization. Article 5, paragraph 1 (*a*), contained only one of the countless examples of references to the negotiation and drawing up of a treaty; it seemed curious to refer to "the participating states" without stating what they were participating in.

50. Mr. de LUNA said that, as the article proclaimed no rights or obligations and did not possess the character of a preamble, it should not form part of the substantive articles. Its content belonged to the article on definitions.

51. Mr. CADIEUX pointed out that the provision failed to stress that the essential purpose of the negotiations was to achieve consent between the parties. He doubted whether the article should be retained and was particularly dissatisfied by the restrictive effect of the word "official", which would presumably exclude agreements negotiated by agents.

52. Mr. EL-ERIAN said he believed the article served a useful purpose.

53. Mr. AGO said that Mr. Cadieux's observation seemed to indicate that he had not distinguished between the process of negotiation and the adoption of the text. Naturally, a treaty did not come into existence until ratified, but if the Commission's draft was to deal with the whole process of treaty-making it should start with the first stage.

54. Mr. AMADO said that the article said nothing more than what was self-evident and though unobjectionable, was hardly necessary.

55. Mr. TUNKIN said he agreed with Mr. Amado; it would be inadvisable to retain the article. The draft articles were not intended to cover every possible feature of treaty-making and certainly should not lay down rules about channels of negotiation. Such a passage, being purely descriptive, would be inappropriate in a draft convention.

56. Mr. GROS said that Mr. Tunkin's argument could be extended to other articles which described well-known facts. The matter should not be approached from too absolute a standpoint. In his opinion, the article was useful because it represented a logical introduction to article 5 in which the existence of various types of negotiation was reflected, and without article 4 *bis*, article 5 was hard to understand.

57. The CHAIRMAN put to the vote Mr. Castrén's proposal that article 4 *bis* be deleted.

The proposal was rejected by 10 votes to 10 with 3 abstentions.

58. Sir Humphrey WALDOCK, Special Rapporteur, said the Commission was only engaged on a first reading and too much should not be made of the arguments for and against including article 4 *bis*. No doubt governments would have something to say about it in their observations. He was uncertain whether it would serve a useful purpose, but for the time being had voted for its retention.

59. Mr. VERDROSS suggested that the text could be simplified by putting a comma at the end of the first sentence, deleting the second sentence as far as and including the words "convened by the organization," and changing the final phrase to read "or in some organ of an international organization".

60. Mr. AMADO suggested that the text as thus amended might form the first paragraph of article 5, the title of which would then be appropriately modified.

61. Sir Humphrey WALDOCK, Special Rapporteur, said he thought it would be better to keep the article on the adoption of the text of a treaty separate.

62. In reply to Mr. Cadieux's objection, he explained that the word "official" was only meant to indicate an authorized channel. The 1959 draft had included the additional epithet "convenient" but the Drafting Committee had dropped it as too vague. He suggested the substitution of the word "agreed" for the word "official".

63. The CHAIRMAN suggested that article 4 *bis* as amended by Mr. Verdross and the special rapporteur should be referred to the Drafting Committee.

It was so agreed.

ARTICLE 5. — ADOPTION OF THE TEXT OF A TREATY

64. Sir Humphrey WALDOCK, Special Rapporteur, said that the Drafting Committee had prepared a new text for article 5 which read as follows:

"1. The adoption of the text of a treaty takes place:

"(*a*) by the consent of all the participating states unless they have agreed to apply another rule, or unless the case falls within sub-paragraphs (*b*) and (*c*) below;

"(*b*) in the case of a treaty drawn up at an international conference convened by the states concerned or by an international organization, by the voting rule that the conference shall, by a simple majority, decide to apply;

"(*c*) in the case of a treaty drawn up within an international organization, by any voting rules in force in the organization."

Paragraphs 2 and 3 were reserved pending consideration of the new article 19 *bis*.

65. Mr. BRIGGS said it was difficult to understand the relationship between the two provisos in sub-paragraph (*a*) and sub-paragraphs (*b*) and (*c*).

66. Mr. CASTRÉN said that in general the text was acceptable but the words "convened by the states concerned or by an international organization" should be deleted from sub-paragraph (*b*) as redundant: there was no other method of convening an international conference.

67. Mr. TSURUOKA said he was troubled by the reference in sub-paragraph (*b*) to the simple majority rule; he suggested that it should be omitted.

68. Mr. AGO suggested that the second proviso in sub-paragraph (*a*) should be dropped, leaving the paragraph to state the general principle. It would be followed by the provisions contained in sub-paragraphs (*b*) and (*c*) which dealt with special cases.

69. The point raised by Mr. Tsuruoka had been discussed at length on previous occasions. In his opinion it was important to maintain the simple majority rule so as to avoid the risk of the conference becoming embroiled at the outset in a procedural dispute which might prevent it from getting under way.

70. Mr. TUNKIN said he was inclined to agree with Mr. Tsuruoka, because he doubted whether the draft should include rigid procedural rules. Despite the argument put forward by Mr. Ago, in the past conferences had managed without such a rule. It was true that the rules of procedure of a conference were usually adopted by a simple majority, but in some cases a unanimity rule had been applied, as in the case of the Antarctic Conference. The article was not intended to differentiate between general conferences and conferences restricted to a group of states, so that the rule should be a general one.

71. Mr. de LUNA said he supported Mr. Ago's suggestion concerning sub-paragraph (*a*).

72. He also agreed with Mr. Ago as to the necessity of including the simple majority rule in sub-paragraph (*b*), which represented progress. Regional or restricted conferences would still be free to agree on a different rule.

73. Mr. BARTOŠ asked whether sub-paragraph (*c*) was intended to cover also treaties drawn up at a conference convened under the auspices of an international organization. In some cases the invitation to attend conferences convened by the United Nations had specified that, pending the adoption of the rules of procedure of the conference, the rules drawn up as a model by the organs of the United Nations would apply provisionally, with the consequence that the final decision of the conference could be made by the two-thirds rule.

74. Mr. EL-ERIAN pointed out that article 5 was descriptive in character and should not be too rigid. He proposed that it be redrafted to read:

"1. The adoption of the text of a treaty takes place:

"(*a*) by the consent of all the participating states unless they have agreed to apply another rule;

"(*b*) in the case of a treaty drawn up at an international conference convened by the states concerned or by an international organization, by the voting rule that the participating states shall decide to apply;

"(*c*) in the case of a treaty drawn up within an international organization, by any voting rules in force in the organization."

75. Mr. JIMÉNEZ de ARÉCHAGA said he agreed with Mr. de Luna that the only progressive element in the article was the simple majority rule in sub-paragraph (*b*). The rule should be made applicable to general multilateral treaties, if the Commission was to be consistent in formulating progressive rules for them.

76. Sir Humphrey WALDOCK, Special Rapporteur, said that at its eleventh session the Commission had decided to include a residual rule that the rules of procedure should be adopted by a simple majority.[5] Such a rule would obviate the risk of delay during the opening stages of the conference and, he believed, reflected modern practice. As such it should not arouse serious objection.

77. He presumed that for a treaty drawn up within an international organization the rules of the organization would apply.

78. Mr. JIMÉNEZ de ARÉCHAGA said he could not agree that sub-paragraphs (*b*) and (*c*) contained residual rules.

79. The CHAIRMAN observed that there seemed to be no objection to the deletion of the second proviso in sub-paragraph (*a*); that should meet the point raised by Mr. Briggs.

80. Mr. BRIGGS said that it would not entirely solve his difficulty.

81. Sir Humphrey WALDOCK, Special Rapporteur, said that Mr. Briggs had raised what was essentially a drafting point, which could be left to the Drafting Committee. The purpose of the second proviso was to refer specifically to the cases dealt with in the two succeeding sub-paragraphs.

82. So far as substance was concerned, the question was whether the Commission wished to abandon the decision it had taken at the eleventh session to insert the simple majority rule.

83. Mr. LACHS said that he still had some doubts about the relationship between sub-paragraph (*a*) and sub-paragraphs (*b*) and (*c*). The difficulty was that, if sub-paragraphs (*b*) and (*c*) were intended to put forward a *lex specialis*, they failed to provide for the case where the parties decided on a different system. That might easily become necessary because of special circumstances. In order to illustrate the kind of problem that might arise under sub-paragraph (*c*) he pointed out that, despite the majority rule applied in many organs of the United Nations, the Committee on Peaceful Uses of Outer Space had decided to proceed by reaching agreement in its work without the need for voting.

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[5] *Yearbook of the International Law Commission 1959*, Vol. II (United Nations publication, Sales No.: 59.V.1, Vol. II), p. 100, para. 10 (*d*).

84. Again, practice indicated that the simple majority rule could not be regarded as universally applied in the cases covered by sub-paragraph (*b*). A two-thirds majority for the adoption of the rules of procedure at the Paris Peace Conference of 1946 had been laid down as a precondition of convocation.

85. In view of those variations in practice, sub-paragraphs (*b*) and (*c*) seemed hardly satisfactory.

86. Mr. TSURUOKA said that, while he would not press for the deletion of the words "by a simple majority", he felt that some relaxation of the rule laid down in sub-paragraph 1 (*b*) was needed. It would be better to limit the rule to multilateral treaties, as in the corresponding clause of the special rapporteur's original draft.

87. In addition, if the intention was to formulate a residual rule, it would be appropriate to commence it with a proviso along the following lines:

"Unless the Conference shall otherwise decide..."

88. Sir Humphrey WALDOCK, Special Rapporteur, said that he had intended to make precisely that proposal in order to establish the relationship between the rule set out in sub-paragraph (*a*) and that contained in sub-paragraph (*b*).

89. Mr. EL-ERIAN stressed that, by his proposal, he had not intended to impair in any way the position of international organizations. In view of the remarks of Mr. Lachs, he would amend the concluding words of his sub-paragraph (*c*) to read:

"...by any voting rules in force or other arrangements applicable in the organization".

90. The proposal that in sub-paragraph (*b*) the proviso "Unless the Conference shall otherwise decide" should be added did not make it clear by what majority that decision would be adopted. If it were intended to introduce a flexible rule in the matter, the best course would be to adopt his own proposal and not to refer to "a simple majority" at all.

91. Sir Humphrey WALDOCK, Special Rapporteur, said that there was a difference between the cases covered by sub-paragraphs (*b*) and (*c*). In the cases covered by sub-paragraph (*c*), a distinction should be made between the process of preparing a text in committee, for which a more flexible procedure could be applied, and the actual adoption of the text, which would have to take place in accordance with the voting rules of the organization.

92. Mr. AGO said that he felt strongly, like Mr. de Luna, that the reference in sub-paragraph (*b*) to the adoption of the voting rule by a simple majority constituted the only significant contribution which the Commission would make by its article 5. If that provision were to be dropped, as suggested by Mr. El-Erian, article 5 would be merely descriptive and would not serve any useful purpose.

93. The rule embodied in the Drafting Committee's article 5 reflected the existing practice and would be helpful to international conferences. It would inform a conference that, in the absence of unanimous agreement over the adoption of its voting rules, it could initiate its proceedings by adopting them by a simple majority. Such a system was necessary in order to enable the conference to make a useful start with its work; otherwise it would be brought to a standstill at the outset by a discussion on the question, on which it might prove impossible to reach a decision what voting rule should be used for the purpose of the adoption of the voting rules of the conference.

94. Mr. VERDROSS noted that, in sub-paragraph (*b*) as proposed by Mr. El-Erian, there was no indication of how the participating states would decide on the voting rule to be applied: would it be unanimously or by a specified majority?

95. Mr. EL-ERIAN said that the points raised by Mr. Ago and Mr. Verdross were perfectly valid in theory but in practice there would be no difficulty. In practice, a conference was usually preceded by preparatory work, either by the secretariat of an international organization or by some preparatory committee. That preparatory work normally included the drafting of a set of provisional rules of procedure to enable the conference to conduct its business until the adoption of its final rules of procedure; international conferences had been conducted in that manner for many years without any difficulty. Conferences did not convene spontaneously only to reach an impasse on the question of the adoption of their rules of procedure.

96. Mr. ROSENNE suggested that the word "any" before the words "voting rules" in sub-paragraph (*c*) should be replaced by "the". His suggestion applied both to the original text and to the amended text proposed by Mr. El-Erian.

97. The CHAIRMAN said that the suggestion was of a drafting character; it would be referred to the Drafting Committee.

98. Mr. LIU stressed the need for some residual rule to enable a conference to adopt its rules of procedure. There was much force in the remark of Mr. Verdross regarding Mr. El-Erian's proposal for sub-paragraph (*b*).

99. The CHAIRMAN pointed out that when the special rapporteur had suggested the introduction in sub-paragraph (*b*) of the proviso "Unless the Conference shall otherwise decide", Mr. El-Erian himself had asked by what majority the decision would be taken.

100. Sir Humphrey WALDOCK, Special Rapporteur, said that the simple majority rule had been intended as a residual rule. It might be possible to make that fact clear by adopting Mr. El-Erian's text for sub-paragraph (*b*) but with the addition of a passage along the following lines:

"or failing any such decision, by such voting rule as they, by a simple majority, shall adopt".

101. Mr. EL-ERIAN said that he would need to reflect on that suggestion.

102. Mr. TUNKIN stressed the need to avoid the confusion that would result from any attempt to deal in

the same provision with the rules for the adoption of the text of a treaty and with the rules for the adoption of the rules of procedure of a conference. As far as the adoption of the text of a treaty was concerned, article 5 should perhaps simply state that, in the case of a treaty drawn up at an international conference, that adoption took place by a two-thirds majority unless the conference decided otherwise.

103. Mr. ROSENNE said that the real difficulty probably arose from the fact that sub-paragraph (*b*) attempted to deal in one and the same provision with two types of conference: conferences convened by the states concerned and conferences convened by an international organization. The simple majority rule for the adoption of rules of procedure was easier to adopt in the case of a conference convened by an international organization. In the case of a conference convened by the states concerned, he saw much force in the proposal by Mr. El-Erian.

104. Mr. TUNKIN pointed out that the two-thirds majority rule constituted the general practice for conferences, whether convened by the states concerned or by an international organization. That rule should therefore be adopted as the residual rule. It would not promote friendly relations between states if the Commission were to recommend a simple majority rule, which would constitute a constant temptation to impose upon certain states the text of some future treaty.

105. Mr. ROSENNE said that he was not in any real disagreement with Mr. Tunkin; as far as the type of majority rule was concerned, he had no intention of disturbing the existing practice. He had merely wished to point out that the majority rule, whether a simple or a qualified majority, was more suited to a conference convened by an international organization than to a conference convened by the states concerned.

106. Mr. BRIGGS said he opposed Mr. El-Erian's proposal because it dropped the valuable simple majority rule for the adoption of the relevant rules of procedure; moreover, Mr. El-Erian's text, like that proposed by the Drafting Committee, did not solve the problem of the relationship between sub-paragraph (*a*) on the one hand and sub-paragraphs (*b*) and (*c*) on the other.

107. If the intention was to make the provisions of sub-paragraph (*a*) the residual rule, then sub-paragraph (*a*) should be placed after sub-paragraphs (*b*) and (*c*) and reworded on the following lines:

> "In all other cases, by the consent of all the participating states unless they have agreed to apply another rule".

108. Sir Humphrey WALDOCK, Special Rapporteur, suggested, as a convenient compromise solution, that the reference in sub-paragraph (*b*) to "a simple majority" should be replaced by a reference to a two-thirds majority.

109. Mr. TUNKIN said he would support that suggestion.

110. Mr. EL-ERIAN agreed that the special rapporteur's suggestion should be referred to the Drafting Committee.

111. Mr. YASSEEN strongly supported the special rapporteur's suggestion. Since the text of the treaty itself would normally be adopted by a two-thirds majority, it would be an elegant solution to provide for a similar majority for the adoption of the rules of procedure under which the text would have to be adopted.

112. Mr. BARTOŠ said that he would be unable to vote on the new text to be formulated if, like the present one, it attempted to deal in one and the same provision with conferences convened by the states concerned and with conferences convened by an international organization. In the former case, the convening instrument embodied the provisional rules of procedure; in the latter case, the provisional rules of procedure were those established by the organization itself.

113. Those considerations apart, he accepted as the residual rule the two-thirds majority rule, which was in keeping with international practice for conferences convened by the United Nations.

114. The CHAIRMAN said that, if there were no objection, he would consider that the Commission agreed to invite the special rapporteur to submit a revised draft of article 5.

It was so agreed.

ARTICLE 6. — AUTHENTICATION OF THE TEXT

115. Sir Humphrey WALDOCK, Special Rapporteur, said the Drafting Committee had redrafted article 6 to read as follows:

> "1. Unless another procedure has been prescribed in the text or agreed upon by the participating states, the text of the treaty as finally adopted may be authenticated in any of the following ways:
>
> "(*a*) initialling of the text by the representatives of the states concerned;
>
> "(*b*) incorporation of the text in the Final Act of the Conference in which it was adopted;
>
> "(*c*) incorporation of the text in a resolution of an international organization in which it was adopted or in any other form employed in the organization concerned.
>
> "2. In addition, signature of the text by a representative of a participating state, whether a full signature or signature *ad referendum*, shall automatically constitute an authentication of the text of a proposed treaty, if the text has not been previously authenticated in another form under the provisions of paragraph 1 of this article.
>
> "3. On authentication in accordance with the foregoing provisions of the present article, the text shall become the definitive text of the treaty. No additions or amendments may afterwards be made to the text except by means of the adoption and authentication of a further text providing for such additions or amendments."

116. Mr. TSURUOKA suggested the deletion of the words "prescribed in the text or" in the first line of paragraph 1. It would be sufficient to state that the provisions in sub-paragraphs (*a*), (*b*) and (*c*) applied unless another procedure had been agreed upon by the participating states.

117. Mr. BARTOŠ said that, although the words indicated by Mr. Tsuruoka were not absolutely necessary, he would support their retention. It was a fairly common practice for a treaty to prescribe the procedure whereby its text would be rendered definitive. In fact, that procedure might not be the same for all sections of the treaty; for example, as had happened in practice, a treaty might provide that the text of its annexes would be established and authenticated by a group of experts, the main body of the treaty being established by the plenipotentiaries themselves.

118. Mr. VERDROSS supported the suggestion for the deletion of the words "prescribed in the text or". If "another procedure" were to be prescribed in the text of the treaty itself, it would have been "agreed upon by the participating states" and would therefore be covered by the remaining provisions of paragraph 1.

119. Mr. BARTOŠ, while agreeing in principle with Mr. Verdross, pointed out that it was a well-established practice to prescribe an authentication procedure in the text of the treaty itself. He accordingly suggested that the passage under discussion should read:

"...prescribed in the text or otherwise agreed upon...".

120. Mr. TUNKIN said the provisions of the second sentence of paragraph 3 were unduly rigid. An authenticated text could be amended by the common consent of the parties otherwise than "by means of the adoption and authentication of a further text".

121. Mr. GROS expressed concern at the use of the term "participating states"; that expression was particularly unsatisfactory in French, because the word "*participant*" could not stand alone; the expression should be completed by indicating the act in which the state was participating. Either the expression "participating states" would have to be defined in general terms in article 1, or in the present case some other expression, such as "states participating in the negotiation", would have to be used. He suggested that the Commission should follow the latter course instead of attempting a general definition of "participating state", which would inevitably be rather cumbersome, something like: "A state which takes part in any act in the course of the process of conclusion of a treaty".

122. Sir Humphrey WALDOCK, Special Rapporteur, recalled that the original term used had been "negotiating states", but since the discussion on the article at the 643rd meeting, it had been replaced by "participating states" to meet the objections of some members. Presumably, the same objections would be made to the expression "states participating in the negotiations".

123. Mr. ROSENNE said that, to him, "participating states" meant, in the context, states participating in the authentication of the text. It was not uncommon for a state to be invited to a conference and to take no other part in it than to participate in the final meeting at which the text of a treaty was adopted. Such a state could properly be called a "participating state", but it would not be a "negotiating state".

124. Mr. AGO, supporting Mr. Gros' suggestion, said that even in the case mentioned by Mr. Rosenne, the state concerned would still be participating in the negotiations.

125. Mr. AMADO also supported Mr. Gros' suggestion.

126. Mr. BARTOŠ said that, on practical grounds, he supported Mr. Gros' suggestion. Sometimes, the actual authentication was effected, not by all the states participating in the negotiations, but only by a few specially authorized for that purpose, as in the case of the four powers which had authenticated the texts of the Paris Peace Conference in 1946. In cases of that type, the states concerned acted on behalf of all the negotiating states and in pursuance of a decision of those states agreeing to that procedure. It was therefore appropriate to make it clear that, in that case as in all others, all negotiating states would participate in the process of authentication, either directly or by accredited intermediaries.

127. Mr. CASTRÉN also supported Mr. Gros' suggestion and pointed out that the expression "participating states" was also used in article 5, where it would similarly have to be amended.

128. Mr. CADIEUX suggested the use of the expression "states which have participated in the negotiations".

129. Sir Humphrey WALDOCK, Special Rapporteur, said he could accept the proposal of Mr. Bartoš for adding the word "otherwise" before the words "agreed upon" in paragraph 1. The case where the procedure was prescribed in the text of the treaty itself was, in fact, the more usual; the words "otherwise agreed upon" would merely indicate that there was no intention to exclude other possibilities.

130. In paragraph 3, he suggested the deletion of the second sentence so as to leave open the question of possible arrangements for the introduction of additions and amendments to the text.

131. The CHAIRMAN said that, if there were no objections, he would consider that the Commission approved article 6 with the amendments accepted by the special rapporteur, subject to the drafting points raised during the discussion.

It was so agreed.

The meeting rose at 1.5 p.m.