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INTRODUCTION

A 1953 study defines the rules of procedure of a conference as 'all the rules and practices which determine the status of each of the participants in an international conference and the conduct of the discussions until the conference adopts its final decision'.[1] The temporary nature of rules of procedure of conferences was emphasised by Tammes in a lecture at the Hague Academy in 1958: 'The conference is a preparatory phase in a law making process; a passing event doomed to be buried in archives together with all its rules and its organisational structure and leaving behind nothing except the living results.'[2]

An examination of State practice at international conferences[3] reveals however that the rules of procedure and their interpretation follow remarkably consistent patterns. Conferences and assemblies of different organisations tend to reach similar conclusions on procedural issues. Oppenheim's Treatise states that 'the degree to which they [conferences] follow a similar pattern and the frequency with which they are held is such that they may be regarded in some sense as one of the regular institutions of the international community'.[4] Conferences do not in fact draft rules of procedure *de novo* without reference to previous practice. The fate of

[1] C. Chaumont, 'The Evolutionary Aspect of International Organizations and International Cooperation', 5 *UNESCO International Social Science Bulletin* 258 (1953 No. 2).

[2] A. J. P. Tammes, 'Decisions of International Organs as a Source of International Law', 94 RCADI 306 (1958 II).

[3] Reference is made throughout this work to 'conferences' and not 'congresses'. Pastuhov, writing in 1945, could even then state that 'the word "congress" as the designation of an assembly of plenipotentiaries has today become more or less obsolete'. Vladimir D. Pastuhov, *A Guide to the Practice of International Conferences* (1945) p. 9. See also Shabtai Rosenne, 'Conferences and Congresses, International', in *Encyclopedia of Public International Law*, ed. R. Bernhardt, vol. I (1992) p. 739 at p. 740.

The term 'international conference', as used in this study, refers to inter-governmental conferences, that is conferences of representatives of States. As to whether the term can also be applied to non-governmental conferences, see Yuen-li Liang, 'Notes on Legal Questions Concerning the United Nations, What is an International Conference?', 44 AJIL 333 (1950).

[4] *Oppenheim's International Law*, eds. R. Jennings and A. Watts, 9th edn, vol. I (1992) p. 1184.

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rules of procedure of past conferences is not quite as morbid as Professor Tammes feared.

Parliamentary procedure is a vital element of all democratic institutions. During a UN Security Council debate, US representative Senator Moynihan described due procedure as 'not an aspect of governance, it is the essence of government'.[5] In national parliaments experienced legislators excel in using procedural techniques against their political rivals. In the realm of the study of international law, procedure at international conferences – except for questions of voting[6] – tends however to be a neglected topic. Even regarding international organisations, where there is a relatively rich literature, Jenks could write in 1958 that the 'parliamentary law of international organisations has attracted very little attention'[7] and Detter writes that the 'Rules of Procedure of international organizations have not attracted the interest of international lawyers.'[8] Notwithstanding the lack of academic interest, it has been pointed out, I believe validly, that 'the development of procedure and the development of [international] collaboration are interdependent'.[9] No international organisation or international conference can carry out its function without clearly defined rules of procedure. Procedural debates have been termed 'time-consuming', 'rather uninteresting and profitless';[10]

[5] Official Records UN Security Council, 1870th Meeting, para. 94, UN Doc. S/PV.1870 (1976).

[6] See, for example, the seminal study: Louis B. Sohn, 'Voting Procedures in United Nations Conferences for the Codification of International Law', 69 AJIL 310 (1975).

[7] C. Wilfred Jenks, *The Common Law of Mankind* (1958) p. 24.

[8] Ingrid Detter, *Law Making by International Organizations* (1965) p. 52.

[9] Chaumont, 'The Evolutionary Aspect', at 265.

[10] The quotation is taken from the following comment by Hambro:

> The rules of procedure play an important part in the day-to-day work of the organs of the United Nations. They are necessary for the orderly conduct of business and to ensure fair play in the Organization. But on the whole they do not play a preponderant part. There are certain delegates who love the sport of raising technical points of order. And a nervous chairman or president trembles when a number of delegates simultaneously stand up in different corners of the room and shout 'point of order!' One sees happy smiles on the faces of some of the adepts at this sport once the going is good, particularly in the legal committee, where it has been developed into a fine art. But the wise chairman tries to avoid this sport which is time consuming and, on the whole, rather uninteresting and profitless. A presiding officer who knows his rules and applies them impartially is generally spared.
>
> Edvard Hambro, 'Some Notes on Parliamentary Diplomacy', in *Transnational Law in a Changing Society, Essays in Honour of Philip C. Jessup*, eds. Wolfgang Friedmann, Louis Henkin and Oliver Lissitzyn (1972) p. 281.

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nevertheless procedure, in any organisation, is integrally linked to due process and Jenks's statement on this issue is worth quoting at length:

> [D]ue process requires regularity of procedure. A proper forum, freedom of speech and a fair hearing are important elements in, but they do not exhaust the requirements of, regularity of procedure. The inclusion in the agenda in accordance with recognised rules of questions which it is desired to raise, respect for time limits designed to secure due notice of such questions, the despatch of business in an orderly manner, and respect by international bodies for their own terms of reference and the limits of their constitutional power are not tedious technicalities which it is legitimate to sweep aside in the name of a higher morality. They are essential ingredients of substantial justice on which all members, whether directly involved in the matter or not, are entitled to rely as guarantees that, before being called upon to participate in a decision which may have far-reaching implications, they will be able to ascertain and give responsible expression to the considered views of their government or other constituents.[11]

In ascertaining the functions of rules of procedure, the definition proposed by the Secretary-General of the UN in 1953 seems particularly apt: 'The rules of procedure are intended to protect the rights of individual Members. They are equally intended to permit an orderly conduct of business.'[12] In attempting to apply this maxim to international conferences one author comments:

> The drawing up of suitable rules of procedure, combining as far as possible the conflicting national practices and affording an adequate guarantee of fair play to all concerned and of orderly proceedings, is also one of the manifold problems which from the very outset confront those who are responsible for the organisation of international conferences.[13]

A detailed knowledge of procedure can be a keen tool for a delegate attending a conference. Righter, in a 1995 book, quotes an anonymous Swiss diplomat as telling her: 'Western defeats on procedural motions are . . . the result of carelessness', adding that 'experts on locust control

[11] C. Wilfred Jenks, *Law in the World Community* (1967) p. 114.

[12] Measures to Limit the Duration of Regular Sessions of the General Assembly: Memorandum by the Secretary-General of the United Nations, Annex VII, Agenda Item 50, 1952–1953, para. 27, UN Doc. A/2206 (1952). See also Louis B. Sohn, 'Editorial Comment, Due Process in the United Nations', 69 AJIL 620 (1975) at 621; Henry G. Schermers, *International Institutional Law*, 2nd edn (1980) p. 590.

[13] William O'Davoren, *Post-War Reconstruction Conferences, The Technical Organisation of International Conferences* (1943) p. 4.

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are rarely masters of parliamentary tricks'.[14] Fitschen writes of the UN General Assembly ('UNGA') rules of procedure that:

> They can be used as a political instrument in a way which should not be underestimated. Delegations can utilize them to determine the direction or speed of GA organs on important substantive issues or even to prevent debate or action concerning a matter altogether.[15]

States frequently choose to contest an issue through use of procedural motions rather than contesting the substance of the issue. Such a choice may be made when a State estimates that it is easier to garner support for its position on an ostensibly neutral procedural issue rather than on the substance. The word 'ostensibly' is used since States involved are cognisant of the substantive issue behind the procedural debate but nevertheless prefer to leave the substance in the background. Delegations may also have flexibility on procedural motions that they do not have on the substance. Rosenne, referring to an Israel effort to gain support in advance for a procedural motion at the 1958 Law of the Sea Conference, writes: 'Questions of procedure, and especially hypothetical ones, are usually left to the delegations on the spot, and it is unusual for instructions to be sent from a capital about a hypothetical procedural vote in a remote conference.'[16] Procedural decisions are taken by a simple majority, while in treaty-making conferences issues of substance are usually decided by a two-thirds majority. Thus, for this reason as well, States may at times choose to contest an issue on procedural grounds, rather than as a substantive issue.[17]

This study commences with a historical review of the development of rules of procedure and the attempts to draft model codes. Chapter 2 deals with the adoption by conferences of their rules of procedure. Chapter 3 examines why States attending a conference are obliged to comply with the rules of procedure and whether certain rules of procedure have become international law. This is followed by the main body of the study, which consists of an examination of the procedural practice of States at international conferences since the end of the Second World War.

[14] Rosemary Righter, *Utopia Lost, The United Nations and World Order* (1995) p. 135.
[15] Thomas Fitschen, 'Article 21', in *The Charter of the United Nations, A Commentary*, ed. Bruno Simma, 2nd edn (2002) p. 402.
[16] Shabtai Rosenne, 'Israel and the First United Nations Conference on the Law of the Sea: The Straits of Tiran', in *An International Law Miscellany* (1993) p. 723 at p. 757.
[17] See Shabtai Rosenne, *Developments in the Law of Treaties 1945–1986* (1989) p. 244.

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It must be stated at the outset that procedural decisions are usually a reflection of the political reality at an assembly or conference. States nevertheless tend to follow precedents in procedural matters: such precedents carry particular weight if they are accompanied by a reasoned decision of an experienced presiding officer, an opinion of a legal adviser, or form part of a consistent pattern of procedural behaviour.

This study gives examples of procedural issues from the UNGA, whose rules of procedure have been described as 'the fullest and the best developed system of procedural norms of international organizations'.[18] Emphasis is placed on those issues that are relevant to all international conferences and assemblies, hence subjects such as distribution of agenda items to specific committees are not dealt with in this study. Procedural rulings and practices are also brought from the practice of assemblies of international organisations, in particular the assemblies of IAEA, ILO, IMO and WHO. Here again examples are only brought on procedural issues that are germane to other assemblies and to international conferences and not those issues particular only to a specific organisation. As treaty-making conferences publish full records of their deliberations, most of the examples of conference practice are taken from the records of such conferences.[19] [20]

Each headlined paragraph in the study usually deals with a specific issue of procedure. Paragraphs commence by giving first the text of the

[18] Jan Kolasa, *Rules of Procedure of the United Nations General Assembly, A Legal Analysis* (1967) p. 111.

[19] Law-making conferences tend to be more respectful of procedural standards than other conferences. It is interesting to note in this context the conclusion of the Institut de Droit International in its resolution on 'The Elaboration of General Multilateral Conventions and of Non-Contractual Instruments Having a Normative Function or Objective', 62 *Yearbook of the Institute of International Law* 274 (1987 II) at 278 (Cairo Session):

> The elements which help to identify a resolution as [having a normative function] include, *inter alia*: . . . (b) respect for procedural standards and requirements.

Judge H. Mosler, replying to a questionnaire on a draft to the above resolution, pointed out that 'the procedural conditions of resolutions are less strict than those for the elaboration of multilateral conventions'. 61 *Yearbook of the Institute of International Law* (1985 II) at 268. See also Rosenne: ' I believe that treaty-drafting is a much more careful operation than resolution drafting.' *Developments*, p. 275.

[20] Many records of conferences state curtly that a 'procedural debate occurred', without giving even a summary report. One author writing a handbook on conferences advises that: 'Debates on questions of procedure which do not affect the substance of the issues under consideration, should especially be summarised in a succinct manner.' O'Davoren, *Post-War Reconstruction Conferences*, p. 105. Modern UN conferences, unless they are treaty-making conferences, do not normally publish records of the debates but only of resolutions and recommendations that were adopted.

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rule of procedure in the UNGA and then the relevant proposal of the UN Model Conference Rules.[21] The UN Model Rules themselves are a useful source of practice since the drafters attempted to incorporate conference practice into the rules they drafted. After the text of the rule, examples are quoted of procedural decisions and statements on the issue, taken from the records of conferences, followed by examples from UNGA practice and then from the practice of international organisations. Where relevant, the author's comment is added as to the predominant international practice.

This book is intended both as a study of the issue and as a practical manual for the use of delegates to the UN, diplomats, lawyers and other participants at international conferences and assemblies. I believe that the book demonstrates that, as regards procedure at conferences, universal State practice appears to be developing. As far back as 1926, a member of a committee of the League of Nations studying the possibility of codifying rules of procedure commented: 'Whatever the subject before the conference, there were certain principles [of procedure] which were invariably identical.'[22] The Committee itself reached the conclusion, as regards rules of procedure, that 'a certain number of practices have grown up and these reappear at each conference and are handed on from one to the other'.[23] Some eighty years after the League of Nations report, certain rules of procedure have achieved near universal application and may well by now have the status of customary international law.

[21] Draft Standard Rules of Procedure for United Nations Conferences, Report of the Secretary-General, UN Doc. A/40/611 of 11 September 1985 (hereinafter referred to as 'the UN Model Rules').

[22] M. Fromageot, member of the Committee of Experts for the Progressive Codification of International Law, Report to the Council of the League of Nations on the Questions Which Appear Ripe for International Regulation, Questionnaire No. 5, Procedure of International Conferences and Procedure for the Conclusion and Drafting of Treaties, quoted from: Shabtai Rosenne, ed., *League of Nations Committee of Experts for the Progressive Codification of International Law* (*1925–1928*), vol. I (1972) p. 236.

[23] Committee of Experts for the Progressive Codification of International Law, Report to the Council of the League of Nations on the Questions Which Appear Ripe for International Regulation, Questionnaire No. 5, Procedure of International Conferences and Procedure for the Conclusion and Drafting of Treaties, Annex to Questionnaire No. 5, Report of the Sub-Committee, p. 107, League of Nations Doc. C.196.M.70.1927.V [CPD 95(2)] of 20 April 1927.

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1

Historical development of rules of procedure of conferences and attempts to establish model rules

1.1 Development of conference rules of procedure

Sohn points out that at the 1868 Geneva Conference 'a distinction seems to have been made for the first time between matters of substance and questions of procedure'.[1] The Congress of Berlin of 1878 however is usually regarded as the first conference where a clear distinction was made between decisions on substance and those of procedure. It was there that Bismarck declared:

> In the interest of accomplishment, resolutions concerning procedure not touching questions of substance should be held to be decisions of the Congress when approved by a majority vote, unless the minority should register formal protest.[2]

Despite these two examples and additional cases of adoption of *ad hoc* procedural decisions, Pastuhov writes that it 'was not the practice of diplomatic conferences held prior to the twentieth century to adopt formal rules of procedure for conducting their business'.[3] Although the First Hague Conference of 1899 voted on procedural issues, it did not have a formal set of rules of procedure; the first conference with a formal set of rules of procedure appears to have been the Second Hague Conference of 1907. The rules of the Second Hague Conference consisted of twelve short articles dealing with the structure and organisation. Only two of the articles dealt with the process of conduct of business and voting.[4]

[1] Louis B. Sohn, 'Voting Procedure in International Conferences for the Codification of International Law, 1864–1930', in *Jus et Societas, Essays in Tribute to Wolfgang Friedmann*, ed. Gabriel M. Wilner (1979) p. 278 at p. 279.
[2] British and Foreign State Papers, LXIX 892 (translated from the French original).
[3] Vladimir D. Pastuhov, *A Guide to the Practice of International Conferences* (1945) p. 122 n. 1.
[4] *Article 8*
Each delegation has a right to only one vote. The vote is taken by roll call according to the alphabetical order of the Powers represented.

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The draft rules of procedure of the International Naval Conference held in London in 1908 and 1909, proposed by the UK as convening State, had four articles,[5] and the final rules of procedure consisted of nine articles of which only one article could be considered as dealing with the actual conduct of business.[6]

The rules of procedure of the 1919 Paris Peace Conference consisted of fifteen articles, of which perhaps three could be considered as dealing with conduct of business.[7]

Article 9

Every proposition of a resolution or vœu to be discussed by the Conference must, as a general rule, be delivered in writing to the president in order to be printed and distributed before being brought to discussion.

The Proceedings of the Peace Conference, Translation of the Official Texts, prepared in the Division of International Law of the Carnegie Endowment for International Peace, The Conference of 1907, vol. I, Plenary Meetings of the Conference (1920) p. 53.

5

1. Plenipotentiary and non-plenipotentiary delegates have equally the right of speaking in the discussions of the Conference.
2. Secretaries of the delegations may accompany the members of their delegations at all the sessions of the Conference.
3. The sessions of the Conference are not public. Its deliberations remain strictly confidential.
4. The French language is recognized as the official language for the deliberations and acts of the Conference. Speeches delivered in another language are given orally in outline in French.

The Declaration of London February 26, 1909, A Collection of Official Papers and Documents Relating to the International Naval Conference held in London December, 1908–February, 1909, ed. James Brown Scott (1919) Annex B, p. 13.

6

5. Tout nouvelle proposition et tout amendement à discuter par la Conférence doivent, en règle générale, être remise par écrit au Président. Si la proposition ou l'amendement n'a pu être distribué avant la séance, la Conférence ne peut s'opposer à une demande d'ajournement à une séance ultérieure.

Quoted from N. Hill, *The Public International Conference* (1929) Appendix F 243.

7 Rules of procedure of the Paris Peace Conference of 1919.

X

With a view to facilitate discussion any Plenipotentiary wishing to propose a resolution must give the President twenty-four hours' notice thereof, except in the case of proposals connected with the order of the day and arising from the actual discussion.

Exceptions may, however, be made to this rule in the case of amendments or secondary questions which do not constitute actual proposals.

XI

All petitions, memoranda, observations and documents addressed to the Conference by any persons other than the Plenipotentiaries must be received and classified by the Secretariat.

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With the exception of the rules of the General Conference of the ILO,[8] the rules of procedure of the Assembly of the League of Nations apparently are the first occurrence of detailed instructions and rules as to conduct of business. The rules consisted of twenty-eight articles subdivided into sub-articles. These rules are the direct predecessors of the rules of procedure of the UNGA. The rules of the UNGA, in turn, have served as the model for all subsequent international conferences and for the UN Model Rules.

The contrast between the detailed rules of the Assembly of the League of Nations and the scant rules of the preceding congresses and conferences is so great that it raises doubt as to whether the League rules were derived from the rules of previous conferences. It has been suggested that the primary source was parliamentary procedure, a source which was familiar to the draftsmen of the Covenant and of the rules of procedure of the League. Prélot, in his lecture at the Hague Academy, states that the rules were adopted practically *en bloc* from various parliamentary procedures.[9]

The rules of procedure of the Assembly of the League of Nations contain such terms as 'calling a speaker to order', 'rising to a point of order' and 'moving the previous question'. The appearance, for the first time in the rules of procedure of an international conference, of such terms points clearly to the parliamentary ancestry of the rules of procedure of the League Assembly. The rules would appear to have been influenced

> Such of these communications as are of political interest will be briefly summarized in a list circulated to all the Plenipotentiaries. Supplementary editions of this list shall be issued as such communications are received.
> All these documents shall be deposited in the archives.
>
> XII
>
> All questions to be decided shall be discussed at a first and second reading; the former shall afford occasion for a general discussion for the purpose of arriving at an agreement on points of principle; the second reading shall provide an opportunity of discussing details.
>
> English version quoted from 13 AJIL Official Documents 109 (1919) at 111.

Marston writes that the basis of these rules was a semi-official document 'Sur le Congrès de la Paix' prepared by French diplomats. F. S. Marston, *The Peace Conference of 1919, Organization and Procedure* (1944) p. 35.

[8] Butler points out that the ILO rules of procedure were in fact 'the first set of international standing orders ever framed'. Harold B. Butler, 'The Washington Conference', in *The Origins of the International Labor Organization*, ed. James T. Shotwell, vol. I (1934) p. 305 at p. 315. However, because of the unique structure of the ILO, the rules of procedure are themselves of a very particular nature.

[9] Marcel Prélot, 'Le droit des assemblées internationales', 104 RCADI 476 (1961 III) at 477.

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primarily by British parliamentary procedure, but certainly not exclusively so.[10]

Kolasa, in his book on the rules of procedure of the UNGA, argues, however, that although there was borrowing from parliamentary procedure, the rules of procedure of the League were in fact a continuation of previous international practice. Kolasa cites the unanimity rule of the League as support for his view that this was international practice and not parliamentary procedure.[11] Although Kolasa is undeniably correct as regards the genealogy of the unanimity rule, an examination of the procedural rules of the League Assembly would appear to support the statement by Noel-Baker that the composition and work of the League 'bear hardly a trace of the old diplomatic conferences of the past'.[12]

At the 1945 United Nations Conference on International Organisation at San Francisco, the Secretariat introduced its proposal on the procedure of the Conference by stating that: 'The following rules of procedure relating to discussion, to motions and to the appointment of subcommittees have been widely applied in connection with international conferences in the past.'[13] An examination of the provisional rules of procedure of the UNGA, as prepared by the Preparatory Commission,[14] shows them

10 Many external features of similarity might suggest procedure in the various democratic assemblies is practically uniform. To a considerable extent this similarity is imposed by the nature of the task at hand. To some degree however it is traceable to the fact that procedure in a great many Parliaments developed out of that in the British Parliament.

Joseph J. Senturia, 'Parliamentary Procedure', in *Encyclopaedia of Social Sciences*, vol. XII (1933) p. 455.

11 This [the adoption of rules of procedure of the League of Nations] not only followed the earlier international practice, but that only the experience of previous international gatherings and the actual existing patterns and precedents established at earlier international debates made it possible to find an easy and fairly straightforward solution to the procedural problems of the League of Nations.

Jan Kolasa, *Rules of Procedure of the United Nations General Assembly, A Legal Analysis* (1967) p. 42.

Therefore it must be stated and stressed that irrespective of the indisputable direct borrowings from the procedural practice of national parliaments, the rules of procedure of the League Assembly are, as in principle they should be, a natural link in the chain of development which began in the 19th century with international conferences and the first international organisations.

Ibid. at p. 46.

12 Philip Noel-Baker, 'League of Nations', in *Encyclopaedia of the Social Sciences*, vol. IX (1933) p. 289.

13 UNCIO, Doc. 332 EX-SEC/8, 13 May 1945.

14 Report of the Preparatory Commission of the United Nations, PC/20/C.I, sec. 3 (1945).

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