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Report on the Law of Treaties by Mr. H. Lauterpacht, Special Rapporteur

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LAW OF TREATIES

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Report by Mr. H. Lauterpacht, Special Rapporteur

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PREFACE

1. This section of the Report on the Law of Treaties is composed of the following three parts: Part I (Definition and nature of treaties); Part II (Conclusion of treaties); and Part III (Conditions of validity of treaties). It is intended that the subsequent sections¹ of the Report should cover the following other topics of the Law of Treaties: Part IV (Operation and enforcement of treaties); Part V (Interpretation of treaties); Part VI (Termination of treaties); Part VII (Rules and principles applicable to particular types of treaties).

2. The draft articles formulated by the Special Rapporteur are accompanied throughout by comments and notes. While the former is intended to constitute part of the work of the Commission to be submitted to the General Assembly, the notes are merely in the nature of explanations for the convenience of the Commission. However, the border-line between the comment and the notes is not contemplated as being rigid and it is probable that eventually substantial sections of the notes may be included in the comment.

3. The present Report is intended primarily as a formulation of existing law. It is largely for this reason that the Special Rapporteur has thought it necessary in a number of cases — as, for instance, in the case of article 9 relating to reservations — to append alternative formulations *de lege ferenda*. In some cases it has been thought necessary to include, for the consideration of the Commission, alternative formulations of *lex lata*. However, in general the Special Rapporteur has attached importance to the preservation of the

distinction between the two main tasks which, in relation to this and other topics, confront the Commission — namely, those of codification and development of international law.

TEXTS OF ARTICLES

Article 1

ESSENTIAL REQUIREMENTS OF A TREATY

Treaties are agreements between States, including organizations of States, intended to create legal rights and obligations of the parties.

Article 2

FORM AND DESIGNATION OF A TREATY

Agreements, as defined in article 1, constitute treaties regardless of their form and designation.

Alternative version of article 2

Agreements, as defined in article 1, constitute treaties regardless of their form and designation and regardless of whether they are expressed in one or more instruments. A treaty obligation may be created by a unilateral instrument accepting an offer or followed by acceptance.

Article 3

THE LAW GOVERNING TREATIES

In the absence of any contrary provisions laid down by the parties and not inconsistent with overriding principles of international law, the conditions of the validity of treaties, their execution, interpretation and termination are governed by international custom and, in appropriate cases, by general principles of law recognized by civilized nations.

¹ Sir Hersch Lauterpacht having been elected to the International Court of Justice in 1954 was unable to publish these sections of his Report.

Article 4

ASSUMPTION OF TREATY OBLIGATIONS

A treaty becomes binding by signature which is not subject to confirmation, ratification, accession, acceptance, or any other means of expressing the will of the parties, through a competent organ, in accordance with the provisions and practice of their constitution.

Article 5

SIGNATURE

1. The signature of a treaty constitutes an assumption of a binding obligation in all cases in which the parties expressly so agree or where, in accordance with article 6, no confirmation of the signature is necessary.

2. In all other cases the signature, or any other means of assuming an obligation subject to subsequent confirmation, has no binding effect except that it implies the obligation, to be fulfilled in good faith:

(a) To submit the instrument to the proper constitutional authorities for examination with the view to ratification or rejection;

(b) To refrain, prior to ratification, from any act intended substantially to impair the value of the undertaking as signed.

Article 6

RATIFICATION

1. Ratification is an act by which a competent organ of a State formally approves as binding the treaty or the signature thereof.

2. In the absence of ratification a treaty is not binding upon a Contracting Party unless:

(a) The treaty in effect provides otherwise by laying down, without reference to ratification, that it shall enter into force upon signature or upon any other date or upon a specified event other than ratification;

(b) The treaty, while providing that it shall be ratified, provides also that it shall come into force prior to ratification;

(c) The treaty is in the form of an exchange of notes or an agreement between government departments;

(d) The attendant circumstances or the practice of the Contracting Parties concerned indicate the intention to assume a binding obligation without the necessity of ratification.

Alternative paragraph 2

2. Confirmation of the treaty by way of ratification is required only when the treaty so provides.

Article 7

ACCESSION

1. A State or organization of States may accede to a treaty, which it has not signed or ratified, by formally declaring in a written instrument that the treaty is binding upon it.

2. Accession is admissible only subject to the provisions of the treaty.

3. Unless otherwise provided, accession may be effected at any time after the establishment of the text of the treaty.

Article 8

ACCEPTANCE

[Wherever provision is made for the assumption of the obligations of the treaty by acceptance a State may become a party to the treaty by a procedure which consists either: (a) in signature, ratification, or accession; or (b) in an instrument formally described as acceptance; or (c) in a combination of the two preceding methods.]

Article 9

RESERVATIONS

I

A signature, ratification, accession, or any other method of accepting a multilateral treaty is void if accompanied by a reservation or reservations not agreed to by all other parties to the treaty.

II

*Alternative proposals de lege ferenda**Alternative draft A of article 9*

If, in any case where a multilateral treaty does not expressly prohibit or restrict the faculty of making reservations, a State signs, ratifies, accedes to or otherwise accepts the treaty subject to a reservation or reservations limiting or otherwise varying the obligations of any article or articles of the treaty, the following procedure shall apply in the absence of any other provisions in the treaty:

1. Whenever a treaty provides that it shall enter into force on a specified number of States finally becoming parties thereto, the fact that a State has appended a reservation or reservations to any article of the treaty is not taken into account for the purpose of ascertaining the existence of the requisite number of parties to the treaty.

2. If within three years of the treaty having entered into force less than two-thirds of the States accepting the treaty, whether they have accepted it with or without reservations, agree to the reservation or reservations appended by a State, that State, if it maintains the reservation, ceases to be a party thereto. If at the end of that period and as the result of the operation of the rule as stated, the number of parties is reduced to below the requisite number stipulated for the entrance of the treaty into force, the treaty is dissolved.

3. If, at the end of or subsequent to the period referred to above, a reservation is agreed to expressly or tacitly by two-thirds or more of the total number of the States accepting the obligations of the treaty, then the State making the reservation is deemed to be a party to the treaty in respect of all parties thereto subject to the right of the other parties not to consider themselves bound by the particular clause of the treaty in relation to the State making the reservation.

4. A State is deemed to have agreed to a reservation made by another State if, within three months of the receipt of notification of the reservation in question, it has not forwarded to the depositary authority a statement containing a formal rejection of the reservation.

Alternative draft B of article 9

If, in any case where a multilateral treaty does not expressly prohibit or limit the faculty of making reservations, a State signs, ratifies, accedes to or otherwise accepts the treaty subject to a reservation or reservations limiting or otherwise varying the obligations of any article or articles of the treaty, the following procedure shall apply in the absence of any other provisions in the treaty:

1. The text of the reservations received shall be communicated by the depositary authority to all the interested States. If, on the expiry of a period of three months following the receipt of such communication, an interested State does not notify the depositary authority that it disagrees with the reservation, it shall be deemed to have accepted it.

2. Unless, after an interval prescribed by the convention, two-thirds of the States qualified to offer objections have accepted the reservation, the reserving State, if it maintains its reservation, will not be considered a party to the treaty.

3. If two-thirds or more of the States referred to in paragraph 2 agree to the reservation, the reserving State will be considered a party to the treaty subject to the right of any party not to apply to the reserving State the provision of the treaty in respect of which a reservation has been made.

Alternative draft C of article 9

If, in any case where a multilateral treaty does not expressly prohibit or limit the faculty of making reservations, a State signs, ratifies, accedes to or otherwise accepts the treaty subject to a reservation or reservations limiting or otherwise varying the obligations of any article or articles of the treaty the following procedure shall apply in the absence of any other provisions in the treaty:

1. The parties or the organ of an international organization responsible for establishing the text of the treaty shall designate a committee, appointed in a manner to be agreed by them, competent to decide on the admissibility of reservations made by any Government subsequent to the establishment of the text of the treaty.

2. The text of the reservations received shall be communicated by the depositary authority to all the interested States. If, on the expiry of a period of three months following the receipt of such communication, an interested State does not notify the depositary authority that it disagrees with the reservation, it shall be deemed to have accepted it.

3. If a reservation is objected to by a State qualified to object, then it shall be competent for the Committee, at the request of the State making the reservation, to decide whether the reservation is admissible. If the reservation is declared inadmissible then the State in question cannot become a party to the treaty if it maintains the reservation.

Alternative draft D of article 9

If, in any case where a multilateral treaty does not expressly prohibit or limit the faculty of making reservations, a State signs, ratifies, accedes to or otherwise accepts the treaty subject to a reservation

or reservations limiting or otherwise varying the obligations of any article or articles of the treaty the following procedure shall apply in the absence of any other provisions in the treaty:

1. The parties or the organ of an international organization responsible for establishing the text of the treaty shall request the International Court of Justice to designate under its rules a Chamber of Summary Procedure to decide on the admissibility of reservations made by a Government subsequent to the establishment of the text of the treaty.

2. The text of the reservations received shall be communicated by the depositary authority to all the interested States. If, on the expiry of a period of three months following the receipt of such communication, an interested State does not notify the depositary authority that it disagrees with the reservation, it shall be deemed to have accepted it.

3. If a reservation is objected to by a State qualified to object, then it shall be competent for the Chamber of Summary Procedure, at the request of the State making the reservation, to decide whether the reservation is admissible. If the reservation is declared inadmissible then the State in question cannot become a party to the treaty if it maintains the reservation.

Article 10

CAPACITY OF THE PARTIES

An instrument is void as a treaty if concluded in disregard of the international limitations upon the capacity of the parties to conclude treaties.

Article 11

CAPACITY OF AGENTS

*Constitutional Limitations
Upon the Treaty-Making Power*

1. A treaty is voidable, at the option of the party concerned, if it has been entered in disregard of the limitations of its constitutional law and practice.

2. A contracting party may be deemed, according to the circumstances of the case, to have waived its right to assert the invalidity of a treaty concluded in disregard of constitutional limitations if for a prolonged period it has failed to invoke the invalidity of the treaty or if it has acted upon or obtained an advantage from it.

3. In cases in which a treaty is held to be invalid on account of disregard of the constitutional limitations imposed by the law or practice of a contracting party that party is responsible for any resulting damage to the other contracting party which cannot properly be held to have been affected with knowledge of the constitutional limitations in question.

4. A party cannot invoke the invalidity of a treaty on the ground that it has been entered into in disregard of the constitutional limitations of the other contracting party.

5. A party asserting the invalidity of a treaty on account of any failure to comply with constitutional limitations is bound, in case of disagreement, to submit the substance of the dispute or the question of damages to the International Court of Justice or to any other international tribunal agreed upon by the parties.

Article 12

ABSENCE OF COMPULSION

Treaties imposed by or as the result of the use of force or threats of force against a State in violation of the principles of the Charter of the United Nations are invalid if so declared by the International Court of Justice at the request of any State.

Article 13

ABSENCE OF FRAUD

1. A treaty procured by fraud is voidable, at the instance of the International Court of Justice or, if the parties so agree, of any other international tribunal, at the option and at the request of the injured party.

2. The injured party may affirm the treaty thus procured and ask for damages for the injury caused to it by the fraud of the other party.

Article 14

ABSENCE OF ERROR

A treaty entered into under the mistaken belief, not due to fraud of a contracting party, as to the existence of a fact substantially affecting the treaty as a whole is voidable, at the instance of the International Court of Justice or, if the parties so agree, of any other international tribunal, at the option and at the request of the party adversely affected by the mistake.

Article 15

CONSISTENCY WITH INTERNATIONAL LAW

A treaty, or any of its provisions, is void if its performance involves an act which is illegal under international law and if it is declared so to be by the International Court of Justice

Article 16

CONSISTENCY WITH PRIOR TREATY OBLIGATIONS

1. A treaty is void if its performance involves a breach of a treaty obligation previously undertaken by one or more of the contracting parties.

2. A party to a treaty which has been declared void by an international tribunal on account of its inconsistency with a previous treaty may be entitled to damages for the resulting loss if it was unaware of the existence of that treaty.

3. The above provisions apply only if the departure from the terms of the prior treaty is such as to interfere seriously with the interests of the other parties to that treaty or seriously impair the original purpose of the treaty.

4. The rule formulated under paragraphs (1) and (2) does not apply to subsequent multilateral treaties, such as the Charter of the United Nations, partaking of a degree of generality which imparts to them the character of legislative enactments properly affecting all members of the international community or which must be deemed to have been concluded in the international interest.

Article 17

WRITTEN FORM

An agreement is void as a treaty unless reduced to writing.

Article 18

REGISTRATION

Treaties entered into by Members of the United Nations subsequent to their acceptance of the Charter of the United Nations cannot be invoked by the parties before any organ of the United Nations unless registered, as soon as possible, with the Secretariat of the United Nations.

**TEXT OF ARTICLES
WITH COMMENTS AND NOTES***Part I***Definition and nature of treaties***Article 1**Essential requirements of a treaty*

Treaties are agreements between States, including organizations of States, intended to create legal rights and obligations of the parties.

Comment

The object of this article is not so much a definition of a treaty as a statement of its essential requirements and characteristics.

1. "Treaties are *agreements* . . ." The consensual—the contractual—nature of treaties constitutes their principal characteristic which underlies the rules of customary international law in the matter of the conclusion, the binding force, the validity, the interpretation and the termination of treaties. The view is occasionally put forward that in the case of certain multilateral treaties of a general character approaching in some respects the process of international legislation or intended to provide a settlement of a general nature there is room for the application of rules somewhat different from those governing treaties at large. This view will be examined in Part VII of this draft which will be devoted to a consideration of special types of treaties and of the question of the extent to which they call for application of rules differing from those applied to treaties generally.² At least one significant pronouncement of the International Court of Justice shows that that view cannot be dismissed without detailed examination. Thus in the advisory opinion on the *Reparation for injuries suffered in the service of the United Nations* the Court considered the question whether the Charter of the United Nations could legally endow the United Nations with an international legal personality with an effect extending not only to its members but also to States outside the United Nations. The Court answered that question in the affirmative. It said: "On this point, the Court's opinion is that fifty States, representing the vast majority of the members of the international community, had the power, in conformity with international law, to bring into being an entity possessing objective international personality, and not merely personality recognized by them alone, together with the capacity to bring international claims" (*I.C.J. Reports 1949*,

² See footnote 1.

p. 185). In a different sphere an authoritative Committee of Jurists appointed in 1920 by the Council of the League of Nations to report on the question of the fortification of the Aaland Islands expressed the opinion that the Convention of 1856 between Great Britain, France and Russia embodying the principle of demilitarization of these islands was in the nature of "a settlement regulating European interests" and that, as such, it "constituted a special international status for the Aaland Islands" with the result that every interested State had the right to insist upon compliance with them (League of Nations Official Journal, Special Supplement, 1920, No. 3, pp. 17-19). In the advisory opinion on the *International status of South West Africa* the International Court of Justice held that the international rules regulating the Mandate constituted an international status for the Territory (*I.C.J. Reports 1950*, p. 132). In his separate opinion in this case Judge McNair cited the Report of the Committee of Jurists in the *Aaland Islands* case in support of his view that article 22 of the Covenant of the League of Nations relating to mandates established a regime which "has more than a purely contractual basis" with the result that "the territories subjected to it are impressed with a special legal status" (p. 154).

However, these and similar pronouncements which lend support to the view that some treaties may, in a sense, partake of the character of international legislation reaching out beyond the parties thereto are not inconsistent with the basic proposition that as between the parties such treaties are instruments of a contractual character. The practice in the matter of reservations, which was adhered to by the great majority of the States in the past, was entirely based on the conception of treaties as contracts, namely, that a State appending a reservation to a treaty in law rejects an agreement reached by the signatories and makes a new offer. It is possible that in this particular case (see below, comment to article 9)—as, indeed, with regard to other special cases—it may be desirable, having regard to special problems of a multilateral treaty, to modify the automatic application of a rule otherwise generally applicable. However, this fact emphasizes rather than detracts from the consensual nature of all treaties. The principle that treaties are agreements of a contractual character is believed to be not only consistent with but also dictated by the preponderant practice in the matter of their validity, interpretation and termination. The presistency with which international tribunals resort to preparatory work for the elucidation of the intentions of the authors of multilateral treaties of a constitutional character—at least in cases in which that intention cannot be ascertained by other means—provides an instructive example of that attitude.

2. "Treaties are agreements *between States, including organizations of States . . .*"

(i) This part of the definition of treaties, in so far as it excludes individuals and bodies other than organizations of States from being parties to treaties, follows from the fact that States only—acting either individually or in association—are the normal subjects of international intercourse and of international law. This means that agreements

between States and individuals or juridical entities which are not States or organizations of States are not treaties even if the law governing such agreements is not the law of any particular State but general principles of law independent of any particular municipal system—as was, for instance, the case in the *Lena Goldfields* arbitration decided in 1930 between the Lena Goldfields Company and Soviet Russia: *Annual Digest of Public International Law Cases* (London), 1929-1930, Case No. 1. In the arbitration between the Sheikh of Abu Dhabi and the Petroleum Development Company, decided in 1951, the umpire, Lord Asquith, held that no municipal law of any particular country was applicable to the interpretation of the concession agreement and that the terms of the agreement "invite, indeed prescribe, the application of principles rooted in the good sense and common practice of the *generality of civilized nations*—a sort of 'modern law of nature'" (*International and Comparative Law Quarterly*, 4th Series, vol. I (1952), p. 251). The Concession Agreement between Persia and the Anglo-Iranian Oil Company of 1933 was described as a "Convention" and the arbitration clause of the agreement provided for the application of the law laid down in Article 38 of the Statute of the Permanent Court of International Justice. But the International Court of Justice declined to admit that the agreement partook of the nature of a treaty. It held that it was "nothing more than a concessionary contract between a government and a foreign corporation" (*I.C.J. Reports 1952*, p. 112). Occasionally it may be difficult to decide whether one of the Contracting Parties is a State or a subordinate agency thereof assimilated to a private corporation. This applies, for instance, to the Loan Agreement between the Government of the United Kingdom and the Export-Import Bank of Washington, described in the Agreement as "an agency of the United States of America" (United Kingdom, *Treaty Series*, No. 78 (1950 Cmd. 8126)). It is not feasible to provide in a general Code of the Law of Treaties for border-line cases of this description.

(ii) The reference to "States" in the above definition contains an element of ambiguity which it may be difficult to resolve in the definition itself. Normally "States" would mean "States which are independent members of the international community" or "States which are normal subject of international law". The result of some such interpretation of the term would be, for instance, that agreements made between the protected and the protecting State, either at the time of the establishment of the protectorate or subsequently, could not be regarded as treaties. However, they have been so treated judicially—by both international and municipal tribunals. Rules and principles of international law applicable to treaties have been applied to them. Opinion is divided whether States which are protectorates are subjects of international law. Yet in the case between France and the United States concerning rights of nationals of the United States of America in Morocco, decided on 27 August 1952, the International Court of Justice seemed to associate itself

with the view, not disputed by either party, that "Morocco, even under the Protectorate, has retained its personality as a State in international law" (*I.C.J. Reports 1952*, p. 185). It has been often — and correctly — stated that the question whether the protected State can conclude certain international treaties must be decided according to the terms of a particular treaty of protectorate. Agreements between the protecting and the protected State are frequent and there has often been no disposition, even on the part of the protecting State, to question their international character. Thus, for instance, in the proceedings before the Permanent Court of International Justice in connexion with its advisory opinion on the Jurisdiction of the Courts of Danzig Poland did not seem to question the international character of the agreement concluded between her and Danzig — a protected State (*Publications of the P.C.I.J., Series B*, No. 15, p. 17). On 5 April 1947, the United Kingdom and the Sultanate of Muscat and Oman (which is a British Protectorate) signed a Civil Air Agreement which was registered with the United Nations (*United Nations, Treaty Series*, vol. 27, p. 287). In 1951 a comprehensive treaty of friendship, commerce and navigation was signed between the United Kingdom and the Sultan of Muscat and Oman and Dependencies (*Muscat No. 1 (1952)*", Cmd. 8462). If the protecting and the protected State while disagreeing as to the interpretation of a particular provision in the agreement establishing the protectorate or of any treaty subsequently concluded between themselves were to agree to submit their dispute to an international tribunal, would the latter be entitled to consider the agreement to be a treaty and interpret it by reference to rules applicable to the interpretation of treaties? It may be difficult to give a negative answer to this question. Thus, to mention once more the judgement of the International Court of Justice in the *case concerning rights of nationals of the United States of America in Morocco*, the Court referred to and interpreted the treaties concerned with the establishment of the protectorate, in particular the Treaty of Fez of 1912 between the Sultan of Morocco and France. "Under this Treaty," the Court said, "Morocco remained a sovereign State but it made an arrangement of a contractual character whereby France undertook to exercise certain sovereign powers in the name and on behalf of Morocco, and, in principle, all of the international relations of Morocco" (*I.C.J. Reports 1952*, p. 188).

Neither is it necessary — or, perhaps, permissible — to deny to an instrument the character of a treaty for the mere reason that a party to it is a State member of a federal State — a subject discussed in greater detail in article 10. Thus according to the constitutions of many federal States members of the federation are authorized to enter into agreement either with one another or, to a much more limited degree, with foreign States. There has been no disposition, on the part of municipal courts, to deny to such agreements the character of treaties. In general, the relations between members of federations have been consid-

ered by the supreme tribunals of the countries in question as governed by international law. Of this tendency an instructive example is provided by the manner in which the German *Staatsgerichtshof* (in *Bremen v. Prussia*, *Annual Digest*, 1925-1926, case No. 266) and the Swiss Federal Court in *Canton of Thurgau v. Canton of St. Gallen* (*ibid.*, 1927-1928, case No. 289) applied the doctrine *rebus sic standibus* to member States of a federal State. An international arbitral tribunal is unlikely to be confronted with the interpretation or application of treaties of this description, though it is conceivable that it may be called upon to do so either incidentally or by way of agreed submission by two parties. The International Court of Justice would probably be unable to do so, having regard to the terms of Article 34 of its Statute — although the matter might not be free of difficulty in the case of treaties of member States of federal States such as the Ukraine or Byelorussia which have acquired a degree of formal international personality by nature of the constitution of the federation of which they are members and of their position in international organization (see below, comment to article 10).

For these reasons, while the term "States" in this article must be deemed primarily to refer to contractual agreements concluded by fully independent States, its effect is not such as to preclude international judicial or other agencies from considering as treaties instruments to which the parties are communities which have been customarily described as States and which as a matter of internal and constitutional law can be considered States by virtue of their political cohesion, their internal autonomy and their historical status. On the other hand, whenever such dependent or subordinate States purport to conclude a treaty in disregard of international obligations and arrangements which limit their contractual capacity the instrument may be void because of incapacity. The matter — as well as the international position of federal States generally — is examined in Part III of the present draft (Conditions of Validity of Treaties, article 10). The difficulty surrounding the subject is that it may be as inaccurate to say that the treaty making power belongs only to fully independent States as it may be incorrect to assume that it belongs to every political unit described by the name of "State". It is equally unsatisfactory to attempt what is no more than a nominal solution by laying down, as is occasionally done, that the power to conclude treaties rests with States which are members of the international community. The latter expression is not self-explanatory — unless it signifies States endowed with plenitude of international rights, including the right to conclude treaties in which case the statement merely begs the question. For this reason the formulation adopted in article 1 is necessarily of a general character — leaving it to the application of article 10 which is concerned with the capacity of the parties to resolve in a pragmatic manner the particular situations which may arise.³

³ Up to the passing of the Act of 3 March 1871 which denied to Indian tribes the status of independent nations

3. "Treaties are agreements between States, including organizations of States, . . ." States can exercise their capacity to conclude treaties either individually or when acting collectively as organizations created by a treaty. It follows that agreements concluded by international organizations with States or other international organizations must be regarded as treaties provided that they otherwise qualify as treaties under the terms of this article. These include treaties concluded by the United Nations⁴ with members of the United Nations (such as the Agreement between the United Nations and the United States of America regarding the Headquarters of the United Nations: United Nations, *Treaty Series*, vol. II, p. 11), and with States which are not members of the United Nations (such as those with Switzerland on the Privileges and Immunities of the United Nations: *ibid.*, vol. 1, p. 163; concerning the Ariana Site, *ibid.*, p. 153; and concerning postage stamps for the Geneva Office of the United Nations: *ibid.*, vol. 43, p. 327); and a number of agreements with specialized agencies and other international organizations. They also include agreements concluded between or by international organizations other than the United Nations such as those concluded by the specialized agencies between themselves (such as the agreement of 1948 between the Food and Agriculture Organization and the World Health Organization providing for close co-operation and consultation in matters of common concern: *ibid.*, vol. 76, p. 172), or with States (for instance, the agreement and accompanying instruments between the International Labour Organisation and Switzerland of 27 May 1948: *ibid.*, vol. 15, p. 377.) These agreements to which the United Nations or a specialized agency are parties have been properly registered under the provision of Article 102 of the Charter which requires the registration of treaties and international agreements. It has been suggested that the circumstance which makes them registrable is not that the United Nations or a specialized agency are a party but that at least one party is a member of the United Nations. However, a considerable number of agreements have been properly registered to which only the United Nations and specialized agencies are parties.⁵ Neither has the use of the instrumentality of registered agreements been limited, among organiza-

"with whom the United States may contract by treaty" numerous treaties had been concluded between the United States and Indian tribes and ratified by the President with the consent and approval of the Senate according to a procedure identical with that followed with regard to ordinary treaties. For details see H. Reiff in *American Journal of International Law*, vol. 30 (1936), pp. 67-69. See also R. Octavio in *Recueil des Cours de l'Académie de droit international*, 1930 (I), p. 252. If the United States had agreed, prior to 1871, to submit to an international tribunal a dispute with an Indian tribe concerning the interpretation of a treaty concluded with it and duly ratified by the President as a treaty, would that Tribunal have been prevented from considering it as such from applying to it rules of international law?

⁴ See generally C. Parry, "Treaty Making Power of the United Nations", in *British Year Book of International Law*, vol. 26 (1949), pp. 108-149.

⁵ The reasons which, it may be assumed, have prompted the Secretary-General to register these and other international agreements to which specialized agencies are parties are cogently stated in an article contributed to the *British Year Book of International Law*, vol. 25 (1948), by Mr. O. Schachter, a member of the Secretariat of the United Nations (pp. 130-132).

tions of States, to specialized agencies as may be seen from the agreement of 25 January 1951 between the United Nations International Children's Emergency Fund and the Government of Paraguay concerning the activities of the former in Paraguay (*ibid.*, vol. 79, p. 10). On occasions a number of international organizations appear as a contracting party on the one side and a State on the other.⁶ International practice shows examples, even prior to the establishment of the United Nations, of agreements concluded between States and international organizations or international organs. Thus on 28 June 1932 an agreement, registered with the League of Nations, was concluded between Yugoslavia, Romania and the International Commission of the Danube concerning the setting up of special services at the Iron Gates (League of Nations, *Treaty Series*, vol. 140, p. 191; M. Hudson, *International Legislation*, 6, p. 47). On 4 August 1924, the Reparations Commission concluded a comprehensive agreement with Germany (League of Nations, *Treaty Series*, vol. 41 p. 432; M. Hudson, *op. cit.*, vol. 2, p. 1301). There are other examples of such treaties.

There appears to be no decisive reason why, subject to any modification as examined in Part VII of this draft of a Code of the Law of Treaties,⁷ the rules otherwise applicable to treaties should not apply to those concluded by or between international organizations created by and composed of States. On the contrary, it would seem desirable to direct political and juristic effort to making available, in the interest of the progressive integration of international society on a functional basis, the experience of the law of treaties to the collective activities of States in their manifold manifestations.⁸ This is so also for the additional reason that the part of multilateral treaties is likely to grow on a world of growing inter-dependence — not only because of the emergence of new interests calling for international regulation of general character, but also because in many cases the essential uniformity or identity of the subject matter of questions regulated in the past by bilateral agreements may increasingly call for the adoption of the machinery of multilateral treaties as being best suited to give effect to such uniformity or identity. The achievement of that object will not be facilitated by questioning the fundamental quality of treaties in relation to the instruments in question.

4. "Treaties are agreements between States, including organizations of States, intended to create legal rights and obligations . . ." There exist formal international instruments solemnly declared or signed by representatives of States or unilaterally proclaimed by

⁶ For instance, in the Basic Agreement of 15 December 1950 between the United Nations, the Food and Agriculture Organization, the International Civil Aviation Organisation, the International Labour Organization, the United Nations Educational, Scientific and Cultural Organization and the World Health Organisation, and the United Kingdom being the Administrative Power of Cyrenaica and Tripolitania, for the provision of technical assistance: United Nations, *Treaty Series*, vol. 76, p. 122.

⁷ See footnote 1.

⁸ Article 748 of Fiore's *International Law Codified* lays down, in the fifth edition which appeared in 1915, that the capacity to conclude treaties may be "possessed by associations to which international personality has been attributed".

them which, however, are in the nature of statements of policy rather than instruments intended to lay down legal rights and obligations. Examples of such instruments are the so-called Atlantic Charter of August 1941 in which the President of the United States and the British Prime Minister representing His Majesty's Government in the United Kingdom agreed "on certain common principles in the national policies of their respective governments on which they base their high hopes of a better future for the world" (*American Journal of International Law*, vol. 35 (1941), Special Supplement, p. 191); the Agreed Declaration by the President of the United States of America, the Prime Minister of the United Kingdom of Great Britain and Northern Ireland, and the Prime Minister of Canada relating to Atomic Energy, signed at Washington on 15 November 1945 (United Nations, *Treaty Series*, vol. 3, p. 131); the Moscow Instrument of 1 November 1943 made by the Heads of the United States, British and Soviet Governments containing the solemn declaration relating to the punishment of war criminals (Cmd. 6668); and the Universal Declaration of Human Rights adopted by the General Assembly of the United Nations in 1948. In some cases the absence of a true contractual nexus in the instruments in question is somewhat obscured by the form, expressed in the traditional form of agreement, given to the instrument. Thus the *communiqué* on the Moscow Conference, signed on 27 December 1945, and the Report of the Ministers of Foreign Affairs of Soviet Russia, the United States of America and the United Kingdom, dated 26 December 1945, was registered with the United Nations (United Nations, *Treaty Series*, vol. 20, p. 272) as "together constituting an agreement relating to the preparation of Peace Treaties and to certain other problems". The registered text of the instrument states that it "came into force on 27 December 1945, by signature". Yet the *communiqué* which forms part of the instrument merely stated that "discussions took place on an informal and exploratory basis and agreement was reached on the following questions". The legal nature of assurances given in an instrument may be problematical notwithstanding the fact that it is couched in the form usually given to binding agreements such as an exchange of notes.⁹ The same applies to cases in which the formal character of an otherwise general undertaking is emphasized by the fact that, like an ordinary treaty, it contains provisions for adhesion by other States. This was the case, for instance, with regard to the "Declaration by the United Nations" of 1 January 1942 subscribing to the

⁹ On 4 June 1940 the Prime Minister of the United Kingdom issued a statement to the effect that should the British Isles become untenable for British ships of war, the British Fleet would in no event be surrendered or sunk but would be sent overseas for the defence of other parts of the Empire. On 29 August 1940 the following enquiry was received by the British Ambassador to the United States: "The Government of the United States would respectfully enquire whether the foregoing statement represents the settled policy of the British Government". An affirmative answer was given. The enquiry and the answer were published in the form of an exchange of notes: *Department of State Bulletin*, 7 September 1940, vol. III, p. 63, p. 191; *American Journal of International Law*, vol. 35 (1941), supplement, p. 37.

common programme of principles and purposes embodied in the Atlantic Charter, pledging the full employment of the resources of each government in the common struggle, and undertaking not to make a separate armistice and peace with the enemy (*American Journal of International Law*, vol. 36 (1942), Supplement, p. 191).

The fact that the obligation provided for in the instrument can be fulfilled by a somewhat nominal act of the parties does not necessarily detract from its character as a treaty. To this category belong treaties embodying the obligation of consultation such as the Nine-Power Treaty of 6 February 1922 concerning China. Similarly an undertaking to negotiate implies a legal obligation to do so although it necessarily leaves a wider margin of discretion to the State bound by it.¹⁰ A legal duty must also be deemed to exist in those marginal cases in which, by virtue of the instrument in question, a State reserves for itself the right to determine both the existence and the extent of the obligation undertaken by it, as, for instance, in the case of some declarations of acceptance of the optional clause of Article 36 of the Statute of the International Court of Justice in which the declaring States have reserved for themselves the right to determine whether a matter falls within their domestic jurisdiction. For such determination must take place in accordance with the implied obligation to act in good faith. The fact that the interested State is the sole judge of the existence of the obligation is, while otherwise of considerable importance, irrelevant for the determination of the legal character of the instrument.¹¹ This is also the position with regard to treaties, such as the North Atlantic Treaty of 4 April 1949, in which each party agrees to assist others by "such action as it

¹⁰ Also, although the Declaration of Denmark, Finland, Iceland, Norway and Sweden of 27 October 1938 for the purpose of establishing similar rules of neutrality did not probably amount to a reciprocal treaty obligation, with regard to the substance of the matters regulated therein, the Declaration (which was registered with the League of Nations: League of Nations, *Treaty Series*, vol. 188, p. 293; M. Hudson, *International Legislation*, vol. VIII, p. 56) included an element of obligation by virtue of the agreement not to modify such rules "without first giving, if possible, sufficient notice to the other four Governments to permit an exchange of views on the matter".

¹¹ The position may be different when the effective fulfilment of the obligation does not depend upon the will of the Contracting State. Thus it has been held, in effect, by the International Court of Justice in the advisory opinion concerning the status of *South West Africa* that an obligation to conclude an agreement is a contradiction in terms and cannot legally exist. The Court said: "An 'agreement' implies consent of the parties concerned, including the mandatory Power in case of territories held under Mandate . . . The parties must be free to accept or reject the terms of the contemplated agreement. No party can impose its terms on the other party" (*I.C.J. Reports 1950*, p. 139). There is, however, room for the view that, like any other obligation, an agreement to conclude an agreement must be interpreted in good faith and in a reasonable manner and that, accordingly, the State undertaking to conclude an agreement is legally bound to fulfil that undertaking in so far as it lies in its power. There is an obligation to accept an agreement offered by the other party if its terms are such that an impartial tribunal would consider them as taking into account the legitimate interests of both parties. The

deems necessary" in case of attack directed against them. In other cases, as with regard to the reservation of action in self-defence proclaimed by some States in connexion with their signature of the General Treaty for the Renunciation of War of 27 August 1948 and coupled with an assertion of the right of these States to determine when the contingency of recourse to self-defence has arisen, the freedom of action, thus claimed, refers only to the decision called for by the exigencies of the situation and permitting of no delay. As in other cases of self-defence, it does not exclude the final impartial determination of the legitimacy of the action thus taken. There is in the instruments of this description no ground for questioning their legal character as treaties.

On the other hand the absence of a true treaty relationship, notwithstanding the formality and the solemnity of the instrument, may be apparent from the terms, the designation and the history of the instrument in question. This was probably the position with regard to the Agreement — often referred to as the

awards in the *Tacna-Arica* arbitration of 1925 between Chile and Peru (*Annual Digest*, 1925-1926, case No. 269) and in the *Spanish Zone of Morocco* Case between Great Britain and Spain (*Annual Digest*, 1923-1924, case No. 8) seem to affirm the legal nature of *pactum de contrahendo*. In its Advisory Opinion of 18 October 1931 concerning the *Railway Traffic between Poland and Lithuania*, the Permanent Court of International Justice stated as follows:

"The Court is indeed justified in considering that the engagement incumbent on the two Governments in conformity with the Council Resolution is not only to enter into negotiations, but also to pursue them as far as possible, with a view to concluding agreements . . . But an obligation to negotiate does not imply an obligation to reach agreement, nor in particular does it imply that Lithuania, by undertaking to negotiate, has assumed an engagement, and is in consequence obliged to conclude the administrative and technical agreements indispensable for the establishment of traffic on the Landwarow-Kaisiadorys railway sector." (Publication of the P.C.I.J., *Series A/B*, No. 42, p. 116.)

The relevant part of the Resolution of the Council was a recommendation to "the two Governments to enter into direct negotiations as soon as possible in order to establish such relations between the two neighbouring States as will ensure 'the good understanding between nations upon which peace depends'". However, where the terms of the *pactum de contrahendo* are precise and mandatory and, in particular, where they are coupled with the conferment, upon an international tribunal, of jurisdiction in disputes arising out of the interpretation or application of the treaty, the legally binding character of the obligation seems to admit of little doubt. Thus article 9 of the Treaty of Peace with Japan of 8 September 1951 provided that "Japan will enter promptly into negotiations with the Allied Powers so desiring for the conclusion of bilateral and multilateral agreements providing for the regulation or limitation of fishery and development of fisheries on the high seas". Identical provisions are contained in article 12 (in the matter of trading, maritime and other commercial relations) and article 13 (in the matter of civil air transport). Article 22 of the Treaty confers upon the International Court of Justice jurisdiction in disputes, not otherwise settled, concerning the interpretation or execution of the treaty. There is a definite obligation and no mere *pactum de contrahendo* in cases such as articles 284 and 354 of the Treaty of Versailles in which a party agrees to accept a treaty or arrangement to be placed before it.

Lansing-Ishii Gentlemen's Agreement of 2 November 1917 between the United States and Japan on the subject of immigration. On occasion, as was the case with regard to the Universal Declaration of Human Rights approved by the General Assembly in 1948, the absence of a legal obligation is not open to doubt when the parties expressly disclaim the intention to assume an obligation of this nature. In all such cases the form given to an instrument is not decisive for the determination of its legal character as a treaty. In the event of a dispute on the subject it must properly be a question for judicial determination whether an instrument, whatever its description, is in fact intended to create legal rights and obligations between the parties and as such coming within the category of treaties. The circumstance that it has been registered with the United Nations, by one or more of the parties, as an international treaty or engagement is not decisive for determining this question — although the fact of its registration as the result of joint action by the parties raises a strong presumption in that direction.

5. "Treaties are agreements between States, including organizations of States, intended to create legal rights and obligations *of the parties*." As a rule, treaties create legal rights and obligations between the parties only — a subject which will be examined in detail in Part IV of this draft relating to the operation of treaties.¹² However, the principle that treaties are instruments intended to create legal rights and obligations between *the parties thereto* does not necessarily mean that their legal effect is necessarily restricted to the parties. Attention has been drawn above (paragraph 1) to the pronouncement of the International Court of Justice in the sense. The report, already referred to, of the Commission of Jurists appointed in 1920 by the Council of the League of Nations in connexion with the Aaland Islands shows in a different sphere — in the creation of a so-called public law of Europe in relation to a general international settlement — the possibility of the same overreaching effect of treaties. Some instruments of a general, quasi-legislative character appear to claim to regulate the conduct of States not parties thereto. To this category belongs Article 2 (6) of the Charter of the United Nations which lays down that "the Organization shall ensure that States which are not Members of the United Nations act in accordance with the Principles (of Article 2) so far as may be necessary for the maintenance of international peace and security". The Article in question imposes no legal obligation upon non-member States. It claims for the United Nations the right to regulate, in the interest of the maintenance of international peace and security, the conduct of non-member States. It is possible that, with the growing integration of international society, collective treaties may, by general consent, be held to produce not only actual compliance but also legal rights and obligations in relation to States which are not parties thereto. To that extent, without losing their character as treaties as between the parties, they may also become instruments of international legislation properly so called.

¹² See footnote 1.

Notes

1. Treaties as agreements. This element of the definition of a treaty is open to the objection that it fails to distinguish between the purely contractual type of treaty and the so-called legislative type, the *traités-lois*. The Special Rapporteur ventures to hope that, in the present context, that objection will not be advanced. For whatever may be the legal consequences of that distinction — a controversial matter examined in part VII of this draft¹³ — it does not alter the fact that at present international instruments creating legal rights and obligations have their source in the agreement either of the parties who accept them in the first instance or of those who adhere to them. It may be noted, however, in this connexion that the general trend of legal opinion is to deny any essential difference — for the purpose of the elaboration of rules governing their creation, operation and termination — between the two types of treaties.¹⁴ The essence of both is that they lay down rules governing the conduct of the parties.

2. Treaties as agreements to which organizations of States are parties. The expression "organizations of States" is here intended as synonymous with the expression "international organizations" conceived as entities which are created by treaty between States, whose membership is composed primarily of States, which have permanent organs of their own, and whose international personality is recognized either by the terms of their constituent instrument or in virtue of express recognition by a treaty concluded by them with a State.

The question, already referred to in the comment, whether the Code on the Law of Treaties to be drafted by the Commission should concern itself with treaties concluded by international organizations was discussed by the Commission during its sessions in 1950 and 1951. The view which it provisionally adopted was that agreements by or between organizations of States do not fall within the province of the law of treaties to be formulated by the Commission. That view, it is submitted, needs revision. The fact of the existence of the very great number of agreements concluded by and between the various international organizations would render incomplete and deficient any codification of the law of treaties which would leave such agreements out of account. Numerous agreements of this type have been entered into by the United Nations as such. A substantial number of them have been concluded by the Economic and Social Council in pursuance of Article 63 of the Charter which provides that the Economic and Social Council may enter into agreements with specialized agencies defining the terms on which the agency concerned should be

brought into relationship with the United Nations.¹⁵ A large number of agreements have been concluded between the various specialized agencies such as the International Labour Organisation, the Food and Agriculture Organization, the United Nations Educational, Scientific and Cultural Organization and the World Health Organization. These agreements are what has been described as "essentially treaties of amity and goodwill"¹⁶ inasmuch as they provide for close co-operation and consultation in matters of common concern. That feature does not deprive them of the character of treaties. The same applies, more conspicuously, to the great number of agreements concluded between the specialized agencies with various States concerning the legal status and the immunities of these organizations, as well as in other matters, within the territories of the States concerned. These include agreements between the United Nations and the United States of America, the United Nations and Switzerland, the United Nations Educational, Scientific and Cultural Organization and France, the International Labour Organization and Switzerland, the World Health Organization and Switzerland, the Food and Agriculture Organization and Italy, the International Civil Aviation Organization and Canada, the International Refugee Organization and Switzerland, the International Telecommunication Union and Switzerland, and the Universal Postal Union and Switzerland. An analysis of any of these treaties will show how closely they approach the traditional type of treaty. Thus the final clauses of the agreement concluded between the Swiss Federal Council and the World Health Organization on 12 January 1949 and regulating the legal status of the World Health Organization in Switzerland read like the final clauses of most other treaties with regard to settlement of disputes as to the interpretation and application of the agreement, entry into force, approval by the competent constitutional authorities, modification and denunciation of the agreement, and the like (United Nations, *Treaty Series*, vol. 26, p. 333). The degree to which agreements concluded by international organizations exhibit and have been judicially treated as exhibiting the common characteristics of treaties may be gauged from the manner in which Judge Read in his opinion in the case concerning the *international status of South West Africa* considered the question whether as the result of a series of acts and declarations of the Government of South Africa an agreement had been brought about between the United Nations and

¹³ See footnote 1.

¹⁴ See, for example, *Harvard Draft Convention*, Harvard Law School, *Research in International Law*, III, *Law of Treaties*, *American Journal of International Law*, vol. 29 (1935), Supplement (general comment to article 1, pp. 688, 689); Ch. Rousseau, *Principes généraux de droit international public*, vol. 1 (1944), p. 136; Balladore Pallieri, *Recueil des Cours de l'Académie de droit international*, vol. 74 (1949) (I), p. 513.

¹⁵ These agreements are now in force between the United Nations and ten specialized agencies, namely, the International Labour Organisation, United Nations Educational, Scientific and Cultural Organization, Food and Agriculture Organization, International Civil Aviation Organization, the Fund, the Bank, World Health Organization, the Universal Postal Union, International Telecommunication Union and World Meteorological Organization. A detailed study of the history of these agreements and an analysis of their provisions is contained in the *Report of Action taken in pursuance of the Agreements between the United Nations and the Specialized Agencies (Official Records of the Economic and Social Council, ninth Session, E/1317)*. See also Sharp, *International Organization*, vol. 1 (1947), pp. 460-474 and 2 (1948), pp. 247-267.

¹⁶ C. W. Jenks, *British Year Book of International Law*, vol. 28 (1951), p. 68.

South Africa. He said: "It is unnecessary to discuss the juridical nature of an international agreement. It is sufficient, for the present purposes, to state that an 'arrangement agreed between' the United Nations and the Union [of South Africa] necessarily included two elements: a meeting of minds; and an intention to constitute a legal obligation" (*I.C.J. Reports 1950*, p. 170).

Agreements by and between international organizations have now become a prominent feature of international relations. The international personality of international organizations — i.e., of organizations of States — is becoming generally recognized. The capacity to conclude treaties is both a corollary of international personality and a condition of the effective fulfilment of their functions on the part of the international organizations. It is, for instance, with the help, *inter alia*, of some such chain of reasoning that the International Court of Justice in the advisory opinion on *Reparation for injuries suffered in the service of the United Nations* affirmed the international personality of the United Nations. After referring to the Convention on the Privileges and Immunities of the United Nations of 1946 which "creates rights and duties between each of the signatories and the Organization", it said: "It must be acknowledged that the Members [of the United Nations], by entrusting certain functions to it, with the attendant duties and responsibilities, have clothed it with the competence required to enable those functions to be effectively discharged." (*I.C.J. Reports 1949*, p. 179.) The treaty-making power of international organizations is one of the significant instruments for their proper functioning and it seems desirable that that instrument should receive adequate recognition and elaboration. In fact, there would appear to be no reason why, in the sphere of the treaty-making power, States acting collectively should not be in the position to do what they can do individually. Quite apart from the function of the International Law Commission to develop international law, the treaty-making power of international organizations has become so much part of international practice that the inclusion, within the category of treaties, of the agreements made by and between them will come in fact within the function of the Commission concerned with the codification of existing law. It would be unsatisfactory, it is submitted, to adopt the position that although agreements made by international organizations are treaties they ought, for one reason or another, somehow to be left out of the orbit of the Law of Treaties as codified by the International Law Commission. Any such limitation of the codification of the law of treaties is probably as open to objection as the exclusion, from its purview, of exchanges of notes — a subject discussed, from this point of view, in the comment to article 2. Reasoning of that character might lead to the exclusion of what some consider to be legislative treaties — which, in their opinion, differ radically from the traditional type of contractual treaties. The result might be to reduce to inconspicuous dimensions the entire task of codification of the law of treaties. The work of the Commission on the subject ought to be complete both as a matter of principle and as a matter of assisting in the development of what is becoming a growing and beneficent aspect of relations of States. For these reasons although

at its session of 1951 the Commission seems to have decided not to include in the codification of the law of treaties agreements made by and between international organizations, it is submitted that that decision ought not to be adhered to. In so far as, in particular matters, specific types of treaties require regulation differing from that applying to treaties generally, the consideration and formulation of such modifications falls properly within the purview of codification.

3. The wording "agreements between States, including organizations of States" has not been adopted without a previous consideration of alternative formulations. The purpose of the wording as formulated is to lay down, in the first instance, that only States or organizations of States can be parties to treaties. The present formulation is also intended to exclude the inference that it is sufficient if an instrument is concluded, *on the one part*, by a State or an organization of States and that the other party need not be a State or an organization of States. The wording "agreements between States and (or) organizations of States" might equally lend itself to a wrong interpretation. In fact there are three kinds of agreements, from the point of view of the parties thereto, contemplated in the present article: (1) agreements between States; (2) agreements between States and organizations of States; (3) agreements between organizations of States. It is believed that the present wording includes all three categories.

4. No reference is made in this article to the requirement adopted in article 1 (a) of the Harvard Draft Convention and, for a time, in the tentative articles approved by the Commission that an instrument, in order to be a treaty, must establish a relationship under international law. The apparent intention of that formula was that, in order to constitute a treaty, the instrument must, according to the intention of the parties or otherwise, be governed by rules of international law. The reason underlying the view thus adopted was, it would seem, the existence of agreements which regulate matters usually falling within the sphere of private law such as loans of money, purchase of foods, regulation of prices, leases or purchase of immovable property, and the like. With the growth of economic activity under the management of the State the scope of agreements of this kind has tended to increase. This applies, in particular, to the wide range of so-called commodity agreements. Yet, it is doubtful whether such agreements can be put in a special category so far as the law applicable is concerned. They are all governed, in the last resort, by international law. It is not the subjection of an agreement to international law which makes of it a treaty. It is its quality as a treaty which causes it to be regulated by international law. This is so even if — which is an exceptional occurrence — the parties stipulate that it shall be governed by the municipal law of one of them. For in that case the specific law thus agreed upon is the consequence of the will of the parties. As the result of some such provision the law applicable is transformed into conventional international law expressing, in the terminology of Article 38 of the Statute of the International Court of Justice, "rules expressly recognized by the contesting parties". Usually, however, such transactions are governed by general

principles of law applicable to them and the rules relating to the interpretation of treaties. For this reason, provided that the instrument otherwise fulfils the requirements of a treaty, it establishes *ipso facto* a relationship under international law between the States or organizations of States in question. This applies even to the case, exceptional in modern conditions, of treaties containing marriage arrangements between members of reigning houses.¹⁷ The definition of a treaty as formulated in article 1 is wide enough to include treaties of this description.

Article 2

Form and designation of a treaty

Agreements, as defined in article 1, constitute treaties regardless of their form and designation.

Alternative version of article 2

[Agreements, as defined in article 1, constitute treaties regardless of their form and designation and regardless of whether they are expressed in one or more instruments. A treaty obligation may be created by a unilateral instrument accepting an offer or followed by acceptance.]

Comment

1. The principle laid down in this article is generally recognized. While the terms "treaty", "convention", "agreement" and "exchange of notes" are the most common and while they account for the great majority — probably four-fifths — of instruments of a contractual character to which States or organizations of States are parties, a great variety of other terms are occasionally also used. They include such terms as "protocol", "declaration", "statute", "final act", "general act", "pact", "*modus vivendi*", "arrangement", "covenant", "exchange of notes constituting an agreement", "*compromis d'arbitrage*", "additional articles", "agreed minutes", "instrument", and others.¹⁸ The terms used are of no legal consequence, so long as the instrument in question can properly be interpreted as creating legal rights and obligations. As the Permanent Court of International Justice said in its advisory opinion concerning the *Customs regime between Germany and Austria*, "from the standpoint of the obligatory character of international agreements, it is well known that such engagements may be taken in the form of treaties, conventions, declarations, agreements, protocols or exchanges of notes".¹⁹ In its judgement on the *Interpretation*

of the Statute of the Memel Territory the Permanent Court of International Justice declined to attach importance to the fact that the Statute was in the form of a Lithuanian municipal enactment and gave its decision on the basis that the Statute was "a conventional arrangement binding upon Lithuania and that it must be interpreted as such" (Publications of the P.C.I.J., *Series A/B*, No. 49, p. 300).

2. Neither is it of importance that the assumption of obligations (and, in some cases, of corresponding rights) takes place in the form of a unilateral declaration relating to a pre-existing instrument such as the various declarations recognizing as compulsory the jurisdiction of the International Court of Justice in conformity with Article 36, paragraphs 2 and 3, of its Statute; or the declaration of Switzerland of 6 July 1948 (United Nations, *Treaty Series*, vol. 17, p. 111) accepting the conditions determined by the General Assembly of the United Nations for Switzerland to become a party to the Statute of the International Court of Justice; or the various "instruments of adherence" to the United Nations, such as those of Iceland, Sweden, Siam and others (*ibid.*, vol. 1, pp. 41, 43, 47). Such unilateral declarations are in some cases in the nature of adherence or accession to a pre-existing treaty (see below, article 7). This is so even if, as in the case of the declarations under the so-called optional clause of Article 36 of the Statute of the International Court of Justice, the terminology used does not expressly refer to adherence in its technical sense. For it is clear that the totality of the declarations under Article 36 of the Statute of the Court constitutes a treaty as between the parties making the declaration. They have been so interpreted by the International Court of Justice, namely, by reference to the paramount consideration of the intention of the parties. This is so notwithstanding the fact that as the text of the declaration is not "a treaty text resulting from negotiations between two or more States", but "is the result of unilateral drafting" by one party, particular rules of interpretation of treaties may not be applicable. (Judgement of the International Court of Justice of 22 July 1952 in the *Anglo-Iranian Oil Co. case* (preliminary Objection): *I.C.J. Reports 1952*, p. 105.) The same applies to such instruments as the declarations made by various States and addressed to the Council of the League of Nations in the matter of protection of minorities. In its advisory opinion of 6 April 1935 concerning the *Minority Schools in Albania* the Permanent Court of International Justice interpreted the Albanian Declaration on the subject as if it were one of the Minorities Treaties (Publications of the P.C.I.J., *Series A/B*, No. 62). In fact, the declaration substantially reproduced the text of these treaties. It provided for the compulsory jurisdiction of the Permanent Court of International Justice in the matter of disputes as to questions of law or fact arising out of its provisions. As in the case of many other treaties, its ratification was deposited with the Secretary-General of the League. It may be added that these and similar declarations demonstrate also that a specifically expressed, exact reciprocity or correspondence of rights and obligations is not an essential prerequisite of a treaty. The benefits which accrue to a State from the assumption of an obligation need not appear directly either in the instrument in

¹⁷ Such as the treaty of 27 October 1923 between Great Britain and Sweden concerning the marriage of Lady Louise Mountbatten to the Crown Prince of Sweden. The treaty, signed by the plenipotentiaries of the two sovereigns, was subject to ratification and was registered with the League of Nations (League of Nations, *Treaty Series*, vol. 22, p. 387). For other examples of such treaties see Ch. Rousseau, *Principes généraux de droit international public*, vol. 1 (1944), p. 145.

¹⁸ See below, paragraph 5 of the note to the present article.

¹⁹ Publications of the P.C.I.J., *Series A/B*, No. 41. Professor Hudson has pointed out that "this list was not intended to be exhaustive and that the names chosen for an instrument, frequently due to political or casual considerations, is seldom of juridical significance". See M. Hudson, *Permanent Court of International Justice, 1920-1942* (New York, 1943) p. 632.

question or in any other instrument. Thus the declaration made by the Kingdom of Iraq on 30 May 1932 concerning the minorities in Iraq was made in pursuance of a resolution adopted by the Council of the League of Nations requesting such a declaration as a condition precedent to the termination of the Mandate (League of Nations, *Official Journal*, 1932, p. 474). The Council then approved the text of the declaration — which, in article 16, stated that its provisions constituted “obligations of international concern”. In circumstances such as these — i.e., of the existence of a resolution of the Government, of a declaration adopted in pursuance of the resolution, and of a further resolution approving the declaration — the “obligations of international concern” must be regarded as partaking of the character of a treaty.²⁰

An apparently unilateral assumption of obligations which accepts the provisions of an already existing instrument or which is followed by acceptance of the party to which it is addressed constitutes a treaty obligation. This is also one of the reasons why, apart from cogent evidence of the practice of States, exchanges of notes must be regarded as constituting a treaty (see below, note 4). The following passage from the report of the Rapporteur of the San Francisco Committee IV/2, which is concerned with the registration of treaties under Article 102 of the Charter, may be noted in this connexion: “The word ‘agreement’ must be understood as including unilateral engagements of an international character which have been accepted by the State in whose favour such an engagement has been entered into.”²¹ Thus viewed, the object of article 2 is, it is believed, adequately expressed by the statement that “agreements, as defined in article 1, constitute treaties regardless of their form and designation”. The alternative version, which is enclosed in brackets, merely elaborates the principle inherent in it. The alternative version of the article is attached in case it should be considered that such elaboration is necessary.

3. The designation of an instrument is irrelevant not only in so far as its character as a treaty is concerned but also in respect of the rules governing its conclusion, the conditions of its validity, its operation and interpretation, and its termination. Thus, as already stated, it does not follow from the mere fact that an instrument is described as an exchange of notes that it does not require ratification. The normal absence of the requirement of ratification in instruments of this description follows from the circumstance that as a rule they expressly dispense with ratification by providing that they shall enter into force on a specified date or on the completion of the exchange of notes, i.e., on the acceptance and confirmation by one contracting party of the document submitted and drafted — usually as the result of a joint effort — by the other party.

4. The same applies to those differences in the form of treaties which spring from the fact that some of

the parties to them are Heads of States while in other cases the parties are designated as the respective States or Governments, or Heads of Governments, or delegations of Governments, or governmental departments, or heads of departments. Thus, for instance, there is no rule of international law which lays down that the answer to the question as to the requirement of ratification depends on who is designated as a party to the treaty — although according to the practice of some States treaties concluded by the Head of the State in person or between departments are not as a rule considered to require ratification. It is impossible to say that according to international practice any particular type of treaty requires a particular description of parties, although as a rule, but not invariably, political treaties of importance — such as treaties of alliance — are concluded between Heads of States. Occasionally, for reasons of internal constitutional law, some States prefer to adhere to a particular description. Thus, for a time, members of the British Commonwealth of Nations attached importance to treaties being concluded in the form of agreements between Heads of States and States as such.²² Other States, such as the United States of America, have preferred, without insisting on such preference in the face of contrary wishes of the other contracting parties, to describe the United States of America as such a party to the treaty. In the case of the General Treaty for the Renunciation of War of 27 August 1928, which was concluded between Heads of States, Japan was reported to have raised objections to article 1 of the Treaty in which the parties declared, “in the names of their respective peoples”, that they condemned war as an instrument of national policy. The objection was raised on the ground that under the Japanese constitution the Emperor signs treaties in his own name and not on behalf of his people. The Preamble to the Charter of the United Nations, which is a document accepted by the “respective Governments”, commences with the words “We the peoples of the United Nations”. In the Constitution of the Food and Agriculture Organization of the United Nations of 16 October 1945 the parties seem to be the “Nations accepting this Constitution.” However, interesting as these innovations may be from other points of view, they are, like other variations of terminology on the subject, without legal significance in the field of the law of treaties.

Note

1. The main principle embodied in this article is generally admitted. That principle is that the designation of the instrument or combination of instruments is, as a rule, irrelevant for the purpose of its (or their) being regarded as a treaty so long as the intention to assume an obligation is reasonably clear. Thus a unilateral declaration constitutes a treaty if the party to whom it is directed accepts it or acts upon it. Similarly, an apparently unilateral declaration — such as that of the optional clause of Article 36 of the Statute of the International Court of Justice — may in itself

²⁰ For a different view as to the nature of these and similar unilateral declarations see the comment to article 4 of the Harvard Draft Convention. Harvard Law School, *Research in International Law, III, Law of Treaties in American Journal of International Law*, vol. 29 (1935), Supplement.

²¹ UNCIO, vol. 13, p. 705 (Doc. 933, IV/2/42 (2)).

²² For the statement on the subject made to the Council of the League of Nations by the British Secretary of State for Foreign Affairs in 1927, see League of Nations, *Official Journal*, 1927, p. 377.

constitute an acceptance of an already established instrument and as such constitute a treaty. Alternatively, a declaration may be regarded as an act of accession to an already established text. Similarly, the governing consideration seems to be that it is irrelevant in what way the text expressing the common intention of the parties has been established — whether it is composed of one instrument or a number of instruments (as in the case of exchanges of notes or accession) and whether the text of the instrument is established by the parties or by some other body and subsequently accepted by the parties. It is probably by reference to some such considerations that the Permanent Court of International Justice held in the *Jaworzina* case that a joint declaration of Czechoslovakia and Poland accepting a decision of the Conference of Ambassadors was in the nature of “two agreements” and that “the two agreements give to the decision arrived at . . . the force of a contractual obligation entered into by the parties” (*Publications of the P.C.I.J., Series B, No. 8, p. 30*). This is so although it may not be easy to state which document constituted, in the opinion of the Court, the treaty binding the parties — the joint declaration accepting the decision or the decision itself. Probably the treaty was constituted by both documents. There would be no difficulty in assuming, following the language of the Court, that the decision constituted the treaty and the joint declaration was in the nature of an acceptance of the treaty thus established.

2. There may indeed arise border line cases in which the character of a unilateral act conceived as a treaty is less apparent and therefore controversial. Thus in the *Free Zones* case the Permanent Court of International Justice held that a manifesto of the Royal Chamber of Accounts of Sardinia of 1829 embodying the assent of the King of Sardinia to a claim made by the Canton of Valais terminated an international dispute relating to the interpretation of the Treaty of Turin, that it thus represented *un accord des volontés*, and that in consequence it possessed “the character of a treaty stipulation” (*ibid., Series A/B, No. 46, p. 145*). It is not clear from the judgement who were the parties to the treaty relationship thus constituted. In the same case the Permanent Court of International Justice held that a declaration made by the Swiss Agent in the course of the proceedings before the Court was binding upon Switzerland notwithstanding the statement of the French Agent to the effect that he had no power to accept the offer contained in the declaration (*ibid., Series A/B, No. 46, p. 170*). It may be difficult to bring an offer not accepted by the other party as constituting a treaty obligation — although, as held by the Court, the declaration was binding. Otherwise the principle must be accepted that whenever there exist in fact the elements of an offer and an acceptance thereof — a recorded instrument or succession or combination of recorded instruments — there may fairly be held to exist a treaty. The object of article 2 is to give expression to that principle.

3. Similar considerations apply to the question, which article 2 is intended to answer with a clear affirmative, as to whether an exchange of notes constitutes a treaty. The Commission, in the course

of the discussion on the subject in 1952, decided, by a majority of six to five, not to omit exchanges of notes from the purview of its codification of the law of treaties.²³ That provisional decision was not reached without considerable hesitation. In the Harvard Draft Convention reasons are given, in the Comment to article 4, for excluding exchanges of notes from the Draft. For reasons which are set out below in some detail it is believed that there is no foundation for the exclusion, from the sphere of the law of treaties, of a class of agreements which accounts for a large proportion of the international agreements actually concluded by governments.

4. It appears that the principal considerations which animated some members of the Commission on this question was the view that as exchanges of notes do not require ratification, and that as any procedure which dispenses with ratification is contrary to the requirements of democratic constitutional processes, no encouragement ought to be given, by way of elevating them to the dignity of a treaty, to international agreements which as a rule dispense with ratification. These assumptions — and the conclusions drawn from them — are in need of reconsideration. In general, in examining the question of exchanges of notes the following considerations ought to be borne in mind:

(a) In the last three decades exchanges of notes have constituted more than one-fourth — probably one-third — of the total number of international agreements. That proportion has been increasing.²⁴ The reason for that tendency is that that procedure of concluding international agreements provides a simplified form of reaching and recording agreements, in particular when concluded between government departments and agencies. It supplies the appropriate method for agreements of a technical character and of limited scope as well as for those which, notwithstanding the importance of their subject matter, require expeditious action for their initiation and execution. The character of exchanges of notes as being in the nature of agreements is emphasized in numerous instruments by the fact that they are expressly described as “exchanges of notes constituting agreements”.²⁵ In fact, it seems almost as if, in order to remove what are essentially

²³ See *Yearbook of the International Law Commission, 1950, vol. I, 51st meeting, para. 38*.

²⁴ Thus it has been estimated that in the years 1921 to 1930, out of 338 instruments published in the United Kingdom *Treaty Series*, 93 were exchanges of notes. Out of 453 instruments published in that *Series* between 1941 and 1950 no less than 195 have been exchanges of notes. In the years 1951 and 1952 about one-half of the instruments in that *Series* were exchanges of notes. Out of the first thousand instruments registered with the Secretariat of the League of Nations 212 were exchanges of notes. Out of the total 4,831 instruments published with the League of Nations between 1920 and 1946 nearly 25 per cent were exchanges of notes. Out of the 1,000 instruments first registered with the United Nations 280 were exchanges of notes. See Weinstein in *British Year Book of International Law, vol. 29 (1952)*.

²⁵ See, for instance, the series of “exchanges of notes constituting an agreement” relating to passport visas between the United States and a number of countries: United Nations, *Treaty Series*, vol. 88, pp. 3, 11, 19, 33, 43, 255, 265, 275, 283.

unfounded doubts, that terminology is assuming a complexion of regularity.²⁶

(b) The fact that numerous exchanges of notes cover technical subjects of limited scope does not mean that exchanges of notes in general are confined to questions of minor importance.²⁷ Exchanges of notes have regulated such matters as limitation of armaments (as between Great Britain and the United States in 1817 covering the number and size of warships on the Great Lakes, or between Great Britain and Germany on 18 June 1935 limiting the future strength of the German navy in relation to the aggregate naval strength of the members of the British Commonwealth (United Kingdom, *Treaty Series*, No. 22 (1935) Cmd. 4953)), renunciation of extra-territorial rights, grant of perpetual leases, establishment of diplomatic relations, agreements on diplomatic and consular representation, commerce and navigation (as between the United States and Nepal (United Nations, *Treaty Series*, vol. 16, p. 97) and Yemen (*ibid.*, vol. 4, p. 165), maintenance of armed forces on foreign soil, cessions of territory, settlement of boundary disputes (e.g., between the United Kingdom and Brazil (*ibid.*, *Treaty Series*, vol. 5 p. 71) or between the United Kingdom and China (*ibid.*, vol. 10, p. 227), aviation, shipping and, generally, communications, settlement of war claims, and the like. Nearly one-fourth of the commercial agreements concluded by the United Kingdom have been in the form of exchanges of notes.

(c) In so far as the objection to considering exchanges of notes as treaties arises from the notion that they are not subject to ratification, it must be remembered:

- (i) That in some cases exchanges of notes are subject to ratification (see, for example the exchange of notes between Germany and Spain — League of Nations, *Treaty Series*, vol. 26, p. 455 — providing for ratification by both parties; between the United Kingdom and Denmark — United Nations, *Treaty Series*, vol. 45, p. 324 — providing for approval by the Parliament of one party; between the United States and Denmark (*ibid.*, vol. 27 (1949), p. 35); between South Africa and Germany (United Kin-

dom, *Treaty Series*, No. 25 (1935), Cmd. 4961) and between the United States and Poland, League of Nations, *Treaty Series*, vol. 37, p. 141).

- (ii) That the omission of the requirement of ratification is not limited to exchanges of notes. The practice of many countries follows the rule that, unless otherwise provided, inter-governmental and inter-departmental agreements do not require ratification — not to mention agreements concluded directly between Heads of States. Moreover, as shown below (article 6), a considerable and increasing number of treaties are being concluded which expressly dispense with ratification.

(d) Numerous decisions of municipal courts exhibit no hesitation in regarding exchanges of notes as treaties — although there is some divergence of practice on the question whether exchanges of notes are in the nature of inter-governmental agreements which do not require ratification or whether they must be considered as formal treaties in the sense of the constitutional law of the State concerned with the result that they cannot be enforced unless ratified. In such cases they are held to be inoperative not because they are not treaties but because, being treaties, they have not been incorporated into the law of the land.²⁸

(e) For the reasons stated there would appear to be strong objection to eliminating exchanges of notes from the purview of the law of treaties. As already mentioned in connexion with the question of unilateral

²⁶ See, for example, exchanges of notes constituting an agreement between Denmark and the Union of South Africa providing for reciprocal exemption from government and local government taxation of income derived from the exercise of shipping activities and operation of aircraft services (30 November 1950: United Nations, *Treaty Series*, vol. 84, p. 51); between Belgium and Chile concerning the reciprocal protection of industrial and commercial trade marks (10 February 1947: *ibid.*, vol. 76, p. 113); between the United States and China concerning claims resulting from activities of the United States military forces in China (13 October 1947: *ibid.*, p. 157); between the United States and Denmark concerning exchange of official publications (27 July 1949: *ibid.*, vol. 79, p. 147); between the United Kingdom and Italy concerning British military fixed assets in Italy (30 December 1947: *ibid.*, vol. 77, p. 33); between the United Kingdom and the Netherlands concerning the settlement of wartime debts (11 March 1948: *ibid.*, p. 69); between Greece and Italy concerning cultural institutions (21 September 1948: *ibid.*, p. 259).

²⁷ “. . . it is the fact that at the present time it can scarcely any longer be said that an exchange of notes habitually deals with matters of smaller importance than do treaties or conventions”: G. Fitzmaurice in *British Year Book of International Law*, vol. 15 (1934), p. 120.

²⁸ This has been so particularly in France: see, for example *In re Talbot* (where the Court held that an exchange of notes cannot, without ratification and publication, have the force of law in the meaning of article 26 of the French Constitution: *Gazette du Palais*, 1947, Part II, p. 17; *Annual Digest*, 1947, Case No. 68). *In re Vermote* (*Sirey*, 1 (1950), Part II, p. 154) and *Benzoni v. Davidovici* (*ibid.*, 1951, Part II, p. 79) are to the same effect. On the other hand see *In re Colman* (*Annual Digest*, 1947, Case No. 67) and *Zumkeller v. Florence* (*Sirey*, 1946, Part I, p. 257). See also *Vicens v. Bonfillon* (*Annual Digest*, 1933-1934, Case No. 180); *Huckendubler v. Hoeffler* (*ibid.*, 1931-1932, Case No. 213); and *In re Société Ruegger* (*ibid.*, 1933-1934, Case No. 179). The decision of the Italian Court of Cassation in *Russian Trade Delegation in Italy v. Querci* (*Foro Italiano*, 67 (1942), Part I, p. 11; *Annual Digest*, 1941-1942, Case No. 129) is to the same effect. For an analysis of these and other cases bearing on the subject see Weinstein in *British Year Book of International Law*, 29 (1952). See also M. Brandon in *American Journal of International Law*, vol. 47 (1953), pp. 58-62, on exchanges of notes in relation to the question of registration under Article 102 of the Charter of the United Nations. In all the cases referred to above the courts were confronted with exchanges of notes interpreting previous agreements. In *Minister of Finance v. United States Line Co.* the French Court of Cassation applied to an independent exchange of notes what it described as an *accord diplomatique* (Clunet, *Journal de droit international*, vol. 65 (1938), p. 532). In two important American cases — *United States v. Belmont*, (1937) 301 U.S. 324, and *United States v. Pink*, (1942) 314 U.S. 203 — the Supreme Court treated exchanges of notes accompanying the recognition of the Government of Soviet Russia as an international compact involving far-reaching — indeed startling — consequences in the sphere of municipal law. See also *United States v. Guy W. Capps Inc.* (1951), F. Supp. 30, where it was held that an exchange of notes between the United States and Canada concerning the import and export of potatoes, although not a treaty in the meaning of the Constitution, had the force of law. And see the *Paris Agreement* case decided by the German *Reichsgericht* (*Annual Digest*, 1919-1922, Case No. 225).

declarations, it may be unsatisfactory to leave outside the framework of codification of a particular topic a subject which, although exhibiting certain peculiarities, intrinsically falls within its purview. There is, apart from the method of establishing the text, no difference of substance between exchanges of notes and other international agreements in the matter of their validity, operation, interpretation and termination. In the municipal sphere the method of concluding a contract by way of parallel complementary instruments is generally recognized. To deny to exchanges of notes the full character of treaties may mean depriving a broad segment of international contractual relations of the authority and effectiveness which the status of a treaty imparts to an instrument. Any such course, if acted upon, would signify neglect of a method which experience has shown to be particularly suited to the growing needs of expanding international intercourse unencumbered by elaborate procedure and solemnity.²⁹

The modern tendency, frequently commented upon by writers, has been in the direction of making the procedure of conclusion of treaties less formal than in the past, when difficulties of communication between governments and their agents were a conspicuous feature of the situation and when the variety and urgency of the interests to be represented did not equal those of the modern expanding intercourse of States. Some drafts, including those previously before the Commission, have referred to a treaty as "a solemn instrument". The fact is that a treaty need not be a solemn instrument; nor need it consist of a single instrument. It may or may not be desirable to require ratification as an invariable prerequisite of the validity of a treaty. Practice has certainly not considered it as such.³⁰ If ratification is considered as a procedure congenial to the climate of constitutionality and democracy, that result must be achieved by the express adoption in treaties of provisions to that effect. It cannot be accomplished by eliminating from the sphere of treaties contractual agreements which properly belong there. On the contrary, such a course may be of doubtful value even when viewed as a means of discouraging the conclusion of international agreements not followed by ratification. For the reform thus achieved would be merely one of terminology. It would not prevent governments from undertaking commitments, expressly described as not requiring ratification, by way of instruments other than exchange of notes.

²⁹ This is so, in particular, seeing that exchanges of notes may, in effect, be used for bringing about agreements of more than two States. See, for instance, the parallel exchanges of notes between Italy and the United Kingdom and Italy and the United States of America (United Kingdom, *Treaty Series*, No. 52 (1951), Cmd. 8294). These parallel notes constitute an agreement between Italy of the one part and the United Kingdom and United States of the other. The procedure of exchange of notes has also been resorted to when one of the parties has not been a State: see, for example, the Exchange of Notes between the International Court of Justice (represented by the President) and the Netherlands concerning precedence: United Nations, *Treaty Series*, 8 (1947), p. 61.

³⁰ For this reason there seems to be little persuasive power in the argument, occasionally adduced, that if exchanges of notes are assimilated to treaties they would be automatically subject to the procedure of ratification.

(f) For these reasons the wording of article 2 as proposed — "Agreements, as defined in article 1, constitute treaties regardless of their form and designation" — is intended to include exchanges of notes within the purview of treaties. In order to remove doubts from what has become a subject of some controversy and uncertainty, it may be considered whether it would not be desirable to elaborate that statement by the addition of the words "and regardless of whether they are expressed in one or more instruments". The alternative version of the article is intended to serve that purpose.

5. The great variety of the designations used for describing international agreements raises the question of the justification for that diversity and of the possibility — or desirability — of keeping it within reasonable bounds. In most cases there is no apparent reason for the variation in the terms used. They often create the impression that they were dependent upon a factor no more decisive than the mood of the draftsman. Thus, to give an example provided by one volume of the United Nations *Treaty Series* — vol. 84 — in 1946 and 1948 the United States concluded with France a series of agreements described variously as *memorandum of understandings constituting an agreement* (relating to lend-lease, reciprocal aid, and the like: p. 59); *agreement and an accompanying supplementary understanding* (transfer of surplus United States army and navy property: p. 79); *agreed combined statement* (disposition of claims: p. 93); *memorandum constituting agreement* (shipping: p. 113); *declaration constituting an agreement* (commercial policy: p. 151); *understanding constituting an agreement* (exhibition of motion pictures: p. 161); *declaration* (economic and financial problems: p. 167); *agreement* (financing of educational exchange programmes: p. 173); *joint declaration constituting an agreement* (motion pictures: p. 185). There is little method in, and no obvious explanation for, the diversity of terminology in this and many other cases. Yet it is doubtful whether there is room for a deliberate effort, by way of codification or otherwise, to introduce uniformity of terminology on this field of the law. So long as no conclusions of legal relevance are drawn from this diversity of expression the mischief, if any, resulting from it is insignificant. The same applies to the discrepancies of practice in the description of the parties.

Article 3

The law governing treaties

In the absence of any contrary provisions laid down by the parties and not inconsistent with overriding principles of international law, the conditions of the validity of treaties, their execution, interpretation and termination are governed by international custom and, in appropriate cases, by general principles of law recognized by civilized nations.

Comment

To a large extent the above article reproduces, in relation to treaties, the substance of Article 38 of the Statute of the International Court of Justice, which enumerates the sources of law to be applied by the Court. To that extent article 3 seems to be redundant

inasmuch as the sources of international law enumerated in Article 38 of the Statute of the Court govern also other parts of international law. However, as in Article 38 treaties themselves figure as the first source of international law enumerated, it is essential to state in an introductory article of a Code of the Law of Treaties that that law is based on and owes its validity to customary international law and to the general principles of law recognized by civilized nations. Although, with few exceptions, all the pronouncements of the International Court of Justice and of its predecessor have been concerned with the interpretation of treaties, such interpretation has taken place against a background of general rules of customary international law. This subordination to international law in its entirety expresses itself in particular in relation to the fundamental aspects of the law of treaties, namely, their binding force and the principle — which is the basis of the law relating to the interpretation of treaties — that they must be interpreted in accordance with the canons of good faith. Thus the binding force of treaties is independent of the will of the States which conclude them in the exercise of their sovereignty. Their binding force and other basic conditions of their operation are grounded in customary international law. While, therefore, States are free to shape their treaty relations and the conditions of their performance in accordance with their will, they can do so only subject to the overriding principles of international law, the general principles of law and principles of good faith. The question of the degree of the overriding effect of these principles is examined in article 15 in part III of this draft. Accordingly, while most of the provisions of the present Code of the Law of Treaties are framed so as to give wide latitude to the autonomy and discretion of the parties and so as to be operative only if the parties have made no provision to the contrary, others are binding upon the parties in all circumstances and must be interpreted accordingly. This is so for the reason that in the matter of treaties the will of States is only one source — and in some cases only a subordinate source — of international law.

Note

On the face of it the subject matter of article 3 seems purely doctrinal and to that extent redundant. However, it is believed that some such article is essential in order to put in its proper perspective what may be provisionally called the Code of the Law of Treaties. As in many other spheres of international law, the parties may by treaty change or modify existing rules of international law. The Code is intended to a large extent to regulate matters which are not expressly provided for by treaty. But, as was perceived in the discussions of the Commission in connexion with the Code of Arbitral Procedure, there are certain rules and principles which are above and outside the scope of the *jus dispositivum* of the parties. An express statement to that effect is particularly necessary with regard to treaties for the reason that they themselves constitute a source of international law. The Code of the Law of Treaties safeguards in many cases the freedom of action enjoyed by the parties. Its articles will be frequently prefaced by the statement "unless otherwise provided by the parties". Even in the absence of some such express provision, the

parties will often be entitled to adopt rules and procedures to meet their particular requirements. On the other hand, it is clear that they cannot contract out of such rules as those which lay down that treaties must not violate binding rules of international law (although it may on occasions be doubtful which rules of international law are so compelling and mandatory that they have the result of nullifying a treaty which is inconsistent with them: see article 15 below); or that a treaty must not, lest it be void, involve the violation of a previous treaty to which the contracting States are parties; or that a treaty imposed by unlawful exercise of force is not binding. In fact, the principle underlying article 3 as drafted provides the basis of the law relating to the validity of treaties as formulated in part III of this draft. As such it is properly — and necessarily — included in the present general and introductory part I.

Part II

Conclusion of treaties

Article 4

Assumption of treaty obligations

A treaty becomes binding by signature which is not subject to confirmation, ratification, accession, acceptance, or any other means of expressing the will of the parties, through a competent organ, in accordance with the provisions and practice of their constitution.

Comment

1. The object of this article, which is of a formal character, is to state the principle that parties to treaties enjoy a wide freedom of choice in the matter of the means by which they assume treaty obligations. This includes, in addition to the traditional methods of signature, ratification and accession, not only the more recent method of so-called "acceptance" (article 8 below), but also such methods as concurrent action by way of exchanging notes (see comment to article 2 above), a unilateral declaration accepted by the other party or parties (*ibid.*) and, generally, any other procedure which the parties may find it necessary to employ.

2. Although signature is enumerated in the present article as one of the means by which a party may assume a treaty obligation, it is also one of the methods for establishing — authenticating — the text of a treaty. It is difficult — and perhaps unnecessary — to decide which is its primary function. The answer to that question will depend largely upon the view eventually taken as to the nature and the necessity of ratification (see article 6 below). It will also depend to some extent on the realization of the fact that at present over one-third of bilateral contractual instruments become binding without ratification. The purpose of these observations is merely to remove a source of misunderstanding resulting from the fact that signature is often regarded and is referred to in paragraph 4 of this comment as one of the means of establishing the text whereas in the present article it appears as one of the methods of assuming a treaty obligation. Moreover, as explained in the comment to article 5, signature is

seldom, if ever, merely a means of establishing the text of the treaty, i.e., of authentication. Even if subject to ratification, it creates, within a limited sphere certain obligations which are by no means of a merely procedural character (see article 5 below).

3. The concluding passage of this article, which provides that the various means of concluding a treaty must be expressed by a competent organ in accordance with the provisions of the constitution — which means both constitutional law and constitutional practice — of the parties refers to one of the conditions of the validity of a treaty and is the subject matter of article 11 in Part III of the present draft (Validity of Treaties).

4. The present article is not concerned with the procedural question of the methods by which the text of a treaty is established. This takes place by the signature on behalf of the parties which have taken part in the negotiation of the treaty or of the conference at which the treaty was negotiated; by incorporation in the final act of the conference; by incorporation in a resolution of an organ of an international organization in accordance with its constitutional practice; in a note or letter which provides the first link in an exchange of letters; by a unilateral declaration subsequently accepted by the party or parties to whom it is addressed; or by any other means agreed upon by the negotiating States. These other methods may include what is in effect a provisional signature, namely, initialling or signature *ne varietur*, which occasionally takes place in cases in which there is an interval between the conclusion of the negotiations and the signature of a treaty. The signature or initialling *ne varietur* is thus a guarantee of the authenticity of the text. It was resorted to in the Locarno Treaty of Mutual Guarantee of 16 October 1925. The treaty was initialled on that day *ne varietur* and it bore that date. It was signed on 1 December 1925. The establishment of the text of a treaty by a resolution of an organ of an international organization is a comparatively recent method. It has been followed in conventions adopted by resolutions of such bodies as the International Labour Organisation, the Food and Agriculture Organization of the United Nations, the United Nations Educational, Scientific and Cultural Organization, or by the United Nations itself, as, for example, in the case of the Convention on Privileges and Immunities of the United Nations of 1946 or the Genocide Convention of 1948. A case in which "other formal means" were adopted is that of the General Act for the Pacific Settlement of International Disputes of 1928. It was signed by the President of the Assembly of the League of Nations and by the Secretary-General. There was no provision either for signatures or ratification; article 43 of the act merely provided for accession.

5. Signature, ratification and accession as methods of assuming treaty obligations each form the subject of a separate article in the present section. The same applies to "acceptance" — a procedure which, although used occasionally before the second world war (as in the case of the United States joining the International Labour Organisation), is of recent origin. It has been adopted largely owing to the desire of some States to avoid the usual reference to "ratification",

and so render unnecessary the literal observance of the constitutional procedure appropriate for ratification. Subject to minor variations it enables a party to become bound by either signature without reservation as to acceptance; or signature with reservation as to acceptance followed by acceptance; or acceptance pure and simple. In article 8 and in the comment thereon the question is raised whether the notion of acceptance thus conceived in fact constitutes a distinct means of assuming treaty obligations.

Note

1. As pointed out in the comment, article 4 — which otherwise lays down no substantive rule of law — has been included largely as an occasion for stating the principle of the freedom of choice of methods for establishing the text of a treaty. Apart from that the Special Rapporteur considers that the elaboration of procedural rules falls outside the scope of the Commission's work on treaties. An authoritative manual of procedure for international conferences and conclusion of treaties may be of great usefulness, and the Commission may ask at some future date whether it ought not to embark on some such study as that which was fore-shadowed by the League of Nations Committee of Experts for the Progressive Codification of International Law, namely, "whether it is possible to formulate rules to be recommended for the procedure of international conferences and the conclusion and drafting of treaties, and what such rules should be". However, although it is not believed that that subject falls within the purview of the law of treaties now before the Commission, it is not a matter which can be altogether disregarded in this connexion. A great deal of the difficulties and of the discussion surrounding the law of treaties has been due to the imperfections of the machinery for formulating and concluding them. Thus — as will be suggested in the comment to article 7 — the controversy, largely unreal in character, whether treaties which contain no specific provision on the question of the requirement of ratification must be ratified in order to be binding is due in most cases to an omission which could have been avoided by careful drafting. The same applies to discrepancies of practice in the matter of accession. Some treaties state that accession shall be admissible at any time; others lay down a date after which accession can be effected; others still provide that accession shall be admissible only after the treaty has entered into force. There seems to be no reason for these differences in procedure. It would not be difficult to multiply such examples. They all raise the question whether some machinery could not be devised which would obviate obscurities and the confusing absence of uniformity in matters with regard to which no apparent interest of the parties and no considerations of convenience seem to require conflicting or ambiguous regulation.

2. In this connexion the Commission may wish to consider whether a measure of support should not be given to a proposal made in 1945 by an authority of recognized experience for the establishment of an international legislative drafting bureau²¹ to advise

²¹ The proposal was put forward by Mr. C. W. Jenks in the *American Journal of International Law*, vol. 39 (1945), pp. 163-179.

governments and conferences engaged in drafting treaties. While the exact nature of the machinery which might thus be set up must be a matter for careful examination, it is very probable that some such machinery would be useful. In many States parliamentary draftsmen attached to the legislative body have become an essential part of the legislative process. Their intimate knowledge of the entire field of the statutory law has been recognized as an invaluable means of preventing embarrassing inconsistencies in legislation and of ensuring the requisite degree of uniformity of technique. In the international sphere the need for some such assistance is even more imperative having regard to the differences of language and, above all, the baffling diversity of the municipal and, in particular, the constitutional law of States. Thus, for instance, the embarrassing problem of the relevance of constitutional limitations would be alleviated if parties to treaties could rely in this respect upon the advice given by international draftsmen whose function would embrace, *inter alia*, the provision of information on the subject. Similarly, with regard to reservations it may not be easy for a government to assess the effect, in all its ramifications, of reservations attached by a State to a particular convention. Here, again, expert information might be of assistance. Finally, although uniformity of nomenclature or structure is not an essential prerequisite of the satisfactory operation of treaties, it is possible that the elimination or the diminution of the present — and often confusing — diversity of practice would be beneficial to the authority and development of this branch of international law. Undoubtedly governments are well served by their own legal advisers, who are fully conversant with international law. However, in the nature of things they cannot be expected to possess the detailed and specialized knowledge springing from intimate experience of the totality of treaty law and of the relevant municipal law of States. In view of this it must be a matter for consideration whether, apart from any substantive formulation of the law of treaties, the Commission should not recommend the creation of a bureau, under the responsibility and as part of the activities of the United Nations, from which governments could enlist the assistance of experts for drafting treaties and whose presence would become a regular feature of international conferences assembled for the purpose of formulating conventions. It will be recalled that at the sixth and seventh sessions of the General Assembly proposals were made and discussed for placing under some expert guidance legal acts and instruments emanating from the General Assembly itself, including conventions concluded under the auspices of the General Assembly.³²

Article 5 *Signature*

1. The signature of a treaty constitutes an assumption of a binding obligation in all cases in which the

³² For the proposal to that effect made by the representative of the United Kingdom see *Official Records of the General Assembly, Sixth Session, Sixth Committee, Annexes*, agenda item 63. And see for a review of the relevant discussions of the General Assembly the note by Y. L. Liang and H. T. Liu in *American Journal of International Law*, vol. 47 (1953), pp. 70-83.

parties expressly so agree or where, in accordance with article 6, no confirmation of the signature is necessary.

2. In all other cases the signature, or any other means of assuming an obligation subject to subsequent confirmation, has no binding effect except that it implies the obligation, to be fulfilled in good faith :

(a) To submit the instrument to the proper constitutional authorities for examination with the view to ratification or rejection ;

(b) To refrain, prior to ratification, from any act intended substantially to impair the value of the undertaking as signed.

Comment

1. The subject matter of this article is closely connected and overlaps with that of article 6 relating to ratification. However, signature as an independent means of assuming a treaty obligation is so widely and so increasingly followed in practice that it is proper to put on record in a separate article its position as such. At the same time, signature as a means of assuming an obligation must still be regarded as a departure from what is the normal rule, namely, the requirement of ratification. For that reason it will be convenient, in connexion with the article on ratification to comment in more detail on this part — i.e., paragraph 1 — of article 5.

2. The statement that “signature, or any other means of assuming an obligation subject to subsequent confirmation . . . implies the obligation, to be fulfilled in good faith, to submit the instrument to the proper constitutional authorities for examination with the view to ratification or rejection”, is controversial, as expressing a rule of international law, even in the present — conspicuously qualified — formulation. The view most frequently expressed is that there is no obligation to ratify a treaty previously signed by a State. That view accurately expresses the existing rule of international law on the subject. At the same time it must be borne in mind that, on the part of a substantial number of writers, that view has been accepted only subject to the qualification that the right to refuse ratification is not unqualified; that it must not be exercised capriciously or arbitrarily; and that misuse of that right is fraught with injury not only to the reputation of the State in question but also to the authority of international law and the needs of international intercourse. The opinion has also occasionally been voiced that there is a legal obligation to ratify in cases in which the full powers issued to the plenipotentiaries include the authority not only to negotiate but also to conclude the treaty. While these and similar views are not, it is believed, borne out to any substantial degree by the existing practice, they constitute a reminder of the inconvenience and disadvantages of the rule which recognizes an unqualified right to treat the signature as being no more than a method of authentication. Considerations of that nature underlay the resolution of the Assembly of the League of Nations of 1930 which authorized the Secretary-General of the League to address annual requests to signatories of treaties concluded under the auspices of

the League as to their intentions with regard to ratification of a convention signed by them. These considerations do not affect the existing principle affirming the right to refuse to ratify a signature freely appended. However, that principle can in the long run operate in a satisfactory way only if some qualifications, however limited in compass, are adopted for modifying its rigidity. It may not be sufficient to rely on the probability that a State which habitually and without good reasons fails to ratify its signature will impair its own contractual capacity for the reason that other States will decline to conclude treaties with it. Such a probability has not prevented Governments from failing indefinitely to take action on signatures freely given — with the resulting impairment of the treaty-making process as a whole.

3. The remedy cannot lie in imposing upon the Government a duty to confirm signatures appended on the express understanding that they will be free to decide whether to confirm them or not. No such duty, unless accepted expressly or by compelling implication, is imposed by international law. However, that does not mean that the codification of the law of treaties must limit itself to the mere statement that there is no duty to confirm the signature of a treaty. It must be regarded as a requirement of good faith, which is in itself part of the law and not merely of political prudence, that signature implies the obligation to cause the treaty thus signed to be examined by the competent constitutional authorities with the view to determining whether the signature ought to be confirmed. Of necessity it is an imperfect obligation, which must be fulfilled by the Government concerned having regard to all the circumstances. It may be occasionally, in effect, a nominal obligation in cases in which the views of the competent constitutional authorities are not likely to differ from those of the Executive determined not to proceed with the treaty. It is nevertheless a legal obligation, though not an unduly onerous one. Under the Constitution of the International Labour Organisation Governments are bound to submit to the national authorities, for approval or rejection, conventions against which the representatives of those Governments have voted at the Conference which adopted them. Governments have full freedom of action in confirming or rejecting a treaty which they have signed subject to the condition of subsequent confirmation — such condition being the normal rule in the absence of express or implied provisions to the contrary (see article 6 below). What, as a matter of good faith, they cannot do is to sign a treaty and subsequently conduct themselves as if they had no concern with it or as if their signature thereto were merely a clerical act of authentication. There is no warrant in international law for reducing to that level the meaning of the signature. Signature of an instrument — even when made subject to subsequent confirmation or ratification — is more than a method of authenticating a text. In many cases the text exists already, as is the case when an established text is approved by a conference and opened for signature,³³

subject to ratification, within a prescribed period, or when accession to or acceptance of an already established text takes place through signature subject to ratification. The correct principle of law with regard to the legal consequences of signature is accurately stated, it is submitted, in the following passage from the Comment to article 9 of the Harvard Draft Convention:

“It is believed that when a duly authorized plenipotentiary signs a treaty on behalf of his State, the signature is not a simple formality devoid of juridical effect and involving no obligation whatever, moral or legal, on the part of the State whose signature the treaty bears. It would seem that not only the treaty-making organ itself but also the other organs of the State which are competent to act for it, once a treaty has been signed on its behalf, are not, if they observe good faith, entirely free to act as if the treaty had never been signed. It would seem also that one signatory State has the right to assume that the other will regard the signature as having been seriously given, that ordinarily it will proceed to ratification, and that in the meantime it will not adopt a policy which would render ratification useless or which would place obstacles in the way of the execution of the provisions of the treaty, once ratification has been given.”

In disregarding the question of the obligation to take appropriate measures in the matter of confirmation or otherwise of the signature the authors of the Harvard Draft failed to draw the necessary conclusions from the principle thus stated. The present draft draws these conclusions. There are compelling reasons why a signatory should not be permitted to treat his signature as a meaningless formality. In signing a treaty it exercises an important influence on some of the procedural clauses of the treaty. (These are usually referred to as the “Final Clauses,” although in some conventions they appear in the opening chapters.) Its signature is instrumental in determining such matters as the right of accession, the admissibility of reservations, the conditions of entry into force, and many others. In fact this consideration applies not only to the formal and procedural clauses of the treaty but to its substantive provisions as well. For these provisions may have been substantially — or decisively — influenced by the signatory State or States in question. The treaty is in many respects the result of a painfully achieved compromise to which some States agree, often with reluctance, in order to secure the participa-

the text. The texts of the four Geneva Conventions of 1949 were stated in the Final Act to have been established by the Conference. The Final Act was signed by all sixty-one participating States on 12 August 1949. This was not tantamount to signature of the Conventions. For only sixteen of the delegations signed all four Conventions; the United States of America signed only Conventions No. 1, 2 and 3. The remainder of the delegations signed the four Conventions at a special meeting convened on 8 December 1949, when the United States also signed Convention No. 4. Each Convention bore the date of 12 August 1949. Each was open for signature until 12 February 1950 in the name of the States represented at the Conference and by States parties to the previous relevant Geneva Convention. After that date the Conventions were open to accession. (International Committee of the Red Cross, the *Geneva Conventions of August 12, 1949*, Geneva).

³³ The following example shows that even from the formal point of view the function of the signature, although not amounting to a binding acceptance of obligations, may be different from that of merely establishing

tion of others. Often a State signs — or ratifies — a convention because the signature of another State or States is regarded by it, in case of doubt, as a sufficient inducement for its own signature. But if these other States are subsequently at liberty to treat their signature as implying no manner of obligation whatsoever, the concessions made by other signatories will have been made in vain seeing that the consideration which they could legitimately expect will not be forthcoming. Moreover, the mere fact of signature confers upon the signatory certain rights — some of them admittedly controversial — and it is proper that there should exist some obligation in consideration of those rights. Thus, according to the widely held view, a signatory State has a voice in determining the admissibility of reservations and, in some cases, of accessions. According to a view, which in the present article is represented as the correct view, signature has the effect of obliging the signatories to abstain, prior to ratification, from a course of action inconsistent with the purpose of the treaty. But if signature is a mere formality which implies no obligations whatsoever on the part of others, there would appear to be no justification for such self-denying restraint. All these considerations prompt the conclusion that signature, although not implying an obligation of ratification, implies the duty to take some action showing a deliberate acknowledgement of the principle that eventual ratification is the natural outcome and purpose of the signature.

4. On the other hand, the authors of the Harvard Draft Convention correctly applied the principle, as stated in the passage cited above, to the question of the obligation resting upon a signatory State between signature and ratification. With regard to that question the present article adopts, as expressing the existing law on the subject, the principle that the signature implies the obligation "to refrain, prior to ratification, from any act intended substantially to impair the value of the undertaking as signed". It will be noted that: (1) that obligation constitutes a legal, and not merely a moral, duty; (2) that it refers only to such acts as are intended, and not merely calculated, to impair the value of the obligation as signed. For the purpose of that rule is to prohibit action in bad faith deliberately aiming at depriving the other party of the benefits which it legitimately hoped to achieve from the treaty and for which it gave adequate consideration. Thus, for instance, a State would be acting in bad faith and in violation of a legal duty if, to mention a concrete case which presented itself to the Permanent Court of International Justice in the case referred to below, after having undertaken to cede to another a portion of its territory it were to proceed to alienate, in the interval between signature and ratification, all the public property of the State which would otherwise pass to the other contracting party under the rules of State succession. On the other hand, apart from deliberate action intended to deprive the other party of some of the benefits of the treaty, a contracting party cannot be divested during a period, which may be long and occasionally indefinite, of its freedom of action with regard to normal activities of State administration. Subject to that qualification, the signature imposes upon a State the duty as formulated in the present article.

The Permanent Court of International Justice in effect affirmed that rule in the *Case concerning certain German interests in Polish Upper Silesia*. While upholding the right of a State to dispose of State property after the signature of the treaty, it qualified that right by laying down that abuse of it would endow an act of alienation with the character of a breach of an international obligation; that such abuse cannot be presumed; and that the burden of proof rests upon the party alleging it (Publications of the P.C.I.J., Series A. No. 7, p. 30). The Court then examined the facts of the case and found that the German acts of alienation did not overstep the limits of the normal administration of public property and that they were not intended to deprive Poland of a right to which she was entitled. There are decisions of other international tribunals and of municipal courts to the same effect.³⁴ Practically all writers who have examined the question support the rule as formulated. There exist a number of treaties which state expressly the obligation of the parties to act on that rule, for instance, article 38 of the Final Act of Berlin of 26 February 1885, which laid down that « *en attendant la ratification, les Puissances signataires de cet Acte général s'obligent à n'adopter aucune mesure qui serait contraire aux dispositions dudit Acte* ». In so far as this and similar provisions refer to action aimed at by the present article 5 they are no more than declaratory of an existing principle. In so far as they prohibit all action contrary to the treaty they probably go beyond that article, which forbids only such action as is deliberately intended to deprive the other contracting party of the benefits of the treaty.

5. With regard to paragraphs 3-5 of the present comment, the reference to the legal effect of signature in some cases is amplified by the statement that this covers also "any other means of assuming an obligation subject to subsequent confirmation". This refers to cases in which, for instance, an accession (see article 7 below) or an acceptance or a unilateral declaration (see article 2 above) is made subject to subsequent confirmation.

Note

1. Article 5 as here formulated differs substantially from the relevant articles tentatively adopted by the Commission, and the observations which follow may therefore be appropriate. Among these articles there was no separate article on signature although signature figured in the enumeration of the means of assuming a treaty obligation. This was so probably for the reason that the Commission, while recognizing that the parties may treat the signature as binding, was inclined

³⁴ See, for example *Megalidis v. Turkey*, decided in 1923 by the Turkish-Greek Mixed Arbitral Tribunal (*Recueil des Décisions des Tribunaux Arbitraux Mixtes*, vol. 8, p. 390; *Schrager v. Workmen's Accident Insurance Institute*, decided in 1927 by the Supreme Court of Poland (*Annual Digest*, 1927-1928, Case No. 274); *Rentengutsvertrag (Danzig) Case*, decided in 1928 by the *Obergericht of Danzig* (*ibid.*, Case No. 276). In the case of *Kemeny v. Yugoslav State* the Hungarian-Yugoslav Mixed Arbitral Tribunal held that the conferment of mining rights on 20 March 1920, i.e., before the date of the signing of the Treaty of Trianon (although after the date of the armistice), was not inconsistent with the obligations of the Treaty (*ibid.*, Case No. 374).

to treat the signature primarily as a means of authentication and viewed with some disfavour, as contrary to precepts of constitutionalism, its use as a means of assuming an immediate obligation. Yet the fact is that the practice of governments recognizes it as such to an increasing degree. Moreover, even when signature does not go to the length of the assumption of an immediate obligation, it has a legal significance going beyond mere authentication. It is a declaration of intention, whether it is subject to ratification or not, to become a party to the treaty. It is of interest to note the frequency with which multilateral conventions brought about by the signature of the States or organizations of States participating in the conferences which adopted them provide for additional possible signatures up to a fixed date and for accession subsequent to that date. Moreover, the place of signature as preliminary to accession (article 7) or acceptance (article 8) is conspicuous in numerous recent conventions concluded under the auspices of the United Nations and dispensing with ratification.³⁵

2. The Special Rapporteur does not consider that the mere negative statement that there is no obligation to ratify a signature does justice to the problem from the point of view either of codification or of development of international law. That negative statement, when properly supplemented, is correct. When standing in isolation it is incomplete and to that extent inaccurate. A party which has signed a treaty is not bound to ratify it. But it cannot, consistently with legal principle and good faith, act — or refrain from acting — as if it had never signed the treaty at all. It must examine the treaty in order to come to a decision, with regard to which it enjoys full freedom of action, whether to approve the treaty or not. It is not of decisive importance that governments have not expressly accepted that principle or that the report on the subject produced by a committee appointed by the Assembly of the League of Nations and pointing to an obligation to submit the treaty to the proper authorities for approval or rejection did not secure formal acceptance. In codifying international law the Commission is not limited to registering uniform practice. If that were its purpose its work would be partly nominal and partly redundant. While in some matters the Commission will adequately discharge its function by the mere fact of drafting rules expressive of uniform practice, in other fields — where uniform practice is lacking — it is its function to formulate rules based on what it considers *the correct legal principle*, the requirements of good faith, and such practice as it considers most conducive to the effectiveness and development of international law.

3. The same considerations apply to the second legal consequence of the signature, namely, abstention — in the period between signature and ratification — from action intended to deprive the treaty wholly or in part of its effectiveness and thus to deceive the other

contracting party. This, again, is a legal obligation. The Commission refrained from laying down that principle on the ground that, as stated in its comment to tentative article 7, the material available is “of too fragmentary and inconclusive a nature to form the basis of codification”. However, as shown in the comment to the present article, judicial practice, including that of the highest international tribunal, is as complete as can be desired in the circumstances. Even if there existed a regularly functioning international judiciary endowed with compulsory jurisdiction it could hardly be expected that it would produce a rich crop of cases bearing on what is in the nature of things an unusual occurrence. Here, again, what is decisive for the purpose of codification is the drawing, in the light of existing practice, of the necessary conclusions dictated by the principles of good faith (which form part of the law), of the function of signature (which goes beyond that of mere authentication), and of the requirement of honest international intercourse. Practically all writers who have examined this question have come to the conclusion formulated in the present article — although some, including Anzilotti, base that conclusion not on the effect of the treaty as such but on the principle prohibiting abuse of rights. Thus Anzilotti says:

« Il faut encore observer que, en excluant tout effet obligatoire du traité antérieurement à la ratification, on ne veut pas dire que l'État puisse ne tenir aucun compte du texte intervenu et faire comme si rien ne s'était produit. Il y a lieu, par contre, d'admettre que, lorsque la procédure de ratification d'un traité régulièrement signé est pendante, l'État doit s'abstenir d'accomplir des actes de nature à rendre impossible ou plus difficile l'exécution régulière du traité une fois ratifié. Mais il est clair qu'il ne s'agit pas alors d'un effet du traité comme tel, mais bien d'une application du principe qui défend d'abuser du droit. » (*Cours de droit international* (Gidel's translation, (Sirey, Paris, 1929), p. 372.)

4. The Special Rapporteur has not found it necessary to refer in the comment to the conventional exceptions to the principle that a party is entitled to refuse to proceed with ratification. This exception is created by article 19 of the Constitution of the International Labour Organisation which provides that, when the consent of the competent authority has been obtained, a member of the Organisation is bound to communicate its ratification of the convention for which consent has been given. In the case of International Labour Conventions there is no question of ratification of a signature previously given. Such ratifications are more in the nature of accession than ratification in the accepted sense. With regard to other treaties the matter is not free from difficulty. It is frequently asserted that a contracting party is under no obligation to proceed to ratify a treaty which it has signed and which has received the legislative approval necessary for ratification. (See, for example as to French decisions and practice in the matter L. Preuss in *American Journal of International Law*, vol. 44 (1950), p. 649.) However, refusal to ratify in such circumstances strains to breaking point the principle that a contracting party is free to decline to ratify a treaty which it has signed. For it is largely the necessity of legislative approval

³⁵ See, for example, the International Sanitary Convention for Aerial Navigation of 15 September 1944, which provides, in article XVIII, that it shall come into force as soon as it has been signed or acceded to on behalf of ten or more Governments (United Nations, *Treaty Series*, vol. 16, p. 247).

which is the *raison d'être* of ratification. There may be reasons justifying refusal to ratify in such circumstances — the reasons being largely identical with those which justify unilateral termination of a treaty — but they must be regarded as exceptional. The question deserves consideration by the Commission. It is particularly acute in cases in which the wording of the article requiring ratification is such as to make legislative approval appear to be the sole reason for the requirement of ratification.

Article 6

Ratification

1. Ratification is an act by which a competent organ of a State formally approves as binding the treaty or the signature thereof.

2. In the absence of ratification a treaty is not binding upon a contracting party unless:

(a) The treaty in effect provides otherwise by laying down, without reference to ratification, that it shall enter into force upon signature or upon any other date or upon a specified event other than ratification;

(b) The treaty, while providing that it shall be ratified, provides also that it shall come into force prior to ratification;

(c) The treaty is in the form of an exchange of notes or an agreement between government departments;

(d) The attendant circumstances or the practice of the contracting parties concerned indicate the intention to assume a binding obligation without the necessity of ratification.

[Alternative paragraph 2]

[2. Confirmation of the treaty by way of ratification is required only when the treaty so provides.]

Comment

1. *Ratification as an act of confirmation by a competent organ.* The question as to who is the competent organ to ratify a treaty is one which international law leaves to the constitution and, generally, to the law of the parties whether they be States or organizations of States. With regard to States, although as a general rule the power to ratify treaties is formally vested in the Head of the State, most constitutions qualify this rule by laying down that ratification shall not be given, or shall not be binding, unless the prior approval of the legislature or part thereof has been obtained. In some States this limitation applies to all treaties; in others only to certain categories of treaties. The rule prevailing in some countries, such as the British Commonwealth of Nations, that the Head of the State has the unfettered power to ratify treaties is a practice modified by the convention that important treaties or certain categories of treaties are submitted for parliamentary approval prior to ratification. Also, in these countries the theoretically unrestricted power of the Head of the State to ratify treaties is limited by the principle that provisions of treaties affecting

the private rights of the subject must be incorporated, by an act of legislation, into the law of the land before they can be applied by the courts. The law of only very few States — such as Ethiopia, Jordan, Morocco, Saudi Arabia and the Vatican City — reserves an unlimited power of ratification to the Head of the State. Occasionally the written constitution or constitutional practice empowers organs other than the Head of the State to ratify international agreements.³⁶ Such provisions, however, are infrequent for the reason that, according to the practice of many States, inter-departmental agreements are not subject to ratification (see below, paragraph 5 (c)). In any case, whatever may be the provisions, if any, of the national law on the subject, compliance with them, in so far as they are known and ascertainable (see article 11 below), is an essential condition of the coming into force of the treaty.³⁷

2. The expression “formally approve as binding the treaty or the signature thereof” is intended to convey that, as a rule, the act of ratification may be an approval either of an instrument which the State has not previously signed or, which is the normal rule, of a signature previously appended by the representatives of the State duly authorized to sign the treaty. The views is occasionally expressed (as, for instance, in the comment to article 6 of the Harvard Draft Convention) that ratification is a confirmation not of the signature (or its equivalent) but of the treaty. It is believed that that view (adopted in the comment to the Harvard Draft Convention and in article 5 of the tentative draft of the Commission) does violence to the language customarily used in instruments of ratification, that it is contrary to the preponderant authority, and that it fails to do justice to the independent status of the signature, which is productive of legal effects of its own. It is irrelevant for this purpose

³⁶ An United States Act of 1934 provides that the Postmaster General may, with the advice and consent of the President, negotiate and conclude postal treaties or conventions. These treaties and conventions are ratified by the Postmaster General. The seal of the Post Office Department of the United States is affixed to the ratification.

³⁷ It must be noted in this connexion that the term ratification as here used refers to *international* ratification. The law and constitutions of some countries occasionally use the term “ratification” for what is essentially approval given by the legislature to subsequent international ratification by the Head of the State. The following message from the Peruvian Congress to the President of the Republic illustrates that terminology: “*Resolución Legislativa* No. 11828, Lima, 3 de abril de 1952. Señor: *El Congreso, en ejercicio de la atribución que le confiere el inciso 21 del artículo 123 de la Constitución política del Estado, ha resuelto ratificar el Convenio Comercial suscrito con la República Federal de Alemania, en Bonn, el 20 de julio de 1951.*” (*Revista Peruana de Derecho Internacional*, 1952, pp. 130-131). On the other hand, article 27 of the French Constitution of 1946 uses what is declared to be more precise language in this connexion: “Article 27. Treaties relative to the international organization, peace treaties, commercial treaties, treaties involving national forces, treaties relative to the personal status and property rights of French citizens abroad, and those that modify French internal legislation, as well as those involving cession, exchange or addition of territories shall not become final until they have been ratified by virtue of a legislative act (*en vertu d'une loi*).

whether the signatures are those of the personal representatives of the Head of the State or of the representatives of the State as such.³⁸ The motive underlying this conception of signature — which is not here admitted as accurate — is, by diminishing its legal importance, to emphasize the absence of any legal obligation to confirm the signature. No such interpretation of the value of the signature is necessary in support of what is an unchallenged rule. This, as has been suggested in the comment to article 5 and as will be suggested presently, does not mean that signature is of no legal value or effect.

The wording used in the present paragraph has been adopted in order to accommodate the eventual occurrence — as is the case with the conventions of the International Labour Organisation or of some treaties constituting international organizations where the treaties are adopted by the Conference and submitted for subsequent acceptance by States — of ratification of treaties which are not subject to signature (although even in these cases the signature is implied in most cases by the participation of the representative of the State in the drafting and adoption of the treaty by a conference or an organ of an international organization).

3. The second paragraph of article 6 is concerned with the question which is often discussed but whose practical importance is distinctly limited, namely, whether treaties, in the absence of an express or implied provision to the contrary, require ratification. For the reasons stated below two — seemingly contradictory — versions of the relevant paragraph may properly be considered. In the first version that question is answered in the affirmative. This version of the second paragraph by obvious implication rejects the view that treaties do not require ratification unless they provide expressly or implicitly that they are subject to ratification. The reasons underlying that view may be stated as follows: The importance of the subject matter of treaties is such that unless the parties have waived the requirement of ratification the latter must be considered essential to the international validity of the treaty. There is little persuasive force in

³⁸ The legal position in the matter has been put correctly, it is believed, by Judge Basdevant in his dissenting opinion in the *Ambatielos* case between Greece and the United Kingdom (Preliminary objection). He said: "The drafting and the signature of an international agreement are the acts by means of which the will of the contracting States is expressed; ratification is the act by which the will so expressed is confirmed by the competent authority, for the purpose of giving it binding force" (*I.C.J. Reports 1952*, p. 69). Similarly, any tendency to distinguish between ratification as understood in the language of general jurisprudence and a conception of ratification peculiar to international law (or between the notion of ratification in earlier and in modern international law) was, in effect, discouraged by the learned judge in the following terms: "When they signed the instruments of ratification — act by which they confirmed the agreement reached by their respective plenipotentiaries and by which they gave the declaration a definitive character of the will of the contracting States — the President of the Greek Republic and the British Monarch were merely confirming what had already been declared by their plenipotentiaries."

the argument that as numerous treaties expressly provide for ratification it must be considered that in all other cases the parties must be deemed to have waived it. For the inclusion of an express provision in the matter of ratification may mean no more than that the parties intended to emphasize the solemnity and the importance of the treaty and that they desired to leave no room for uncertainty in the matter. It has also been pointed out that by parity of reasoning it might be argued that as numerous treaties lay down expressly that they shall enter into force upon signature (i.e., that they do not require ratification), the absence of any reference to the matter would mean that ratification is indicated. The controversy surrounding the subject is to a large extent theoretical. The more formal type of instruments designated as treaties and conventions between Heads of States or States include, practically without exception, express provisions on the subject. They are to be found on occasions, admittedly rare, also in exchanges of notes and inter-departmental agreements. Whatever may be their description, treaties either provide that the instrument shall be ratified or, by laying down that it shall enter into force on signature or on a specified date or event, dispense with ratification. This is the regular practice. Silence on the subject is exceptional. In view of this the elaboration, in the second paragraph of article 6, of the situations in which, in the absence of any provision on the subject, ratification is not required may seem otiose. However, it is one of the purposes of codification to provide for cases — even if rare — in which the subject is not expressly regulated by the parties.

4. As stated, the practical importance of article 6 as formulated is somewhat reduced by the fact that an increasing number of treaties provide, without reference to ratification, that they shall enter into force on signature or on a specified date or event thereafter. Nearly one-third of the bilateral instruments between States or organizations of States contain provisions to that effect. That circumstance may well act as a reminder of the element of exaggeration inherent in the occasional statements to the effect that modern practice has tended to reduce the importance of the signature — a statement which must be received with no less caution than the view that recent practice shows a tendency to dispense with ratification in favour either of signature or of new methods such as acceptance. The fact is that both signature and ratification are — apart from accession — the typical means of assuming treaty obligations. It might be conducive to clarity and simplicity if they were to remain so. It may now be convenient to comment on the first version of paragraph 2.

5 (a). "In the absence of ratification a treaty is not binding upon a contracting party unless: (a) the treaty in effect provides otherwise by laying down, without reference to ratification, that it shall enter into force upon signature or upon any other date or specific event other than the ratification of that particular treaty." As mentioned, the various methods of dispensing with ratification — in particular, the precise determination of the date of entry into force — have become a frequent feature of international practice in

relation to bilateral agreements.³⁹ The "other date", referred to in this paragraph, is occasionally left to future determination by agreement of the parties. Occasionally it is stated to be the "appointed date" or a date prior to signature.

³⁹ Thus, to give examples taken from one volume, chosen at random, of the United Nations *Treaty Series*—vol. 76 (1950)—more than one-third of the instruments reported there provide that they shall enter into force upon signature. In the second category—entering into force upon any other date—the Trade Agreement of 15 December 1958 between Turkey and Denmark provides that it shall enter into force on 1 January 1949 (*ibid.*, p. 21). The Exchange of Notes Constituting an Agreement, of 28 February 1945, between the United States of America and the Provisional Government of the French Republic relating to the Principles Applying to the Provision of Aid to the Armed Forces of the United States laid down that it should enter into force on the date of signature with retroactive effect as from 6 June 194 (*ibid.*, p. 214). In the third class—entering into force upon a specified event—the Payment Agreement of 15 December 1948 between Denmark and Turkey provided that it shall enter into force on the same day as the Trade Agreement signed by the parties (*ibid.*, p. 7). A similar provision was included in the Exchange of Notes between the Netherlands and New Zealand of 18 October 1947 constituting a Supplementary Agreement to the General Agreement on Tariffs and Trade (*ibid.*, p. 42). It is of interest to note that in the above-mentioned volume of the *Treaty Series* only two treaties provide for ratification, and only one for "approval" (the agreement between the Food and Agriculture Organization and the World Health Organization). In respect of one agreement only, published in the volume in question, the position as to ratification remained partly undetermined, namely, the agreement of the Netherlands with the International Refugee Organization of 20 June 1950 relating to the care to be given to forty refugees resident in the Netherlands (*ibid.*, p. 56) "partly undetermined", for this agreement, in view of the urgency of its execution, probably falls within the category of agreements not requiring ratification having regard to "attendant circumstances" (see below, paragraph 5 (c)). The footnote of the Secretariat of the United Nations states that the agreement came into force on the date of signature. The only other agreement in that volume which contains no provision on the subject is the Exchange of Notes of 8 November 1945 between France and the United States of America supplementing a previous agreement, which entered into force on the date of signature, relating to the Principles Applying to Mutual Aid in the Prosecution of the War (*ibid.*, p. 153). The agreement is one which probably falls within the category of declarations of policy rather than of legal instruments (see article 1 above). A footnote appended by the Secretariat of the United Nations states that the notes came into force on the day on which they were exchanged. The above volume of the *Treaty Series*, which is believed to be typical with respect to bilateral treaties, in addition to providing examples of contractual instruments entering into force without ratification is instructive as providing further evidence that, in view of the normal regulation of that question in the instruments themselves, the question whether treaties require ratification is, while of considerable theoretical interest, of limited practical importance.

In a matter of this description, in which doctrinal controversy has to a considerable degree obscured the realities of the problem which confronts the task of codification, it is useful to scrutinize closely the practice of agreements, and the Special Rapporteur has therefore thought it useful to verify the results of the analysis of volume 76 of the United Nations *Treaty Series* by an examination of volumes 66, 56 and 46 of the *Treaty Series*. Volume 56 is entirely devoted to a mimeographed reproduction of schedules of tariff concessions in connexion with the General Agreement on Tariffs and Trade, and

The nature of the "event" upon which the treaty is to enter into force is described in terms of great diversity. Thus the series of agreements concluded in 1947 between the United Kingdom and Ceylon on matters of defence, external affairs and trade provided that they "will take effect when the constitutional measures necessary for conferring on Ceylon fully responsible status within the British Commonwealth of Nations shall come into force" (United Nations, *Treaty Series*, vol. 86, p. 28). The Agreement of 5 June 1946 between the Government of the United Kingdom and the Government of Canada for the Avoidance of Double Taxation provides, in article 10, that it shall come into force "on the date on which the last of all such things have been done in the United Kingdom and Canada as are necessary to give the Agreement the force of law in the United Kingdom and Canada respectively" (*ibid.*, p. 5).

5 (b). "In the absence of ratification a treaty is not binding upon a contracting party unless: (b) the treaty, while providing for ratification, provides that it shall come into force prior to ratification." There are frequent examples of this type of treaty. For instance, the Trade and Payments Agreement between Denmark and Argentina of 14 December 1948, after providing, in article 41, that it "shall be approved" in conformity with the constitutional procedure of each of the High Contracting Parties, lays down that "without prejudice to its final approval, this Agreement shall enter into force provisionally fifteen days from the date of signature and shall remain in force for five

may therefore be left out of account. Volume 66 records the following position: Twelve instruments, being exchanges of notes, entered into force on the date of the first or the second note; nine instruments, not being exchanges of notes, entered into force on the date of signature; six instruments entered into force on a date fixed by the treaty. It thus appears not only that in not one out of twenty-six instruments was the question of ratification left open, but that all these agreements entered into force without any ratification at all (except in one case in which the approval of the national Parliament of one party—but not ratification—was stipulated). In volume 46 ten instruments, being exchanges of notes, entered into force immediately; four other agreements entered into force upon signature; and four others upon the date of exchange of ratification. In one case—that of the Franco-Belgian Convention of 29 December 1947 (p. 112)—the convention came into force provisionally upon signature and finally upon exchange of ratification. Of the three remaining instruments the Protocol of the Circulation and Traffic in Obscene Publications (p. 170) provided that States may become parties by (a) signature without reservation as to approval; (b) acceptance to be effected by the deposit of a formal instrument with the Secretary-General of the United Nations. The Parcel Post Agreement of 15 July 1949 between the Philippines and Australia (p. 216) laid down that the Agreement shall come into force upon ratification or approval by the proper authorities but that, pending ratification or approval, it may be put into force administratively on a date to be mutually settled between the postal administrations of the two countries. Again, in no case was the question of the necessity for ratification left in abeyance.

⁴⁰ The English text has the term "approved", while the French text lays down that the "accord sera ratifié". The Spanish text provides: "El presente Convenio no sera aprobado". It is probable that the intention was to refer to international ratification, as distinct from internal constitutional approval.

years" subject to a right of denunciation after the first year. The Franco-Belgian Convention for the Avoidance of Double Taxation signed on 29 December 1947 provided, in article 10, that it shall be ratified and the instruments of ratification exchanged as soon as possible, but that it shall enter into force provisionally on the date of its signature (United Nations, *Treaty Series*, vol. 46, p. 117).

5 (c). "In the absence of ratification a treaty is not binding upon a contracting party unless: (c) the treaty is in the form of an exchange of notes or an agreement between government departments." Normally the form or designation of the treaty cannot be regarded as relevant to the question of necessity for ratification. For, as already mentioned, exchanges of notes have occasionally been made subject to ratification. However, as a rule — and this applies also to agreements concluded between government departments — they specify the date on which they shall enter into force and thus, by obvious implication, dispense with ratification. That date may be — and usually is — the date of the exchange of the notes. In some cases it is laid down that the agreement established by the exchange of notes or by the inter-departmental arrangement⁴¹ shall enter into force on a date to be settled by the parties. To that extent the matter is governed by paragraph 2 (a) which lays down, in effect, that the treaty is binding without ratification if the parties, without referring to ratification, determine the date or accept a date on which the treaty shall enter into force.

In general, exchanges of notes, apart from exceptional cases, leave no doubt as to the intention of the parties to dispense with ratification. With regard to such exceptional cases, reasons of convenience, the uniformity of existing practice, and considerations of expedition which characterize exchanges of notes — and agreements between government departments — urge acceptance of the presumptive rule that they do not require ratification.

5 (d). "In the absence of ratification a treaty is not binding upon a contracting party unless: (d) the attendant circumstances or the practice of the Contracting Parties concerned indicate the intention to assume a binding obligation without the necessity of ratification." The nature of the attendant circumstances which make ratification unnecessary cannot be circumscribed in advance. They will as a rule cover agreements of limited scope concluded by Governments and requiring speedy action. The agreement referred to above (note to paragraph 2 (a)), between the Netherlands and the International Refugee Organization for the care of forty refugees in Holland may be mentioned as an example. Also, if it can be shown that the practice of a contracting party has been such as not to require the ratification of a particular type of agreement

that party will be bound by the instrument in question unless the requirement of ratification has been expressly made part of the agreement. To that extent the subject of this paragraph 2 (d) is identical with that of paragraph 2 (c). Thus Sir Arnold McNair has pointed out that, in view of the consistent custom of inserting a provision for ratification in all cases in which the parties desire that procedure to be followed, the Government of the United Kingdom does not deem it necessary to ratify a treaty which contains no such clause. In particular, he states, ratification is unnecessary, from the point of view of the United Kingdom, with regard to inter-governmental agreements even if they are concerned with matters of importance, for instance, arbitration agreements or boundary agreements; protocols or declarations⁴² or additional articles modifying or adding to the principal agreement which does or did not require ratification; and "many exchanges of notes, agreements establishing *modi vivendi* or other provisional arrangements, and agreements prolonging the duration of commercial treaties and extradition treaties" (*The Law of Treaties*, Oxford, 1938, pp. 85-87).

6. The general manner of formulation of this part of paragraph 2 of article 6 is deliberate. No attempt has been made to define in detail the nature of the attendant circumstances which raise the presumption that no ratification was intended and that none is required. However, in some cases the practice of States has assumed the complexion of a well established — though not necessarily rigidly defined — custom. It is that custom which makes it permissible to state that, in general and subject to any express provisions to the contrary, interdepartmental agreements and arrangements which are obviously concerned with matters of limited importance do not require ratification. The same applies to other instruments — whatever their designation — which, within a limited sphere, are supplementary to agreements previously concluded. As already stated, in all these cases it is the content of the instrument and the attendant circumstances rather than the designation of the instrument which are decisive. Although there is occasionally some correlation between the designation of the instrument and its content, this is not always so. "Conventions" or "treaties" is the term often used to cover agreements on matters of a general character and of obvious political importance — just as in such cases it is frequently the Head of the State or the State as such who are described as the contracting parties. However, these designations of the instrument and of the parties thereto are occasionally used in connexion with instruments of limited importance or of a purely technical character. The decisive consideration is that there are factors which make ratification appropriate and natural in some cases, but not in others. Thus, for instance, a treaty, bilateral or multilateral, requiring extensive changes in municipal law and detailed inter-departmental consultation in

⁴¹ Thus, for instance, the Parcel Post Agreement between the United States and Korea (signed by Korea on 17 February 1949 and by the United States on 13 April 1949) concluded between the Post Office Department of the United States of America and the Department of Communications of Korea laid down that it should take effect on a date to be mutually settled between the administrations of the two countries.

⁴² In the *Ambatielos* case Judge McNair was prepared to hold, if necessary, that a declaration which, in his view, did not form part of a ratified treaty was binding without ratification having regard to the practice of the United Kingdom (*I.C.J. Reports 1952*, p. 60).

this connexion, may require ratification notwithstanding its designation — though it is natural to assume and to expect that in such cases the designation of the treaty will not be that of an exchange of notes or of an agreement between administrative agencies. As a rule the previous practice, in the matter of ratification, of the State concerned may legitimately be relied upon. It is not possible, in commenting upon this part of article 6, to go beyond this necessarily general statement. In practice, as previously suggested, the question arises only in rare cases. As a rule treaties, of whatever description, leave no doubt as to the intention of the parties in the matter of ratification. But a rule there must be both in order to meet the rare cases and as an inducement to governments, in case they desire the ratification of an instrument which is here stated as normally not requiring it, to give clear expression to their intentions. In general, with regard to multilateral treaties — because of their importance and frequently, their resulting implications in the municipal sphere — more stringent proof will be required to show that, in the language of paragraph 2 (c), the “attendant circumstances and the practice of the parties” are such as to justify the conclusion that no ratification is required.

7. However — and this consideration leads to the alternative version of the second paragraph of article 2 — if there must be a rule, if the cases in which the parties in effect fail to regulate the matter are conspicuous for their rarity, and if the rule as stated above provides for so many exceptions as almost to be transformed into a principle opposed to that which seemingly underlies it, is it not preferable to lay down, as expressing either the existing or the desirable law, that no ratification is required unless the parties provide for it expressly? Constant practice of governments shows that, with minor exceptions, in all cases of multilateral treaties of importance express provision is made for ratification. It would seem reasonable to assume that with regard to such treaties the absence of provision for ratification shows that the parties did not wish ratification to be a condition of entry into force. For it could hardly be assumed that the matter escaped their attention. Undoubtedly, it would be better if they had said *something*, e.g., that the treaty shall enter into force upon signature or upon some specified date or event. They do so occasionally.⁴³ However, having regard to the constant practice of expressly providing for ratification where the parties wish the treaty to be ratified, the implication of necessity for ratification seems an inconclusive inference from their mere silence. In fact in those

rare cases in which a treaty has been silent on the matter, there has been a tendency to assume that no requirement of ratification was intended.⁴⁴ For these reasons it has been deemed convenient to present here an alternative version of the second paragraph of article 6 — a version according to which ratification is not required if it is not expressly provided for in the treaty. As will be submitted — in notes 1 and 2 to this comment — the actual practical difference between these two versions is not substantial. The present alternative version, in addition to the considerations outlined above, takes into account the changes which have taken place in international intercourse in the matter of conclusion of treaties. These changes, especially in relation to bilateral treaties are the result of factors which are not of a merely transient character. In the first instance, as the result of developments in the sphere of telecommunications and facilities for travel generally, ratification is no longer a confirmation of a treaty negotiated by plenipotentiaries out of touch with the central authorities of their State and unable to receive day-by-day instructions with regard both to the details of the negotiations and to the signature itself. Secondly, whatever may be the political divisions of the world, the growing interdependence of States, and the manifold variety of their contracts have added very substantially to the range of treaties and to the necessity for expedition in bringing them into force. The increasing and already largely consummated tendency towards simplification of the procedure in the treaty-making process is an inevitable consequence of these changes.

Note

1. With regard to the main question connected with the present article, namely, whether in the absence of relevant provisions in the treaty ratification is required in order to make the treaty binding, the solution, or solutions, outlined by the Special Rapporteur differ, in effect, but little from that tentatively adopted by the Commission. In the first version of paragraph 2 they differ from it in so far as they envisage a wider range of cases in which the parties must be presumed to have intended to dispense with ratification. However, even in the article tentatively adopted by the Commission the range of exceptions was so wide as to leave but little scope for the operation of the principal rule laying down that in the absence of relevant provisions a treaty must be ratified in order to be binding. In view of this there is only a slight practical difference between that formulation and the seemingly contrary rule, formulated in the alternative version of paragraph 2, that in the absence of express provisions requiring ratification no ratification is

⁴³ The Agreement of 31 December 1934 concerning postal exchanges between Denmark, Finland, Iceland, Norway and Sweden was concluded between the Post Office authorities of those countries. It laid down that it shall enter into force on 1 January 1935. The Agreement of 3 April 1939 between Belgium, France and the Netherlands concerning navigation on the Rhine provided that it shall enter into force on the date of signature (M. Hudson, *International Legislation*, vol. 8, p. 283). The Nyon Arrangement of 14 September 1937 and the Supplementary Arrangement of 17 November 1937 concerning attacks upon merchantmen in the Mediterranean provided expressly that they shall enter into force immediately (*ibid.*, vol. 7, pp. 831, 841).

⁴⁴ The Final Act of the Conference of Wheat Exporting and Importing Countries of 25 August 1933 was stated to have entered into force on that day (League of Nations, *Treaty Series*, vol. 141, p. 71; M. Hudson, *International Legislation, 1932-1934*, vol. 6, p. 437). The Act contained no reference to the subject. This was also the case with regard to the Agreement of 20 December 1935 between the United Kingdom, Canada, Australia, New Zealand and South Africa, on the one hand, and Germany on the other, concerning war graves (*ibid.*, vol. 7, p. 213).

necessary for the validity of the treaty. This conclusion is, on the face of it, startling. But it is startling only if we forget that a wholly unqualified rule requiring ratification is contrary to practice and that qualifying exceptions, if numerous, tend to bridge the gap between the opposing formulations.

2. As there is no substantial difference between the two seemingly opposed solutions as expressed in the two alternative versions of paragraph 2, it would appear that it does not matter very much which solution is accepted—although purely practical considerations counsel the adoption of a rule which is precise and clear. As a matter of doctrine the difference between the two methods of approach is substantial. One will recommend itself to those who, for reasons of constitutionality, of the importance of the interests affected, and of the historic function of ratification as a natural concomitant of signature, consider ratification to be essential unless expressly dispensed with. The second solution will be favoured by those who, having regard to the requirements of international intercourse in modern conditions and to cogent deductions from actual practice, see in the signature an act of a significance greater than mere authentication and establishment of the text. As stated, the practical difference in the effect of either solution is small. The importance of the subject is further reduced by the circumstance that the question hardly arises in practice. For with minor exceptions treaties either provide that they shall be ratified or, in various ways, indicate conclusively the intention of the parties to bring them into effect without ratification. While, as shown in the comment to article 11, there are examples of States attempting to avoid a treaty on the ground that it was not ratified in accordance with the requirement of their constitution, there are probably no instances of their attempting to do so on the ground that the treaty required ratification as a condition of its international validity and that it was not in fact ratified. That circumstance does not absolve the Commission from the task of formulating a rule for the very small residuum of cases in which the parties have left the question open. For it is only the existence of a clear presumptive rule which will induce the parties to adopt an explicit provision in case they desire a procedure differing from that as expressed within the framework of general codification.

3. In formulating the present article the special Rapporteur has avoided undue elaboration of matters of detail—some of them obvious—connected with ratification. These matters include the principle, which ought not to give rise to controversy, that wherever in an international instrument there is a reference to a “treaty”, such reference means a valid treaty, i.e., a treaty which has been ratified, and that where reference is made to “parties to a treaty” such reference means parties who have ratified a treaty. This—and no other—is in fact the import of the relevant pronouncement in the Judgement of the Permanent Court of International Justice given in 1929 in the *Case concerning the territorial jurisdiction of the International Commission of the River Oder* (Publications of the P.C.I.J., No. 23, pp. 17-22), where reference in article 338 of the Treaty of Versailles to a convention to be drawn up by the Allied and Associated Powers

was held to mean, in relation to Poland, a convention ratified by Poland. This was so, in particular, seeing that the convention in question—the Barcelona Convention—provided expressly that it was subject to ratification. In view of this the Court held that the Barcelona Convention, not having been ratified by Poland, could not be invoked against her.⁴⁵ In *Phillipson and Others v. Imperial Airways Ltd.* [1939], A.C. 337, the British House of Lords held that the term “High Contracting Party”, used in a contract of carriage and referring to the Warsaw Convention of 1929 on Air Transport, included Belgium, who had signed but not ratified the convention. The decision can probably be explained by reference to the special circumstances of a commercial contract. In a subsequent communication addressed to the United States, the Government of the United Kingdom seems to have dissociated itself from that decision. It said: “H.M. Government are of the opinion that the ordinary meaning of High Contracting Party in a convention is to designate a party who is bound by the provisions of a convention and therefore does not cover a signatory who does not ratify it.” The United States Department of State agreed with that view (Hackworth, *Digest of International Law*, vol. 4, p. 373).

4. In general, it is not the ratification, but the exchange or deposit of ratifications, which brings the treaty finally into force. That rule comes more conveniently within the purview of part IV, which is concerned with the operation and enforcement of treaties, and it is proposed to examine it there.

5. The Special Rapporteur did not consider it necessary to elaborate the principle, expressed in paragraph 1, that ratification is a formal document—which means, in any case, that it is a written document. Writers have occasionally discussed the question whether ratification may be in the form of an oral declaration. It is believed that there are no instances of such ratification and that, in any case, the considerations which require the written form for the conclusion of a treaty (see article 17 below) apply, *a fortiori*, to its ratification. It is of the essence of ratification that it should be a deliberate and formal act directed exclusively to that purpose. For similar reasons it is difficult to admit the legal possibility of implied ratification, i.e., ratification by conduct. When a party or the parties have in fact acted upon a treaty which provided for ratification, the correct legal construction is not that they have ratified it by conduct but that their conduct amounts to a waiver of the requirement of ratification.

Article 7

Accession

1. A State or organization of States may accede to a treaty, which it has not signed or ratified, by formally declaring in a written instrument that the treaty is binding upon it.

⁴⁵ This judgement of the Court is occasionally referred to as an authority for the proposition that treaties require ratification. However, this is hardly the true import of the judgement.

2. Accession is admissible only subject to the provisions of the treaty.

3. Unless otherwise provided, accession may be effected at any time after the establishment of the text of the treaty.

Comment

1. In the present article the expression "accession" is used as synonymous with "adhesion". Attempts have occasionally been made to give different meanings to these terms. It is not believed that such attempts find support in international practice, except that as a rule "accession" is used in the English and *adhésion* in the French language.

2. "A State or organization of States may accede to a treaty, which it has not signed or ratified..." The explanation of the words "or ratified" is that occasionally — though not frequently — a treaty makes it possible for the parties who participated in a conference to adhere to a treaty which they signed but for some reason failed to ratify within the period described by the treaty. In such cases there would appear to be room for a modification of the usual — and logical — practice of limiting the right of accession to non-signatory States. Thus, for instance, the Protocol of 19 September 1949 on Road Signs and Signals, which lays down that ratifications thereof could take place only up to 1 January 1950 (article 56 (3)), provides that "from 1 January 1950, this Protocol shall be open to accession by States signatories to the Convention on Road Traffic and by States acceding or having acceded to it". This seems also to be the case with regard to the Convention approved by the General Assembly on 9 December 1948 on the Prevention and Punishment of the Crime of Genocide, which sets the date of 1 January 1950 as the date after which States invited to sign it may accede to the Convention. This, again, may refer to States which, availing themselves of the invitation, have signed it but have failed to ratify it by 1 January 1950. Where no time limit is set for ratification by the signatories, it is difficult to see why such signatories should not at any time proceed to ratification instead of accession.⁴⁵ Most multilateral conventions expressly limit the right of accession to non-signatory States. Thus the International Telecommunications Convention of 2 October 1947 provides, in article 17, that "the Government of any country, not a signatory to this Convention, may accede thereto at any time. . ." The Telecommunications Convention of 9 December 1932 contained, in article 4, an identical provision (M. Hudson, *International Legislation*, vol. 6, p. 113). The Geneva Prisoners of War Convention of 12 August 1949 provides, in article 139, that "from the date of its coming into force, it shall be open to any Power in whose name the present Convention has not been signed, to accede

to this Convention". Similar provisions have been adopted in the Protocol of 23 April 1946 to prolong the International Sanitary Convention for Aerial Navigation of 1944 (United Nations, *Treaty Series*, vol. 16, p. 179); in the various Peace Treaties signed in Paris on 10 February 1947; in the Convention of 2 December 1949 for the Suppression of the Traffic in Persons and the Exploitation and Prostitution of Others; in the Sanitary Convention for Air Navigation of 2 April 1933; and in many others. On the other hand, the General Agreement on Tariffs and Trade of 30 October 1947 (United Nations, *Treaty Series*, vol. 55, p. 194), the Protocol of 19 September 1949 on Road Traffic and some other instruments are open to the construction that States which have signed but not ratified them may accede to them (although no time limit is provided for ratification). In view of the great — and to some extent confusing — variety of treaty provisions on the subject it seems advisable to adopt a fairly wide formulation of the relevant provision of article 7. It must be a matter for consideration whether the codification of this subject ought not to be accompanied by an attempt to introduce in this respect a measure of uniformity into a practice which may otherwise become a source of confusion.⁴⁷

3. The article as formulated provides for the possibility of accession by international organizations. This is in accordance with the scheme of the present draft which recognizes the treaty-making power both of States and of organizations of States. Obviously the practical possibility of international organizations becoming parties to multilateral treaties is limited. The World Meteorological Organization cannot, consistently with its purpose, aspire to participate in the convention concerning, say, the regulation of whaling. However, any limitation of the right of international organizations to become parties, by accession, to multilateral conventions must take place, by reference to the above considerations, in accordance with paragraph 2 of the article, in which the right of accession is dependent upon the parties to the treaty.

4. Paragraph 2 of the article lays down the self-evident principle that parties to a treaty must agree to the participation, by way of accession, of any new parties. The principle that there is no right of accession apart from the provisions of the treaty was clearly laid down by the Permanent Court of International Justice in the *Case concerning certain German interests in Polish Upper Silesia* (Judgement No. 7, pp. 28, 29.)

⁴⁵ Thus, for instance, the Agreement of 22 November 1950 on the Importation of Educational, Scientific and Cultural Materials provides in article IX (1) that it shall remain open for signature by all Member States of the United Nations Educational, Scientific and Cultural Organization, all Member States of the United Nations and any non-member State if subsequently invited. The same article provides that the Agreement shall be ratified. Article X provides that States referred to in paragraph 2 of article IX (1) may accept this Agreement from 22 November 1950. It is difficult to follow the meaning of article X unless its intention is to make it possible for States referred to in article IX (1) to become parties without resorting to ratification. Article IX seems to constitute an accession clause of indefinite duration and irrespective of the question whether the Agreement has entered into force.

⁴⁶ As is the case with regard to the General Treaty of Peace and Amity of 7 February 1923 between the Central American Republics which, while setting no time limit for ratification, provided that "any of the Republics of Central America which should fail to ratify this treaty shall have the right to adhere to it while it is in force."

A State cannot be allowed to foist itself against their will upon the parties to an existing treaty. Such consent is as a rule given in the accession clause of the treaty. It may also be given subsequent to its conclusion, as, for instance, in the North Atlantic Treaty of 4 April 1949 which provides, in article 10, that the parties may, by unanimous agreement, invite any other European State possessing the necessary qualification to accede to the Treaty (United Nations, *Treaty Series*, vol. 34, p. 243). Similarly, the treaty of 3 November 1934 establishing the Balkan Entente laid down, in article 7, that it was open to accession by other States, "such accession to take place only if all the High Contracting Parties consent thereto" (M. Hudson, *International Legislation*, vol. 6, p. 939). The treaty may limit the right of accession on the part of certain categories of States, as, for instance, in the International Civil Aviation Convention of 7 December 1944 which laid down, in article 92, that the convention shall be open for adherence by Members of the United Nations and States associated with them, and States which remain neutral during the present world conflict" (*ibid.*, vol. 9, p. 1950). A treaty may also provide that, in addition to the States referred to in the treaty, a designated body may declare any other State or any category of States eligible for accession. Thus the Convention on Road Traffic of 19 September 1949 provides, in article 27, that, in addition to States therein designated, any other State may accede "which the Economic and Social Council may by resolution declare eligible". Similar provisions are contained in the Convention of 6 April 1950 on the Declaration of Death of Missing Persons (article 13). In case of such delegation of the exercise of the right of assent to accession it must be presumed that the body thus designated determines the matter by a vote in conformity with its accepted procedure.

5. While, as a rule, definite provision for accession is made in the treaty itself, occasionally the treaty leaves to some subsequent action or condition the determination of the question of accession. Thus the General Agreement of 30 October 1947 on Tariffs and Trade lays down, in article 23, that accession may take place, *inter alia*, by "a government not party to this Agreement . . . on terms to be agreed between such government and the contracting parties" (United Nations, *Treaty Series*, vol. 55, p. 194). This does not necessarily mean "all the contracting parties". These in any case may include States which were not parties to the original agreement but which acceded at a subsequent date. When, as in the Monetary Convention of 5 November 1878, a treaty expressly provides that unanimous agreement of the contracting parties is necessary for the accession of a new party — "contracting parties" including presumably parties which subsequently acceded to the Treaty — the position leaves no room for doubt. Occasionally, as in the Geneva Convention of 6 July 1906, it is provided that non-signatory States shall have the right to accede provided that within a prescribed period no contracting party has raised objection to the adhesion. However, the treaty may provide that unanimity is not required. Thus the Convention of 13 October 1919 on the Regulation of Aerial Navigation provided, in article 42, that after 1 January 1923

accession "may be admitted if it is agreed to by at least three fourths of the signatory and adhering States" voting in a manner prescribed by the Convention. In general, in multilateral conventions establishing international organizations the organs of the organization have been given power to permit accession by a decision falling short of unanimity.

6. In so far as the original instrument makes accession dependent upon some subsequent action or condition, there is room, so far as the future development of the law is concerned, for relaxing in cases of doubt the requirement of unanimous consent. In theory there is force in the view that every contracting party must possess the right to agree to — or reject — the participation of a new party in the contractual relation. However, multilateral treaties regulating matters in the sphere of the general interest of the international community cannot properly be viewed as mere contractual bargains. There is in them an inherent tendency to universality which deserves encouragement. Thus, for instance, there is probably little justification, other than that of legal theory,⁴⁸ for making accession to a convention such as that for the Pacific Settlement of International Disputes dependent upon agreement between the contracting parties. This was what The Hague Conventions of 1899 and 1907 on the subject in fact provided. But it does not appear that when, after the first World War, some newly created States — such as Poland, Czechoslovakia and Finland — acceded to these conventions any serious attempt was made to act upon the provision requiring the consent of all the contracting parties. Except where the treaty contains rigid provisions to the contrary, the result ought to be avoided which would permit a single contracting party to prevent the accession of a State to a humanitarian and non-political convention intrinsically aiming at general application.

7. Such restrictive interpretation of the rule of unanimity is especially indicated when the original treaty makes accession dependent upon the fulfilment of certain conditions of status or otherwise and the question arises whether the party seeking to accede fulfils these conditions. This may include the question whether that party is a State.⁴⁹ In many cases the answer to that question can properly be given by any tribunal upon which the parties have conferred jurisdiction in the matter of interpretation of the clauses of the treaty. In the absence of such compulsory jurisdiction of an international tribunal or of voluntary submission of the ensuing dispute to judicial determination there is no occasion for adhering rigidly to the principle of unanimous consent of all the contracting parties. At the time of the original establishment of

⁴⁸ Or, possibly, for the reason — not unconnected with doctrines of legitimacy — that the contracting parties may wish to reserve for themselves freedom of action with regard to any States which may arise subsequently to the conclusion of the treaty.

⁴⁹ Thus in connexion with the establishment of the so-called State of Manchukuo the question arose, in connexion with possible attempts by Manchukuo to accede to multilateral conventions, whether the essential condition of accession, namely, the quality of statehood as required by international law, was present in that case.

the text of the treaty the vote of one State cannot in fact prevent the insertion of the accession clause. There is no reason why such faculty should be enjoyed by it at a subsequent stage. In view of this, the proposed second paragraph of article 7 abstains from laying down the rule, which is to be found in some other drafts, that a State can adhere to the treaty only subject to the unanimous consent of the other contracting parties.

8. "Unless otherwise provided, accession may be effected at any time after the establishment of the text of the treaty." The present article adopts, in this respect, a solution different from some previous drafts, including that of the Harvard Draft Convention (article 9 (b)), which laid down that a State can accede to a treaty only after that treaty has come into force. This latter solution has occasionally been stated to be the only one which is consistent with logic seeing that unless a treaty has entered into force there is nothing to which a State can accede. The compelling character of that logical argument is open to doubt. There seems to be no convincing reason why the object of accession should not be an instrument which will enter into force and which is identical with an already established text as distinguished from an instrument which has already entered into force. Moreover, the view which underlies the present article is believed to be supported, on the whole, by practice. Undoubtedly some, though not many, treaties provide expressly that accession can be effected only after they have entered into force. Thus the General Treaty of 27 August 1928 for the Renunciation of War provided, in article 3, "that it shall, when it has come into effect... remain open as long as may be necessary for adherence by all the Powers of the World". The four Geneva Conventions of 12 August 1949 provide uniformly that "from the date of its coming into force, it shall be open to any Power in whose name the present Convention has not been signed, to accede to this Convention". The Convention on Aviation Salvage at Sea of 29 September 1938 was to the same effect (M. Hudson, *International Legislation*, vol. 8, p. 145). The Convention of 22 November 1928 concerning International Exhibitions provided for accession "at any time after the coming into force of the present convention" (M. Hudson, *International Legislation*, vol. 4, p. 2571). So did the Convention of 31 May 1928 concerning Safety of Life at Sea (article 64: *ibid.*, p. 2768). The same principle was followed in the Convention of 20 July 1936 concerning the Regime of the Straits (*ibid.*, vol. 7, p. 399) and in the Convention of 8 June 1937 concerning Regulation of Whaling (*ibid.*, p. 761). The treaty of 25 March 1936 of Limitation of Naval Armament provided expressly that accessions if made prior to the date of the coming into force of the Treaty shall take effect on that date (*ibid.*, p. 283). At the second Hague Conference of 1907 it seems to have been assumed as evident that an "adhesion may have no effect except, at the earliest, from the time the Convention goes into effect".

However, the preponderant practice of Governments has been in the opposite direction. Treaties constantly provide for accession irrespective of the date of entry into force. The Convention of 11 October 1933 for Facilitating International Circulation of Films of an

Educational Character entered into force on 15 January 1935 (*ibid.*, vol. 6, p. 457). Article 16 of the Convention provided that it may be acceded to on or after 12 April 1934. The Convention of 11 October 1933 for the Suppression of Traffic in Women and Children entered into force on 24 August 1934 (*ibid.*, p. 469). Article 7 of the Convention provided for accession as from 1 April 1934. The Convention of 28 October 1933 concerning the International Status of Refugees entered into force on 13 June 1935. It provided, in article 19, for accession on or after 16 April 1934. The Convention of 8 November 1933 for the Preservation of Fauna and Flora entered into force on 14 January 1934. It provided, in article 17, for accession as from 31 March 1934 (*ibid.*, p. 519). The Convention of 14 December 1928 concerning Economic Statistics entered into force on 14 December 1930. It provided for accession as from 1 October 1929 (*ibid.*, vol. 4, p. 2586). The Convention of 20 April 1929 concerning Counterfeiting Currency entered into force on 22 February 1931. Provision for accession was made as from 1 January 1930 (*ibid.*, p. 2702). The same system was followed in the Convention of 20 February 1935 for the Campaign against Contagious Diseases of Animals (*ibid.*, vol. 7, p. 9) and in the Convention of 20 February 1935 concerning Export and Import of Animal Products (*ibid.*, p. 35). The Convention of 25 July 1934 concerning Protection against Dengue Fever laid down, without referring to any limitation as to the time limit, that it is open to accession of any country which has not signed it (*ibid.*, vol. 6, p. 934). The Universal Postal Convention of 20 March 1934 provided for accession "at any time" (Article 2: *ibid.*, p. 649). So did the European Broadcasting Convention of 15 April 1939 (*ibid.*, vol. 8, p. 2961). The Arrangement of 18 August 1938 concerning the Powers of the European Commission of the Danube (United Kingdom, *Treaty Series*, No. 38 (1939), Cmd. 6069) provided, in addition to ratification, for the right of accession of any State represented on the European Commission. It made provision for a *procès-verbal* of the deposit of instruments of ratification or accession and laid down that "the Arrangement will enter into force three months after the closing of the *procès-verbal*". The Convention of 10 February 1938 concerning the Status of Refugees coming from Germany entered into force on 26 October 1938. But article 21 of the convention provided that "on and after 10 August 1938 any Member of the League of Nations or any other State referred to in the convention may accede to it (M. Hudson, *International Legislation*, vol. 8, p. 29). The Convention of 1 March 1939 on Tax Exemption in Air Traffic (United Kingdom *Treaty Series*, Misc. No. 7 (1939)) laid down, in article 5, that after 1 June 1939 it shall be open to accession on behalf of any country on whose behalf it had not been signed. By 1946 the Convention had not yet entered into force. The Convention of 7 June 1930 concerning Stamp Law and Bills of Exchange provided, in article 5, that it shall not come into force until it has been ratified or acceded to on behalf of the seven States specified therein (*ibid.*, No. 14 (1934)).

The practice as outlined above assumes an even more conspicuous complexion in cases in which accession is the only means for the entry of the treaty into force — as is the case with regard to the Convention on the Privileges and Immunities of the United Nations

approved by the General Assembly on 13 February 1946 (United Nations, *Treaty Series*, vol. 1, p. 15), or the Convention on the Privileges and Immunities of the Specialized Agencies, approved by the General Assembly on 21 November 1947 (*ibid.*, vol. 33, p. 261). The General Act of 1928 for the Pacific Settlement of International Disputes was to the same effect. So was the Revised General Act approved by the General Assembly on 28 April 1949. The International Sanitary Convention for Aerial Navigation, which was opened for signature on 15 September 1944, provided in article 18 that it shall come into force as soon as it has been signed or acceded to on behalf of ten or more Governments (*ibid.*, vol. 16, p. 247). A substantially identical provision on the subject was included in the International Convention of 20 April 1929 for the Suppression of Counterfeiting Currency (League of Nations, *Treaty Series*, vol. 112, p. 371). The Genocide Convention approved by the General Assembly on 9 December 1948 provided, *inter alia*, for accession as from 1 January 1950. But by that date only five States had ratified the convention — which provided in article 13 that twenty instruments of ratification or accession were required for its entry into force. There are many other examples of similar provisions.⁵⁰

9. In view of the preponderance of practice, as shown here, there is no justification for regarding accession as not operative prior to the entrance of the treaty into force. Important considerations connected with the effectiveness of the procedure of conclusion of treaties seem to call for a contrary rule. Many treaties might never enter into force but for accession. Where the entire tendency in the field of conclusion of treaties is in the direction of elasticity and elimination of restrictive rules it seems undesirable to burden the subject of accession with a presumption which practice has shown to be in the nature of an exception rather than the rule.

10. For similar reasons there is no cause for limiting the freedom of a State to accede to a treaty subject to subsequent confirmation. A State may attach importance to signifying its intention to consider accession to a treaty without limiting the power of its constitutional organs to consider the question of the ratification of accession in the same way as they are free to consider treaties signed by their representatives. In view of this the matter may well be allowed to rest where it was left by a resolution of the Assembly of the League of Nations in 1927, which was to the effect that "The procedure of accession to international agreements given subject to ratification is an admissible one which the League should neither discourage nor encourage. Nevertheless if a State gives its accession, it shall know that, if it does not expressly mention that this accession is subject to ratification, it shall be deemed to have undertaken a formal obligation. If it desires to prevent this consequence, it must expressly declare at the time of accession that the accession is given subject to ratification." (League of Nations, *Assembly Records*, Plenary Meetings, September 1927.)

Note

1. As in other articles of the present draft, the Special Rapporteur has refrained from giving a definition of the procedure involved (i.e., in this case, a definition of accession). The necessary element of definition is contained in the substantive rules embodied in the article.

2. The Special Rapporteur has felt compelled to depart, for reasons given in the comment above, from the article as tentatively adopted by the Commission and to formulate conclusions which are, in some ways, in the opposite sense. This applies to the question of the requirement of consent of all the contracting parties subsequent to the entry of the treaty into force and, in particular, to the question whether accession can become operative before the treaty has fully entered into force.

3. The question has been discussed by some writers⁵¹ whether the acceding State becomes a party to the treaty on a footing of full equality with the original contracting parties. The answer to that question really admits of no doubt. It is occasionally obscured by the argument that the effect of the accession clause if accepted is to result in a new treaty — albeit identical with the old one between the original contracting parties and the acceding State. Even if that argument were correct, it is difficult to see what difference it makes to the legal situation. However, in either case the circumstance that the acceding State becomes a party, in effect and in law, to the original treaty on a footing of equality has the further result, which will be commented upon in the part on interpretation of treaties, that the acceding State must be deemed to possess full knowledge of the facts and records, if published, relating to the history of the negotiations preceding the conclusion of the treaty and the establishment of its text.

4. The Special Rapporteur does not consider it necessary to comment in detail upon the first paragraph of the article, which lays down that accession to a treaty must be formally declared in a written instrument. That rule is no more than an application of the principle, examined below in article 17, that the conclusion of a treaty must take place through a formal written instrument. It follows that a tacit accession is not possible. In the *Case concerning certain German interests in Polish Upper Silesia* (Judgement No. 7, p. 28) the Permanent Court of International Justice held that "there has been no subsequent tacit adherence or accession on the part of Poland to the Armistice Convention or Protocol of Spa". It seems hardly permissible to deduce from this phraseology that the Court admitted by implication the admissibility of implied accession. In any case, practically all the relevant treaties provide either that accessions must be notified to the depositary of the convention or that they must be effected by the deposit of a formal instrument. The Commission may attach importance to inserting an express provision to that effect in the present article.

⁵⁰ See, for example, the Convention of 19 September 1949 on Road Traffic (article 27) and the International Sanitary Convention for Aerial Navigation opened for signature on 15 December 1944 (United Nations, *Treaty Series*, vol. 16, p. 247).

⁵¹ See, for example, comment to article 9 (e) of the Harvard Draft Convention.

Article 8

Acceptance

[Wherever provision is made for the assumption of the obligations of the treaty by acceptance a State may become a party to the treaty by a procedure which consists either: (a) In signature, ratification, or accession, or; (b) In an instrument formally described as acceptance; or (c) In a combination of the two preceding methods.]

Comment

1. This article is enclosed in brackets for the reason that the necessity of including it within the codification of the law of treaties may be open to doubt. The reason which prompted the deliberate adoption, during and after the end of the second World War, of "acceptance" as a means of assuming treaty obligations was to provide an instrument of a less formal character than some of the traditional methods, in particular ratification, and thus to make available appropriate machinery in cases in which the municipal law of a particular State renders the assumption of treaty obligations by the traditional method of ratification more complicated than is the case if other methods are followed. Thus the Constitution of the United Nations Educational, Scientific and Cultural Organization of 16 November 1945 provided in article 15: "1. This Constitution shall be subject to acceptance. . . 2. Signature may take place either before or after the deposit of the instrument of acceptance" (United Nations, *Treaty Series*, vol. 4, p. 275). The relevant articles of the Constitution of the International Monetary Fund (*ibid.*, vol. 2, p. 39) and of the International Bank for Reconstruction and Development included similar provisions: "Each government on whose behalf this Agreement is signed shall deposit with the Government of the United States of America an instrument setting forth that it has accepted this Agreement in accordance with its law and has taken all steps necessary to enable it to carry out all of its obligations under this Agreement." This formula was followed, on a somewhat altered form, in a number of other agreements. The General Agreement on Tariffs and Trade of 30 October 1947 provided that it "shall be open to acceptance by any government signatory to the Final Act". This was also the case in the Havana Charter of 24 March 1948 for an International Trade Organization. In a number of agreements⁵³ the parties have adopted a uniform formula providing for the assumption of the treaty obligations by: (a) signature without reservation

as to acceptance; or (b) signature subject to acceptance followed by acceptance; or (c) acceptance. It must be noted that the contracting of international obligations by that method was not altogether novel. Thus in 1934 when accepting membership in the International Labour Organisation, the United States did so not by way of ratifying any international instrument but by way of accepting an invitation extended to it — that step, in turn, following a Joint Resolution of Congress authorizing the President "to accept membership for the Government of the United States of America in the International Labour Organisation".⁵³

2. In 1948 the Sixth Committee of the General Assembly, after detailed discussion, adopted a resolution in connexion with the draft Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, expressing by a substantial majority (of 30 votes to none, with 4 abstentions) preference for the traditional method (of signature followed by ratification) as compared with the uniform formula of acceptance as described above.⁵⁴ Although since then it appears that only two agreements have provided for acceptance — in addition to signature followed by ratification⁵⁵ — there is no decisive reason for assuming that that expression of opinion was intended to cover all international instruments.

3. The term "acceptance" does not exclude the assumption of treaty obligations by ratification or accession. Nor does it exclude signature; it is often combined with it. Its effect is to leave to governments the option of assuming the treaty obligation either by the traditional methods of signature, ratification or accession or by using the — apparently less formal — machinery of "acceptance". Various objections may be raised against the conferment of a formal status of a distinct method of concluding a treaty upon "acceptance" thus conceived. Thus it may be said that no formula used in a treaty can absolve a government from complying with the constitutional limitations upon the final conclusion of a particular treaty. A government ratifying a treaty may or may not be under an obligation, according to its municipal law, to obtain the necessary approval or authorization. The formula of "acceptance" used in a treaty will not release it from that obligation. The possibility of accession, which,

⁵³ The United States had previously assumed membership in some international organizations in accordance with that procedure, as in the case of the International Hydrographic Bureau in 1921 and the International Statistical Institute in 1924. The Proclamation of acceptance of membership of the International Labour Organisation was made by the President in a form not dissimilar to the proclamation of treaties in general. In the Proclamation the President did "proclaim and make public the Constitution of the International Labour Organisation, a certified copy of which is hereto annexed, to the end that the same and every article and clause thereof may be observed with good faith by the United States of America and the citizens thereof".

⁵⁴ *Official Record of the General Assembly, Third Session, Part I, Sixth Committee*, 88th and following meetings.

⁵⁵ Agreement of 22 November 1950 on the Importation of Educational, Scientific and Cultural Materials and the Universal Copyright Convention of 6 September 1952 drawn up under the auspices of the United Nations Educational, Scientific and Cultural Organization.

⁵² e.g., Protocol approved by the General Assembly on 3 December 1948 amending the Agreement for the Suppression of Circulation of Obscene Publications (United Nations, *Treaty Series*, vol. 30, p. 3); Convention of 6 March 1948 on the Inter-Governmental Maritime Consultative Organization; Convention of 10 May 1948 of the International Institute of the Hylean Amazon. For a survey of the use of the term "acceptance" in the practice of the United Nations in the matter of conclusion of treaties see Y. L. Liang in *American Journal of International Law*, vol. 44 (1950), pp. 342-349.

as has been shown, is open to States which have signed the treaty but have not ratified it and which does not depend upon the treaty having already come into force, provides an informal method of assuming a treaty obligation. For in most, if not all, States — to use the language of Sir Arnold McNair — “an accession does not require ratification and is regarded as constitutionally equivalent to ratification”.⁵⁶ On the other hand—and that circumstance is probably decisive — if a government finds that the use of a certain procedure may facilitate, without setting aside a legitimate and requisite expression of national will, the assumption of international obligations, there would seem to be reason for not discouraging such simplified methods by making obligatory, in effect, the use of more complicated machinery. From this point of view it would be regrettable if a treaty were to provide for ratification as the only means of finalizing the acceptance of its obligations.

4. In view of this it would appear that “acceptance” fulfils a function different from that of merely generalizing the various methods — more or less formal — of assuming a treaty obligation or confirming or approving an obligation provisionally undertaken by signature (or, in some cases, by accession). A number of recent agreements refer to “approval” instead of “acceptance”⁵⁷ while some authorize both procedures with the underlying — though by no means obvious — assumption that there is a difference between the two. Thus according to the Constitution of the World Health Organization of 22 July 1946 (United Nations, *Treaty Series*, vol. 14, p. 185) States may become parties to the Constitution by (1) signature without reservation as to approval; (2) signature subject to approval followed by acceptance; or (3) acceptance.

5. While the Commission believes that the law of treaties ought to encourage elasticity and flexibility in the matter of the machinery used for assuming treaty obligations, it is bound to acknowledge the force of the view that it may not be necessary to give the rigid complexion of an article to terminology which has no specific content. The law of treaties need not ignore the tendencies implied in the terminology of “acceptance”. But it may be sufficient to consider it as adequately accommodated within the wide orbit of article 4, which refers to “any other means” accepted by the parties. These means include a procedure which, while leaving room for confirmation of the signature by a subsequent act of approval, does not make such approval dependent upon formal ratification. This, of course, was the practice also prior to the explicit emergence of “acceptance” as a means of assuming treaty obligations. On the other hand, nothing in the nature — or in the practice — of “acceptance” prevents a party from finalizing its undertaking by way of formal ratification.

⁵⁶ *The Law of Treaties, op. cit.*, p. 99. He adds: “It is not the usual practice to pass an instrument of accession under the Great Seal. A notification signed by the Secretary of State for Foreign Affairs or some other duly authorized person is considered adequate.”

⁵⁷ See, for example, the Protocol concerning the Office International d'Hygiène Publique (United Nations, *Treaty Series*, vol. 9, p. 66) or the Protocol amending the Agreements, Conventions and Protocols on Narcotic Drugs (*ibid.*, vol. 12, p. 179).

Note

The Special Rapporteur has included the present article largely out of deference to article 10 as tentatively adopted by the Commission and as a basis for discussion. He is not certain that a separate article on the subject ought to be retained. As already mentioned in the comment, a decision to refrain from adopting a separate article on “acceptance” would not have the result of disregarding a practice which has found some following and which is not altogether devoid of usefulness. The case would be met by the existing reference in article 4 to “other means of accepting or approving” a treaty. These means must necessarily be formal means. In fact, most of the various agreements providing for acceptance require the formal deposit of an instrument of acceptance. For these reasons it may be held to be conducive to clarity and the avoidance of confusion if “acceptance”, “approval”, and similar procedures are included within the whole formula of article 4 without being created into a category of their own. Only so, it might be said, can we hope to avoid the ambiguities and contradictions which threaten to surround the subject. Thus the article 10 tentatively adopted by the Commission defines acceptance of a treaty as “an act by which a State, in lieu of signature or ratification or accession or all of these procedures, declares itself bound by the treaty”. Yet it is clear both from practice and from the comment which followed that article that “acceptance” does not necessarily take place in lieu of signature or ratification or accession. It is often effected by or combined with any of these three procedures. On the other hand, although there may be but little in the procedure of “acceptance” — assuming that it constitutes a procedure of its own — which cannot, internationally, be achieved by the traditional methods of signature, ratification, or accession or by a combination of them, this need not necessarily be the decisive consideration. If, in some cases, governments and the cause of international co-operation can be assisted by the use of terminology which leaves room for the desired freedom of procedure, such terminology may deserve encouragement even at the risk of some inelegancy or redundancy.

Article 9

Reservations

I

A signature, ratification, accession, or any other method of accepting a multilateral treaty is void if accompanied by a reservation or reservations not agreed to by all other parties to the treaty.

Comment

1. In the view of the Commission, article 9 as here drafted must be regarded as probably still representing the existing law. Prior to the advisory opinion of the International Court of Justice in the matter of the Genocide Convention (*I.C.J. Reports 1951*, p. 15) and apart from the so-called “American system” initiated in 1938 as the result of a resolution adopted at the Eighth International Conference of American States

held at Lima, the principle as stated in article 9 was generally, if not universally, recognized as expressive of a rule of international law. This was so notwithstanding the doubts occasionally and increasingly raised in respect of its operation. The practice of the depositary authority of The Hague Conventions and of the League of Nations was based on that principle. So was the report, approved in 1927 by the Council of the League of Nations, prepared by the Committee for the Progressive Codification of International Law.⁵⁸ This was also the practice of the Secretary-General of the United Nations, which until the controversy occasioned by the reservations to the Genocide Convention, was not seriously challenged. The report which the International Law Commission submitted in 1951 to the General Assembly was based on that principle.⁵⁹ In the view of the Commission, in the absence of any deliberate change in this respect effected by general agreement or constant practice acknowledged as law, this must be regarded as still constituting the existing rule of international law.

However, although nothing decisive has occurred to dislodge the principle of unanimous consent as a rule of existing international law, the Commission, for reasons stated in the comment which follows, is not now of the view that it constitutes a satisfactory rule and that it can—or ought to—be maintained. Accordingly, the statement of law in the present draft of article 9 is accompanied by a number of alternative drafts which accept a different principle as the basis of the future law on the subject. These drafts are commented upon in considerable detail. The subject of reservations to multilateral treaties is one of unusual—in fact baffling—complexity and it would serve no useful purpose to simplify artificially an inherently complex problem. This applies in particular to situations in which the task of the Commission is one of developing international law after the existing principle has been found to be unsatisfactory and not acceptable to a large number of States.

In view of the fact that the Commission does not consider the principle of unanimous consent as expressed in article 9 as drafted to offer a satisfactory basis for the future operation of this aspect of the law of treaties, no detailed comment on article 9 is believed to be necessary—although a number of considerations relevant to the subject will be found in the comment to the alternative drafts, in particular in the comment to the alternative draft A.

Alternative draft A

If, in any case where a multilateral treaty does not expressly prohibit or restrict the faculty of making reservations, a State signs, ratifies, accedes to or otherwise accepts the treaty subject to a reservation or reservations limiting or otherwise varying the obligations of any article or articles of the treaty, the following procedure shall apply in the absence of any other provisions in the treaty :

⁵⁸ League of Nations publication, *V. Legal*, 1927. V.16 (document C.357.M.130.1927.V).

⁵⁹ *Yearbook of the International Law Commission*, 1951, vol. II (doc. A/1858, Ch. II), pp. 125-131.

1. Whenever a treaty provides that it shall enter into force on a specified number of States finally becoming parties thereto, the fact that a State has appended a reservation or reservations to any article of the treaty is not taken into account for the purpose of ascertaining the existence of the requisite number of parties to the treaty.

2. If within three years of the treaty having entered into force less than two-thirds of the States accepting the treaty, whether they have accepted it with or without reservations, agree to the reservation or reservations appended by a State, that State, if it maintains the reservation, ceases to be a party thereto. If, at the end of that period and as the result of the operation of the rule as stated, the number of parties is reduced below the requisite number stipulated for the entrance of the treaty into force, the treaty is dissolved.

3. If, at the end of or subsequent to the period referred to above, a reservation is agreed to expressly or tacitly by two-thirds or more of the total number of the States accepting the obligations of the treaty, then the State making the reservation is deemed to be a party to the treaty in respect of all parties thereto subject to the right of the other parties not to consider themselves bound by the particular clause of the treaty in relation to the State making the reservation.

4. A State is deemed to have agreed to a reservation made by another State if, within three months of the receipt of notification of the reservation in question, it has not forwarded to the depositary authority a statement containing a formal rejection of the reservation.

Comment

I. General observations

1. Before proceeding to an explanation of the legal effect of draft A of article 9 it is convenient to recall once more that with regard to the subject-matter of the article the Commission was not, more conspicuously than with regard to other articles of the draft of the Law of Treaties, in a position to limit itself to a codification of the existing law. This is so to some extent for the reason that there is at present no general agreement as to the law on the subject. In the view of some States⁶⁰ this was the position even prior to the advisory opinion of the International Court of Justice in the matter of the reservations to the Genocide convention. While what is subsequently referred to as the "unanimity view" was followed by the generality of States and while that view found expression in the, on the whole,⁶¹ consistent practice of the Secretary-

⁶⁰ Including the United States—as shown in the written statement of the Government of the United States of America before the International Court of Justice in connexion with the advisory opinion on *Reservations to the Convention, on the prevention and punishment of the crime of Genocide* see (I.C.J., *Pleadings, Oral Arguments, Documents*, pp. 23-47).

⁶¹ In its advisory opinion on *Reservations to the Convention on the prevention and punishment of the crime of Genocide* the International Court of Justice quoted in full (I.C.J. *Reports* 1951, p. 25) the following passage from

General of the League of Nations and the Secretary-General of the United Nations, the American States have since 1938 followed a different practice. On occasions the principle of the requirement of unanimous consent was operative only by virtue of implied consent — as was probably the case with regard to some of the reservations appended to certain of The Hague Conventions relating to the law of war.⁶² The advisory opinion of the International Court of Justice in the matter of the Genocide Convention has further impaired the authority of the principle of unanimous consent as expressing a generally recognized principle of international law. This is so although that opinion was, by its terms of reference and by its own language, limited to the particular issue before it. For the reasoning both of the Court and of the important dissenting opinion of four of the judges is, in many ways, of a general character applicable to reservations to any international treaty. Finally, it is impossible to disregard the fact that, subsequently to that advisory opinion, a substantial majority of States represented at the Sixth Session of the General Assembly declined to accept, as expressive of existing international law, the principle of unanimous consent which underlay the report of the International Law Commission presented to it in 1951. Moreover, it appears that some of the Governments, including that of the United Kingdom, who in the past have conspicuously advocated that principle, may be ready to admit that it is too rigid and that it may have to be replaced by a system based on some kind of majority⁶³ vote.

2. In view of the fact that the principle of unanimous consent has ceased to be regarded as supplying a satisfactory solution of the problems which have arisen and are likely to arise in this connexion, the Commission no longer feels justified in limiting itself to the formulation, by way of codification, of a legal rule on the subject based on that principle. Nor does it consider itself justified in making the principle of unanimous consent the basis of the future law on the subject. At the same time the Commission has felt

unable to accept, either as expressive of existing law or as a basis of future legal regulation, the so-called "sovereignty principle" according to which a State possesses an unlimited right to append reservations coupled with the right to become a party to the convention regardless of the objections of the other parties. Finally, although the alternative drafts of article 9 follow in some limited measure the flexibility of the so-called American system, they differ from it in substantial respects. In fact, these drafts attempt a solution independent of any of the three main principles (the "unanimity" rule, the "sovereignty" principle and the "American" system) which have been advocated or which have found more or less wide acceptance in the past.

3. It may now be convenient to outline here the principal considerations underlying the alternative drafts, in particular draft A.

A. It is desirable to recognize the right of States to append reservations to a treaty and become at the same time parties to it provided these reservations are not of such a nature to meet with disapproval on the part of a substantial number of the States which finally accept the obligations of the treaty;

B. It is not feasible or consistent with principle to recognize an unlimited right of any State to become a party to a treaty while appending reservations however sweeping, arbitrary, or destructive of the reasonably conceived purpose of the treaty and of the legitimate interests and expectations of the other parties;

C. The requirement of unanimous consent of all parties to the treaty as a condition of participation in the treaty of a State appending reservations is contrary to the necessities and flexibility of international intercourse.

These three principal considerations may now be reviewed.

4. *Justification of reservations.* While the right of a State to become a party to a treaty subject to reservations is not at issue, the cognate question as to the extent of its right to do so regardless of the consent of the other parties is controversial. It is a question closely, though indirectly, connected with that of the intrinsic justification of reservations, and a brief consideration of that question appears therefore to be indicated. Although the argument concerning the justification of reservations in general is inconclusive, there has been a growing tendency to acknowledge that there is nothing inherently improper in the practice of appending reservations. If the view is adopted that, in principle, it is proper and desirable to admit the right to attach reservations, then, apart from the disputed logical emanations of the doctrine of the unity of the contractual nexus between the parties to the same conventions — a subject referred to in the course of this comment — the requirement of unanimous consent to a reservation falls to the ground. Undoubtedly, the objections, in principle, to attaching reservations cannot be lightly dismissed. There is room for the view that a State must choose between, on the one hand, any particular provision of its law and constitution or any particular interest of its own

the Report of the Secretary-General of the United Nations of 21 September 1950:

"While it is universally recognized that the consent of the other Governments concerned must be sought before they can be bound by the terms of the reservation, there has not been unanimity either as to the procedure to be followed by a depositary in obtaining the necessary consent or as to the legal effect of a State's objecting to a reservation."

⁶² See, however, the statement of the Government of the Netherlands submitted on 19 January 1951 to the International Court of Justice concerning the steps taken by that Government, as depositary of The Hague Convention of 29 July 1899 concerning the adaptation to maritime war of the principles of the Geneva Convention of 1864, to obtain the unanimous consent of the signatories of the Convention to reservations appended by some States with regard to article X of that Convention (*I.C.J. Reports 1951*, p. 288).

⁶³ See the observations of Sir Gerald Fitzmaurice, representative of the United Kingdom, at the 267th Meeting of the Sixth Committee of the General Assembly on 10 December 1951 (*Official Records of the General Assembly, Sixth Session, Sixth Committee*, pp. 86, 87). Also Sir Gerald Fitzmaurice's article in *International and Comparative Law Quarterly*, vol. 2, part I (1953), pp. 1-27.

and, on the other hand, participation in international treaties, and that it cannot reasonably claim both. If the interest to be safeguarded by the reservation is real and far-reaching then, it may be said, the reservation renders participation in the treaty somewhat nominal. If the interest involved is of limited significance then, it may be contended, it ought to yield to the paramount necessity of uniformity of international regulation. States cannot claim to be parties to treaties without sacrificing *some* interest; a treaty has little meaning and approaches a purely nominal declaration of principle unless the parties undertake, within a given sphere, to abandon their freedom of action, to sacrifice a particular interest and to change their legislation. If the existing law of the State is regarded as sacrosanct and if the State can agree to a treaty only if the latter is not incompatible with its law, then the conclusion of a treaty is no more than a gesture. Naturally, the various executive departments of a State view with apprehension the inconvenience and complications resulting from the necessity of changing the law of the State and are therefore prone to encourage reservations which obviate the necessity of any such changes. This phenomenon of departmental conservatism need not be decisive. Moreover, experience has shown that very often the subject matter of the reservations, although giving expression to the views strongly held by the reserving State on a given matter, is not of great importance in comparison with the significance of the treaty as a whole and that the reservation could have been omitted without sacrificing any true interest of the State in question.

5. On the other hand, there is force in the contention that, in practice, a particular reservation, however much it detracts from the symmetry and uniformity of the treaty and although it touches upon an important point of principle, does not unduly impair the value of the treaty. That circumstance, which explains the relative rarity of objections to reservations appended in good faith, must temper the notion that the practice of attaching reservations is in itself blameworthy — especially having regard to the fact that, in a sense, it provides a safeguard for the rights of the minority of States who have agreed to become parties to a treaty drafted by the majority in disregard of the views and attitude, however well founded, of the dissenting minority. In cases of accession that minority may have had no opportunity at all to voice its objections. In such cases it may be difficult, at times, to dissent from the view that the rights of the minority must be admitted by the effective recognition of their faculty to make reservations. However, if the propriety of making reservations is admitted, then recognition of that right has a meaning only if it is coupled with the admission of the right to append reservations within the limits of propriety and good faith, even if these are not unanimously agreed to by all the other parties. On the other hand, it is important to put in proper perspective the argument based on the rights of minorities. For, in contrast with the case of legislation within the State, no minority is compelled to become a party to a multilateral treaty. Nor is a minority entitled to impose its own view, which in practice may amount to altering drastically the character of the treaty, upon the majority.

6. *The requirement of unanimous consent.* For the reasons stated — as well as for others — the present alternative draft of article 9 and the other alternative drafts do not follow what is the most widely, though not uniformly, adopted opinion and practice in the matter, namely, the so-called “unanimity” view which asserts the right of a single State — whether an actual or a potential party to the treaty — to prevent, in disregard of the attitude adopted by the other parties, the participation in the treaty of one or more reserving States. According to the present draft of article 9 there must be one-third of the total number of States, who themselves have expressed in a binding form the wish to become parties, to prevent the participation of a State making a reservation. If two-thirds or more of the parties feel that the State making the reservation acts in good faith and in a manner which is not so unreasonable as to interfere decisively with the purpose of the treaty, then, according to draft A of article 9 as proposed, that State ought not to be precluded from becoming a party to the treaty. It is true that many States who are prepared to take a lenient or liberal view of the reservations made by others may do so because they themselves have appended reservations. However, so long as the number of such States is substantial — two-thirds of the total number represents a substantial proportion — that consideration ought not to be decisive. A treaty cannot aspire to an excellence transcending the attitude of the parties to it. The strict requirement of unanimous consent is, on the face of it, unreasonable and out of keeping with the necessities and the flexibility of international intercourse. The requirement of unanimous consent to reservations is open to objections of an order similar to that to which the rule of absolute unanimity is open in other spheres. In the matter of reservations there may be a semblance of justification for that rule inasmuch as reliance is placed on precedent, namely, on what has admittedly been the general practice or on a somewhat technical reasoning — which, as will be suggested, is of doubtful validity. Otherwise there seems to be little justification for a rule which makes it possible for one State to prevent, however arbitrarily, the participation of another State in a convention on account of a single reservation, even if reasonable and proper. The requirement of unanimity of consent is, upon analysis, motivated alternately by the suspicion that all reservations are captious and dishonest and therefore to be discouraged or by the assumption that assent to reservations will not be arbitrarily withheld. There may often be no justification for either of these assumptions. In particular, the confidence that assent to reservations will not be capriciously or vexatiously withheld ignores the fact that the harmony and courtesies of international intercourse are more conspicuously in evidence in some periods than in other periods.

7. The requirement of unanimous consent can be upheld only by reference to considerations, which have been frequently and authoritatively stated,⁶⁴ of

⁶⁴ See McNair, *The Law of Treaties* (Oxford, 1938), p. 105; H. W. Malkin in *British Year Book of International Law*, vol. 7 (1926), p. 142; Harvard Draft Convention, *American Journal of International Law*, vol. 29 (1935), Supplement, p. 870.

legal logic drawn essentially from the notion of the consensual nexus in bilateral contracts and treaties, based on strict reciprocity of obligations and on the equivalence of consideration — the *quid pro quo* — which every party is entitled to expect in return for its own unconditional acceptance of the obligations of the treaty. A party which, the argument runs, ratifies a treaty subject to reservations not previously agreed by the other parties in fact rejects the original instrument and makes a new offer; that offer, if it is to produce legal results, must be accepted by all the other parties. This is so, it is argued, quite apart from the obvious reasons of convenience and propriety which discourage the idea that a State may by unilateral action write new terms into an instrument which has evolved painfully, as the result of prolonged negotiations, amidst a process of mutual compromise and accommodation. These arguments cannot be regarded as decisive. Thus there is only limited force in the view that in accepting a multilateral treaty a State justifiably regards it as an essential part of the consideration received that all other parties accept the treaty without qualifications. This may apply to some treaties, for instance, to those of an economic character and treaties such as the conventions concluded under the auspices of the International Labour Organisation where the departure by one party from the standards laid down in the treaty makes it difficult for others to adhere to it. But this is not invariably the case in humanitarian and similar conventions of a general character — in what has been described as conventions of a normative type. The conspicuous aspect of many, perhaps most, of these treaties is not the establishment of a nicely balanced system of rights and obligations — of give and take — of the parties *inter se*, but rather the assumption of an absolute obligation towards a transcending and imperative international interest subscribed to out of a sense of moral obligation and international solidarity. It is probable that in obligations of that nature the number of the parties and the conditions under which they accept the treaty are not always regarded as of decisive importance by the other parties accepting the treaty. Undoubtedly, it is inconvenient and it provides a legitimate cause of grievance if the symmetry of the edifice of the treaty, so laboriously constructed, is disturbed by qualifications and limitations added, without any effort at co-ordination, by subsequent reservations. However, in relation to the general purpose and character of the treaty, this may be no more than an inconvenience. The rigid dichotomy of choice — the choice whether the reserving State or the other States ought to be excluded from the treaty — does not in fact arise.⁶⁵

8. Moreover, while a multilateral treaty is basically a treaty and as such a contract to which it is proper to apply the fundamental notions of the general principles of the law of contract, that analogy must stop short of a reasoning which in effect transforms the requirement of consensual agreement into a negation thereof. That point is reached when the will of one

party frustrates the will of all the others by rendering ineffective their consent to reservations appended by a State. It is difficult to apply to multilateral treaties the rigid requirements of the unity of the contractual relation. There is, for instance — to mention what is in effect one of the most important multilateral instruments — only a general unity and symmetry of contract in what is essentially a collective treaty of international judicial settlement resulting from the declarations of acceptance of the optional clause of article 36 of the Statute of the International Court of Justice. We find there a multiplicity of relations brought about by the interplay of reciprocity in connexion with reservations nowhere expressly authorized in the original instrument and never expressly accepted by the States parties to the optional clause. In the field of the law of war the undesirable effects of the so-called general participation clause, which is based on the notion of an exacting symmetry of treaty obligations equally applicable to all, have caused it to be abandoned in more recent conventions such as the Gas Protocol of 1925 and, in particular, the Geneva Conventions of 1949. International practice shows, in a different sphere, numerous examples of States and governments not recognized by other parties to the same treaty and yet participating fully, in relation to other parties, in the treaty in question. There are obvious limits to the mechanical application to multilateral treaties of the logical reasoning appropriate to bilateral treaties. In the chain of relationships brought about by reservations to a multilateral treaty the element of consent — which is inescapable in any treaty, whether bilateral or multilateral — can be secured only by way of giving an opportunity to withdraw from the treaty to the State or the small minority of States who find it necessary to oppose the general desire of other contracting parties to acquiesce in reservations made by other parties. The element of true consent can thus be secured by means other than that of permitting one State or a small number of States to disregard — and frustrate — the accommodating attitude of others. But it would have to be only one State or a small number of States. Otherwise the somewhat paradoxical result is reached that those very countries which are prepared to accept the treaty in its entirety, without making any reservations, are compelled to withdraw from the treaty and to leave the field to those who are willing to accept only some of its obligations.

9. *The unlimited right to make reservations.* It is also by reference to the same fundamental requirement of general — as distinguished from mere individual — consent that this alternative draft of article 9 denies the so-called sovereignty doctrine in the matter of reservations, namely, the unlimited right of a State to append reservations, however arbitrary and however destructive of the essential purpose of the treaty, and to claim at the same time the right to participate in the treaty in disregard of the objection of a substantial number of the parties. If the reservation is of such a nature as to call seriously in question the good faith and sincerity of the State making the reservation then, it may be assumed, there will be found the requisite one-third of States who have finally accepted the treaty whether with reservations or not, who will object to

⁶⁵ The reasons underlying, from this point of view, the doctrine of unanimous consent are lucidly stated in the general comment of the Harvard Draft Convention to articles 14, 15 and 16 (*loc. cit.*, pp. 870, 871).

the participation of that State in the treaty. In face of opposition on such grounds and in such numbers, a claim, by reference to the rights of sovereignty, to participate in the treaty amounts to a denial of the sovereignty of the other parties to the treaty. That right of effective objection, as laid down in the present draft, asserted by a substantial number of States acting, as their number shows, in the general interest, provides the necessary safeguard against an abuse of the treaty-making power which might otherwise enable a State to claim advantages, including the intangible but important advantage of participating in the treaty, without assuming substantive obligations thereunder. As experience has shown, governments will not lightly avail themselves of that safeguard, which consists in the exclusion of the reserving State. But a safeguard there must be, in the interest of the authority of treaties and of maintaining an adequate standard of international intercourse and, in a distinct sense, of international morality. Certainly the codification of the law of treaties should give no countenance to practices by which governments can use the faculty of making treaties for the purpose not of undertaking international obligations but of merely creating the impression that they have undertaken them.

10. There is force in the view that one of the principal objects of the codification of the law of treaties may be to provide a safeguard of that nature. The object is not so much to secure the integrity of treaties in the sense that they must be homogeneous and of uniform application to all, but that they should exhibit a minimum degree of reality of the obligations undertaken. In the absence of such minimum of effectiveness the measure of universality, achieved at the expense of the reality of the undertaking, represents no more than a nominal advantage. It is in the light of such considerations that a compromise must be sought between the claims of universality and the integrity of the convention. These considerations provide the answer to the contention that half a loaf, secured by the universality of treaties, is preferable to no loaf at all or to its integrity achieved at the expense of drastically reducing the number of the parties to the treaty. Half a loaf⁶⁶ may be better than no bread. But there ought to be at least some approximation to half a loaf. Thus, for instance, if a Government in accepting a treaty were to add a reservation to the effect that it is under no obligation to apply the provisions of the treaty in cases in which they are in conflict with its law or if it were to reserve the right to determine in each disputed case the extent of its obligation, it might be held that the right to conclude a treaty is being diverted from its true purpose and that the reservation is of such a nature as to exclude the State in question from participation in the treaty. This is a conclusion which ought not to be made lightly. The danger of abuse or arbitrariness in reaching a conclusion of so serious a nature is effectively met by the provision of the present draft requiring the

⁶⁶ The deceptiveness of some manifestations of the "half a loaf" doctrine is lucidly illustrated by Sir Gerald Fitzmaurice in a valuable article on "Reservations to Multilateral Conventions", *International and Comparative Law Quarterly*, vol. 2 (1952), part I, pp. 1-26.

concurrence, for that purpose, of not less than one-third of the States accepting the obligations of the treaty concerned. On the other hand, there is danger of conduct inimical alike to the authority of treaties and of international law in general in the concession, for the sake of the universality of the treaty, of an absolute right to become a party to a multilateral treaty regardless of the nature of the reservations appended, or in the grant of the right to become a party so long as there is one State which does not object to a reservation. If, to use the language of the written statement of the Government of the United States of America before the International Court of Justice in connexion with the Genocide Convention, a reservation is fraudulent, unreasonable, and making a mockery of ratification, then it is in the nature of an anti-climax to say that notwithstanding a reservation of that kind the reserving State may become a party if it finds one State which does not object to it. The more rational solution is that if a substantial number of parties finds that the reservation is, for the reasons stated, of a highly objectionable character, then the reserving State cannot become a party to the treaty. That number is given in the present draft as at least one-third of the parties.⁶⁷

11. In so far as the "American" or any other system postulates that only the refusal of all the parties to the treaty to accept a reservation should prevent the reserving State from becoming a party to the treaty, this draft adopts a solution opposed to those systems. It represents an attempt to strike a balance between the seemingly opposing considerations of universality and integrity — in either of the two meanings of the latter term — of the treaty. Universality may be an achievement which is deceptive and inimical to the dignity of international intercourse if it is obtained through acquiescence in a transparent device of participation in treaties not accompanied by acceptance of tangible and binding obligations. At the same time the so-called integrity of treaties, if attempted to be achieved through the operation of a rigid rule of unanimity in disregard of the legitimate views and interests of individual States, may become an obstructive factor in the conventional regulation of matters of common international interest. Universality, if insisted upon at all costs, can be achieved only at the expense of the reality and genuineness of treaties. "Integrity", if an attempt is made to bring it about through the requirement of unanimous consent to reservations and the resulting possible disregard of a legitimate claim to diversity, may unnecessarily restrict the field of international co-operation.

⁶⁷ Inasmuch as the present draft is intended to strike a balance between the rival principles of unanimity of consent and of the right of the reserving State to become a party to the treaty provided that at least one State accepts the reserving State as a party, the details of the compromise implied in the proposed solution are subject to modifications, in the light of any discussion before the Commission, without affecting the essential character of that solution. Thus, for instance, the draft requires acceptance, express or implied, of the reservation by at least two-thirds of the parties. There is room for discussion whether such acceptance should not be required by a larger or smaller proportion of the total number of parties.

12. In the light of these general considerations, which to a large extent apply to all the alternative drafts here submitted, it is now convenient to distinguish between two problems which are of a different nature and which ought to be kept apart in the examination of draft A. The first problem is that connected with the entry of the treaty into force. Treaties provide, as a rule, that they shall enter into force on the occurrence of a certain event amounting to the assumption of a treaty obligation — that event being either signature, or ratification, or exchange or deposit of ratifications, or accession including ratification thereof, or deposit of an instrument of acceptance or approval — on the part of a specified number of States. When such States assume a treaty obligation subject to reservations the question arises whether — in case of objection to the reservation or until all the contracting parties have expressed approval or failed to express disapproval — the State or States making the reservation may be counted among the required number of States and whether, accordingly, the treaty has entered into force. The second, and main, question is the right of a State making a reservation to become a party to the treaty regardless of the objections of the other parties. These two questions can and, it is believed, ought to be treated separately.

II. Entry into force

13. The attempt at a solution of the first question, that of the entry into force of treaties whose signature, ratification, accession or other means of acceptance is accompanied by reservations not expressly agreed to by the other parties, constitutes the main feature of draft A of article 9. The principal aspect of the proposed solution is that in all cases in which a treaty provides that it shall enter into force when a named number of States have definitely accepted obligations thereunder, the fact that a State has attached a reservation or reservations to any of its articles ought to be disregarded for the purpose of ascertaining whether the requisite number of States have ratified the treaty or otherwise finally accepted its obligations. This solution, if accepted as the basis of the future law, might obviate the difficulties connected with the controversial question whether consent to reservations is required on the part of those States only which have ratified or otherwise finally assumed obligations under the treaty, or whether it extends also to States which have signed the treaty but which have not proceeded to ratify it and which may never ratify it, or, even, whether it extends to States, often indeterminate in number, which have not signed the treaty but have the right to accede to it. Reasons have occasionally been advanced why a State which has signed a treaty but has not yet ratified it shall be entitled to prevent, by its objection, the participation of a State ratifying (or otherwise finally accepting the treaty obligation) subject to reservations. These reasons, although not without some force, may not be decisive.⁶⁸ The International Court of Justice declined,

in its advisory opinion on the *Genocide Convention*, to admit such a right⁶⁹ — though apparently such right was asserted, without any indication of reasons, with regard both to signatories and to States merely entitled to accede, by four judges of the Court. In its report (*Yearbook of the International Law Commission, 1951*, vol. II (doc. A/1858, ch. II)) presented to the General Assembly at its Sixth Session in 1951 the Commission, while acknowledging the right of a mere signatory to prevent the participation of a reserving State, qualified the exercise of that right by the proviso that an objection by such a State should cease to have the effect of excluding the reserving State from becoming a party if within twelve months from the time of the making of its objection the objecting State has not ratified or otherwise accepted the treaty. It is probable, in the light of discussions which have since taken place, that the proposals, even if modified, acknowledging the right of actual or potential mere signatories to prevent the participation of a reserving State, are not acceptable to many States, that in some respects they are not practicable, that in other respects they are open to grave objections, and that they can no longer be upheld.⁷⁰

State may be actively engaged in the study of the convention, or it may be in the process of completing the procedure necessary for ratification, or, for some reason, such as the assembling of its parliament, it may have been compelled to delay its ratification" (Section 29). These considerations probably do not outweigh the disadvantages of a rule according to which a State which is not — and may never become — a party to the treaty is entitled to prevent the participation in it of a State which declares, albeit with reservations, that it assumes binding obligations under it. These doubts apply also to conferring a right of this nature upon States which have not signed the treaty but who have been given the right to adhere to it. In view of this the Commission does not consider it necessary to express an opinion on the question whether there exists in this matter a difference in status, with a consequent difference in the right to object to reservations, between the two categories of States, namely, the signatory States and those entitled to accede. That question was answered in the affirmative, though only for a very limited and almost nominal purpose, by the majority of the Court in its advisory opinion on the genocide convention (*I.C.J. Reports 1951*, p. 28). The four dissenting judges, without giving reasons, answered it in the negative (*ibid.*, p. 48). They recognized the right of objection, with the effect of preventing the reserving State from becoming a party to the treaty, on the part both of the signatories and of States merely entitled to accede.

⁶⁸ Although it attributed to an objection by a mere signatory the effect of a notice of objection, which acquires legal force by ratification of the treaty by the objecting States (*I.C.J. Reports 1951*, p. 30).

⁷⁰ Such scant practice as exists on the matter suggests that only those States which have finally adhered to the treaty are entitled to offer objections to reservations. Article 22 of the Convention of 20 April 1929 concerning Counterfeiting Currency provided that ratifying or acceding States desiring to be allowed to make reservations shall inform the Secretary-General to this effect and that the latter shall thereupon communicate such reservations to the High Contracting Parties on whose behalf ratifications or accessions have been deposited and inquire whether they have any objections thereto. "If within six months of the date of the communication of the Secretary-General no objections have been received, the participation in the Convention of the country making the reservation shall be deemed to have been accepted by the other High Contracting Parties subject to the said reservation." (M. Hudson, *International Legislation*, vol. 4, p. 2703.)

⁶⁸ In its report on the work of its third session (1951) the Commission expressed the view that, notwithstanding the contrary practice of the Secretary-General, "the concern of a mere signatory State should also be taken into account". For, as the Commission then put it, "at the time the reservation is tendered, a signatory

14. It may be convenient to draw attention to some of the possible objections to the proposals contained in the report of the Commission of 1951 which include mere signatories and States entitled to adhere among those entitled to prevent the participation of a reserving State.

(a) The system proposed may have the effect of delaying the entry into force of multilateral conventions at least for a period of twelve months and, in view of the time limits provided elsewhere for raising objections to reservations, for a considerably longer period as the result of an objection by a State which objects to the reservation and subsequently fails to ratify the treaty. Moreover, in many cases the period of twelve months allowed to an objecting State for proceeding with ratification may not be sufficient having regard to the complexity of many multilateral treaties which, in view of the necessary consequential changes in municipal law, may require prolonged inter-departmental consultation. The ratification of multilateral conventions within a period of such short duration is an exception rather than the rule.

(b) The proposals formulated by the Commission in 1951 confer the right to object only upon States which have signed or ratified the convention. They leave out of account the position of States entitled to accede. Assuming that a right of objection properly belongs to signatory States, it is difficult to see why it should be denied to States which are entitled to accede to the convention at any time on the same basis as signatory States. All the reasons adduced by the Commission for conferring that right upon signatories apply also to States entitled to adhere.

(c) The proposals disregard the complicated question as to the position arising from the fact that the States upon whose consent the participation of the reserving State depends may themselves have ratified (or otherwise finally acceded to) the treaty subject to reservations. Shall these States, whose very participation in the treaty may be in doubt on account of their own reservations, have the right effectively to object to the reserving States being counted among those whose participation is necessary for the entrance of the treaty into force?

(d) If the principle of unanimous consent is regarded as paramount, it is difficult — with respect to conventions entering into force as on the deposit of a specified number of ratifications — to regard as satisfactory a solution according to which a State which makes a reservation at the time of ratification can become a party to the convention if there is no objection on the part of any State which has previously ratified (or otherwise finally acceded to) the treaty. Apart from the difficulty which may arise from the fact that these latter States may themselves have ratified the convention subject to a reservation, the resulting situation may be that a very small number of States whose ratification or accession is required for the entrance of the treaty into force will be in a position to determine finally the participation of the reserving State with respect to a convention subsequently ratified or acceded to by thirty or forty States.

(e) As admitted in the Commission's report (paragraph 31), the proposed solution leaves out of account, as raising special problems, the question of treaties

open to accession and not open to signature, such as the Convention on the Privileges and Immunities of the United Nations of 13 February 1946. The report states, in explanation, that such treaties raise special problems and are exceptional. However, in fact such conventions are quite frequent.⁷¹ This is so in particular if it is borne in mind that the position is substantially identical with regard to treaties to which States can become parties by acceptance or approval only, or to which they become parties either by signature or by acceptance (or approval). The number of such treaties has been increasing. Far from being exceptional, they may become typical. In view of this any purported solution which leaves such instruments on one side cannot be regarded as complete or satisfactory.

15. Having regard to the difficulties as outlined above, the solution which may be practicable and which is adopted in paragraph 1 of draft A of article 9 as proposed is that the entry into force of a treaty, at a time specified in it, should be entirely independent of the fact that the State or States upon whose final acceptance the entry into force depends have entered a reservation to any of the provisions of the treaty. Such States shall, for that purpose, be regarded as having fully accepted the obligations of the treaty and the latter shall therefore enter into force forthwith. No decision in the matter would be incumbent upon — or, in fact, admissible on the part of — the depositary authority. The latter will have to communicate the reservations to the other States which have signed the treaty, or have become parties to it, or which are entitled to accede to it. But such communication and any replies thereto, although, as is explained later on, relevant for other purposes, must be regarded as irrelevant for the purpose of the treaty entering into force. It will enter into force forthwith. As subsequently pointed out, there remains a possibility — albeit slight — that the treaty which has thus entered into force may have to be regarded as dissolved on account of the fact that, as the result of objections raised to the participation of reserving States, the number of parties to the treaty has fallen below the required minimum. However, the probability of such a contingency materializing is so small that it cannot be regarded as outweighing the advantages of the solution here proposed. Subject to these safeguards the procedure suggested in draft A of article 9 would appear to be free from complications. The treaty which has entered into force continues to be operative in relation to any reserving State unless, after a period of adequate duration — which it is suggested should be three years — at least one-third of the number of States which have finally accepted the obligations of the convention declare a reservation to be so objectionable as to prevent the reserving State from continuing to be a party to the treaty. It must be irrelevant for that purpose whether any of the one-third (or more) States thus objecting have themselves made a reservation. The same principle would

⁷¹ See, for example, the Convention on the Privileges and Immunities of the Specialized Agencies, approved by the General Assembly on 21 November 1947; the Revised General Act, approved by the General Assembly on 28 April 1949, for the Pacific Settlement of International Disputes; the Convention of 6 April 1950 on the Declaration of Death of Missing Persons.

apply to a State adhering to a treaty after the expiration of the period of three years. Admittedly, in theory the solution here proposed may give opportunities for abuse and for nullifying in effect the purpose of the treaty. This might happen, for instance, if all or most of the States were to attach reservations which render the acceptance of the treaty purely nominal. However, it may be pessimistic to assume the likelihood of a large number of governments resorting to such devices, which, in any case, may be ineffectual. In the first instance, in view of the governing principle of reciprocity such States would be unable to obtain any advantages under the treaty in the sphere covered by their own reservations. Secondly, any practical advantage accruing from recourse having been had to a device of that nature would in any case be limited to the relatively short period of three years, as explained below, at the expiry of which a majority of the parties may, by objecting to a reservation, cause the reserving State to cease to be a party to the treaty. Thirdly, even within that period, if some parties were to feel that the entry of the treaty into force was obtained by purely nominal acceptances which in effect nullify the treaty, they would be in a position to avail themselves of any right of withdrawal provided for in the treaty.

16. There are other objections to the scheme as proposed which are more cogent and which require consideration.

(a) In the first instance, Governments may be unwilling to accept a position in which they have been parties to a convention for three years subject to reservations and are subsequently excluded from participation in the treaty. A possible answer to that objection is that such Governments, if they have accepted the procedure as proposed, will have no legitimate cause for grievance seeing that they knew in advance that this might be the result of their reservations. For the provisional character, in the first three years, of the participation of a State which has made a reservation is of the essence of the solution here proposed.

(b) In view of the serious and invidious situation which is bound to arise if a State which has been a party, if only provisionally, for three years, were to cease to be a party, it is doubtful whether other States would be inclined to exercise the right of objecting to reservations unless these were obviously frivolous or made in bad faith. Reluctant as Governments are to offer a positive objection to a reservation, even if they disapprove of it, that reluctance is bound to be much greater if the convention has in fact entered into force with the reserving State as a party to it and if that reservation has in fact been in existence for some time. The result might be that reservations would be upheld which are destructive of or inconsistent with the purpose of the treaty. There cannot in the nature of things be a conclusive answer to that argument except that action resulting in termination of the membership of a reserving State would not be the result of any individual action of one party, but the cumulative result of the objection of at least one-third of the parties. Moreover, as rejection of a reservation must take place within a short period after

its notification, in the event of a number of States objecting to the reservation within that period the reserving State would really not be for long in doubt as to the fate of its reservation.

(c) Finally, it may be said that there is an obvious disadvantage in a solution which makes possible the dissolution of a treaty as a result of the fact that, on account of the objection of one-third or more States, the total number of parties may fall below that required by the treaty. It is difficult to deny the inconvenience which would result from the dissolution of the treaty and the necessity of dealing with the legal effects of acts performed during its operation. However, the resulting difficulty is not insurmountable. The probability of its occurrence is small seeing that it presupposes a large number of States making reservations and a large number of States objecting to them.

III. *Acceptance and rejection of reservations*

17. While paragraph 2 of draft A of article 9 is concerned with the entrance of the treaty into force, paragraph 3 is devoted to what is the principal aspect of the subject matter of that article, namely, the question as to the conditions under which a State making reservations can definitely become a party to the treaty. (Paragraph 2, it will be noted, is intended to supply merely a provisional solution of the more limited question of the treaty entering into force.) It is convenient to preface the analysis of the solution here proposed by a statement of the technical difficulties involved, some of which have already been referred to in general terms in connexion with the question of the entrance of the treaty into force.

18. When a State objects to the reservation made by another State the legal consequences of such objection are by no means automatic or uniform. Four possibilities must be envisaged: In the first instance — and this appears to be the conclusion drawn from what is described as the “unanimity” doctrine — the State making the reservation does not, in the absence of unanimous acceptance of the reservation, become a party to the treaty in any way whatsoever. Secondly, the effect of the objection may be that the State making the reservation becomes a party to the treaty in relation to all those States which do not object to the reservation — though it does not become so in relation to the State which has objected. Thirdly, the result of the objection may be merely that there is no contractual relation, between the State, making the reservation and the objecting State with regard to the particular clause covered by the reservation. Fourthly, the objecting State may be satisfied with moral or political disapproval of the reservation without expressly attaching any legal consequences to the objection. This seems to have been the attitude, for instance, of the Government of El Salvador which expressed “its complete disagreement” with the reservations made to the Genocide Convention by certain States and insisted that, by failing to object to them when depositing its own ratification of the Convention, it did not thereby tacitly accept them. At the same time the Government of El Salvador emphasized that in ratifying the Convention it did not intend to refer in any way to the reservations made, in an act of full

sovereignty, by certain specified countries.⁷² It is obvious that in the absence of legal regulation, by way of codification, of this aspect of the matter the position must remain confused. This is bound to be so particularly if, with regard to the State making a reservation, different parties adopt different solutions from amongst the four possible alternatives outlined above.

19. A further difficulty arises in connexion with the question as to who can raise an objection resulting in any of the consequences outlined above. Is it only the States who, by a definite act of signature, of accession not requiring ratification, or of ratification, have definitely become parties to the treaty? Or does that right belong also to States who have signed or acceded subject to ratification, or who merely have the right, as yet not exercised, to do so? The considerations militating against giving the inarticulate mass of States — often comprising all the Members of the United Nations or even a potentially larger number of States — who are not bound by the treaty the right to prevent reserving States from becoming parties to it, have already been referred to. Similarly, as previously pointed out, if the number of States whose final participation is required for the purpose of the treaty entering into force is small — in the case of the Geneva Conventions of 1949, which were signed by sixty-one States, that number was laid down as two — the result may be that, whether the principle of unanimity of consent or some kind of majority decision to reservations is adopted or accepted, these States may acquire a power of decision of transcending consequences for the treaty as a whole.

20. Finally, if the principle is adopted that only States who have definitely become parties to the treaty may effectively object to reservations, there arises the further question whether those States must have finally accepted the treaty *without any reservations* in order to be entitled to exclude States who wish to become parties subject to reservations. For it may be argued that it is only the State whose participation is not in question who is entitled to question — and to nullify — the participation of others. Such an argument may not be altogether without force.

21. Paragraphs 2-4 of this draft of article 9 attempt to provide an answer to these difficulties by way of the following solution:

⁷² Annex 123 to the written statement of the United States of America before the International Court of Justice in connexion with the advisory opinion on the Genocide Convention (I.C.J. *Reservations to the Convention on the prevention and punishment of the crime of Genocide, Pleadings, Oral Arguments, Documents*, p. 185). This was also the attitude of the Government of Guatemala (*ibid.*, p. 166). The attitude finally adopted by Ecuador left room for some uncertainty. On 21 March 1950 the Assistant Secretary-General addressed a letter to the Government of Ecuador drawing attention to a previous communication of that Government in which it stated that Ecuador had no objection to make concerning the submission of reservations by the Union of Soviet Socialist Republics and some other States but that "at the same time, it expresses disagreement with the content of these reservations". In answer to a request from the Assistant Secretary-General for clarification of that statement the Government of Ecuador replied that it "is not in agreement with these reservations and that therefore they do not apply to Ecuador" (*ibid.*, pp. 153, 154).

(a) Within a period of three years subsequent to the treaty having entered into force all the parties which have finally accepted the obligations of the treaty — with or without reservations of their own — are given an opportunity to declare whether they object to the reservations appended by other States and, if they do, what effect they wish their objection to produce. They may expressly or tacitly, i.e., by failing to object, agree to the reservations; or they may adopt the position that the reservations are in their view so objectionable and contrary to the purpose and spirit of the treaty that the reserving States cannot, unless they abandon their reservations, become parties to the treaty; or they may declare — although this would in any case be the result — that while not opposing the participation of a reserving State in the treaty, they will not consider themselves bound by the treaty, in relation to that State, with regard to the operation of the particular clause in respect of which a reservation has been made. If less than one-third of the number of States which at the end of that period have finally undertaken the treaty obligation in question, with or without reservations, object to the reserving State becoming a party to the treaty, then that State will be considered a party — subject to the right of the other parties not to regard the treaty as operative as between themselves and the reserving State with respect to the clause covered by the reservation. Thus, at the end of the three years' period it will be possible to ascertain whether the treaty has definitely entered into force by having secured the final adherence of the required number of States. After the end of that period, in case a further number of States assume the obligations of the treaty subject to reservations, the question whether they can be regarded as contracting parties will be determined in the same manner — the parties up to date having an effective right of decision.

(b) It will be noted that, according to the solution here advanced, unless at least one-third of the number of the parties object to the reserving State becoming a party to the treaty, that State would become a party to the treaty not only in general but also in relation to all other parties. This would mean that no party would be in a position to declare that it does not consider itself bound by the treaty in relation to the reserving State — although it would still be in the position to insist that it will not apply the particular clause in relation to the reserving State. That solution would eliminate what some consider to be a serious defect in the "American" system, namely, that a State which is a party to the treaty in general may not be a party to it in relation to some of the other parties (which may in extreme cases mean that a State is a party to the treaty in general although it is in effect a party to it only in relation to one State) — a situation which many regard as illogical or, in any case, undesirable. It is possible that that criticism is not absolutely decisive. However, it is a criticism which is of sufficient weight to justify the solution here proposed.

Alternative draft B

If, in any case where a multilateral treaty does not expressly prohibit or limit the faculty of making reservations, a State signs, ratifies, accedes to or otherwise

accepts the treaty subject to a reservation or reservations limiting or otherwise varying the obligations of any article or articles of the treaty, the following procedure shall apply in the absence of any other provisions in the treaty :

1. The text of the reservations received shall be communicated by the depositary authority to all the interested States. If, on the expiry of a period of three months following the receipt of such communication, an interested State does not notify the depositary authority that it disagrees with their reservation, it shall be deemed to have accepted it.

2. Unless, after an interval prescribed by the convention, two-thirds of the States qualified to offer objections have accepted the reservation, the reserving State, if it maintains its reservation, will not be considered a party to the treaty.

3. If two-thirds or more of the States referred to in paragraph 2 agree to the reservation, the reserving State will be considered a party to the treaty subject to the right of any party not to apply to the reserving State the provision of the treaty in respect of which a reservation has been made.

Comment

1. This alternative draft follows the preceding draft with regard to its principal aspect, namely, inasmuch as it does not accept the principle to unanimous consent to reservations and considers the consent of at least two-thirds of the total number of interested States to be sufficient for the purpose. To that extent the general observations of the comment appended to the previous draft apply also to draft B.

2. On the other hand, the present draft B attempts to avoid the complications, admittedly serious, involved in the previous scheme which is based on the notion of the treaty entering into force provisionally regardless of any reservations made to it by the parties. It also leaves it, to some extent, to the treaty to determine who are the "interested States", i.e., the States qualified to offer objections to the reservations — provided that a period is set within which objections may be raised. The practical effect would be that in most cases the treaty would enter into force on the date or event specified for the reason that the required number of States would ratify or otherwise finally accept the treaty without reservations. In cases in which that did not happen the entry into force would be delayed until the number of ratifications (or its equivalent), unaccompanied by reservations — or accompanied by reservations subsequently agreed to by the qualified States — reaches the number required by the treaty. This might mean a considerable delay in its entry into force. A further complication might arise if one of the "qualified States", i.e., the States qualified to make objections to reservations, itself made reservations subsequently objected to by others. In that case the objection of that State would be immaterial if its own reservations were objected to by one-third or more States and if, as a result, it did not become a party to the convention.

3. The central idea underlying this scheme would be substantially clarified if the treaty were to provide

expressly that the "qualified States" are those only which themselves ratify or otherwise finally accept the treaty within the period prescribed by the treaty. Alternatively, following the recommendation made by the Commission in 1951, it could be provided that the objection of a mere signatory (or a State entitled to accede) ceases to be valid if that State does not ratify the treaty within a prescribed period.

Alternative draft C

If, in any case where a multilateral treaty does not expressly prohibit or limit the faculty of making reservations, a State signs, ratifies, accedes to or otherwise accepts the treaty subject to a reservation or reservations limiting or otherwise varying the obligations of any article or articles of the treaty the following procedure shall apply in the absence of any other provisions in the treaty :

1. The parties or the organ of an international organization responsible for establishing the text of the treaty shall designate a committee, appointed in a manner to be agreed by them, competent to decide on the admissibility of reservations made by any Government subsequent to the establishment of the text of the treaty.

2. The text of the reservations received shall be communicated by the depositary authority to all the interested States. If, on the expiry of a period of three months following the receipt of such communication, an interested State does not notify the depositary authority that it disagrees with the reservation, it shall be deemed to have accepted it.

3. If a reservation is objected to by a State qualified to object, then it shall be competent for the committee, at the request of the State making the reservation, to decide whether the reservation is admissible. If the reservation is declared inadmissible then the State in question cannot become a party to the treaty if it maintains the reservation.

Comment

1. The main provision of this alternative draft is self-explanatory. It confers upon a standing committee designated by the States or the international organ which have established the text of the treaty the power to decide upon the admissibility of a particular reservation. Proposals of this character have been made in the past.⁷³ If adopted, it would eliminate the diffi-

⁷³ A suggestion on these lines was made in 1932 by Sir Arnold McNair with regard to reservations to International Labour Conventions concerning points "of minor discrepancy" between the Convention and national laws. The International Labour Office did not accede to the suggestion. It may be convenient to reproduce the proposal in full:

"7. To put my suggestion into concrete form, it is this — that every convention, and, upon its periodical revision, every revised convention, shall contain a clause running somewhat as follows:

"In order to obviate difficulties in the way of ratification arising from points of minor discrepancy between the text of this convention and the text of national laws or decrees in existence or to be passed to give effect to this convention each Member may submit to the Reservations Committee of the Conference

culties connected both with the entry of the treaty into force and with the complications arising out of the necessity for an individual decision by States.

2. The procedure as here proposed contains no answer to the question who are the States qualified to object to a reservation. That answer would be simplified—in fact, the necessity for it would be removed altogether—if it were provided that the committee should decide on the question of the admissibility of the reservation regardless of whether an objection has been raised against it.

3. It is not considered necessary to elaborate the details or possible variations of the solution here outlined, for instance, whether the committee should be the regular body to decide on the admissibility of reservations or whether it should act only if objection is raised by a State (a variation which would immediately raise the question as to what categories of States are entitled to object); whether the decisions of the Committee should be by a majority, and what kind of majority; whether it should be composed of the States designated or of independent persons appointed by them; and many others. Should a solution on these lines recommend itself to Governments, further consideration might be given to an elaboration of the requisite procedure.

4. The advantages of simplicity and expedition which characterize this particular solution may be considered by some to be so obvious as to outweigh any disadvantages or doubts inherent in it. Of these the most important is the possible—and perhaps natural—reluctance of governments to confer upon a body over which they would have no control the essentially discretionary power to decide on modifications in the contents of the treaty in matters which may

the text of any reservation which it may desire to make. The Reservations Committee shall take such proposed reservations into consideration, and if, acting by a majority of not less than two-thirds, they are of opinion that the reservation is reasonable having regard to the legal system and other circumstances prevailing in the country of the Member proposing it, and can be permitted without endangering the uniformity of the application of this convention, they shall notify their assent to the Member. Thereupon a ratification to which such reservation is attached shall become effective unless and until it shall be disallowed by the General Conference of the Organization at the session next ensuing.'

"8. Further, it would be necessary for the Conference to constitute a Reservations Committee on some such basis as the following:

"The Reservations Committee shall be a standing committee of the Conference, consisting of six members, of whom four shall be permanent members (two being government delegates, one other being a delegate representing employers, and one other being a delegate representing workers) and two shall be non-permanent and appointed *ad hoc* by the Governing Body and having special technical knowledge with reference to each convention.'" (I.C.J., *Reservations to the Convention on the prevention and punishment of the crime of Genocide, Pleadings, Oral Arguments, Documents*, p. 259).

The Protocol to the Convention for the Simplification of Customs Formalities of 3 November 1923 empowered the Council of the League of Nations to decide upon the admissibility of certain reservations after consulting a body of experts to be appointed by it.

refer to fundamental aspects of its provisions and which do not admit of an answer by reference to ascertainable legal standards. This latter consideration may be held to apply, for instance, to the test laid down by the International Court of Justice in its advisory opinion on the reservations to the Genocide Convention, namely, the test of compatibility with the purpose and object of the convention. It is clear that any reservation to a particular clause is incompatible with the purpose and object of that clause. The question to be answered, therefore, is whether that particular clause constitutes an essential object and purpose of the treaty. Thus an article conferring upon the International Court of Justice jurisdiction in disputes relating to the interpretation or application of the treaty may be regarded by some as of a purely procedural character separable from the main purpose of the treaty. Others may regard that jurisdictional clause as being of the very essence and the principal *raison d'être* of the treaty—particularly if its substantive provisions are in fact no more than declaratory of the general legal and moral sentiment of the contracting parties. It is difficult to visualize any legal answer, which is not purely subjective in nature, to questions of this character. However, this very circumstance may militate in favour of entrusting the power of decision on this question to an organ which is partly expert and partly political in its composition.

Alternative draft D

If, in any case where a multilateral treaty does not expressly prohibit or limit the faculty of making reservations, a State signs, ratifies, accedes to or otherwise accepts the treaty subject to a reservation or reservations limiting or otherwise varying the obligations of any article or articles of the treaty the following procedure shall apply in the absence of any other provisions in the treaty:

1. The parties or the organ of an international organization responsible for establishing the text of the treaty shall request the International Court of Justice to designate under its Rules a Chamber of Summary Procedure to decide on the admissibility of reservations made by a Government subsequent to the establishment of the text of the treaty.

2. The text of the reservations received shall be communicated by the depositary authority to all the interested States. If, on the expiry of a period of three months following the receipt of such communication, an interested State does not notify the depositary authority that it disagrees with the reservation, it shall be deemed to have accepted it.

3. If a reservation is objected to by a State qualified to object, then it shall be competent for the Chamber of Summary Procedure, at the request of the State making the reservation, to decide whether the reservation is admissible. If the reservation is declared inadmissible then the State in question cannot become a party to the treaty if it maintains the reservation.

Comment

As in the case of draft C, the main provision of the present alternative draft D is self-explanatory. Its object is to confer upon a Chamber of Summary

Procedure, to be constituted by the International Court of Justice under its rules, the power to decide upon the admissibility of a reservation either in the first instance or by way of appeal against the rejection of the reservation by any of the parties (or potential parties) to the treaty. A solution on these lines has a number of features in common with that proposed in draft C. It is in some respects open to the same doubts. But there is attraction in the idea that disputes of this nature — to some extent there are present the elements of a dispute in a situation in which a State puts forward a contested claim to be entitled to append a reservation — should be decided by a body of permanent composition and of acknowledged independence, and which is capable, by virtue of the continuity of its practice, of developing standards of general application. This is so although, essentially, the question of the admissibility of a particular reservation is probably not of a legal character but calls for a decision of a legislative nature. However, there would seem to be no reason why a permanent and authoritative body should not make a weighty contribution, in addition to solving concrete difficulties, to developing legislative standards of value. In so far as a particular reservation involves the issue of its compatibility with the general object and spirit of the treaty it raises the question whether the right to append reservations has been exercised in good faith. As such it is a question of fact which is not outside the proper province of the judicial function. As in the case of a standing committee designated by the signatory States, as outlined above in draft C, recourse to the summary procedure of the Court might — to an even larger extent — provide a solution conspicuous for its simplicity and expedition. Inasmuch as it could be adopted within the framework of a general codification of the law of treaties it would render unnecessary the creation of a special body for every treaty. Nor would it throw an undue burden upon the Court as a whole. The acceptance of such a function by the Court would be in keeping with its readiness in the past to assist in the settlement of disputes in cases not calling for the exercise of the judicial function proper.

Note

(1) The length of the comment to this article exceeds considerably that to other articles of the present draft. This is so not only on account of the complexity of the subject but also because the various solutions formulated in the article *de lege ferenda* differ from those adopted in the past by Governments and official bodies, as well as by the Commission itself. For this reason the special Rapporteur considered a fuller elaboration of the comment to be appropriate.

(2) The nature of the subject explains also why the Special Rapporteur has adopted the method of presenting a number of alternative solutions, without expressing an obvious preference for any of them. The Special Rapporteur is of the opinion that the formulation of principles to be adopted on the subject comes within the purview of the task of the Commission connected with the codification of the law of treaties after it has laid down what is still the existing law. Various Governments represented at successive sessions of the General Assembly have voiced the view that the

Commission should devote, in connexion with its work on treaties, further consideration to the matter. In presenting in 1951 its report, which was based on the predominant doctrine of the requirement of unanimous consent, the Commission probably envisaged its task in the matter as being limited substantially to codification of the existing law. The conclusions of the report, thus conceived, did not prove acceptable to a large majority of States represented at the Sixth Session of the General Assembly in 1951. In the view of the Special Rapporteur, even prior to the controversy brought about by the reservations to the Genocide Convention, it was felt increasingly that the doctrine of unanimous consent was not free from difficulties. Sir William Malkin, writing on the subject in 1926, while still adhering to the view that every reservation must be the subject of definite acceptance by other signatories,⁷⁴ welcomed developments tending to mitigate the rigidity of the then existing system and to ensure "the acceptance of reservations which are consistent with the intentions of the original signatories but no others".⁷⁵ Having regard, apart from the inherent shortcomings of the traditional view, to the growing flexibility of the procedure of concluding treaties and the present unwillingness of many — perhaps a majority of — Governments to accept the unanimity principle in the matter, the subject of reservations lends itself to a combination of two methods, of codification and development, open to the Commission by virtue of its Statute. The various alternative drafts of article 9 are drafted on that assumption. The argument that the principle of unanimous consent has operated satisfactorily in the past is, perhaps necessarily, inconclusive. It is not easy to assess to what extent the frequent absence of ratification of numerous conventions on the part of a large number of States — occasionally to the point of causing the convention not to enter into force — was due to the operation of the rule of unanimous consent and to the resulting difficulty of making reservations. The Hague Convention of 1930 relating to Conflicts of Nationality Laws did not secure wide acceptance although it provided that the parties may, when signing, ratifying, or acceding, attach reservations to all substantive provisions of the Convention.⁷⁶ On the other hand, it may not be easy to accept the view that the principle of unanimous consent did not give rise to difficulties. The existence of these difficulties explains the discussions, before the League of Nations

⁷⁴ In *British Year Book of International Law*, vol. 7 (1926), p. 160. Similarly, Mr. Jenks, writing in 1945, pointed to the "marked tendency, in the case of instruments negotiated under the auspices of the League of Nations, to endeavour to expedite their acceptance by the inclusion of provisions designed to facilitate the acceptance of reservations by relaxing the ordinary rule of international law that an instrument cannot validly be accepted subject to a reservation unless the reservation is accepted by all the parties to the instrument" (*American Journal of International Law*, vol. 39 (1945), p. 167).

⁷⁵ *Loc. cit.*, p. 162.

⁷⁶ There are other instances of treaties allowing in advance reservations of wide and almost unlimited scope. Thus the Convention of 14 September 1939 on the Status of Refugees Coming from Germany provides that "the High Contracting Parties may make reservations concerning articles contained in chapters to which their obligations extend" (M. Hudson, *International Legislation*, vol. 8, p. 32).

and elsewhere, of this question in the period preceding the establishment of the United Nations.

(3) For reasons which appear in the comment, none of the schemes here outlined follow that aspect of the so-called "American system", as adopted in 1938, which recognizes the possibility of a State being a party to a treaty in relation to some but not to other States. As already pointed out, that feature of the American system is not without precedent. However, it is probable that decisive weight must be attached to the view that a system of that nature detracts from the unity of the treaty; that it transforms it, in many respects, into a loose combination of bilateral agreements; and, above all, that it has hardly any application to treaties which, in fact, do not create rights and obligations as between the parties but which are intended to establish an absolute obligation of all parties.⁷⁷

(4) Any procedural regulation of the subject of reservations within a general codification of the law of treaties must be purely optional in character. It must remain open to the parties, in conformity with the recommendation made in the report of the Commission in 1951⁷⁸ and approved by the resolution of the General Assembly of that year, to adopt any other

⁷⁷ As with regard to the system of unanimous consent so also with regard to the "American system" divergent views have been expressed as to the success of its operation. The Department of International Law and Organization in the Pan-American Union has stated that that practice is well adapted "within the limited inter-American system" and that it has successfully operated within that sphere. "The Pan-American Union procedure is believed to be best adapted, within the limited inter-American regional system, to increasing the number of ratifications and widening the use of treaties both for purposes of a contractual character and for the development of general principles of international law. Thus far it has not had the effect, to which it might logically have given rise, of creating confusion in respect to the obligations of the various treaties which have been entered into. Whether the procedure is as well adapted to the larger organization of the United Nations, in which law-making treaties may be expected to play a larger part than in the inter-American regional system, is a question apart from the scope of the present memorandum." (I.C.J., *Reservations to the Convention on the prevention and punishment of the crime of Genocide, Pleadings, Oral Arguments, Documents*, p. 20.) In his article on "Reservations to Multilateral Conventions" Mr. Fitzmaurice has adduced impressive evidence of the dissatisfaction, among some American countries, with the operation of the system (*International and Comparative Law Quarterly*, vol. 2 (1953), pp. 20-22). The following quotation, included in that article, from a report of an (apparently different) organ of the Pan-American Union is of interest: "The absence of a definite criterion as to the effect of reservations made at the time of signature . . . has given rise to various interpretations so different from one another in some cases — as in that of the Economic Agreement of Bogotà — that they have made the instrument impracticable because no State considers it wise to ratify a multilateral agreement whose application varies with each country as a result of numerous reservations." (*ibid.*, pp. 20-21.)

⁷⁸ The Commission suggested that "the organs of the United Nations, specialized agencies and States should, in the course of preparing multilateral conventions, consider the insertion therein of provisions relating to the admissibility or non-admissibility of reservations and to the effect to be attributed to them" (A/1853, para. 33, in *Yearbook of the International Law Commission, 1951*, vol. II, p. 130).

provisions governing the matter. They may provide that no reservations shall be admissible, or that reservations shall not be admissible with regard to specified articles. The relevant article of a code would merely lay down what, in the absence of regulation by treaty, shall be the procedure governing the subject. Of necessity, that article must be of a general character. It cannot take fully into account the fact of the wide diversity of treaties. Thus there may be a clear difference, for the purpose of reservations, between a humanitarian treaty, such as the Genocide Convention, and a treaty of a political or economic nature in which reciprocity and uniformity of obligations may be an essential feature of the arrangement. In such cases it may be particularly desirable that the treaty should contain detailed provisions as to the admissibility and the effect of reservations. An article of a Code of the Law of Treaties is not the most suitable medium for impressing upon governments the desirability of incorporating such detailed regulation. That purpose may be partly achieved by reiterating, in connexion with the codification of the law of treaties, the resolution of the General Assembly on the subject.

(5) Whatever scheme is eventually adopted, it is probable that the function of the depositary authority will have to be of a purely administrative nature. It will have to be relieved of any responsibility for deciding on the question whether, having regard to the reservations appended, the treaty has entered into force. Its function would be limited to that of receiving the declarations, varying in form, of acceptance of treaty obligations; communicating them, and any reservations attached to them, to the Governments concerned; and, if necessary, obtaining a clarification of any statements or declarations made by Governments in this connexion. This would apply also to the question whether any particular statement or declaration does or does not constitute a reservation.⁷⁹

⁷⁹ It may be noted in this connexion that there is no compelling reason to regard as reservations such declarations as merely limit the effect of a provision of the treaty. As Professor C. Hyde has put it: "The practice of States seemingly rejects the conclusion that a reservation must be confined to a proposal or condition that lessens the scope of burdens set forth in a text in relation to the reserving State. There are instances where a reservation has served to modify by enlargement obligations to be borne by other parties or prospective parties in relation to the reserving State." (C. C. Hyde, *International Law* (2nd ed., Boston, 1945), vol. 2, p. 1435.) The question whether a declaration amounts to a reservation is independent of the designation given to it by the declaring State. The United States of America signed in 1938 a number of International Labour Conventions subject to "understandings" which were made a part of the ratification. It was stated on that occasion by the United States that "these understandings are deemed not to be reservations which would require the acceptance of the other governments, but to be merely clarifications of definitions to show that the definitions accepted by the United States of America are in fact those that were intended by the Conference." The formal notification was made "subject to the understandings hereinafter recited and made part of this ratification" (*Official Bulletin of the International Labour Office*, 23 (1938), No. 4, pp. 128-136). Hackworth's *Digest of International Law* (1943), vol. 5, pp. 144-153, contains an interesting section on "Understandings Short of Reservations".

Part III

Conditions of validity of treaties

Section I

Capacity of the parties and of their agents

Article 10

Capacity of the parties

An instrument is void as a treaty if concluded in disregard of the international limitations upon the capacity of the parties to conclude treaties.

Comment

1. This article overlaps to some extent with article 1 (which contains the definition of a treaty) and article 16 (which lays down that a treaty is void if its performance involves a breach of a treaty obligation previously undertaken by one or more contracting parties). It is thus probable that the present article may be of a somewhat residuary character and, to that extent, of limited practical importance. Moreover, one of the main difficulties which surround this subject is the fact that while in municipal law the contractual capacity of persons is defined by overriding rules of law, in the international sphere the requisite status may be conferred by the very fact that an instrument claimed to be a treaty is concluded by an indisputably sovereign State with an entity whose legal status has hitherto been doubtful. A further difficulty is due to the circumstance that the question covered by the present article does not seem to have received either judicial consideration or any frequent or uniform treatment, justifying the drawing of confident conclusions, on the part of Governments.

2. The following entities whose capacity to conclude a treaty may be controversial come within the purview of the present article:

- (a) Dependent States, in particular Protectorates;
- (b) Subordinate States such as member States of Federal States;
- (c) Sovereign States whose contractual capacity is limited as the result of the conferment of a certain status, as in the case of neutralized States;
- (d) Sovereign States whose freedom to contract has been limited as the result of the assumption of international obligations in specified spheres;
- (e) International organizations inasmuch as their contractual capacity is limited by the scope of the powers assumed by them in their constitutions.

These five categories may now be considered in turn.

3. *Dependent States, in particular Protectorates.* Protectorates to which reference is made here are States — and they are States probably also in contemplation of international law — which, although normally represented in the field of international relations by the protecting States, have a separate administrative existence and distinct degree of autonomy.⁸⁰ There is

⁸⁰ This rules out political communities such as the British colonial protectorates — although the borderline between the latter and ordinary protectorates is somewhat elastic. Thus in the case of the *Duff Development Company*

an occasional tendency to assume that such States, “not being members of the international community”, possess no power to conclude treaties. That statement, which is probably inaccurate, seems to beg the question. The status of a political entity as a member of the international community depends upon various factors, including the capacity to conclude treaties. This does not necessarily mean that the capacity to conclude treaties depends on the status as a member of the international community. It is probably more accurate to say that, unless the contrary is expressly provided in the treaty establishing the protectorate, the protected State does possess capacity to conclude treaties — at least with the consent of the protecting State. Thus, for instance, while France signed the International Sanitary Convention of 21 June 1926 (M. Hudson, *International Legislation*, vol. 3 (1925-1927), p. 1903) on her own behalf and on behalf of a number of her possessions and mandated territories, Tunisia and Morocco were separate parties to that Convention. Similarly, the Convention of 5 June 1935 concerning Unification of Methods of Analysis of Wines in International Commerce included among the parties thereto the Sultan of Morocco and the Bey of Tunis signing in their own name (*ibid.*, vol. 7, p. 89). This was also the case with regard to the International Convention for the Protection of Industrial Property of 2 June 1934 (*ibid.*, vol. 6 (1932-1934), p. 870). Other numerous examples of the exercise of the treaty-making power of Protectorates can be quoted.⁸¹ In addition, treaties are often concluded, subsequent to the establishment of the Protectorate, between the protecting and the protected States. Thus the Treaty of 8 June 1883 between France and Tunisia confirmed the Treaty of 12 May 1881 establishing the protectorate and provided for internal reforms and French financial assistance to Tunisia. Various treaties and agreements — which subsequently gave rise to the advisory opinion of the Permanent Court of International Justice in the matter of the *Jurisdiction of Danzig Courts* (Publications of the P.C.I.J., *Series B*, No. 15) — were concluded between Poland and Danzig.⁸²

While therefore the general capacity of a protected State to conclude treaties is not at issue, the question which arises under the present article is that connected with any express limitation or exclusion, by the treaty establishing the protectorate or any subsequent treaty with the protecting State, of the right of the protected State to conclude treaties. Thus in the Treaty of 3 August 1881 with the Transvaal Great Britain reserved for herself the “control of the external relations

Ltd. v. Government of Kelantan [1924] A.C. 797 the British Foreign Office informed the Court that Kelantan was an independent State notwithstanding the fact that by virtue of an agreement regulating the relations between the United Kingdom and the State of Kelantan the latter undertook to have no political relations with any foreign Power except through the medium of the Government of the United Kingdom and to follow, in all matters of administration, the advice of an adviser appointed by the Government of the United Kingdom. In the same agreement the United Kingdom undertook not to interfere with the internal administration of Kelantan save in certain exceptional contingencies.

⁸¹ For some of them see Hackworth, *Digest of International Law*, vol. 5 (1943), p. 154.

⁸² And see for other instances the comment to article 1 above.

of Transvaal including the conclusion of treaties". Similarly, article 104 (b) of the Treaty of Versailles and the Convention of Paris of 9 November 1920 between Poland and Danzig provided that the former shall undertake the conduct of the foreign relations of Danzig — a provision which the Permanent Court of International Justice described as constituting an organic limitation and essential feature of the political structure of Danzig (Publications of the P.C.I.J., *Series B*, No. 18, p. 11). In some cases, as in the Treaties of France with Morocco (30 March 1912), Tunisia (12 May 1881) and Monaco (17 July 1918), the conduct of international relations of the protected States was subject to an "entente préalable" with France. It is with regard to treaties concluded by the protected State in disregard of such limitations that the question arises as to the validity of the treaty thus concluded. There is some authority in support of the view that such treaties are void. Hall says: "All contracts therefore are void which are entered into by such [protected] States in excess of the powers retained by, or conceded to, them under their existing relations with associated or superior States." (*International Law* (8th ed., Oxford, 1924), p. 380.) In an Opinion of the British Law Officers of the Crown of 27 April 1896 (reported in Sir Arnold McNair's *The Law of Treaties* (*op. cit.*, p. 139)) the view was expressed that a treaty concluded by the South African Republic in disregard of the Treaty of 1881, referred to above, with Transvaal was invalid. They admitted that the offending treaty — a treaty of extradition — was not "in itself of great importance", but held that "the principle involved is obviously of the utmost gravity" (p. 140). In 1908 the Acting Secretary of State of the United States stated in his instructions to the American Ambassador to Turkey as follows: "A State proposing to enter into treaty relations with another State which is not fully *sui juris*, a State whose personality is in any way incomplete or abnormal, by reason, for instance, of its dependence in any from upon another State or its membership of a larger unit such as a Federal State, is deemed to have notice of its deviation from normal and complete capacity and must satisfy itself that the proposed treaty falls within the limited capacity of the other contracting State. Treaties made by such States in excess of their capacity are void" (Hackworth, *Digest of International Law*, vol. 5 (1943), p. 153).

On the other hand it has been suggested that treaties concluded by a dependent State in disregard of its contractual capacity are merely voidable — apparently at the option of the protecting State. Thus Sir Arnold McNair while stating that the British Government had had no opportunity to pronounce itself on the question and that the question does not admit of a general answer, suggests that where "the dependent State is allowed to conclude treaties subject to the communication of them to the dominant State and to the latter's veto within a certain period, it would seem probable that the former's treaties are only voidable, being made subject to a resolutive condition, and are valid until timously vetoed" (*op. cit.*, p. 138). Professor C. Hyde, in a somewhat inconclusive treatment of the subject, seems to have suggested that treaties here under discussion are not necessarily "without any legal value" and that they are voidable rather than

void.⁸³ (*International Law, op. cit.*, 2nd ed., vol. 11, p. 492). It is submitted that, in this case, the distinction is probably without a practical difference. In general, the matter must be regarded as governed by the overriding principle — elaborated below in article 16 — that treaties concluded in violation of previous treaties are void. Any mitigation of that principle must be based on the fact of the implied consent, manifested through absence of protest, on the part of the protecting State. When such protest occurs it is sufficient to render the treaty void and as such unenforceable. As the question is one of status imposed not as the result of any general operation of a rule of law but in consequence of a — usually bilateral — treaty, it is probably unnecessary in this case to follow what is apparently the correct logical conclusion and to hold that a treaty concluded in disregard of the contractual capacity of the dependent State is unalterably and irremediably void. It is preferable to regard the absence of protest on the part of the superior State as equivalent to acquiescence amounting to a renunciation of the limiting provisions of the original treaty. If that is so, the question of its violation, whith the resulting invalidity of the subsequent treaty, no longer arises. In the absence of such acquiescence the treaty must be regarded as void. The question whether the treaty concluded in disregard of the dependent status of a party is voidable at the option of the other party to the subsequent treaty, who — for excusable reasons — had no knowledge of the limitation, is too theoretical to require detailed treatment.

4. *Subordinate, in particular member states of federal states.* It might be maintained that no question of validity of treaties concluded by members of Federal States can in fact arise on the international plane for the reason that such subordinate States, not being States in the sense of international law, cannot conclude international treaties. As pointed out above in the Comment to article 1, such argument cannot be regarded as helpful. According to the constitutions of a number of countries State members of Federal States are authorized to conclude treaties. Thus an amendment of 1 February 1944 to the Constitution of the Union of Soviet Socialist Republics confers on each Republic of the Union "the right to enter into direct relations with States, to conclude agreements with them, and to exchange diplomatic representatives with them" (Law on the Granting of Authority to the Union Republics in the Sphere of Foreign Relations). In pursuance of that law the Ukrainian S.S.R. and the Byelorussian S.S.R. became separately Members of the United Nations. They have become, in their own name, parties to numerous multilateral Conventions. Article 32 of the Constitution of Western Germany of 1949 provides that in so far as the member

⁸³ The circumstance — to which Professor Hyde attached importance — that the protests of the superior State have often remained without effect is probably only of limited legal relevance. In some cases, these protests were not, it appears, well founded in law. Thus with regard to Bulgaria — with regard to which occasional protests were made by her Turkish suzerain against the exercise by her of the treaty-making power — British Law Officers held in 1894 that the limitations imposed upon Bulgaria in the Treaty of Berlin did not make it improper for the British Government to conclude a treaty with her (McNair, *op. cit.*, pp. 141-144).

States (Lander) are competent to legislate they may, with approval of the Federal Government, conclude treaties with foreign States.⁸⁴ Article 78 of the Weimar Constitution of 1919 was to the same effect. Article 9 of the Swiss Constitution of 1848 conferred upon the Cantons the power to conclude treaties with foreign States on the subject of public economy, relations with neighbouring States and police matters along the border provided that they are not incompatible with the interests of the Confederation or the rights of other Cantons. It appears that treaties of this description have been concluded between Swiss Cantons and German States.⁸⁵ It is believed that treaties thus concluded by State members of Federal States are treaties in the meaning of international law. They are treaties in the contemplation of the present article 10 of this draft. They are concluded in conformity with the contractual capacity, as required by international law, of the member States in question. International law authorizes States to determine the treaty-making capacity of their political subdivisions. The conferment, by the constitutional law of the Federal States in question, of the treaty making capacity upon their member States amounts, upon analysis, to a delegation of that power on the part of the Federal State. This fact is emphasized by the occasional requirement of express authorization by the Federal authority and of conformity with the interest of the other members of the Federation.

On the other hand, in the absence of such authority conferred by federal law, member States of a Federation cannot be regarded as endowed with the power to conclude treaties. For according to international law it is the Federation which, in the absence of pro-

⁸⁴ Kraus, "Die Zuständigkeit der Länder der Bundesrepublik Deutschland zum Abschluss von Kulturabkommen mit auswärtigen Staaten nach dem Bonner Grundgesetz," in *Archiv des Völkerrechts*, vol. 3 (1915-1952), pp. 414-427.

⁸⁵ In 1874 Baden and Basle concluded an agreement providing for the establishment of a ferry. In 1907 Basle-Land and Aargau concluded an agreement with Baden for the establishment of a hydro-electric plant. In 1935 Bern and Neuchâtel concluded agreements with France. See generally on the subject E. His in *Revue de droit international et de la législation comparée* (1929), pp. 454-479.

The Joint Resolution of Congress of the United States approved on 4 August 1947 in the matter of the Headquarters Agreement Act provides in section 4 as follows:

"Any States, or, to the extent not inconsistent with State law any political subdivisions thereof, affected by the establishment of the headquarters of the United Nations in the United States are authorized to enter into agreements with the United Nations or with each other consistent with the agreement and for the purpose of facilitating compliance with the same: *Provided*, that, except in cases of emergency and agreements of a routine contractual character, a representative of the United States, to be appointed by the Secretary of State, may, at the discretion of the Secretary of State, participate in the negotiations, and that any such agreement entered into by such State or States or political subdivisions thereof shall be subject to approval by the Secretary of State."

While this provision cannot be interpreted as conferring upon States any treaty-making power proper, it is of interest in this connexion as covering agreements which are not of "a routine contractual character" and as requiring the consent of the Secretary of State to what presumably must be arrangements of a public law character.

visions of constitutional law to the contrary, is the subject of international law and international intercourse. It follows that a treaty concluded by a member state in disregard of the constitution of the Federation must also be considered as having been concluded in disregard of the limitations imposed by international law upon its treaty-making power. As such it is not a treaty in the contemplation of international law. As a treaty, it is void. Moreover, as unlike in the case of protected States a State member of a Federation is not *prima facie* a subject of international law, it would seem that there is in this case no question of the treaty being merely voidable at the option of the Federal State.

5. *Limitation of contractual capacity of sovereign states as the result of the creation of a certain status as in the case of neutralized States.* While the limitation, by virtue of their status, of the contractual capacity of dependent and subordinate States covers, as a rule, the entirety of the treaty-making power, the latter may be limited in a particular sphere in consequence of conventional regulation amounting, within that sphere, to the creation of a status. This applies, in particular, to a neutralized State. The status of neutrality consists, on the one hand, in the guarantee of independence and integrity given to the neutralized State, and — on the other hand — in the undertaking of the latter to refrain, *inter alia*, from concluding treaties calculated to jeopardize its neutrality and to involve it in war. Switzerland being the only neutralized State in existence,⁸⁶ there is little practical importance attaching to the subject. In principle, however, in so far as arrangements of that nature amount to what has been described as an international settlement⁸⁷ of an objective character — and they do so to a large extent — they would seem to constitute a limitation of contractual capacity in a way which renders void treaties concluded in disregard of the limitation thus accepted. This is so quite apart from the fact that a treaty concluded by the neutralized State in disregard of its voluntarily accepted obligations as a neutralized State probably falls under the principle, formulated below in article 16, avoiding

⁸⁶ Article 24 of the Lateran Treaty of 11 February 1929 between Italy and the Holy See provided that the Vatican City shall in all circumstances be considered as neutral and inviolable territory. It is doubtful whether that article, incorporating a declaration to that effect issuing from the Holy See, can be regarded as having the effect of constituting the Vatican City a neutralized State. There are clearly absent from this article the typical elements of neutralization. With regard to Belgium and Luxembourg it must be assumed that their neutralized status has disappeared as the result of obligations undertaken by their acceptance of the Charter of the United Nations.

⁸⁷ See the advisory opinion of the International Court of Justice on the *International Status of South West Africa* of 11 July 1950 where the Court held that "the international rules regulating the Mandate constituted an international status for the Territory recognized by all Members of the League of Nations" (*I.C.J. Reports 1950*, p. 132) See also for a similar explanation of the provisions of the Treaty of Paris relating to the demilitarization of the Aaland Islands the Report of the Committee of Jurists appointed in 1920 by the Council of the League of Nations: *Official Journal of the League of Nations*, 1920, Special Supplement, No. 3.

treaties inconsistent with previous treaties.⁸⁸ It may be noted that the Treaty of 31 May 1867 which effected the neutralization of Luxembourg and to which Belgium was a signatory, provided expressly that Belgium would not be one of the guaranteeing Powers on the ground that she herself was "*un État neutre*". Her neutralized status was thus regarded as a reason for her legal incapacity to undertake the obligation of a guarantee.

6. *Sovereign States whose freedom to contract has been limited as the result of the assumption of international obligations in specified spheres.* It is probable that this category of cases does not constitute a limitation of contractual capacity. In a sense, every obligation by which a State is bound by virtue either of customary or conventional international law constitutes a limitation of its contractual capacity inasmuch as henceforth it is not lawful for it to conclude a treaty inconsistent with its obligations. However, there seems to be no warrant for stretching to that point the notion of contractual capacity. Two examples may illustrate the situation. The treaty of 22 May 1903 between the United States of America and Cuba provided that "the Government of Cuba shall never enter into any treaty or other compact with any foreign Power or Powers which will impair the independence of Cuba, nor in any manner authorize or permit any foreign Power or Powers to obtain by colonization, or for military or naval purposes, or otherwise, lodgment in or control over any portion of the said island". It might be said that the restrictions imposed upon Cuba in that article were of such wide compass as to affect her status in the sphere of her contractual capacity. On the other hand, many may prefer the view that although in the treaty of 1903 Cuba agreed not to enter into treaties impairing her status as an independent State, the treaty itself did not formally affect her status — including her contractual capacity — as a State. Probably it is of no considerable legal consequence which view is adopted, namely, whether a treaty concluded in violation of the restriction imposed is void on the ground of absence of contractual capacity (either in general or within a limited sphere) or whether it is void by virtue of the principle formulated below in article 16, which nullifies treaties inconsistent with former treaty obligations. The same applies to the declaration, subscribed by Austria in a protocol signed on 4 October 1922 which she undertook not to alienate her independence and to abstain from any economic or financial engagement calculated directly or indirectly to compromise her independence. In its advisory

⁸⁸ Sir Arnold McNair in *The Law of Treaties, op. cit.*, pp. 135-137 quotes a number of authorities in the form of opinions of British Law Officers of the Crown, which, however, seem to be inconclusive and partly contradictory. In an opinion given on 22 July 1872 the Law Officers considered that the only consequence of a permanently neutralized State entering into a treaty inconsistent with its status would be the release of the guaranteeing Powers from their obligations. *Sed quaere*, seeing that, in addition to the guarantee, the status of neutrality is also based on the obligation of the State whose independence is guaranteed. On the other hand, in an opinion given on 4 May 1871 the Law Officers held that the accession of Luxembourg to the Germanic Confederation "would be a violation of the Treaty of 1867" on the part of Luxembourg.

opinion given on 19 March 1931 (Publications of the P.C.I.J., *Series A/B*, No. 41) the Permanent Court of International Justice held that a customs union established between Germany and Austria would not be compatible with the obligations of the protocol of 1922. It must remain largely a question of terminology whether the obligations of Cuba and Austria, respectively, under the treaties referred to above were such as to impair their contractual capacity (and, as the result, render void treaties concluded in disregard of such limitations) or whether they merely imposed upon them the duty to refrain from undertaking a specified kind of obligations (with the result that such obligations, if entered into, could produce no legal results). The same problem arises in connexion with Article 102 of the Charter of the United Nations relating to the registration of treaties. It may be said that the contractual capacity of every Member of the United Nations is limited, in relation to Members and non-members alike, to the extent that it cannot conclude a treaty enforceable by any organ of the United Nations, unless that treaty is registered. Or it may be said that the effect of Article 102 is merely to create an obligation to register treaties, without affecting the contractual capacity of Members of the United Nations and that the result of non-compliance with that provision is merely that the non-registered treaty cannot be invoked, with the view to its enforcement, before an organ of the United Nations. The same applies, in a different sphere, to article 103 of the Charter inasmuch as its consequence is to qualify the contractual capacity of Members of the United Nations in the sense that they cannot effectively conclude treaties which may prove inconsistent with their obligations under the Charter — for such treaties must yield, when the case arises, to the provisions of the Charter. Yet it may be difficult to regard any treaty concluded by a Member of the United Nations as void — on account of incapacity to contract — on the mere ground that it does not include a reference to the overriding provision of Article 103. For these reasons the Commission is of the opinion that obligations, however wide, accepted by a State in a treaty do not constitute a limitation of its capacity to conclude treaties unless they amount to the creation of a status as in the case of neutralization.

7. *Limitations upon the contractual capacity of international organizations.* The present draft embodies, in article 1, the principle that international organizations possess, in general, the capacity to conclude treaties. However, it must remain a matter for consideration whether such capacity is inherent in international organizations without any limit or whether its extent is determined by their purpose and constitution. In the municipal sphere it is recognized that the contractual capacity at least of some corporations is restricted. Thus in England a corporation created by or in pursuance of an Act of Parliament is limited in its contractual capacity by the language of the Act; a company incorporated under the Companies Act is bound by the terms of its constitution not to conclude contracts which are inconsistent with or foreign to its objects as formulated in the constitution. A contract made in disregard of that limitation is *ultra vires* and, to that extent, void. In the international sphere it is doubtful whether the capacity of

international organizations to conclude treaties is unlimited. Undoubtedly, such capacity is the consequence of their international personality. But that personality is not coterminous, in kind and extent, with that of States. As the International Court of Justice said in its advisory opinion on *Reparation for Injuries suffered in the service of the United Nations*: "Whereas a State possesses the totality of international rights and duties recognized by international law, the rights and duties of an entity such as the Organization [the United Nations] must depend upon its purposes and functions as specified or implied in its constituent documents and developed in practice" (*I.C.J. Reports 1949*, p. 180). For that reason the Court, while holding that the United Nations is an international person and that it has the capacity to conclude agreements, added the following qualifying statement: "That is not the same things as saying that it is a State, which it certainly is not, or that its legal personality and rights and duties are the same as those of a State" (*ibid.*, p. 179).

This applies, *a fortiori*, to international organizations whose functions and purposes are less comprehensive than those of the United Nations. In some cases the constitutions of international organizations expressly indicate the fact of the limitation of their international capacity. Thus the constitution of the Food and Agriculture Organization provides that "the Organization shall have the capacity of a legal person to perform any legal act appropriate to its purpose which is not beyond the powers granted to it by this Constitution" (article 15 (1)). An identical wording is adopted in the constitution of the World Health Organization (article 66). Similarly, the constitution of the International Refugee Organization, approved by the General Assembly at its first session in December 1946, laid down that "the organization shall enjoy in the territory of its members such legal capacity as may be necessary for the exercise of its functions and the fulfilment of its obligations" (article 13). Numerous other international organizations and organs contain similar provisions. On the other hand, the constitutions of some other international organizations recognize, without any limitation "the international personality and legal capacity" of the Organization.⁸⁹ However, probably no decisive importance need be attached to the fact that some constitutions expressly limit their international personality and capacity so as to conform with their objects and purpose while others contain no provisions of that character.* The general language, cited above, used by the International Court of Justice in the *reparation for injuries suffered in the service of the United Nations* case suggests that some such general limitation of capacity must be implied in all international organizations. So far no cases seem to have arisen which throw direct light on the subject so as to permit the formulation of clear and specific rules. The Commission has deemed it sufficient to accommodate the principle involved within the framework of the comprehensive language of article 10 as proposed.

⁸⁹ See, for example article 8 (13) of the Agreement of 1946 establishing the European Central Inland Transport Organization.

Note

The Special Rapporteur has found it difficult to determine to what extent the subject matter of this article is of practical importance. With regard to such problems as the contractual capacity of protectorates and neutralized States the practical significance of the question involved tends to diminish. With regard to the possible limitation of contractual capacity as the result of the assumption of the obligation not to conclude treaties of specified character the comment suggests that this is not a case of restriction of the capacity to conclude treaties in a way amounting to the creation of a status but, rather, a case falling within the purview of article 16 relating to the validity of treaties inconsistent with previous treaty obligations. The problem of the capacity of member States of Federal States to conclude treaties raises matters of some complexity and the Special Rapporteur has found it necessary to examine that question at some length. With regard to the limitations of the contractual capacity of international organizations any detailed regulations must be left to the activity of judicial and other bodies within the framework of the general principle laid down in article 10. Some such general principle — giving expression to the legal consequences of any disregard of limitations of status in the matter of contractual capacity — there must be. The statement, adopted in some previous drafts, that every State has the capacity to conclude treaties, but that the capacity of some States to conclude treaties may be limited, contains information of uncontroversial character.

Article 11

Capacity of agents

Constitutional limitation upon the treaty-making power

1. A treaty is voidable, at the option of the party concerned, if it has been entered in disregard of the limitations of its constitutional law and practice.

2. A contracting party may be deemed, according to the circumstances of the case, to have waived its right to assert the invalidity of a treaty concluded in disregard of constitutional limitations if for a prolonged period it has failed to invoke the invalidity of the treaty or if it has acted upon or obtained an advantage from it.

3. In cases in which a treaty is held to be invalid on account of disregard of the constitutional limitations imposed by the law or practice of a contracting party that party is responsible for any resulting damage to the other contracting party which cannot properly be held to have been affected with knowledge of the constitutional limitation in question.

4. A party cannot invoke the invalidity of a treaty on the ground that it has been entered into in disregard of the constitutional limitations of the other contracting party.

5. A party asserting the invalidity of a treaty on account of any failure to comply with constitutional limitations is bound, in case of disagreement, to submit the substance of the dispute or the question of damage to the International Court of Justice or to any other international tribunal agreed upon by the parties.

Comment

1. This article is intended to formulate the law on a subject of the law of treaties on which legal opinion has been divided and with regard to which the judicial and governmental practice provides no clear answer. Only a small minority of writers now holds, without qualifications, the view that the limitations of the constitutional law or practice upon the treaty making power are irrelevant and that a State which has finally assumed a treaty obligation is bound by it regardless of whether the constitutional limitations have been observed. The reasons for that view have been repeatedly stated. They are grounded in some cases in the deductions drawn from the so-called dualistic and monistic conceptions of the relation of international to municipal law. These deductions are inconclusive for it appears that authors starting from opposite points of view in the matter arrive at practically identical conclusions. Thus Anzilotti, adopting the typically dualistic approval held that municipal limitations of the treaty-making power are irrelevant for the reason that international law imputes to the State the will to contract through the Head of the State (or a person delegated by him in accordance with the constitutional law of the State the details of which are of no concern to international law).⁹⁰ On the other hand, Professor Scelle, starting from the monistic notion of the primacy of international law, considers the constitutional limitations irrelevant for the reason that to hold otherwise would mean to subordinate international law to the requirements of municipal law (*Précis de droit des gens*, vol. II (1934), p. 455). This seems also to be the view of Kelsen.⁹¹

2. The two main reasons for the view which holds constitutional limitations to be irrelevant have been:

(a) The requirement of security of international transactions which, it has been said, would be jeopardized if parties to treaties were to be unable to rely on the ostensible authority of the organs accepting binding obligations on behalf of their State and if they were compelled to probe into the often uncertain and obscure provisions of constitutional law of the other contracting party or parties on the subject;

(b) The serious inconvenience to and the resulting invidious position of a contracting party compelled

⁹⁰ That view is stated in the following frequently quoted passage: « *La conclusion à laquelle nous arrivons est donc que le droit international impute à l'État la déclaration de la volonté de stipuler faite en due forme par le chef de l'État, sans prendre égard aux dispositions constitutionnelles qui, d'une façon quelconque, limitent sa compétence ou lui imposent des devoirs. Nous disons « par le chef d'État », nous référant ainsi au cas le plus important et le plus grave : ajoutons immédiatement toutefois que lorsque, en conformité avec une pratique désormais bien établie, des accords internationaux sont conclus sans l'intervention des chefs des États contractants, notre conclusion vaut pour les déclarations de volonté des organes dûment autorisés à conduire les négociations et à conclure l'accord. La question, qui est le droit constitutionnel, de savoir si, dans ces cas, la compétence des organes doit se ramener à une délégation de compétence du chef d'État et si cette délégation est valable, est dénuée de pertinence au regard du droit international » (Anzilotti, *Cours de Droit International op. cit.*, vol. 1 (1929), pp. 366-367).*

⁹¹ *Recueil des Cours de l'Académie de droit international*, vol. 14 (1926), p. 270; H. Kelsen, *Principles of International Law* (New York, 1952), p. 324.

to assume the function of an arbiter of controversial questions of constitutional law of the other contracting party and occasionally to question the authority of the organ representing it.⁹²

These considerations, which are of a weighty character, must be taken into account in formulating the principles governing the subject. For reasons which will be stated presently they cannot be regarded as decisive.

3. On the other hand, a substantial number — though, once more, not the majority — of writers⁹³ have adopted the view that a treaty concluded by the agents of the State, whether it be the Head of the State or its government or other persons delegated for the purpose, in disregard of constitutional limitations is invalid. The reasons underlying that point of view is that international law leaves it to be municipal law of States to determine the scope of representative authority conferred upon its agents; that to the extent to which an agent acts outside the scope of his authority he acts without any authority at all; that, in accordance with the maxim *qui cum alio contrahit non est vel non debet esse ignarus conditionis ejus*, a contracting party must be deemed to possess knowledge of the fact and of the nature of the constitutional limitations upon the treaty-making power of the agents of the other contracting party; and that the notion that a State may become bound by acts of persons acting outside the scope of their authority is unacceptable as being totally out of harmony with modern conceptions of representative government and principles of democracy.

4. The approach to the subject which underlies the view adopted in the present article and which is believed to be supported by the bulk of practice is that the correct solution, both as a matter of good faith and security of international transactions, must constitute a compromise between the opposing doctrines outlined above. The compromise consists in the recognition of the fact that while constitutional limitations are, as a rule, decisive and while they must constitute the starting point of any solution of the problem, importance must be attached to such factors as the notoriety and clarity of the constitutional limitations in question, the subsequent conduct of the party attempting to avoid the treaty, and the duty to compensate any injury suffered by the innocent party. It is a solution based on some such considerations which must

⁹² These reasons were cogently stated by Sir Gerald Fitzmaurice in an article contributed to the *British Year Book of International Law*, vol. 15 (1934), pp. 129-137. The learned author formulates the principle that “no State which has purported to become bound by an international engagement, through the performance of all that is necessary from the international point of view to achieve that object, ought to be permitted to deny the validity of its own action by pleading a failure to observe its own constitutional requirements” (p. 133). However, the question is: (a) whether it is really the State (and not its unauthorized agents) who has purported to be bound; and (b) whether ratification by an unauthorized agent is all that is necessary from the international point of view.

⁹³ These include W. Schoen in *Zeitschrift für Völkerrecht und Bundestaatsrecht*, vol. 5 (1911), p. 400; Charles de Visscher in *Bibliotheca Visserriana*, vol. 2 (1924), p. 98; W. Schücking in *Annuaire de l'Institut International de Droit Public*, 1930, p. 225; P. Chailley, *La nature juridique des traités internationaux* (Paris, 1923), pp. 175, 215.

be considered as having secured the support of the majority of writers, including those who have examined the subject in recent years.⁹⁴ Undoubtedly, the

⁹⁴ Thus the late Professor C. Hyde after stating that "it is reasonable and necessary for the domestic courts of a country such as the United States to regard an unconstitutional treaty as void", elaborated that proposition as follows: "It may be said that where a contracting State holds out to another assurance that the terms of a proposed agreement are not violative of the fundamental laws of the former, and does so through an agent who is supposedly conversant with the requirements thereof by reason of the character of his connexion with the particular department of his government to which is confided the management of foreign affairs, and when no written constitution is involved, and no published and authoritative instrument notoriously proclaims an opposing view, there is ground for the conclusion that the contracting State holding out such assurance is not in a position to deny the validity of an agreement which has been concluded in pursuance thereof" (*International Law, op. cit.*, vol. 2, p. 1385). Sir Arnold McNair formulates as follows a rule governing a different aspect of the question: "It seems safe to say that, in the view of the United Kingdom Government, when an international engagement has been partly performed or otherwise treated by both parties as internationally binding, it cannot validly be repudiated by either of them on the ground that its conclusion failed to comply with some internal requirement of its constitutional or other law" (*The Law of Treaties, op. cit.*, p. 44). Elsewhere Sir Arnold McNair qualifies the general conclusion as to the invalidity of the treaty in question by the following statement: "It seems more reasonable to the latter view and to say that in concluding a treaty if one party produces an instrument 'complete and regular on the face of it' (to borrow an expression from another department of law) though in fact constitutionally defective, the other party, if it is ignorant and reasonably ignorant of the defect, is entitled to assume that the instrument is in order and to hold the former to the obligations of the treaty. If that view is correct then the repudiation of such a treaty constitutes an international wrong" (Introduction to E. Arnold, *Treaty-Making Procedure, op. cit.*, p. 6). In the Harvard Draft Convention the relevant article 21 embodies the elements of the main qualifying considerations underlying the present article 10: "A State is not bound by a treaty made on its behalf by an organ or authority not competent under its law to conclude the treaty; however, a State may be responsible for an injury resulting to another State from reasonable reliance by the latter upon a representation that such organ or authority was competent to conclude the treaty" (*American Journal of International Law*, vol. 29 (1935), Supplement, Part III, p. 992). This, on the whole, seems also to correspond with the conclusions reached, in a careful study, by Paul de Visscher, *De la conclusion des traités internationaux* (Bruxelles, 1943), p. 275. Similarly, Professor Verdross writes in the second edition of his treatise as follows: "Ein ratifizierter Staatsvertrag ist aber dann anfechtbar, wenn die effektive Beschränkung der 'treaty-making power' dem anderen Vertragspartner bekannt war oder bei Anwendung der nötigen Sorgfalt hätte bekannt sein müssen. Er kann sich daher in einem solchen Falle nicht beklagen, wenn der Vertrag mangels der parlamentarischen Genehmigung nicht erfüllt werden kann. Hat hingegen ein Staat bonafide einen Vertrag abgeschlossen, ohne die Beschränkung der Zuständigkeit der 'treaty-making power' des Partners zu kennen, dann ist dieser Staat schadenersatzpflichtig, wenn er die Verbindlichkeit des Vertrages nicht nachträglich anerkennt" (*Völkerrecht* 2nd ed., 1950), p. 218). This is also essentially the position adopted by Professor Guggenheim in a meticulously qualified statement of the rule laying down the invalidity of a treaty adopted in disregard of constitutional limitations. He says: "Si l'autorité exécutive conclut un traité de commerce, contrairement à une disposition claire et non ambiguë de son droit interne et présumée connue de la partie adverse, l'organe législatif compétent a le droit de l'annuler. Toutefois, l'Etat dont l'organe incompetent a conclu la convention reste responsable des actes illicites consécutifs

fundamental rule of nullity of acts done in excess of authority as well as compelling claims of the democratic principle forbid the acceptance of the view that a State may become bound, in matters affecting its vital interests and in others, by acts for which there is no warrant or authority in its own law. But these considerations must not be allowed to enable governments to conduct themselves in a manner prejudicial to the sanctity of treaties and violative of dictates of good faith; to derive benefits from a treaty and then, in reliance upon a controversial or obscure constitutional doctrine, to repudiate their obligations; and to assert the right to do so without compensating the other contracting party which relied, in good faith and without any fault of its own, on the ostensible authority of the regular constitutional organs of the State in question. There are indications in international practice, amply endorsed by writers, that these factors cannot be left out of account.

5. It is also probably for some such reasons that the practice of Governments shows relatively few instances of attempts to avoid a treaty by reference to alleged disregard of constitutional limitations. In addition to isolated cases submitted to judicial or arbitral determination and referred to below, the following list approximates, apart from some minor historical instances,⁹⁵ to completeness: the repudiation by France, in 1832, of a convention concluded in the previous year with the United States of America for the payment of compensation in respect of the spoliation of the property of American citizens during the revolutionary war — a repudiation justified on the ground of absence of legislative approval; the protest, in 1835, by the United States against a commercial agreement concluded between Peru and Chile; the controversies, in 1861, between Ecuador and Peru and in 1888 between Costa Rica and Ecuador;⁹⁶ the attempted repudiation by the Transvaal Republic of an arbitral award, rendered in 1871 in the *Western Griqualand Diamond Deposit Case*, on the ground that the arbitration agreement had been concluded in disregard of the requirements of the constitution; the apparent reliance by China, in denying the validity of her treaties concluded with Japan in 1915, on the fact that the President had acted in excess of his constitutional authority; the attitude adopted in 1920 by the Romanian Government, with respect to a commercial treaty concluded with Austria — which treaty, it was alleged, had not secured parliamentary approval; the doubts raised by Argentina between 1920 and 1933 with respect to the validity of her adherence to the League of Nations; the question of the validity of adherence of Luxembourg to the

commis dans le cadre de l'exécution du traité, malgré l'invocation de sa nullité" (*Recueil des Cours de l'Académie de droit international*, vol. 74 (1949), p. 236). Mervyn Jones' conclusions are to the same effect: *Full Powers and Ratification* (Cambridge, 1946), p. 155.

⁹⁵ Professor Balladore Pallieri refers — in *Recueil des Cours de l'Académie de droit international*, vol. 74 (1949), p. 472 — to King François I contesting the validity of a treaty concluded by him on the ground that it had not secured the approval of the Parliament of Paris.

⁹⁶ The details as to the three last mentioned disputes are recounted by Mervyn Jones in *Full Powers and Ratifications, op. cit.*, pp. 137-141.

League of Nations;⁹⁷ the repudiation, in 1932, by the Irish Free State of agreements concluded with Great Britain with respect to the payment of certain land annuities on the ground that they had not been approved by the Dail as required by the constitution;⁹⁸ and the request made by Switzerland in 1929 to withdraw her adherence to a resolution of the Washington Conference on the Limitation of Armaments obliging the parties to furnish to each other lists of treaties and agreements made with or concerning China. The request, which did not amount to an attempt at unilateral repudiation, was made on the ground of subsequent discovery that the Swiss adherence was illegal and erroneous for the reason of the failure to comply with the requirements of the Swiss Constitution.⁹⁹ It is significant that when in 1926 Switzerland answered the questionnaire formulated on the subject by the Committee of Experts for the Progressive Codification of International Law she adopted the view that, having regard to security of international intercourse, treaties ratified by the executive organs of a State are binding upon it.

6. The practice of international tribunals on the subject is even more conspicuous for its scarcity. The arbitral award of President Cleveland, given in 1888 in a dispute between Costa Rica and Nicaragua, adopted with important qualifications as to the burden of proof and as to subsequent acquiescence by conduct, the principle that the disregard of constitutional limitations entails the invalidity of the treaty (Moore, *International Arbitrations*, vol. 2, p. 1946). On the other hand, in the Franco-Swiss arbitration of 1912 an arbitral tribunal declined to attach importance to the fact that the tariff regulations to be fixed in accordance with the commercial agreement with Switzerland had not been confirmed by the French legislature. In the view of the Tribunal, that circumstance was "a matter pertaining to internal law".¹⁰⁰ In the award given in 1923 in the arbitration between Great Britain and Spain, Judge Huber declined to enter into questions of Moroccan constitutional law which, it was maintained, required a Sheriffian decree confirming an exchange of letters relied upon by Great Britain. However, he attached importance to the fact that subsequently both parties relied on the exchange of letters in ques-

⁹⁷ An incident discussed in detail by Paul de Visscher, *De la conclusion des traités internationaux*, op. cit., pp. 165-170.

⁹⁸ For details of these incidents see Sir Arnold McNair's introduction to Arnold, *Treaty-Making Procedure*, op. cit., pp. 3-13, and the comment to article 22 of the Harvard Draft Convention, pp. 1002-1005. The attempted repudiation, on constitutional grounds, by the Persian Government, in 1932 and 1952, of the oil concessions agreement with the Anglo-Iranian Oil Company was directed to an agreement which that Government considered to be a private contract as distinguished from a treaty.

⁹⁹ For details see Hackworth, *Digest of International Law*, vol. 5 (1943), p. 83. Actually Switzerland complied with the resolution which, however, she then declared to have remained a "dead letter" for the reason that the other Parties had supplied no such information to Switzerland.

¹⁰⁰ Sir Arnold McNair, op. cit., p. 8, points out that France did not in this case maintain that the treaty was invalid on account of the absence of constitutional approval. She merely insisted that the latter circumstance pointed to an interpretation of the treaty different from that by Switzerland.

tion.¹⁰¹ The judgement of the Permanent Court of International Justice in the case of *Eastern Greenland* (Publications of the P.C.I.J., Series A/B, No. 53, p. 71) has been occasionally interpreted as having been based on the same principle. Actually the Court held that the declaration made by the Foreign Minister, which the Court — in the circumstances of the case — considered binding upon Norway, had been given by him "in regard to a question falling within his province". A statement made by the Permanent Court of International Justice in the case of the *Free Zones of Upper Savoy and the District of Gex* (*ibid.*, No. 46, p. 170) as to the binding force of a declaration made by the Swiss agent in the course of the oral proceedings before the Court — a declaration which was questioned by France on the ground that it was made in disregard of the requirements of Swiss constitutional law — is probably not germane to the issue here discussed.¹⁰²

7. The paucity and the inconclusiveness of the judicial and arbitral pronouncements on the subject make it difficult to deduce from them any rule of international law which is calculated to provide a practical solution of the problem involved. The present article attempts a solution of that nature. Although the importance of the question may be more limited than the abundance of doctrinal discussion suggests, its detailed regulation, through codification, is desirable. Such regulation cannot be limited to the statement, such as formulated in paragraph 1 of article 11, to the effect that constitutional limitations are decisive and that a State can undertake binding obligations only through competent agents acting in accordance with its constitutional law and practice. Paragraphs 2 and 3 of article 11 are intended to provide the qualifications necessary to render the major rule just and reasonable. They take into account, in paragraph 2, the possibility that the State invoking the nullity of the treaty on account of the disregard of constitutional limitations may have tacitly accepted it by acting upon it or by deriving benefits from it. A State cannot be allowed to avail itself of the advantages of the treaty when it suits it to do so and repudiate it when its performance becomes onerous. It is of little consequence whether that rule is based on what in English law is known as the principle of estoppel or the more generally conceived requirement of good faith. The former is probably no more than one of the aspects of the latter. For the same reason paragraph 2 admits of a variety of qualifications which it is not necessary to specify in detail but which are required by a reasonable application of the principle rule. Thus, for instance, the fact that a State has for a long time adopted and acted upon a treaty concluded in disregard of constitutional limitations is not of decisive importance, if owing to the continuance in power of an unconstitutional government which concluded the treaty, there has been no way in which the constitutional will of the nation could have expressed itself and repudiated the treaty. The repudiation is improper

¹⁰¹ *Annual Digest*, 1923-1924, Case No. 20.

¹⁰² No reference is here made to the award given in 1923 by President Taft in the Arbitration between Great Britain and Costa Rica concerning the validity of concessions granted to a private company in disregard of the provisions of the Constitution of Costa Rica: *American Journal of International Law*, vol. 18 (1924), pp. 147-174.

only if the treaty has been acted upon during the regime of the repudiating government or of the regime identical with it. Similarly, there is no more than an application of the principle of good faith in the provision of paragraph 3 which makes the right to compensation, on account of the avoidance of a treaty concluded in violation of constitutional limitations, dependent on the fact of knowledge of these limitations on the part of the State, which has taken a reasonable degree of care to ascertain these limitations, claiming compensation. On the other hand, obvious considerations of juridical logic require that such knowledge is relevant only to the question of damages, but not that of the validity of the treaty. The fact of the absence of constitutional authority cannot be remedied by excusable ignorance of the limitations in question.¹⁰³

8. It may be noted that the above article 11 applies to the constitutional limitations of the treaty-making power proper. It does not apply to situations in which a State has finally accepted a treaty by ratification or otherwise in conformity with its constitutional law and practice but in which, owing to its constitution, it finds itself unable to give effect to the treaty without further municipal legislation. The government of a Federal State may have validly ratified a treaty in accordance with its constitution and yet it may find that owing to the reserved powers of the member States it cannot implement the treaty by its own federal legislation. Thus in the case of *Attorney-General for Canada v. Attorney-General for Ontario* decided in 1937 by the Judicial Committee of the Privy Council for the British Empire on appeal from the Supreme Court of Canada it was held that the Parliament of Canada had no power to enact legislation to give effect to various international labour conventions validly concluded by Canada (United Kingdom, *Appeals Cases* (1937) 326; *Annual Digest*, 1935-1937, Case No. 17). In such cases a State cannot plead any international invalidity of the treaty. If the latter was concluded in good faith and in the belief, not unreasonably held, of the power of the contracting party in question to give effect to the treaty, then probably the only proper course resulting from inability to implement it would be a request, to be addressed to the other contracting parties and which ought not to be refused, to be allowed to withdraw from the treaty regardless of any time limits laid down therein — although in cases where the State in question has derived benefits from the treaty at the expense of the other contracting party or parties there must be assumed to exist an equitable duty of compensation. In matters of this description and of obvious constitutional complexity the State ratifying the treaty may fairly be deemed to have acted in good faith even if ultimately its highest tribunals find that the constitution prevents it from implementing the treaty by legislation. Thus about the same time when the British Judicial Committee of the Privy Council, in the case referred to above, found that no legislative effect could be given to the treaty by way of federal legisla-

tion, a different conclusion — on a similar subject — was reached by the High Court of Australia in respect of federal legislation to implement the Air Navigation Convention of 1919 ([1936] 55 *Commonwealth Law Reports*, 608). In the well-known case of *Missouri v. Holland* the Supreme Court of the United States decided that the United States was competent by way of federal legislation to give effect to the Migratory Birds Treaty concluded with Canada in a matter normally falling within the province of the States ([1920] 252 U.S. 416). But it is equally well known that that decision, which has given rise to controversy, could not have been predicted in advance with any certainty.

9. On the other hand it is clear that the mere fact that a Government has failed to take the necessary steps to enact legislation necessary to implement a treaty — or because of reasons other than the provisions of its constitution has been unable to secure such legislation — is not a sufficient ground for absolving it from the obligations of the treaty. (That principle was explicitly affirmed by the Permanent Court of International Justice in its advisory opinion concerning the *Jurisdiction of the Courts of Danzig* (Publications of the P.C.I.J., *Series B*, No. 15, p. 262) where the Court held that the failure to enact the requisite legislation in itself amounted to a non-fulfilment of an international obligation and that it could not therefore be relied upon by Poland.¹⁰⁴ For this reason it seems desirable that a State should not finally become a party to a treaty unless it has assured itself that it will be in the position to take the necessary legislative measures. Thus, for instance, in the United Kingdom, while the conclusion and ratification of treaties is, as a rule, within the unfettered province of the Executive, courts will not enforce treaties affecting private rights unless the relevant provisions of the treaty have been made part of the law of the land through an enabling act of Parliament. Cases have occurred in which, as the result of the operation of that rule, courts have declined to give effect to treaties validly concluded by the executive and fully operative in the international sphere.¹⁰⁵ In such cases there is no question of the State being entitled to avoid a treaty as the result of non-compliance with constitutional limitations. On the contrary, in situations of this nature the State is internationally responsible for the non-fulfilment of its treaty obligation. The resulting unsatisfactory position can be avoided by the adoption of a rule — whose acceptance would amount to a change in the constitutional practice — requiring the passage of the necessary enabling legislation as a condition of the ratification of the treaty. There are indications of the gradual

¹⁰⁴ In the advisory opinion concerning the *Treatment of Polish Nationals in Danzig Territory* the Court held that a State cannot adduce as against another State the provisions of its own constitution in order to evade obligations incumbent upon it under international law or treaties in force (Publications of the P.C.I.J., *Series A/B*, No. 44, p. 24). However, this does not apply to the provisions of the constitution relating to the treaty-making power and enacted prior to the ratification of the treaty in question.

¹⁰⁵ See, for example, *Administrator of German Property v. Knoop* [1933] Ch. 439; *Republic of Italy v. Hambros Bank* [1950] 1 All. E.R. 430. As to Canada see to the same effect: *Re Arrow River Tributaries Slide and Boom Co.*, *Annual Digest*, 1931-1932, Case No. 2.

¹⁰³ It might appear that the same reasoning applies to paragraph 2. Actually that paragraph is based on the principle that the element of true consent is supplied by subsequent conduct expressive of the will of the State and thus remedying the original absence of constitutional authority.

evolution of some such practice.¹⁰⁶ When that practice is established, it will amount to a constitutionally sanctioned procedure which must be presumed to be within the knowledge of the other contracting parties and whose disregard will be internationally relevant in the same way as the corresponding provisions of written constitutions. Thus it is clear that there is a definite constitutional limitation of the treaty-making power in article 27 of the French Constitution of 1946 requiring legislative approval of enumerated categories of treaties as a condition of the final ratification by the executive. The same result may be achieved by the insertion of a clause, such as in the Agreement of 5 June 1946 between the United Kingdom and Canada concerning double taxation, which provides that it shall enter into force "on the date on which the last of all such things has been done in the United Kingdom and Canada as are necessary to give the Agreement the force of law in the United Kingdom and Canada respectively" (United Nations, *Treaty Series*, vol. 86, p. 14).

10. The question of nullity or voidability of treaties concluded in disregard of constitutional limitations has been discussed in the past from the point of view of bilateral treaties. It is only on that assumption that it is possible to subscribe to a rule, as formulated in the present article 11, that "a treaty is voidable, at the option of the party concerned, if it has been entered in disregard of the limitations of its constitutional law and practice". However, it is clear that that phraseology cannot apply to multilateral treaties. A multilateral treaty as such is not voidable — or void — because one or more parties thereto have accepted its obligations in violation of their constitutional law

¹⁰⁶ In introducing in 1952 the Visiting Force Bill intended to provide for changes in English law rendered necessary by the agreement entered into between the North Atlantic Treaty Powers relating to the status of their forces in the territory of another North Atlantic Treaty Power the Home Secretary stated as follows: "Until our law is modified in these respects this country cannot ratify the agreement" (*Weekly Hansard*, No. 231, 1952, col. 565). However, on 11 March 1953, in answer to a question in Parliament, the British Government stated that "strictly speaking Her Majesty's Government never have to obtain Parliamentary consent before making or ratifying a treaty" but that in practice ratification is expressly provided for in the treaty and Parliamentary approval sought in advance of ratification in two types of cases: (a) "The first is where we should not, in fact, be able to implement the Treaty without legislation. It is then necessary to ask Parliament for the legislation, and since Her Majesty's Government cannot be certain that Parliament will grant it, it is necessary that the Treaty should be subject to ratification, and that we should get the legislation passed between the time when we signed the Treaty and the time when we propose to ratify it." (b) "The other case is that in which the political importance of a Treaty is so great that Her Majesty's Government feel obliged, as a political necessity, but not as a legal necessity, to consult Parliament about it before becoming committed. Here again, it would be customary to make the coming into force of the Treaty dependent upon ratification and to stage a debate about it in Parliament at some point after signature, so that, if Parliament clearly disapproved, it would still be open to Her Majesty's Government not to ratify the Agreement." (180 House of Lords Deb., col. 1284). This phenomenon of a growing constitutional practice which has not crystallized into a binding convention of the constitution in itself provides an illustration of the complexity of the problem of constitutional limitations.

or practice. The treaty remains in force as between the other contracting parties (unless — a somewhat far-fetched possibility — so many parties to the treaty have concluded it in violation of their constitution that the number of the remaining parties has fallen below that required by the treaty for its entry into force.¹⁰⁷) In view of this it must be a matter for consideration whether the language of the article as at present formulated ought not to be changed in order to cover the case of multilateral treaties. That object could be achieved by the use of some such language as "the acceptance of a treaty is voidable" (instead of "a treaty is voidable") or "a treaty is voidable, at the option of and in relation to the party concerned". Similar changes would have to be introduced in other paragraphs of this article. (The same question arises in relation to the other articles of part III of the present draft in which, for one reason or other, the treaty is deemed to be void or voidable.)

11. However, in relation to multilateral treaties the question is more than of phraseology. When two States negotiate and conclude a treaty it is reasonable to assume, in the first instance, that the parties must be presumed to possess knowledge of the constitutional law and practice of each other. This is not the position in the case of a multilateral treaty where the number of signatories is considerable and where, moreover, parties may sign or accede subsequent to the establishment of the text of the treaty. In the latter case the parties are hardly in the position to raise the question of any constitutional limitations upon the action of the State acceding to the treaty. While the problems arising in this connexion cannot properly form the subject matter of a legal provision in a Code of the Law of Treaties it may be proper to consider to what extent the difficulty can be met by the establishment of some permanent advisory international machinery, available to international conferences and to Governments generally, for assisting them — and, in appropriate cases, the depositary authority — in resolving what must often be a complex problem requiring an intimate knowledge of the constitutional law and practice of many States. The consideration of some such machinery has been suggested above in connexion with article 4 (note 2).

Note

1. The length of the preceding comment is partly explained by the fact that the statement of the law in article 11 departs from the view adopted by the Commission in article 4 as tentatively formulated by it. Apparently the Commission regarded treaties concluded in disregard of constitutional limitations as being invalid *tout court*. The comment of the Commission on that article states that the view adopted therein is held by the majority of writers. This, in the opinion of the Rapporteur, is not the case.¹⁰⁸ The article as

¹⁰⁷ Or — which is, once more, a somewhat strained possibility — that as the result of the failure of participation of some States other contracting parties are justifiably of the opinion that the treaty has failed in its object and is no longer binding upon the others.

¹⁰⁸ On the other hand, that comment assumes that the judgement of the Permanent Court of International Justice in the case of *Eastern Greenland* lends "a measure of support" to the opposite view. As pointed out, in the comment to article 11 above, this interpretation of the judgement of the Court is open to doubt.

provisionally adopted by the Commission has the apparent merit of clarity and precision. It would be, to some extent, acceptable if constitutional limitations of the treaty-making power in various countries were precise, well known, and easily ascertainable. However, the contrary is the case. In view of this any solution which treats, without any qualifications, non-observance of constitutional limitations as the decisive and the only factor may result in introducing into the field of the law of treaties an element of arbitrariness and abuse. This might also be the result of a rule which would make it possible for Governments to avoid their treaties, on the ground of unconstitutionality, regardless of their conduct prior and subsequent to their conclusion. There may be a measure of deceptiveness in the mere simplicity of a rule designed to regulate a problem of intrinsic complexity.¹⁰⁹ The merits of an otherwise sound principle may be impaired by the failure to consider situations in which its unqualified application is manifestly unreasonable or productive of injustice.

2. The following consideration of a general character ought, it is believed, to be borne in mind in any attempt to codify this aspect of the law of treaties. On the whole, the appeal, on the part of Governments, to the alleged invalidity of treaties on account of non-compliance with constitutional limitations has not constituted a frequent feature of international practice. It is possible that an explicit and authoritative recognition in an international code of a right to avoid a treaty on that ground may encourage allegations of invalidity of treaties in a manner inconsistent with good faith, with the stability of international relations and the observance of treaty obligations. The danger of that possibility materializing will be substantially reduced, if not removed altogether, by the provision — in addition to the safeguards provided in the preceding paragraphs — of paragraph 5 which makes the legal effectiveness of any such allegation dependent, in case of disagreement, upon the finding of a judicial or arbitral tribunal. Provision for and recognition of the compulsory jurisdiction of an international tribunal must in this case — as indeed in other cases of allegation of the nullity of a treaty — constitute an integral part of any rule of international law on the subject.

Section II

Reality of Consent

Article 12

Absence of compulsion

Treaties imposed by or as the result of the use of force or threats of force against a State in violation

¹⁰⁹ An example of that complexity is provided by the otherwise illuminating treatment by Balladore Pallieri. He states that « *les constitutions internes sont devenues toujours plus compliquées, la détermination de l'organe compétent donne naissance à des questions toujours plus subtiles ; à un certain moment, il n'y a presque plus de traité dont la validité ne soit couteuse à cause de l'incompétence de l'organe* » : (*Recueil des Cours de l'Académie de droit international*, vol. 74 (1949), p. 475). On the following pages he says in a manner not easily reconcilable with the statement as quoted: « *Il se peut qu'un Etat ne se donne pas la peine de se renseigner sur l'organisation constitutionnelle d'autrui, mais il le fait à ses risques et périls. Les constitutions sont des actes assez notoires, et sur lesquels il n'est pas difficile de se renseigner.* »

of the principles of the Charter of the United Nations are invalid if so declared by the International Court of Justice at the request of any State.

Comment

A. In general

1. The object of this article is to declare the validity, in the sphere of international law, of a general principle of law which found no place in the society of States prior to the renunciation and prohibition of the use of force in general international agreements, such as the General Treaty for the Renunciation of War, the Covenant of the League of Nations and the Charter of the United Nations. The reason why traditional international law disregarded the use of force or of threats of force as a factor vitiating the validity of treaties has been repeatedly stated. In the past, international law permitted recourse to war not only as a means of enforcing rights recognized by international law, but also for the purpose of challenging and destroying the existing legal rights of States. If war was permitted as an institution, it followed that the law was bound to recognize the results of successful use of force thus used. To this explanation, unimpeachable in logic, of the legal position there was added the cogent consideration that the adoption of a different rule would have removed the legal basis of all treaties imposed by the victor upon the defeated State and thus perpetuated indefinitely a state of war. While the persuasive power of these considerations could not be denied, it was clear that the disregard of the vitiating force of duress in the conclusion of treaties tended to constitute, in a real sense, a denial of the legal nature of treaties conceived as agreements based on the free will of the contracting parties. Consensual transactions in which the true consensus of the parties, emanating from their free will, is irrelevant are an anomaly. Any rule which sanctions that anomaly is, like the admissibility of war as such, expressive of a fundamental defect in the structure of international law.

2. The cumulative result of the developments since the first World War has been to remove the foundations of the traditional rule of international law which recognized the validity of treaties imposed by force. These developments consist, in the limitation and, subsequently, in the renunciation and prohibition of war, and, more generally, of force or of threats of force. Although the Covenant of the League of Nations did not abolish the right of war, it prohibited recourse to it prior to the exhaustion of means of pacific settlement prescribed by it. To that extent it rendered unlawful any recourse to war in violation of the obligations of the Covenant and authorized and prescribed sanctions against the offending State. It was generally assumed that as the result of these provisions of the Covenant the status of war in international law had undergone a fundamental change. In the General Treaty for the Renunciation of War of 27 August 1928 (Pact of Paris) the Parties renounced recourse to war as an instrument of national policy in their relations with one another. The legal effect of that Treaty was that war could no longer be resorted to either as a legal remedy or as an instrument for changing the law. It has been stated that "being permanent in its nature and purpose and representing a fundamental change

in the legal structure of international society, the Pact of Paris must be regarded as continuing in being and as one of the cornerstones of the international legal system" and that "this is so although it has not been expressly incorporated in the Charter of the United Nations" (Oppenheim, *International Law*, vol. II (7th ed., 1952), London, p. 197). The Charter of the United Nations provides, in paragraph 4 of Article 2, that "all Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the United Nations". The same Article lays down, in paragraph 6, that the United Nations shall ensure that States which are not members of the United Nations act in accordance with the Principles of the Charter in so far as may be necessary for the maintenance of international peace and security. The Inter-American Treaty of Reciprocal Assistance signed at Rio de Janeiro on 2 September 1947 combined the provisions of the Pact of Paris and of the Charter of the United Nations. Article 1 of that Treaty laid down that the "High Contracting Parties formally condemn war and undertake in their international relations not to resort to the threat or the use of force in any manner inconsistent with the provisions of the Charter of the United Nations or of this Treaty." The cumulative result of these international enactments of a general character — of the Covenant of the League, the General Treaty for the Renunciation of War, and the Charter of the United Nations — has been to effect a change in the law, in the matter of the legal position of war, not only between the parties thereto, but in the international community as such. The prohibition of war, and of force generally, to the extent laid down by these instruments, must now be regarded as independent of these instruments and as having acquired the complexion of a general rule of international law binding upon States in the same way as rules of customary international law. That general rule prohibits aggressive war, i.e., a war undertaken as an instrument of national policy in violation or in disregard of the principles of the basic instruments referred to above. In the judgement of the International Military Tribunal of Nürnberg, whose principles have been affirmed by the General Assembly of the United Nations, aggressive war was declared to constitute an act both illegal and criminal.

3. It follows that a treaty imposed by or as the result of force or threats of force resorted to in violation of the principles of these instruments of a fundamental character is invalid by virtue of the operation of the general principle of law which postulates freedom of consent as an essential condition of the validity of consensual undertakings. The reasons which in the past rendered that principle inoperative in the international sphere have now disappeared. Moreover, in so far as war or force or threats of force constitute an internationally illegal act, the results of that illegality — namely, a treaty imposed in connexion with or in consequence thereof — are governed by the principle that an illegal act cannot produce legal rights for the benefit of the law-breaker. That principle — *ex injuria jus non oritur* — recognized by the doctrine of international law and by international tribunals,

including the highest international tribunal,¹¹⁰ is in itself a general principle of law.

4. The consequences of that principle have, in turn, found expression in the various declarations of policy or in declarations or the assumption of the obligation not to recognize treaties, or situations, or acquisitions of territory resulting from unlawful use of force in violation of former undertakings. Thus, in the well-known pronouncement of Mr. Stimson, the United States Secretary of State, it was declared on 7 January 1932 that the United States "cannot admit the legality of any situation *de facto* nor does it intend to recognize any treaty or agreement entered into between those Governments, or agents thereof, which may impair the treaty rights of the United States or its citizens in China . . . ; and that it does not intend to recognize any situation, treaty, or agreement which may be brought about by means contrary to the covenants and obligations of the Pact of Paris of August 27, 1928, to which treaty both China and Japan, as well as the United States, are parties" (United States, Foreign Relations, *Japan*, 1931-1941, vol. I, p. 76). While the above declaration was in the nature of a declaration of a voluntarily assumed policy — of intention — of non-recognition, the resolution adopted by the Assembly of the League of Nations on 11 March 1932 gave expression to the principle of non-recognition as implying a legal obligation. It stated that "it is incumbent upon the Members of the League of Nations not to recognize any situation, treaty, or agreement which may be brought about by means contrary to the Covenant of the League of Nations or to the Pact of Paris". Formal pronouncements of American States have given frequent expression to the obligation of non-recognition as distinguished from a policy of non-recognition. Thus the Lima Declaration of 22 December 1938 on Non-Recognition of the Acquisition of Territory by Force reiterated "as a fundamental principle of the Public Law of America" that such acquisitions shall not be valid or have legal effect "and that the pledge of non-recognition of situations arising from the foregoing conditions is an obligation which cannot be avoided either unilaterally or collectively". In the draft Declaration of Rights and Duties of States prepared by the International Law Commission in 1949 it was laid down, in article 11, that "every State has the duty to refrain from recognizing any territorial acquisition by another State acting in violation" of the obligation to refrain from resorting to war as an instrument of national policy and to refrain from the threat or use force.¹¹¹ Upon analysis, non-

¹¹⁰ See, for example the Advisory Opinion in the matter of the *Jurisdiction of the Courts of Danzig* (Publications of the P.C.I.J., Series B, No. 15, pp. 26, 27); the judgement in the case concerning the *Factory at Chorzow* (*ibid.*, Series A, No. 9, p. 31); the judgement in the case of *Eastern Greenland* (*ibid.*, Series A/B, No. 48, p. 285 and No. 53, p. 75 — where the Court held that the Norwegian declaration of occupation and other measures taken by Norway in that connexion constituted a violation of the existing legal situation and were accordingly « *illegales et non valables* » (unlawful and invalid); the order in the case of the *Free Zones* (*ibid.*, Series A, No. 24 — where the Court stated that France could not invoke against Switzerland any changes resulting from the illegal transfer of the French customs line).

¹¹¹ See *Yearbook of the International Law Commission*, 1949, p. 288.

recognition of treaties, including treaties providing for transfer of territory, imposed by unlawful exercise of force means that in the view of the States refusing recognition the treaty is invalid. While express recognition, in the field of treaties and elsewhere, is not essential as a condition of the valid creation of rights, express refusal to recognize them amounts to and is intended as a denial of their validity. It follows that, apart from the general considerations based on the principle which denies legal effect, for the benefit of the law-breaker, to unlawful acts, the nullity of treaties imposed by unlawful exercise of force must now be deemed to result, in addition to other factors, from the practice, in many cases acknowledged as an obligation, of non-recognition.

5. These factors, pointing to the invalidity of treaties imposed in connexion with or as a result of unlawful exercise of force, may now be summarized. They are (a) the general principle of law avoiding consensual transactions brought about by duress; (b) the obsolescence of the rule of international law permitting resort to or threats of war or force as a means of redress or of altering rights recognized by international law; (c) the general principle of law denying any law creating effect, in favour of the law-breaker, to acts which the law stigmatizes as illegal; (d) the practice and the principle of non-recognition. Having regard to the operation of these factors, the express formulation by the Commission of the rule as laid down in article 12 must be deemed to represent a codification, in this respect, of the existing law. That existing law is no longer what it was prior to the first World War.

6. It is arguable — and there is some apparent cogency in the argument — that the practical importance of formally sanctioning the invalidity of treaties imposed by force may be inconsiderable. For, it may be said, if international society organized in the United Nations is unable to prevent unlawful recourse to force, it may not be in position to assert, against the victorious aggressor, the principle sanctioning the invalidity of treaties imposed by force. Moreover, it is arguable that as soon as changed conditions of power permit to challenge the efficacy of treaties imposed by force such change can be effected by a political decision supported by public opinion of the world rather than by reliance on a principle of law. However, the force of these and similar arguments is more apparent than real. A general international organization such as the United Nations may not, on account of the operation of the rule of unanimity or for other reasons, be in a position to prevent aggression, or threats of aggression, and treaties imposed in consequence thereof. However, that circumstance need not necessarily signify the total breakdown either of the international organization or of the rule of law. On the contrary, the prospect that the advantages gained by an imposed treaty may prove illusory, in addition to other reasons, because of the invalidity of the settlement thus imposed — an invalidity to be formally affirmed by international tribunals, by third States and, when conditions permit, by the victim of violence himself — may in itself act as a brake upon designs of unlawful use of force. However that may be, it seems imperative that a codification of the law of treaties under the auspices of the United Nations should elevate to the dignity

of a clear rule of international law a general principle of law recognized by all civilized States, namely, that freedom of consent — i.e., absence of constraint exercised otherwise than by law — is an essential condition of the validity of treaties conceived as contractual agreements. In fact, there is room for the view that if the codification of the law of treaties were to achieve no other result than to declare formally the elimination from the body of international law the traditional rule which disregarded the vitiating effect of duress, a rule which is offensive to accepted notions of law and morality and which is therefore a serious reflection upon the authority of international law — such codification would be desirable for the sake of some such article. At the same time it is of importance to ensure that the principle thus formally incorporated should not be invoked — and abused in a manner inconsistent with the authority and the effectiveness of treaties. As intimated in the comment which follows, the present article 12 has been formulated with this object in view.

B.

7. *Treaties imposed as the result of the use of force or threats of force* — (a) The formulation here adopted follows the language of the Charter of the United Nations. It refers to treaties imposed not as the result of war but as the result of the use of force and threats of force. The latter clearly include war. The merit of the formulation adopted in the Charter is that it obviates the doubts, which gave rise to some uncertainty under the Covenant and the Pact of Paris, as to whether in a particular case the use of force amounts to war in the technical sense of the term. Under the Charter and the article as here formulated that distinction is devoid of relevance. (b) The expression “by or as the result of the use of force or threats of force” is intended to express the principle that coercion, however indirect, if resulting from unlawful recourse to force or threats of force invalidates a treaty. This means that a treaty is invalid if a State, as the result of unlawful use of force, has been reduced to such a degree of impotence as to be unable to resist the pressure to become a party to a treaty although at the time of signature no obvious attempt is made to impose upon it by force the treaty in question. The formulation here adopted covers also the situation in which the victor has established within the defeated State a subservient government which signs the treaty without a show of protest. (c) The article refers to physical force or threats of physical force as distinguished from coercion not amounting to physical force. However, in the case of a State the borderline between these two kinds of coercion is not rigid. In fact it would appear that direct physical force can be applied only to persons, but not to the collective entity of the State. On the other hand, in cases such as attempts or threats to starve a State into submission by cutting off its imports or its access to the sea, although no physical force is used directly against persons it may be difficult to deny that the treaty must be deemed to have been concluded as the result of the use of force or threats of force. Neither would it appear to be essential that compulsion thus directly applied against a State should be the result of a war or of other use of direct physical force. The inevitably indefinite character of this cause of invalidity of treaties renders it particularly

necessary to make its operation dependent upon impartial determination as provided in this article.

8. *Upon States* — The present article is concerned only with the coercion of States in their collective capacity. It is not concerned with physical force or threats thereof against the organs of the State in connexion with the conclusion of a treaty. Force or threats of force of that character, of which text-books adduce a number of examples,¹¹² eliminate altogether the element of freedom of consent which is essential for the validity of a contractual undertaking. There has been general agreement, even under traditional international law, that a treaty concluded or an undertaking given in such circumstances was without legal effect.

9. *In violation of the principles of the Charter of the United Nations* — Force ceases to have the character of mere coercion if it is exercised in execution of the law — as a legal sanction — or in accordance with the law. Although in such cases the element of consent on the part of the State concerned is lacking, the impersonal authority of the law on behalf of which — and in accordance with which — force is employed is properly deemed to supply, or to remedy, the absent element of consent. For this reason a treaty or any other undertaking imposed by the United Nations, in the course of its enforcement action, upon a State held to be guilty, in the language of Article 39 of the Charter, of a “breach of the peace or act of aggression” does not invalidate the treaty or the undertaking. It must be assumed that force exercised by the collective action of the United Nations is exercised in accordance with its principles. This is so even in cases in which it is applied against a State not guilty of an act or of a threat of aggression. For the enforcement action of the United Nations, under Chapter VII of the Charter, is not limited to action against States engaged in or threatening aggression. It is possible for such action to take in a situation amounting to a “threat of war”, i.e., in situations in which the United Nations consider that force must be exercised, if necessary, against a State whose attitude, while otherwise not unlawful, endangers peace.¹¹³

In this connexion the question arises whether the rule as formulated in the present article affords protection, by virtue of the principle which vitiates a treaty on account of duress, to a State which has first resorted to force in violation of its obligations. That question is here answered in the affirmative. For unless force is exercised, even against the aggressor, in accordance with or behalf of and within the limits of the law, the fact of aggression is irrelevant — except to the extent that provision against future aggression and just reparation for damage resulting from aggression may legitimately form an element of the treaty.

For the same reason, as in the existing state of international organization collective enforcement of

¹¹² See Ch. Rousseau, *Principes généraux de droit international public*, vol. I (1944), pp. 352-354.

¹¹³ It is probably by reference to some such considerations, that an explanation may be found of the view expressed by Professor Scelle that « le droit-loi imposé par la violence ou la pression est ou non valide selon sa conformité ou sa non-conformité avec le droit objectif » (*Précis de droit des gens*, vol. II (Paris, 1934), p. 344).

peace and effective collective resistance to aggression may not always be possible, the character of legal sanction may occasionally be attributed to the action of one or more States acting for the enforcement of peace or repulsion of aggression. When acting in that capacity individual States or groups of States must, in proper cases, be deemed to act as agents of the law.¹¹⁴ Whether they are so acting and whether in thus acting they remain within the orbit of the principles of the Charter of the United Nations, so that they may properly be regarded as the agents of the law, must be a matter for impartial determination by agencies other than the parties directly concerned.

10. It is necessary in this connexion to explain the reference in this article to the principles of the Charter of the United Nations as expressive of international law in general. The present article — as indeed the present draft of the Code of the Law of Treaties — is based in the assumption that the codification of international law as a whole or any part thereof must take place within the framework of the fundamental principles of the Charter. For some purposes the law of the Charter must be regarded as the law of the international community in the sense envisaged by the International Court of Justice in its Advisory Opinion on the *Reparation for injuries suffered in the service of the United Nations* (see above, article 1 (1)). The prohibition of force and threats of force must be considered as falling within the orbit of these principles. These, and some other, basic principles of the Charter must be regarded as permanent and, in case of the substitution of the United Nations by any other general organization of States, as necessarily forming part of the constitution of that organization. For that reason it has been considered proper in this draft to treat the Charter of the United Nations as expressive, for some purposes, of general international law of enduring validity. Should the political condition of the world result, at any future time, in the total disappearance of any general organization of States, it is probable that any Code of a Law of Treaties would become obsolete.

11. . . . *If so declared by the International Court of Justice at the request of any State* — While other provisions of this article are believed to express existing law, it must, *de lege ferenda*, be regarded as fundamental that any allegation of the invalidity of a treaty on account either of compulsion or of any other reason of invalidity as laid down in articles 12-16 of this chapter may properly be made with legal effect only: (a) if accompanied by the willingness of the State making such allegation to obtain a finding of an international tribunal on the matter, and (b) if followed by an actual

¹¹⁴ The notion that compulsion is not a vitiating element in relation to validity of treaties in cases in which what is exacted from the coerced State does not go beyond the limits of international law is clearly expressed by Hall: “Consent . . . is conceived to be freely given in international contracts, notwithstanding that it may have been obtained by force, so long as nothing more is exacted than it may be supposed that a State would consent to give, if it were willing to afford compensation for past wrongs and security against the future commission of wrongful acts When this point, however is passed, constraint vitiates the agreement” (E. E. Hall, *International Law* (3rd ed., 1890), p. 235).

finding of the tribunal to that effect. It is only if these conditions are fulfilled that reliance on the vitiating effect of duress — as well as of other reasons of invalidity — instead of constituting a disintegrating force in the treaty relations of States may become a factor in maintaining the authority of international engagements. If a State has been unlawfully coerced into entering a treaty, the proper course for it is — when conditions permit — to ask an international tribunal to make, in contentious proceedings, a declaration to that effect. The acceptance of the present article would amount to a conferment of obligatory jurisdiction upon international tribunals in a matter of this description. In view of the gravity of the issues involved the International Court of Justice would seem to be the proper tribunal competent to declare the invalidity of the treaty.

As the continued validity of a treaty imposed by force is a matter of concern for the entire international community, the present article gives to every Member of the United Nations — whether it has become a party to the Code of the Law of Treaties or not — the right to ask the Court to declare, in contentious proceedings, the invalidity of a treaty imposed by force. The State directly affected may not always be in the position to do so.

Note

1. As already submitted in the general observations to the comment to this article, the Commission is confronted with an important question of principle in relation both to the present article and most of the other articles in this part bearing on the validity of treaties. For although there exists a certain amount of inconclusive practice in the form of allegations of duress¹¹⁵ bearing on this aspect of the law of treaties that practice is not considerable either in extent or in importance. At the same time, the various causes of invalidity of treaties have loomed large in the writings of publicists and in various codes and drafts of the law of treaties. This has been so for the reason — which must be regarded as decisive — that the systematic exposition of an important branch of law cannot properly be determined by the actual or probable frequency of occurrences giving rise to the application of the rules of law in question. This is not merely a matter of *elegantia juris*. It is a question of the authority and the completeness of the law. There is no warrant for assuming that by giving to the various aspects of invalidity a place in the Code of the Law of Treaties, encouragement may be given to arbitrary appeal to them. If the safeguards of a judicial nature formulated in the present article are adopted, they will rule out, as a matter of law, any abusive or unilateral reliance on the fact or assertion of coercion. It will

¹¹⁵ At the Washington Conference of 1921 China raised, though in somewhat circuitous fashion, the question of the validity of her acceptance in 1915 of the so-called twenty-one demands presented to her by Japan (Willoughby, *China at the Conference* (1922), pp. 253, 255). In the course of the *Tacna-Arica Arbitration* of 1925 and 1926 Peru relied frequently on the allegation that she had been compelled to sign the Treaty of 1884. When in 1920 Bolivia and Peru addressed to the Assembly of the League of Nations a request for the revision of their treaties with Chile one of the grounds of the request was that those treaties had been imposed by force.

not be the interested State but the International Court of Justice which will declare the treaty to be invalid. Undoubtedly, experience shows that the nullification of treaties imposed by force takes place not in pursuance of a judicial verdict but of a political action taken in conformity with changed conditions of power. But this is not an adequate or desirable reason for removing from the province of judicial determination what is essentially a question of law. The decisive feature of the article as here formulated is that the historic foundation of the traditional rule which disregarded the vitiating effects of duress has disappeared. That historic foundation was the legal admissibility of war as an instrument both of enforcing and creating rights. The International Law Commission is now called upon to find — *constater* — that change as a matter of fact. In thus drawing the consequence of an accomplished change of the law the Commission will be codifying, not developing, the law of nations in one of its most essential aspects. At the same time it will be formally incorporating into the law of treaties a general principle of law of incontestable authority.

2. According to the article as drafted treaties imposed by force or threat of force are void. They are a nullity.¹¹⁶ They are not merely voidable — with the effect that the coerced party may take advantage of it or of part of it, if it so chooses, or that it may become legally bound by it if it fails to exercise its right of avoidance within a reasonable time or if it has benefited from it. The attitude of acquiescence or apparent acquiescence on the part of the coerced party is irrelevant. Any State may ask for a declaration of nullity. The defect of the treaty concluded in such circumstance is fundamental and nothing short of the conclusion of a freely negotiated treaty can cure it. For this reason it is difficult to accede to the reasoning adopted in article 4 (3), and the comment thereto, of the Harvard Draft Convention of Rights and Duties of States in case of Aggression to the effect that the imposed treaty “may offer an intrinsically fair and equitable adjustment of the controversy which led to the armed conflict”.¹¹⁷ For the case is not merely one of an armed conflict; it is a case of unlawful recourse to force. In relation to a treaty concluded in these circumstances it is impracticable and contrary to principle to confer upon an international tribunal the power of scrutinizing whether it is “intrinsically reasonable”. The governing consideration is that a treaty concluded under duress — following upon unlawful recourse to force — is not only vitiated by

¹¹⁶ The Harvard Research Draft Convention of 1939 on Rights and Duties of States in case of aggression lays down, in article 4 (3), that “a treaty brought about by an aggressor’s use of armed force is voidable”. The difference between “absolute nullity” and mere voidability is discussed lucidly by Professor Guggenheim in his course of lectures entitled « La validité et la nullité des actes juridiques internationaux » in *Recueil des Cours de l’Académie de droit international*, vol. 74 (1949), pp. 194-236. Valuable contributions to the subject have also been made by Professor Verzijl (« La validité et la nullité des actes juridiques internationaux » in *Revue de droit international*, t. XV (1935) pp. 284-339) and Dr. W. G. Hertz (« Essai sur le problème de la nullité » in *Revue de droit international et de la législation comparée*, 3^e série, vol. 20 (1939) pp. 450-500).

¹¹⁷ *American Journal of International Law*, vol. 33 (1939), Supplement, p. 828.

the absence of consent but also that its conclusion and continuation are contrary to international public policy. For the same reason, unlike in the case of error or even fraud, it is difficult to apply to such treaties the principle of severability (see below, part IV of the draft) and to try to discover which provisions of the treaty were not in fact imposed by force (and may therefore be treated as valid) and which must remain void; or, to apply another test, which provisions are intrinsically reasonable and equitable and which are not.

3. It has been noted that under the present article no party to a treaty is entitled to declare it invalid on the ground that it has been concluded under duress. What it, or any other State, may do is to request the International Court of Justice, by a unilateral application, to declare, in contentious proceedings, that the treaty is invalid. The consent of the other party to, or its participation in, the proceedings are not required — although it is to be expected that if it has a good case it will elect to defend it before the Court. (In the absence of such participation the Court, acting in accordance with article 53 (2) of its Statute, would still be bound to investigate the merits of the allegation that the treaty has been concluded under duress.) The essence of the relevant provision of the present article is that there is no other way of legally pronouncing the illegality of an enforced treaty except through a judgement of the Court. There is no room for any unilateral action of the interested State save that of initiation of judicial proceedings. For that reason the present article does not follow the suggestion embodied in article 32 (c) and (d) of the Harvard Draft Convention on Treaties which gives to the State seeking from the Court a declaration of nullity the right to suspend provisionally the performance of its obligations under the treaty. The necessity of any such measures may be met through the exercise by the Court of the power, under article 41 of its Statute, to indicate provisional measures to preserve the respective rights of either party. This may include, in proper cases, the right of a party to be freed, provisionally, from the performance of an invalid treaty. It may be a matter for consideration whether this article should not give the Court the power to decree, as distinguished from mere intimation, any applicable provisional measures. In any case, it must be for the Court — and not for the States concerned — to suspend provisionally the operation of a treaty.

Article 13

Absence of fraud

1. A treaty procured by fraud is voidable, at the instance of the International Court of Justice or, if the parties so agree, of any other international tribunal at the option and at the request of the injured party.

2. The injured party may affirm the treaty thus procured and ask for damages for the injury caused to it by the fraud of the other party.

Comment

1. The subject matter of this article is largely theoretical. There have been no instances of judicial determination — by national or international tribunals

— of disputes arising out of attempts to avoid a treaty on account of fraud. Neither does it appear that international practice shows examples of Governments raising the issue at all — although writers have occasionally discussed the propriety of the action of Mr. Webster, the United States Secretary of State, in not bringing to the attention of the British negotiators a map privately discovered and showing the boundary line in a manner favourable to the British contention. They have also discussed at some length whether treaties induced by fraud are void or voidable. For reasons substantially identical with those adduced in the general comment to article 12 relating to coercion it is desirable that the Code of the Law to Treaties should contain, subject to suitable variations, an article such as here proposed.

2. The reasons — including those of international public policy — which prompt the adoption of the principle that treaties concluded under duress are void, do not obtain in the case of fraud. It is sufficient to lay down the principle that such treaties are voidable at the option of the injured party and to the extent to which their provisions have been affected by fraud.

3. As in the case of coercion so also in relation to the present article a State is not entitled unilaterally to throw off the obligations of a treaty by a unilateral assertion that it has been procured by fraud. This seems to be in accordance with existing legal principle. Only an international tribunal is entitled to make a declaration and pronounce judgement to that effect. *De lege ferenda*, in default of agreement by the parties to confer jurisdiction in the matter upon another international tribunal, the International Court of Justice must be accorded compulsory jurisdiction to adjudicate upon the allegation of fraud. The occasional disinclination of writers to recognize fraud — as well as other factors affecting the reality of consent — as a reason of nullity or voidability of treaties has been the apprehension that, in view of the deficiencies of international judicial machinery, any such elaboration of the requirements of validity of treaties may affect adversely the binding force of international engagements. The principle embodied in the present article leaves no room for any such apprehension. It may be noted that whereas in the case of duress the seriousness of the alleged ground of nullity and the probable absence of equality in the position of the parties require the exclusive jurisdiction of the International Court of Justice, these considerations do not apply in the case of other defects of consent.

4. For the same reasons — unlike in the case of duress — the right to challenge the validity of the treaty on account of fraud must be deemed to belong to the injured party only.

5. As the treaty induced by fraud is not automatically void, the party adversely affected must possess the option: (a) of relying on the principle of severability of provisions of treaties and, in proper cases, of asking for the rescission of some of its provisions only, and (b) of affirming the treaty as a whole and of asking for compensation of the damage resulting from the fraud perpetrated by the other contracting party. In both cases the compulsory or agreed jurisdiction of an international tribunal must be regarded as essential.

Article 14

Absence of error

A treaty entered into under the mistaken belief, not due to fraud of a contracting party, as to the existence of a fact substantially affecting the treaty as a whole is voidable, at the instance of the International court of justice or, if the parties so agree, of any other international tribunal, at the option and at the request of the party adversely affected by the mistake.

Comment

1. The reasons, adduced in article 12 above as to the propriety and desirability of including in the draft Code of Treaties articles bearing on the reality of consent as a condition of validity of treaties, apply also to the present article. Moreover, instances in international practice, both judicial and otherwise, of mistakes as affecting treaties are more frequent than those of fraud — though in some cases, occasionally discussed under the heading of mistake, the subject-matter of the difficulty more accurately falls within the category of interpretation and rectification. This applies, for instance to the case of article 15 (1) of the Warsaw Convention of 12 October 1929 for the Unification of Certain Rules relating to International Aerial Transport. In that article, by a mistake of translation, the word “transporteur” was used instead of “exporteur”. The mistake was subsequently rectified by agreement of the parties and the action of the Secretary-General of the League of Nations (for details see comment to article 29 of the Harvard Draft Convention).¹¹⁸ It is possible that interpretation, and not reality of consent, is the proper *sedes materiae* with regard to what is believed to be the most frequent example of mistake in international practice, namely, a discrepancy between maps or geographical facts and the apparent intention of the parties as expressed in the treaty. Apart from this, the problem of mistake as an element vitiating the validity of treaties, far from constituting a prominent feature of international practice, has been merely conspicuous in textbooks. The care and deliberation which precede the making of treaties in modern times and the ease of access to sources of information render it unlikely that its regulation in a Code of the Law of Treaties will prove of direct practical assistance. However, for the reasons stated, it is not feasible or proper to disregard it in any codification of the law of treaties.

2. The mistake which in the contemplation of the present article invalidates a treaty, is one which is not induced by misrepresentation. For in the latter case, the treaty is invalidated by fraud. The mistake must be such as to go to the root of the matter and affect an essential aspect of the treaty. The fact that it could have been discovered prior to the conclusion

of the treaty, is probably irrelevant — though the circumstance that a contracting party has been guilty of negligence in failing to discover a mistake which could have been discovered by the exercise of ordinary foresight may entitle the innocent party to compensation for the loss caused by the invalidation of the treaty.

3. The considerations and principles bearing upon the voidability (as distinguished from nullity) of a treaty affected by essential mistake; the necessity of a judicial or arbitral determination of the fact and the consequence of mistake; provisional suspension of the operation of the treaty; and the severability of its provisions are the same, *mutatis mutandis*, as in the case of fraud (article 13 above). In view of the actual and probable scarcity of international practice on the subject it is unnecessary to elaborate in the present article the details of these contingencies. These must be left to the appreciation of international tribunals in the light of general principles of law and good faith.

4. The principle of compulsory jurisdiction of international tribunals to determine the existence of error as a cause of invalidity of a treaty must, upon analysis, be regarded as a principle *de lege lata*. This is so for the reason that any acknowledgement of the right of a party to terminate unilaterally a treaty on the ground of error — or, generally, of any other allegation of absence of reality of consent — would be tantamount to a denial of the binding force of the treaty.

Note

1. As stated in the comment the main — if not the only — instances in which error has been invoked by a contracting party in relation to a treaty and in which there has been judicial or arbitral pronouncement on the subject have been instances of error in connexion with maps or other geographical descriptions. Parties have found on occasions that a particular locality as described in the treaty did not exist at all or that the crucial line of delimitation was at a very considerable distance from that which they assumed.¹¹⁹

¹¹⁹ In this class must be included the controversy which arose between Great Britain and the United States in connexion with the Treaty of 1783 which referred to a range of highlands south of the St. Croix River as the dividing line between two systems of rivers. No such range of highlands existed; nor was it shown on the map used by the negotiators: J. B. Moore, *History and Digest of International Arbitrations* (Washington, 1898), pp. 65 ff. A dispute also arose as to the identity of the St. Croix River. The dispute was settled by arbitration in 1798: J. B. Moore, *International Adjudications, Ancient and Modern* (New York, 1929-1930), vol. 2, p. 373. The decision of the Supreme Court of the United States, in *United States v. Texas* [1896] 162 U.S. 1, 37-42, is another example of a rectification of a geographical description used in a treaty (of 1819 between the United States and Spain). So is also, to a conspicuous degree, the *Island of Timor* case between Portugal and the Netherlands decided in 1914 (Scott, *Hague Court Reports* (1916), pp. 355 *et seq.*), where the Tribunal interpreted the apparently erroneous description of the boundary by carefully elucidating the intentions of the parties at the successive stages of the negotiations. The incident between Russia and France on the one hand and Great Britain and Austria on the other, in connexion with the interpretation of the Paris Treaty of 1856, recounted by McNair, *The Law of Treaties*, *op. cit.*, p. 131, is of interest. And see generally Sandifer, *Evidence before International Tribunals* (1939), pp. 156-164, with regard to maps.

¹¹⁸ *American Journal of International Law*, vol. 29 (1935), Supplement. A recent example of a rectification, by subsequent agreement, of an error made in the original treaty may be noted. In the agreement of 1 August 1950 between Canada and France concerning air services the following error occurred: article 5 of the agreement instead of stating “from being used for the carriage of any international air traffic offered”, used the word “ordered”. By an Exchange of Notes of 28 September 1950 the parties rectified the error (United Nations, *Treaty Series*, vol. 77, p. 369).

Nevertheless the parties have not claimed in such cases that the treaty was void. They have asked for an interpretation or a rectification of the treaty. Writers have treated the matter largely as one of interpretation or evidence. With regard to maps, municipal jurisprudence has treated discrepancies between the description of the parcels in the contract and the map attached to it as one of construction. However, even if cases of this nature fall more properly within the field of interpretation, they illustrate at the same time the principle that not every error involves the voidability of the treaty. Such effect attaches only to an essential error which goes to the roots of the treaty.

2. It will be noted that the error referred to in the above article must be one of fact — not of law. The principle that a person — or a State — cannot plead ignorance of the law, civil or criminal, as a reason for escaping the consequences of his conduct is an indispensable legal principle. It applies with special force to Governments who are in the position to rely on the services of experts. The matter was touched upon by Judge Anzilotti in his dissenting opinion in the case of *Eastern Greenland* where he discussed the question whether the validity of a declaration made by the Norwegian Foreign Minister could have been vitiated by a mistake — the Judge found that “there was no mistake at all” — as to the consequences of the extension of Danish sovereignty: “one can scarcely believe that a Government could be ignorant of the legitimate consequences following upon an extension of sovereignty” (Publications of the P.C.I.J., *Series A/B*, No. 53, p. 92). On a minor scale, in the matter of a contract made by a ruler of a protected State, the following observation of the arbitrator, Lord Asquith, may be noted in relation to the allegation that as the ruler was not cognizant of the rule that territorial waters form part of the territory of the State, a concession given by him over his entire territory did not, nevertheless, cover the territorial waters. The arbitrator said: “I am not impressed by the argument that there was in 1939 no word for ‘territorial waters’ in the language of Abu Dhabi, or that the Sheikh was quite unfamiliar with that conception. . . . Every State is owner and sovereign in respect of its territorial waters, their bed and subsoil, whether the ruler has read the works of Byonkershoek or not. The extent of the ruler’s dominion cannot depend on his accomplishment as an international jurist” (*The International and Comparative Law Quarterly*, 4th Series, vol. I, Part II (1952), p. 253).

Section III

Legality of the object of the treaty

Article 15

Consistency with International Law

A treaty, or any of its provisions, is void if its performance involves an act which is illegal under international law and if it is declared so to be by the International Court of Justice.

Comment

1. The principle formulated in this article is generally — if not universally — admitted by writers who have examined this aspect of validity of treaties. Yet,

mainly for two reasons, the question is not free of difficulty. In the first instance, not every treaty is void which departs from customary international law. For it is generally recognized that, in principle, States are free to modify by treaty, as between themselves, the rules of customary international law. *Modus et conventio vincunt legem*. Thus, so long as the treaty does not affect the rights of third States, there would seem to be no reason why two States shall not agree that, *as between themselves*, the width of territorial waters should be fifty miles; that their warships should be allowed to stop and otherwise exercise jurisdiction over the merchant vessels of the other contracting party on the high seas; that their diplomatic representatives should not enjoy the jurisdictional immunities otherwise prescribed by international law; that their public ships and other governmental agencies should have no immunity from suit; that their nationals should be liable to military service in the territory of the other contracting party; or that they shall have the right to nationalize without compensation the property of the nationals of the other contracting party. Numerous other examples of this nature could be adduced. In so far as any such treaty modifying or abolishing a rule of customary international law were to purport to interfere with the rights of third States they would in any case be without effect in as much as a treaty cannot lawfully affect the rights of States which are not parties to it and in as much as, for that reason, an international tribunal would declare it to be unenforceable so far as the rights of third States are concerned.

2. Accordingly, a treaty is not void on account of illegality on the mere ground that it purports to affect, without its consent, the right of a third State. If it purports to do that it will be, to that extent, unenforceable by international tribunals by virtue of the rule *pacta tertiis nec prosunt nec nocent*. It is arguable that for that very reason, namely, because they purport to affect the rights of third States, such treaties are not only unenforceable against such States, but are also in themselves void on account of the fact that their object is illegal — such illegality consisting in the attempt to interfere with the rights of a third State in disregard of rules of international law. Thus to quote from Judge McNair’s work on treaties: “It is believed that a treaty between two States the execution of which contemplates the infliction upon a third State of what customary international law regards as a wrong is illegal and invalid *ab initio*” (*op. cit.*, p. 113). The true reason of such treaties being void is that they have for their object an act which is illegal according to customary international law.

3. The object of a treaty may be illegal — and the treaty correspondingly void — even if it does not directly affect third States. Thus it has been suggested that in so far as instruments such as the Declaration of Paris of 1856 which abolished privateering or the Slavery Convention of 1926 obliging the parties to prevent and suppress trade in slaves have become expressive of a principle of customary international law, a treaty obliging the parties to violate these principles would be void on account of the illegality of its object. The abovementioned instruments constitute also examples of inconsistency of a subsequent

treaty with rules of international law which, although originating from a treaty concluded between a limited number of States, subsequently acquire the complexion of generally accepted — and, to that extent, customary — rules of international law.

4. It would thus appear that the test whether the object of the treaty is illegal and whether the treaty is void for that reason is not inconsistency with customary international law pure and simple, but inconsistency with such overriding principles of international law which may be regarded as constituting principles of international public policy (*ordre international public*). These principles need not necessarily have crystallized in a clearly accepted rule of law such as prohibition of piracy or of aggressive war. They may be expressive of rules of international morality so cogent that an international tribunal would consider them as forming part of those principles of law generally recognized by civilized nations which the International Court of Justice is bound to apply by virtue of Article 38 (3) of its Statute. Although it is not possible to cite any judicial decision in support of that view there are occasional interesting observations of individual judges to that effect. Thus in his individual opinion in the *Oscar Chinn* case Judge Schücking asserted that “the Court would never . . . apply a convention the terms of which were contrary to public morality” (Publications of the P.C.I.J., *Series A/B*, No. 63, p. 150).

5. The voidance of contractual agreements whose object is illegal is a general principle of law. As such it must find a place in a codification of the law of treaties. This is so although there are no instances, in international judicial and arbitral practice, of a treaty being declared void on account of the illegality of its object.

6. The following observations are relevant to the test of the proposed article: (a) In referring to “a treaty or any of its provisions” the intention is to apply the principle of severability, namely, that any single provision involving an illegality, does not entail the nullity of the treaty if the latter, taken as a whole, can be upheld. This will not be possible if the provision in question constitutes an essential part of the treaty. (b) As the offending treaty — or the offending provision — is contrary to overriding principles of international law it cannot be enforced by an international tribunal even if the State which stands to benefit from the judicial nullification of the treaty fails to raise the issue. No action will lie on a treaty of that description. On the other hand, the defendant State, although it has taken part in bringing about the illegal treaty, can plead the illegality as a defence. *In pari delicto potior est conditio defendentis*. This to a large extent answers the question whether and to what extent a State can be relieved of the performance of an illegal treaty. It can suspend performance and leave it to the other contracting party to resort to the International Court of Justice for the vindication of the validity of the treaty. The jurisdiction of the Court in such cases is obligatory. It is the Court, and not the interested party, which is finally entitled to declare the treaty, or part thereof, to be void on account of illegality.

7. As in other articles of this part of the present draft, so also in the matter of nullity of treaties on the ground of their inconsistency with binding rules of international law, the operation of the principle involved must be dependent upon the willingness of the party invoking it to abide by the decision of an international tribunal upholding the allegation of invalidity or making, *proprio motu*, a finding to that effect. The reasons, which are of a general character, for that principle have been stated above in paragraph 4 of the comment on article 14. It is a principle *de lege lata*.

Note

1. As explained in the comment the incorporation of this article must be regarded as essential in any codification of the law of treaties. This is so notwithstanding the substantial practical and doctrinal difficulties inherent in the solution here adopted. Thus in the sphere of municipal law the legislature is often called upon to enact statutes which derogate from what has hitherto been regarded as the overriding law of the land and imperative considerations of public policy. Courts must give effect to the statutes thus enacted. In the international sphere the function of such legislation is frequently fulfilled by treaties, both bilateral and multilateral. But if, as stated in the present article, international courts are to be judges of the validity of treaties in the light of overriding principles of international custom and international public policy as hitherto recognized, a situation may be created in which international society may be deprived of the necessary means of development through processes of international legislation. Probably the exceptional character of such contingencies reduces to limited proportions the practical difficulty involved. But there ought to be no doubt as to the existence of the problem and the possible necessity of an attempt at solving it, *de lege ferenda*, within the framework of the present article. (The same problem arises, in article 16, with regard to treaties of a general legislative character inconsistent with previous treaties). Thus, for instance, if Article 2 (6) of the Charter were to authorize, in terms more categorical than it does at present, intervention in the affairs of non-member States, the question might arise of the validity of some provision on the face of it incompatible with the prohibition of intervention and the independence of States. *De lege ferenda* there may be room for the consideration of a principle affirming that a multilateral treaty concluded in the general international interest is valid even if departing from or contrary to what has been considered in the past to be an overriding rule of customary international law.

2. At the same time this and similar difficulties counsel caution in the matter of extending the limits of voidability of treaties. For this reason the present draft does not refer in a separate article to consistency with international morality as a condition of validity of treaties. To do so may result in conferring upon international tribunals a measure of discretion, in a matter admitting of highly subjective appreciation, which Governments may not be willing to confer upon them and which they could exercise only with difficulty. In so far as considerations of morality — such as conduct in accordance with canons of

good faith — form a constituent part of general principles of law and of the requirements of international public policy they are provided for in the present article.

Article 16

Consistency with Prior Treaty Obligations

1. A treaty is void if its performance involves a breach of a treaty obligation previously undertaken by one or more of the contracting parties.

2. A party to a treaty which has been declared void by an international tribunal on account of its inconsistency with a previous treaty may be entitled to damages for the resulting loss if it was unaware of the existence of that treaty.

3. The above provisions apply only if the departure from the terms of the prior treaty is such as to interfere seriously with the interests of the other parties to that treaty or seriously impair the original purpose of the treaty.

4. The rule formulated under paragraphs (1) and (2) does not apply to subsequent multilateral treaties, such as the Charter of the United Nations, partaking of a degree of generality which imparts to them the character of legislative enactments properly affecting all members of the international community or which must be deemed to have been concluded in the international interest.

Comment

1. The subject-matter of the present article is of considerable importance and also of some complexity inasmuch as it raises the problem of the adaptation of a cogent legal principle to the requirements of peaceful development on international law and organization. This is so although the matter has given rise to only a relatively small number of judicial or arbitral pronouncements and although even these provide no direct authority for the principle here formulated. Thus in the *Oscar Chinn* case (Publications of the P.C.I.J., *Series A/B*, No. 63), while the dissenting opinions of two judges were based in substance on the principle formulated in the present article, the Court as a whole did not pronounce directly on the subject. The question in that case was whether the Convention of St. Germain of 1919 relating to the Congo, which altered the provisions of the General Act of Berlin of 1885, was valid. The judgement of the Court relied in this respect on the fact that the parties to the dispute, the United Kingdom and Belgium, did not challenge the validity of the Convention of St. Germain. In 1917 Costa Rica and Salvador brought an action before the Central American Court of Justice on account of the violation by Nicaragua, by a treaty concluded with the United States, of her treaties with these States. The Court, for jurisdictional reasons, declared itself unable to act on the request that it should declare the treaty with the United States to be null and void (*American Journal of International Law*, vol. II (1917), p. 228). It declined to do so for the reason that one of the parties thereto, namely, the United States, was not a party to the dispute. But the Court found that Nicaragua "is under the obligation — availing itself of all possible means provided by international law — to re-establish and to maintain the legal status that existed prior to the Bryan-

Chamorro Treaty" (*ibid.*). The decision of the same Court in an action brought *in pari materia* by Salvador against Nicaragua was to the same effect (*ibid.*, p. 729). In what is perhaps the most important incident bearing on the subject — the incident arising out of the allegation of inconsistency of the Hay-Varilla Treaty of 1903 between the United States and Panama and the Hay-Pauncefote Treaty of 1901 between the United States and Great Britain in the matter of exemption of Panama from tolls levied on ships passing the Canal — the dispute never came for judicial determination.

2. The effect of article 16 is that an international tribunal requested to enforce a treaty the performance of which involves a breach of a treaty obligation previously undertaken by one or more of the parties to the new treaty must decline to enforce the subsequent treaty. It must do so on the ground that the latter is void. The article does not adopt alternative solutions such as that the obligations of the former treaty take priority over those of the latter treaty which otherwise remains valid. It proceeds on the assumption that if parties to a treaty bind themselves to act in a manner which is a violation of the rights of a party under a pre-existing treaty, they commit a legal wrong which taints the subsequent treaty with illegality. This result follows cogently from general principles of law governing the subject, from requirements of international public policy and the principle of good faith which must be presumed to govern international relations. These considerations are summarized in an extract reproduced below in note 1 to this comment.

3. The knowledge, at least on the part of one contracting State, of such incompatibility must — unless in exceptional circumstances of which it is not easy to conceive — be assumed. This is so, in particular, having regard to the fact that since the Covenant of the League of Nations the obligation of registration, followed as it is by publication, rests upon most States. In those exceptional cases in which one of the parties to the new treaty had, for no fault of its own, no knowledge of the pre-existing treaty, principle requires that the other party should compensate it for the damage caused by the fact that the subsequent treaty is declared void. This is the effect of the second paragraph of the article. The possibility that the incompatibility was unknown to both parties to the new treaty must be regarded as remote — except in so far as it is due to the mistaken belief that no legally relevant inconsistency with the former treaty existed.

4. As in the case of invalidity on other grounds, so also the invalidity of the subsequent treaty on account of its inconsistency with a previous treaty, must, if it is to excuse a party from performance, be declared by an international tribunal, when called upon to enforce that subsequent treaty, on the application of one of the parties. Moreover, international tribunals must also be deemed competent to declare the nullity of the subsequent treaty at the request of a party to the prior treaty even if no attempt has yet been made to put the subsequent treaty into effect. For the very existence of the subsequent offending treaty, in so far as it is a source of challenge and uncertainty for the parties to the previous treaty, provides a legitimate

occasion for protest by the parties to the prior treaty and for a request on their part that the subsequent treaty should be formally declared void. This in fact has been the attitude of Governments in most of the cases in which they considered their interest to be affected by the conclusion of the subsequent treaty.

5. The principle that the subsequent treaty, violative of a prior conventional obligation, is invalid requires a substantial modification in cases in which that subsequent treaty partakes of the nature of a general rule of international law of a legislative character. Within the municipal sphere a statute may effectively interfere with pre-existing contracts. Some such principle must also apply in international relations in cases in which the subsequent treaty is — in effect (though not in strict law seeing that there is as yet no legislation proper in the relations of States) — of a legislative character. Thus Article 103 of the Charter of the United Nations provides that “in the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreements, their obligations under the present Charter shall prevail”. In referring, in the matter of the obligations of the Members of the United Nations, to “their obligations under any other international agreement” the Charter refers to agreements concluded both prior and subsequent to the acceptance of the Charter. In so far as it is directed to the latter the Charter merely upholds the principle that the obligations of a prior treaty have precedence over those of a treaty concluded subsequent to it. Under the present article 16, which is intended to be declaratory of existing law, treaties inconsistent with the Charter and concluded subsequent to its acceptance are void whether concluded with Members of the United Nations or with States which are not Members. However, in so far as Article 103 of the Charter in referring to “obligations under any other international agreement” aims at treaties entered into prior to the acceptance of the Charter, that Article, being inconsistent with treaties previously concluded, would itself be void unless we apply to it the principle adopted in paragraph 4. That principle provides an exception with regard to “subsequent multilateral treaties, such as the Charter of the United Nations, partaking of a degree of generality which imparts to them the character of legislative enactments properly affecting all members of the international community”. The same principle has been sanctioned in a different sphere by the International Court of Justice in the advisory opinion concerning *Reparations for injuries suffered in the service of the United Nations*. To that extent this part of paragraph 4 of article 16 must be regarded as being *de lege lata*. (Article 20 of the Covenant of the League of Nations merely provided, with respect to obligations undertaken by a State prior to its becoming a member of the League and inconsistent with the Covenant, that it is its duty to take immediate steps to procure release from such obligations. With regard to other obligations the Covenant adopted the rule that “the Covenant is accepted as abrogating all obligations and undertakings *inter se* which are inconsistent with the terms thereof” which meant in effect that they were void. This result — with regard to future treaties — would have followed, it is believed, even without the

express provision of article 20 with regard to treaties concluded by members of the League both *inter se* and with non-member States.)

6. Similar considerations, although in a more limited sphere, may apply to paragraph 4 in so far as it refers to treaties, inconsistent with previous treaty obligations, “which must be deemed to have been concluded in the international interest”. At present, the possibility of quasi-legislative international enactments, such as the Charter of the United Nations, being accepted by a vast majority of States is distinctly limited. But situations may arise in which a treaty concluded by a considerable number of States, though not so numerous as to approach universality, coincides so patently with general international interest that it may properly be entitled to claim to override previous treaty obligations — especially if in cases of this description an attempt is made to compensate the beneficiary of the prior treaty. In exceptional cases this might be held to apply even to a bilateral treaty. Thus there is room for the view that the treaty of 1903 between the United States and Panama which promised the latter exemption for Panamanian ships passing the Canal and which was considered inconsistent with the treaty concluded in 1901 with Great Britain was concluded in the international interest inasmuch as its purpose was to make possible the opening of a great international highway of paramount importance and inasmuch as the special concessions granted to Panama were an essential condition of the conclusion of the treaty. It is not suggested that the above example necessarily falls within the provision of the exception formulated in paragraph 4. However, that example lends emphasis to the view that some such exception may properly find a place in any general rules as laid down in that paragraph. While this specific provision of paragraph 4 is essentially *de lege ferenda*, it is believed to merit full consideration in connexion with the codification of the law of treaties. The safeguarding of the authority of treaties must be reconciled with the equally important international interest involved in preventing the development of international law from being hampered by the obligations of existing treaties. In some cases parties have expressly provided against the contingency of a treaty becoming a stumbling block in the way of general international regulation. Thus the Air Navigation Agreement between the United Kingdom and Canada of 19 August 1949 provided, in article 11 (2), that “in the event of the conclusion of any general multilateral convention concerning air transport by which both contracting parties become bound, the present Agreement shall be amended so as to conform with the provisions of such convention” (United Nations, *Treaty Series*, 44, p. 240).¹²⁰

¹²⁰ With this there may be contrasted the way in which the Hague Convention of 1930 on Certain Questions Relating to the Conflict of Nationality Laws attempted to resolve the problem of inconsistency by providing, in article 19, that nothing in the Convention “shall affect the provisions of any treaty, convention or agreement in force between any of the High Contracting Parties relating to nationality or matters connected with it”. A provision of this character substantially reduces the legal effect of the multilateral treaty — although it cannot be interpreted as leaving the parties freedom of action with regard to treaties concluded subsequent to the acceptance of the multilateral treaty.

7. Considerations of similar nature apply also to the qualification of the general rule as expressed in paragraph 3. That qualification is specially relevant to the case of multilateral conventions. The latter are often in need of revision. It is clearly undesirable that such revision should be possible only through unanimous agreement of the original contracting parties. If such unanimity is impossible, the parties to the original convention must, in proper cases, be in a position to alter, *inter se*, its provisions by means of a new treaty concluded by them. This, for instance, has been the case in the matter of the various Hague Conventions of 1899 and 1907 and the successive Geneva Conventions for the amelioration of the condition of the sick and wounded in the armies in the field. These new treaties did not adversely affect the interest of the original contracting parties or impair the purpose of the original treaties. A different situation was said to have arisen in connexion with the case, mentioned above in paragraph 1 of this comment, of the Treaties of Berlin of 1885 and of St. Germain of 1919. Two of the dissenting judges in the *Oscar Chinn* case, which was concerned with the relation between these two treaties, were of the opinion that the latter treaty had, to a substantial extent, the effect of frustrating the object of the Treaty of 1885, which was still in force, and that for that reason the Treaty of 1919 was null and void. (The opinions of Judges Nyholm and Negulesco in the case concerning the *Competence of the European Commission of the Danube* — Publications of the P.C.I.J., *Series B*, No. 14 pp. 73, 129 — were substantially to the same effect.) If that were so — the present comment expresses no opinion on the question — the view of the dissenting judges must be regarded as unobjectionable. The fact that the parties directly concerned in the case did not challenge the validity of the treaty of 1919 was probably not relevant. It is believed that if the Court had examined the allegation that the treaty of 1919 frustrated the purpose, to which some of the original signatories legitimately attached importance, of the treaty of 1885, and if the Court had come to the conclusion that it was so, then it would have been consistent with and required by correct legal principle to hold that the treaty of 1919 was void. An international court cannot properly enforce a treaty whose purpose of effect amounts to a legal wrong, in matters of substance, against some of the signatories of the original treaty. The proper course for States wishing to conclude a new treaty inconsistent with their obligations under the prior multilateral treaty is to decounce it, if they can do so consistently with its provisions, and to conclude a new treaty. On the other hand — in particular if such termination of the original treaty is not legally possible — the continued existence of the original multilateral treaty cannot legitimately provide a reason for preventing developments which are desirable and generally beneficial and which, although departing from or amplifying, however considerably, the terms of the original treaty, cannot be regarded as unduly interfering with the rights of the original parties or the true purpose of that treaty. Moreover, it is clear that, *de lege ferenda*, consideration ought to be given to the adoption of a rule permitting changes in the original treaty by a decision which, if necessary, falls short of an unanimous decision of the original parties.

Note

1. The importance of the subject matter of this article from the point of view both of the law of treaties and of international law in general justifies, it is believed, a detailed treatment of the matter in the article itself and in the comment. The Special Rapporteur ventures to refer in this connexion to the following passage in an article, of which he is the author:

“In the international sphere the reasons for regarding later inconsistent treaties as void and unenforceable are even more cogent than in private law. It is, as a general rule, incompatible with the unity of the law for the courts to enforce mutually exclusive rules of conduct laid down in a treaty, a statute, or a contract. But among individuals contracts are infinite in variety and number; among States they are relatively few and a matter of general knowledge. The shock, therefore, resulting from any recognition of the later contract to the sentiment of the unity of the law is greater in the latter than in the former case. Moreover, in so far as there is any disposition by municipal courts to treat the later contract as subsisting, the logical exclusiveness of the subject-matter of the two contracts is mitigated by substituting the right to damages for the second inconsistent obligation. In the international sphere damages, by the very nature of things, are in most cases not likely to offer adequate compensation for the wrong. For these reasons it is difficult to accept the view that the treaties in question are valid and that the only effect of the inconsistency is that the obligations of the former treaty take priority over the conflicting provisions of the later agreement. This would be the position in any case. For, obviously, a state cannot lawfully terminate a treaty by the simple device of concluding another treaty inconsistent with the first. The flaw in the later treaty has an effect reaching beyond the mere reproduction of an obvious rule of international law. It makes that later treaty unlawful and incapable of enforcement.

“This insistence on the nullity of the later treaty is not, it is submitted, mere pedantry. Treaties, woven into the structure of customary international law, are the substance of the growing and changing law of nations. International law cannot recognize and it must actively discourage a state of affairs in which the law-creating faculty of states is abused for violating existing law as laid down in valid agreements. Governments cannot be permitted to discredit international law and to render it unreal by filling it with mutually exclusive obligations and by reducing treaties to conflicting makeshifts of political expediency.” (*British Year Book of International Law*, vol. 17 (1936), pp. 63-64).

2. The principle that contracts entered into by the parties in violation of previous contractual obligations binding upon them are void must be regarded as a general principle of law. As to English law, Sir Frederic Pollock (*Principles of Contracts* (9th ed., 1921), p. 475) lays down, without apparent qualification, the rule that if A concludes a contract with B and then another contract with C which, to the knowledge of both B and C, is inconsistent with the first contract, then the

second contract is void. For an elaboration of this rule in private law see H. Lauterpacht, "Contracts to Create a Contract" in *Law Quarterly Review*, 1936, pp. 434-454. (See also *ibid.*, pp. 524-527, for an examination of French and German law.) The principal French decision on the subject is that of the French Court of Cassation of 13 October 1912 in *Deutsche Celluloid Fabrik v. Schwerber* (*Sirey*, 1913, I, p. 259) where it was held that a contract of service between the plaintiff and the defendant made in disregard of a contract which, to the knowledge of both parties, was binding on the defendant, was void.

3. Some treaties, including article 20 of the Covenant of the League of Nations referred to above, include express provisions in which the parties undertake not to conclude treaties inconsistent with the obligations already undertaken. As already suggested, such provisions, in which the parties undertake not to violate an existing obligation, are redundant and of doubtful legal elegance.¹²¹ They do not provide an argument either in support or in refutation of the principle formulated in article 16.

4. The importance of that principle assumes particular importance in relation to conventions codifying international law. If the parties were to be in a position to conclude, *inter se*, treaties inconsistent with the general purpose of the convention, the resulting situation would indeed be confusing. Reference may be made in this connexion to an article by Professor M. Hudson in *American Journal of International Law*, vol. 24 (1930), p. 461, in which he discusses the possibility of States concluding treaties modifying *inter se* the conventions resulting from The Hague Codification Conference of 1930. He suggested that "such action would, in a sense, be contrary to the spirit of codification". He recalled that in the report of the drafting committee such conventions were not considered improper provided that they affected "only the relations between the States parties thereto". However, the purport of these conventions would not thus be limited if their effect were to frustrate or seriously impair the purpose of codification.

5. For the reasons stated the present article 16 does not adopt the solution proposed in article 22 (c) of the Harvard Draft Convention which, while leaving on one side the question of the nullity of the offending subsequent treaty, merely lays down that "the obligation assumed by the earlier treaty takes priority over the obligation assumed by the latter treaty". That formulation of the legal position is, it is believed, contrary to principle (see note 1) and to the views of practically all writers who have considered the question. Neither does it take into account the nature of the situation confronting a court adjudicating on a claim to enforce the subsequent treaty. The question of

priority of obligations is not before the court. It is not called upon to pronounce whether the prior obligation is to be enforced or not.

6. In this connexion it may be noted that the question of the nullity of the subsequent inconsistent treaty does not arise if the party to the prior treaty which is adversely affected by the subsequent treaty expressly or by implication waives its rights thereunder. This happens on occasions as, for instance, in the case of the British protest against the Hay-Varilla Treaty in 1903. Once waiver has taken place, there is no longer any inconsistency and therefore no question of the nullity of the subsequent treaty.

Section IV

Form and publicity

Article 17

Written Form

An agreement is void as a treaty unless reduced to writing.

Comment

1. There is slight — and occasionally exotic¹²² — authority in support of the view that a treaty may be the result of an oral agreement. It is not certain to what extent certain passages in the judgement of the Permanent Court of International Justice in the case of *Eastern Greenland* (Publications of the P.C.I.J., Series A/B, No. 53, pp. 69, 70) can be regarded as supporting that view. It is probable that, as the fact and the contents of the oral declaration made, in that case, by the Norwegian Minister for Foreign Affairs were not disputed, the Court did not address itself to that question at all. It appears also that the declaration was recorded simultaneously with its oral transmission. In view of this no decisive importance need be attached to the observation of Judge Anzilotti in his Dissenting Opinion that "there does not seem to be any rule of international law requiring that agreements of this kind must necessarily be in writing, in order to be valid" (*ibid.*, pp. 91, 92). In the *Kulin* case decided in 1927 by the Roumanian-Hungarian Mixed Arbitral Tribunal the latter refused to recognize the binding force of alleged verbal engagements, as recorded in the minutes of a conversation, made by Hungary (*Recueil des décisions des tribunaux arbitraux mixtes*, vol. VII, p. 38). In the arbitral award given in 1889 in the dispute between Germany and Great Britain concerning a concession on the Island of Lama the arbitrator, in declining to attach importance to an alleged oral statement of the Sultan of Zanzibar declaring his immediate readiness to grant a concession,

¹²¹ The same probably applies to such provisions as article 6 of the Brussels Treaty of 17 March 1948 of Economic, Social and Cultural Collaboration and Collective Self-defence in which the parties declared "each so far as he is concerned, that none of the international engagements now in force between him and any other of the High Contracting Parties is in conflict with the provisions of the Treaty".

¹²² See for example, the agreement referred to by Grotius between Mithridates and Sulla in 84 B.C. (*De juri belli et pacis*, ii, XVI, 30); between King Ludwig and King Charles the Bald in 870, referred to in L. Bittner, *Die Lehre von den völkerrechtlichen Urkunden* (Stuttgart, 1924), p. 4; and an arrangement for an alliance between Peter the Great and Frederick III in 1697, Elector of Brandenburg (F. von Martens, *Traité de droit international* (translation A. Leo) Paris, 1883, p. 541).

expressed the view that "although there is no law which prescribes a written form for agreements between States, it is nevertheless contrary to international usage to contract orally engagements of this nature and character". In the course of the Manchurian dispute between Japan and China, the former relied on a "protocol" consisting of the minutes of conversations between the Chinese and Japanese representatives in Peking in 1905 in which China agreed not to construct railways in certain districts of Manchuria. China contended that the "protocol", which was never incorporated in a formal treaty, consisted of an "arbitrary selection" of various articles of provisional understandings embodied in the daily records of the Conference. The Lytton Commission of Enquiry in its Report of 4 September 1932 treated the "protocol" as a binding agreement having the force of a "formal commitment" although the results of the conversations were not subsequently embodied in the treaty.

2. Whatever may be the interpretation of the above inconclusive incidents and pronouncements, it is submitted that a Code of the Law of Treaties must expressly lay down the requirement of written form as a condition of their validity. In view of the conflicting conclusions which can be drawn by reference to such rare authority as there exists on the subject, it is of little importance whether the requirement of writing as a condition of validity of treaties is regarded as being *de lege lata* or *de lege ferenda*. The decisive consideration in favour of the solution adopted in the present article is: (a) that international precedents suggesting that oral agreements are binding as treaties are but few, insignificant and controversial; and (b) that it is desirable, having regard to the security and certainty of international transactions and to the significance of their subject matter, that treaties be recorded in writing. Treaties to which States and international organizations are parties are concerned with matters of importance. Within the State the law provides uniformly that certain types of important contracts should be in writing or an even more solemn and recorded form. It is an obvious requirement of the certainty and the convenience of international intercourse that this should be so invariably in the case of treaties. At a time when the additional requirement of registration is in most treaties regarded as a condition of their enforceability before the organs of international society (see article 18), the mere requirement of writing is a self-evident minimum.¹²³ This statement is not inconsistent with the occasional and still surviving practice of so-called "verbal notes" which are, in point of fact, neither *verbal* nor instruments constituting agreements. They are communications transmitted and recorded in writing.¹²⁴ It is significant that prac-

tically all unofficial and official drafts or Codes of the Law of Treaties postulate written form as a condition of the validity of treaties. Article 2 of the Havana Convention on Treaties of 20 February 1928 lays down that "the written form is an essential condition of treaties".¹²⁵

3. The rule that an oral undertaking does not constitute a treaty does not necessarily signify that, on occasions, it may not result in the creation of an international obligation. For international obligations may be created by acts other than treaties such as, for instance, the declarations of or conduct by agents in the course of oral proceedings before international tribunals.¹²⁶ Such declarations made by authorized agents have frequently been regarded by the Permanent Court of International Justice and its successor as binding upon the parties. But this does not mean that such acts are treaties.

4. The principle formulated in article 17 according to which writing is a condition of the validity of the treaty does not signify that any special requirement of form or formality attaches to the requirement of writing. What matters is the existence of a record of the agreement — provided that such record does not emanate exclusively from one of the parties. Thus the minutes of a conference or of a meeting recording the agreement of the parties or a recorded unilateral declaration accepted by the other party may be sufficient for the purpose. The fact that such unilateral declaration, duly recorded, took originally the form of an oral declaration is irrelevant.¹²⁷ The same applies essentially to cases in which the written agreement is stated to constitute the acceptance of proposals made verbally¹²⁸ or in confirmation of an oral agreement.¹²⁹

Article 18

Registration

Treaties entered into by Members of the United Nations subsequent to their acceptance of the Charter of the United Nations cannot be invoked by the parties before any organ of the United Nations unless regis-

¹²³ See also Field's draft, article 188; Bluntschli's draft, article 422; Fiore's draft, article 744; Pessoa's draft, article 200; the draft of the International Commission of American Jurists, article 2.

¹²⁴ See for example, *Mavrommatis* case (Publications of the P.C.I.J., Series A, No. 5, p. 37); *Upper Silesian* case (*ibid.*, Series A, No. 7, p. 13); *Free Zones* case (*ibid.*, Series A/B, No. 46, pp. 170, 172); case of *Société commerciale de Belgique* (*ibid.*, Series A/B, No. 78, p. 178); *Corfu Channel* case (*I.C.J. Reports 1949*, pp. 24, 25).

¹²⁷ See the oral declaration made at the signing of the Anglo-Egyptian Treaty of Alliance of 1936 (*Parliamentary Papers: Egypt*, No. 1 (1936)). It is probable that the Oral Declaration of the Norwegian Foreign Minister and the "protocol" relating to the Manchurian railway, both referred to above in paragraph 1 of this Comment, belong to this category. And see note 5 following upon the Comment to article 2 above on *memoranda of understanding constituting an agreement, agreed combined statements, and the like*.

¹²⁸ As in the Exchange of Notes of 18 and 19 December 1922 between the Netherlands and Romania (League of Nations, *Treaty Series*, vol. 14, p. 191).

¹²⁹ As in the Exchange of Notes of 23 March 1944 between the United Kingdom and Turkey (United Nations *Treaty Series*, vol. 2, p. 227).

¹²³ J. W. Garner, who generally favoured the view that oral agreements are binding, stated that "it is not easy to see how parties to an oral treaty can comply with this requirement [of registration]": *American Journal of International Law*, vol. 27 (1933), p. 494.

¹²⁴ See for example, the verbal note of 1 March 1948 by which the Czechoslovak Government in pursuance of article 10 of the Peace Treaty with Romania notified the Romanian Government of those pre-war bilateral treaties between the two countries which Czechoslovakia desired to keep in force. The communication, registered in the United Nations, *Treaty Series* (vol. 26, p. 112), ends with the request to the Romanian Minister of Foreign Affairs "to acknowledge the receipt of the present verbal note".

tered, as soon as possible, with the Secretariat of the United Nations.

Comment

1. This article does no more than reproduce the substance of Article 102 of the Charter of the United Nations. It is not certain to what extent, in its present formulation, it has a direct bearing on the question of validity of treaties. For article 102 does not lay down that treaties which have not been registered are invalid. It merely provides that they cannot be invoked before any organ of the United Nations. This means substantially — though not inevitably — that they cannot be enforced before any organ of the United Nations. As enforceability is the hallmark of validity, the effect is that such treaties are, to that extent, invalid.

2. It may be said, in reliance upon the wording of Article 102, that there is nothing to prevent an organ of the United Nations from applying a non-registered treaty if the latter is not invoked by the parties. Any such argument is believed to be a refinement. If a non-registered treaty is likely to be of advantage to one party, it will be "invoked" by the other in order to prevent its application. Moreover, it is believed that an accurate — as distinguished from a literal — interpretation of this provision of the Charter is that a non-registered treaty cannot be *applied* by an organ of the United Nations (and not merely that it cannot be invoked before an organ of the United Nations).¹³⁰

3. The article as drafted does not prevent non-Member States from registering treaties concluded either between themselves or with Members of the United Nations. No such limitation follows from the terms of the Charter. In fact, as the consequences of non-registration of a treaty to which a Member of the United Nations is a party may adversely affect contracting parties who are not Members, it is proper that they should be permitted to register treaties concluded by them and it is in their interest that they should avail themselves of that facility. The practice of the United Nations has been in accordance with that view.¹³¹

4. The term "treaties" used in article 18 is here intended to be identical with the expression "every treaty and every international agreement" used in Article 102 of the Charter and to cover the entire field of treaties in the meaning of article 2 of the present draft.¹³²

¹³⁰ For an expression of a somewhat different view on the subject see M. Brandon in *British Year Book of International Law*, vol. 29 (1952).

¹³¹ See the following comment in the Report of the Rapporteur of Committee IV/2 of the San Francisco Conference in the matter of paragraph 2 of article 102: "This provision also covers treaties and agreements to which both members and non-members are parties. It is open to the latter to have such treaties or agreements registered. Moreover, it is necessary that they should be able to do so, seeing that their right to invoke the treaty or agreement before an organ of the Organization is made subject to registration" (UNCIO, vol. 13, p. 706).

¹³² The subject is discussed by M. Brandon in an article entitled "Analysis of the Terms 'Treaty' and 'International Agreement' for Purposes of Registration under Article 102 of the United Nations Charter" and published in *American Journal of International Law*, vol. 47 (1953), pp. 49-69.

Note

1. The present article, in so far as it reproduces substantially an article of the Charter of the United Nations, seems to be out of place in a general codification of the law of treaties applicable, in principle, to all States. However, it has been deemed proper to include it in the present draft for the reason that, as stated elsewhere (comment to articles 1 and 12), the Charter must be regarded in some ways as an expression of general international law; that, in the matter of registration of treaties the effects of the Charter extend — not improperly — to States which are not members of the United Nations (see below, note 2); and that the reasons which have led to the adoption of Article 102 as well as of the corresponding article 18 of the Covenant of the League of Nations are of general validity (see below, note 3).

2. No legal impropriety attaches to a rule which affects with unenforceability — so far as organs of the United Nations are concerned — non-registered treaties the parties to which are non-member States. No obligation of registration is imposed upon such States. The Charter — and the present article — merely provide that if a non-member State desires to be in the position to invoke a treaty before the organs of the United Nations it must avail itself of the opportunity offered to it to register the treaty. Moreover, a non-member State, when concluding a treaty with a Member of the United Nations, must be deemed to be affected with the knowledge of the provision of the Charter which requires registration as a condition of enforceability before the organs of the United Nations. To that extent the contractual capacity of Members of the United Nations is limited. Non-members enter into treaty relations with Member States with the full knowledge of that limitation. They are in the position, by availing themselves of their right to register the treaty, to safeguard themselves against its consequences.¹³³

3. The reason for viewing the principle of registration as an incipient rule of general international law is particularly cogent if it is considered that the principle of registration — and subsequent publication — is a principle adopted in the general interest of the international community, of certainty of international intercourse, and of the authority and effectiveness of treaties within such spheres, for instance, as that covered by article 16 of the present draft relating to consistency of treaties with prior treaties. The importance of that principle was stressed in a memorandum approved in 1920 by the Council of the League of Nations, in a passage which merits quotation:

"Publicity has for a long time been considered as a source of moral strength in the administration of National Law. It should equally strengthen the

¹³³ The somewhat restrictive interpretation, in this respect, of the corresponding provision of the Covenant of the League of Nations by the President of the French-Mexican Claims Commission in the *Pablo Najera* case (*Annual Digest*, 1927-1928, Case No. 271) can partly — but only partly — be explained by the manner in which the fact of non-registration of the French-Mexican Claims Convention of 1924, which established the Commission, was relied upon by Mexico.

laws and engagements which exist *between nations*. It will promote public control. It will awaken public interest. It will remove causes for distrust and conflict. Publicity alone will enable the League of Nations to extend a moral sanction to the contractual obligations of its Members. It will, moreover, contribute to the formation of a clear and indisputable system of International Law" (League of Nations, *Official Journal*, 1920, p. 154).

It was by reference to these considerations that Judge Hudson, when commenting upon the registration of treaties by the United States with the League of Nations, spoke of "the general benefit to be derived from the provision of article 18 of the Covenant" (*American Journal of International Law*, vol. 28 (1934), p. 345).

4. While the present article, following Article 102 of the Charter, makes it possible for Members of the United Nations to invoke a non-registered treaty before a tribunal or body other than an organ of the United Nations, the practical importance of the remedy thus left open is insignificant. As a rule, apart from any treaty conferring obligatory jurisdiction upon a tribunal other than the International Court of Justice, proceedings before any such outside body or tribunal would require the consent of both parties to the treaty. In the circumstances, it is not likely that any such consent would be forthcoming. However, there ought to be little doubt as to the unsatisfactory nature of a provision which makes the enforceability of a treaty dependent upon the organ called upon to apply it. In some cases that organ may be designated by the United Nations itself as, for instance, in the case of the Security Council acting under Chapter VI of the Charter and recommending, as a proper method of settlement, recourse to an arbitral tribunal. These considerations appear to militate in favour of the adoption, *de lege ferenda*, of some such rule as proposed in note 5 below.

5. It may be a matter for consideration whether in its codification of the law of treaties the International Law Commission ought not, in the exercise of its function to develop international law, formulate a rule both more comprehensive and more explicit than formulated in the present article on the basis of Article 102 of the Charter. In the sphere of municipal law the requirement of registration is a condition of the validity of many instruments of an importance smaller than that usually attaching to treaties. There is no apparent reason why such requirement should not be adopted without qualification in the matter of treaties. That rule might be formulated as follows: "A treaty concluded by a Member of the United Nations shall be void if not registered with the United Nations within six months of its entry into force." A formulation of this nature would avoid

many of the existing obscurities of Article 102 of the Charter. In particular, it would have the merit of providing a time limit for registration; of rendering unnecessary the determination, both by the organs concerned and by the parties, of the period within which a treaty is to be deemed to have been registered "as soon as possible"; and of discouraging a practice of delaying registration until the necessity arises for invoking the treaty. Some such time limit would not necessarily have the effect of permanently nullifying a treaty which has not been registered as the result of oversight or for similar reasons. It would always be open to the parties to conclude a new treaty, in terms identical with those of the non-registered treaty, and to register it within the period prescribed. Moreover, the provision of a time limit might be accompanied by the conferment, upon some international organ, of the power to grant relief, in appropriate cases and for cogent reasons, by sanctioning an extension of the time limit as prescribed. Such power of relief may extend, in particular, to cases in which the treaty has actually been published by the parties. For in such case the main reason of the requirement of registration has, in fact, been complied with. The latter circumstance explains, in part, why the Permanent Court of International Justice on two occasions admitted as relevant instruments which had not been registered with the League of Nations.¹³⁴ Similarly, some such element of reasonable interpretation in accordance with the spirit of the principle of registration may justify the assumption of jurisdiction by the Court by reference to a special agreement which has not been registered and is immediately acted upon by the parties. In a different sphere, provision might be made for permitting the disregard of the absence of registration, *by the parties*, of multilateral treaties or such instruments as the trusteeship agreements or declarations of the acceptance of the jurisdiction of the International Court of Justice under Article 36 of the Statute. In all or most of these cases registration may be effected *ex officio* by the depositary authority or the Secretary-General of the United Nations. It may be possible to make some general provision for such latitude of interpretation in cases involving a departure from the letter—though not the spirit—of an otherwise mandatory rule adopted in pursuance of what has become recognized as an important principle of international public policy.

¹³⁴ In the *Mavrommatis Palestine Concession* cases the Court assumed jurisdiction, in its judgement of 30 August 1924 (Publications of the P.C.I.J., *Series A*, No. 2, p. 33) by reference to a protocol concerning concessions signed at Lausanne on 30 August 1924. In the advisory opinion concerning the *Polish Postal Service in Danzig* (*ibid.*, *Series B*, No. 11) the Court took note of the so-called Warsaw Agreement between Danzig and Poland which had not been registered but the text of which had been communicated to the Council of the League of Nations.