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# REPORT OF THE COMMISSION TO THE GENERAL ASSEMBLY

## DOCUMENT A/5209\*

Report of the International Law Commission covering the work of its fourteenth session,  
24 April - 29 June 1962

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## Chapter I

### ORGANIZATION OF THE SESSION

1. The International Law Commission, established in pursuance of General Assembly resolution 174 (II) of 21 November 1947, and in accordance with its Statute annexed thereto, as subsequently amended, held its fourteenth session at the European Office of the United Nations, Geneva, from 24 April to 29 June 1962. The work of the Commission during the session is described in this report. Chapter II of the report contains twenty-nine provisional draft articles on the conclusion, entry into force and registration of treaties, with commentaries. Chapter III relates to the Commission's future work in the field of the codification and progressive development of international law. Chapter IV concerns the organization of the work of the next session. Chapter V deals with a number of administrative and other questions.

#### I. Membership and attendance

2. By its resolution 1647 (XVI) of 6 November 1961, the General Assembly decided to increase the number of members of the Commission from 21 to 25. At its 1067th plenary meeting, on 28 November 1961, the Assembly elected the members listed below for a term of five years, pursuant to its resolution 985 (X) of 3 December 1955. The term of the present members began on 1 January 1962.

3. The Commission consists of the following members:

<i>Name</i>	<i>Nationality</i>
Mr. Roberto AGO	Italy
Mr. Gilberto AMADO	Brazil
Mr. Milan BARTOŠ	Yugoslavia
Mr. Herbert W. BRIGGS	United States of America
Mr. Marcel CADIEUX	Canada
Mr. Erik CASTRÉN	Finland
Mr. Abdullah EL-ERIAN	United Arab Republic
Mr. Taslim O. ELIAS	Nigeria
Mr. André GROS	France
Mr. Eduardo JIMÉNEZ DE ARÉCHAGA	Uruguay
Mr. Victor KANGA	Cameroon
Mr. Manfred LACHS	Poland
Mr. LIU Chieh	China
Mr. Antonio DE LUNA GARCÍA	Spain
Mr. Luis PADILLA NERVO	Mexico
Mr. Radhabinod PAL	India
Mr. Angel M. PAREDES	Ecuador
Mr. Obed PESSOU	Dahomey
Mr. Shabtai ROSENNE	Israel
Mr. Abdul Hakim TABIBI	Afghanistan
Mr. Senjin TSURUOKA	Japan
Mr. Grigory I. TUNKIN	Union of Soviet Socialist Republics
Mr. Alfred VERDROSS	Austria

<i>Name</i>	<i>Nationality</i>
Sir Humphrey WALDOCK	United Kingdom of Great Britain and Northern Ireland
Mr. Mustafa Kamil YASSEEN	Iraq

4. All the members, with the exception of Mr. Victor Kanga, attended the session of the Commission.

#### II. Officers

5. At its 628th meeting, held on 24 April 1962, the Commission elected the following officers:

*Chairman:* Mr. Radhabinod Pal;  
*First Vice-Chairman:* Mr. André Gros;  
*Second Vice-Chairman:* Mr. Gilberto Amado;  
*Rapporteur:* Mr. Manfred Lachs.

6. At its 634th meeting, held on 2 May 1962, the Commission appointed a Drafting Committee under the chairmanship of the first Vice-Chairman of the Commission. The composition of the Committee was as follows: Mr. André Gros, Chairman, Mr. Roberto Ago, Mr. Eduardo Jiménez de Aréchaga, Mr. Manfred Lachs, Mr. Grigory I. Tunkin, Sir Humphrey Waldox, Mr. Mustafa Kamil Yasseen.

7. The Legal Counsel, Mr. Constantin Stavropoulos, was present at the meetings of the Commission and represented the Secretary-General from 29 May to 1 June. Mr. Yuen-li Liang, Director of the Codification Division of the Office of Legal Affairs, acted as Secretary to the Commission. He also represented the Secretary-General in the absence of Mr. Stavropoulos.

#### III. Agenda

8. The Commission adopted an agenda for the fourteenth session consisting of the following items:

1. Law of treaties.
2. Future work in the field of codification and progressive development of international law (General Assembly resolution 1686 (XVI)).
3. Question of special missions (General Assembly resolution 1687 (XVI)).
4. Co-operation with other bodies.
5. Date and place of the fifteenth session.
6. Other business.

9. In the course of the session, the Commission held forty-five meetings. It considered all the items on its agenda except item 3 (Question of special missions).

10. At its twelfth session, in 1960, the Commission had, in pursuance of General Assembly resolution 1453 (XIV) of 7 December 1959, requested the Secretariat<sup>1</sup> to undertake a study of the juridical régime of historic waters and to extend the scope of the preliminary study outlined in paragraph 8 of the memorandum on historic bays, prepared by the Secretariat in connexion with the first United Nations Conference on the Law of the Sea.<sup>2</sup> This study (A/CN.4/143) was submitted to the present session, but as the question was not on the agenda, it was not considered by the Commission.

<sup>1</sup> *Yearbook of the International Law Commission, 1960* (United Nations publication, Sales No.: 60.V.1) vol. II, p. 180.

<sup>2</sup> *United Nations Conference on the Law of the Sea, Official Records, vol. I* (United Nations publication, Sales No.: 58.V.4, vol. I), document A/CONF.13/1.

## Chapter II

### LAW OF TREATIES

#### I. Introduction

##### A. SUMMARY OF THE COMMISSION'S PROCEEDINGS<sup>3</sup>

11. At its first session in 1949, the International Law Commission placed the "Law of treaties" amongst the topics listed in paragraphs 15 and 16 of its report for that year as being suitable for codification and appointed Mr. J. L. Brierly as Special Rapporteur for the subject.

12. At its second session in 1950, the Commission devoted its 49th to 53rd meetings to a preliminary discussion of Mr. J. L. Brierly's first report<sup>4</sup> which like his other reports envisaged the Commission's work on the law of treaties taking the form of a draft convention, and also had available to it replies of Governments to a questionnaire addressed to them under article 19, paragraph 2, of its Statute.<sup>5</sup> The Commission's report for that session contained *inter alia* the following observation:

"A majority of the Commission were also in favour of including in its study agreements to which international organizations are parties. There was general agreement that, while the treaty-making power of certain organizations is clear, the determination of the other organizations which possess capacity for making treaties would need further consideration." (Paragraphs 161-162 of the report.)

13. At its third session in 1951, the Commission had before it two reports from Mr. Brierly,<sup>6</sup> one a continuation of the Commission's general work on the law of treaties and the other a special report on "reservations to multilateral conventions" called for by the General Assembly at the same time as it had requested an advisory opinion from the International Court of Justice on the particular problem of reservations to the Genocide Convention.<sup>7</sup> As to the Commission's opinions and recommendations on the special subject of reservations to multilateral conventions, there is no need to summarize them here, since this is done later in the present report in the commentary which follows articles 18, 19 and 20.<sup>8</sup> At its third session of the Commission, Mr. Brierly presented a second report on the law of treaties which was discussed in the course of eight meetings. The Commission took a further decision at that session concerning the question of international organizations already mentioned in its report for 1950. It adopted "the suggestion put forward the previous year by Mr. Hudson, and supported by other members of the Com-

mission, that it should leave aside, for the moment, the question of the capacity of international organizations to make treaties, that it should draft the articles with reference to States only and that it should examine later whether they could be applied to international organizations as they stood or whether they required modifications."<sup>9</sup>

14. At its fourth session in 1952, the Commission had before it a "third report on the law of treaties",<sup>10</sup> prepared by Mr. Brierly, who, however, had meanwhile resigned his membership of the Commission. In the absence of its author the Commission did not think it expedient to discuss that report, and it confined itself to electing Mr. H. Lauterpacht to succeed Mr. Brierly as Special Rapporteur.

15. At its fifth session in 1953, the Commission received a report from Mr. Lauterpacht containing draft articles and commentaries on a number of topics in the law of treaties but, owing to its other commitments, was unable to take up the report at that session. It therefore instructed Mr. Lauterpacht to continue his work and present a further report. At its sixth session in 1954, the Commission duly received Mr. H. Lauterpacht's second report but was again unable to take up the subject. Meanwhile Mr. (by then Sir Hersch) Lauterpacht had resigned from the Commission on his election as judge of the International Court of Justice, and at its seventh session in 1955 the Commission elected Sir Gerald Fitzmaurice as Special Rapporteur in his place.

16. At the next five sessions of the Commission, from 1956 to 1960, Sir Gerald Fitzmaurice presented five separate and comprehensive reports on the law of treaties, covering respectively: (a) the framing, conclusion and entry into force of treaties,<sup>11</sup> (b) the termination of treaties,<sup>12</sup> (c) essential and substantial validity of treaties,<sup>13</sup> (d) effects of treaties as between the parties (operation, execution and enforcement)<sup>14</sup> and (e) treaties and third States.<sup>15</sup> Although taking full account of the reports of his predecessors, Sir Gerald Fitzmaurice began preparing his drafts on the law of treaties *de novo* and framed them in the form of an expository code rather than of a convention. During this period the Commission's time was largely taken up with its work on the law of the sea and on diplomatic and consular intercourse and immunities, so that, apart from a brief discussion of certain general questions of treaty law at the 368th-370th meetings of its 1956 session, it

<sup>3</sup> This summary is based upon paragraphs 8-11 in chapter II of the Commission's report to the General Assembly in 1959 (A/4169): *Yearbook of the International Law Commission, 1959* (United Nations publication, Sales No.: 59.V.1), vol. II, pp. 88-89.

<sup>4</sup> *Yearbook of the International Law Commission, 1950* (United Nations publication, Sales No.: 57.V.3), vol. II, p. 223.

<sup>5</sup> *Ibid.*, p. 196.

<sup>6</sup> *Yearbook of the International Law Commission, 1951* (United Nations publication, Sales No.: 57.V.6), vol. II, pp. 1 and 70.

<sup>7</sup> *I.C.J. Reports 1951*, p. 15.

<sup>8</sup> See para. 23 below.

<sup>9</sup> *Yearbook of the International Law Commission, 1951* (United Nations publication, Sales No.: 57.V.6), vol. I, p. 136.

<sup>10</sup> *Yearbook of the International Law Commission, 1952* (United Nations publication, Sales No.: 58.V.5), vol. II, p. 50.

<sup>11</sup> *Yearbook of the International Law Commission, 1956* (United Nations publication, Sales No.: 56.V.3), vol. II, p. 104.

<sup>12</sup> *Yearbook of the International Law Commission, 1957* (United Nations publication, Sales No.: 57.V.5), vol. II, p. 16.

<sup>13</sup> *Yearbook of the International Law Commission, 1958* (United Nations publication, Sales No.: 58.V.1), vol. II, p. 20.

<sup>14</sup> *Yearbook of the International Law Commission, 1959* (United Nations publication, Sales No.: 59.V.1), vol. II, p. 37.

<sup>15</sup> *Yearbook of the International Law Commission, 1960* (United Nations publication, Sales No.: 60.V.1), vol. II, p. 69.

was only able to concentrate upon the law of treaties at its eleventh session in 1959. At that session it devoted some twenty-six meetings<sup>16</sup> to a discussion of Sir Gerald Fitzmaurice's first report on the framing, conclusion and entry into force of treaties, and provisionally adopted the text of fourteen articles, together with their commentaries. However, the time available was not sufficient to enable the Commission to complete its series of draft articles on this part of the law of treaties.<sup>17</sup> In its report for 1959 the Commission stated that, without prejudice to any eventual decision to be taken by the Commission it had not so far envisaged its work on the law of treaties as taking the form of one or more international conventions but rather as "a code of a general character". The arguments in favour of a "code" were stated to be two-fold:

"First, it seems inappropriate that a code on the law of treaties should itself take the form of a treaty; or rather, it seems more appropriate that it should have an independent basis. In the second place, much of the law relating to treaties is not especially suitable for framing in conventional form. It consists of enunciations of principles and abstract rules, most easily stated in the form of a code; and this also has the advantage of rendering permissible the inclusion of a certain amount of declaratory and explanatory material in the body of the code, in a way that would not be possible if this had to be confined to a strict statement of obligation. Such material has considerable utility in making clear, on the face of the code itself, the legal concepts or reasoning on which the various provisions are based."<sup>18</sup>

Mention was also made of possible difficulties that might arise if the law of treaties were to be embodied in a multilateral convention and then some States did not become parties to it or, having become parties to it, subsequently denounced it. On the other hand, it recognized that these difficulties arise whenever a convention is drawn up embodying rules of customary law. Finally, it underlined that, if it were decided to cast the code in the form of a multilateral convention, considerable drafting changes, and possibly the omission of some material, would almost certainly be required.

17. The twelfth session, in 1960, was almost entirely taken up with consular intercourse and immunities and *ad hoc* diplomacy, so that no further progress was made with the law of treaties during that session. Sir Gerald Fitzmaurice then had himself to retire from the Commission on his election as judge of the International Court of Justice, and at the thirteenth session, in 1961, the Commission elected Sir Humphrey Waldock to succeed him as Special Rapporteur for the law of treaties. At the same time the Commission took the following general decisions as to its work on the law of treaties:

"(i) That its aim would be to prepare draft articles on the law of treaties intended to serve as the basis for a convention;

"(ii) That the Special Rapporteur should be requested to re-examine the work previously done in this field by the Commission and its Special Rapporteurs;

"(iii) That the Special Rapporteur should begin with the question of the conclusion of treaties and

then proceed with the remainder of the subject, if possible covering the whole subject in two years."<sup>19</sup>

By the first of these decisions the Commission changed the scheme of its work on the law of treaties from a mere expository statement of the law to the preparation of draft articles capable of serving as a basis for a multilateral convention. In doing so, it had two considerations principally in mind. First, an expository code, however well formulated, cannot in the nature of things be so effective as a convention for consolidating the law; and the consolidation of the law of treaties is of particular importance at the present time when so many new States have recently become members of the international community. Secondly, the codification of the law of treaties through a multilateral convention would give all the new States the opportunity to participate directly in the formulation of the law if they so wished; and their participation in the work of codification appears to the Commission to be extremely desirable in order that the law of treaties may be placed upon the widest and most secure foundations.

18. At the present session of the Commission the Special Rapporteur submitted a report (A/CN.4/144 and Add.1) on the conclusion, entry into force and registration of treaties which was considered by the Commission at its 636th-672nd meetings. The Commission adopted a provisional draft of articles upon these topics, which is reproduced in the present chapter together with commentaries upon the articles. Its plan is to prepare a draft of a further group of articles at its next session covering the validity and duration of treaties and a draft of a yet further group of articles at the subsequent session covering the application and effects of treaties. Whether all the drafts should be amalgamated to form a single draft convention or whether the codification of the law of treaties should be dealt with in a series of related conventions is a question which can be left over for decision when all the drafts are complete. Provisionally, and for the purpose of facilitating the work of drafting, the Commission is adopting the same method as in the case of the law of the sea—of preparing a series of self-contained though closely related groups of draft articles.

19. In accordance with articles 16 and 21 of its Statute, the Commission decided to transmit its draft concerning the conclusion, entry into force and registration of treaties, through the Secretary-General, to Governments for their observations.

#### B. THE SCOPE OF THE PRESENT GROUP OF DRAFT ARTICLES

20. The present group of draft articles covers the broad topic of the "conclusion" of treaties. "Entry into force" has been regarded as naturally associated with, if not actually part of, "conclusion", while the subject of "registration of treaties" has been added as belonging essentially to the procedure of treaty-making and as being closely linked in point of time to entry into force.<sup>20</sup> Articles providing for the correction of errors discovered in the texts of treaties after their authentication have been included, as well as articles concerning the appointment and functions of a depositary. The de-

<sup>19</sup> *Official Records of the General Assembly, Sixteenth Session, Supplement No. 9* (A/4843), para. 39.

<sup>20</sup> Article 102 of the Charter requires treaties to be registered "as soon as possible," while the regulations adopted by the General Assembly on 14 December 1946 provide that they shall not be registered until they have entered into force; see article 1, paragraph 2, of the regulations reproduced in the annex to the present report.

<sup>16</sup> 480th-496th, 500th-504th and 519th-522nd meetings.

<sup>17</sup> Chapter II of the Commission's report for 1959 contains articles 1-10 and 14-17 of a proposed chapter of a comprehensive code on the law of treaties.

<sup>18</sup> *Yearbook of the International Law Commission, 1956* (United Nations publication, Sales No.: 56.V.3), vol. II, p. 107.

positary State or international organization plays so essential a part in the working of the procedural clauses of a multilateral treaty that reference to the functions of a depositary is almost inevitable in articles codifying the law concerning the conclusion of treaties. The Commission notes, moreover, that the General Assembly itself, in its resolution 1452 B (XIV) of 7 December 1959 concerning reservations to multilateral conventions, emphasized the need for the practice of depositary States and organizations to be taken into account by the Commission in its work on the law of treaties. The articles (articles 28 and 29) prepared by the Commission concerning the functions of a depositary will, however, be re-examined since the information concerning the practice of depositary States and organizations called for in the above-mentioned resolution is not yet available.

21. The Commission again considered the question of including provisions concerning the treaties of international organizations in the draft articles on the conclusion of treaties. The Special Rapporteur had prepared, for submission to the Commission at a later stage in the session, a final chapter on treaty-making by international organizations. He suggested that this chapter should specify the extent to which the articles concerning States apply to international organizations and formulate the particular rules peculiar to organizations. The Commission, however, reaffirmed its decisions of 1951<sup>21</sup> and 1959<sup>22</sup> to defer examination of the treaties entered into by international organizations until it had made further progress with its draft on treaties concluded by States. At the same time the Commission recognized that international organizations may possess a certain capacity to enter into international agreements and that these agreements fall within the scope of the law of treaties. Accordingly, while confining the specific provisions of the present draft to the treaties of States, the Commission has made it plain in the commentaries attached to articles 1 and 3 of the present draft articles that it considers the international agreements to which organizations are parties to fall within the scope of the law of treaties.

22. The draft articles have provisionally been arranged in five sections covering: (i) general provisions, (ii) the conclusion of treaties by States, (iii) reservations, (iv) the entry into force and registration of treaties and (v) the correction of errors and the functions of depositaries. In preparing the draft articles, the Commission has sought to codify the modern rules of international law concerning the conclusion of treaties, and the articles formulated by the Commission contain elements of progressive development as well as of codification of the law.

23. The text of draft articles 1 to 29 and the commentaries, as adopted by the Commission on the proposal of the Special Rapporteur, are reproduced below:

## II. Draft articles on the law of treaties

### Part I

#### CONCLUSION, ENTRY INTO FORCE AND REGISTRATION OF TREATIES

##### SECTION I: GENERAL PROVISIONS

#### Article 1

##### Definitions

#### 1. For the purposes of the present articles, the

following expressions shall have the meanings hereunder assigned to them:

(a) "Treaty" means any international agreement in written form, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation (treaty, convention, protocol, covenant, charter, statute, act, declaration, concordat, exchange of notes, agreed minute, memorandum of agreement, *modus vivendi* or any other appellation), concluded between two or more States or other subjects of international law and governed by international law.

(b) "Treaty in simplified form" means a treaty concluded by exchange of notes, exchange of letters, agreed minute, memorandum of agreement, joint declaration or other instrument concluded by any similar procedure.

(c) "General multilateral treaty" means a multilateral treaty which concerns general norms of international law or deals with matters of general interest to States as a whole.

(d) "Signature", "Ratification", "Accession", "Acceptance" and "Approval" mean in each case the act so named whereby a State establishes on the international plane its consent to be bound by a treaty. "Signature" however also means, according to the context, an act whereby a State authenticates the text of a treaty without establishing its consent to be bound.

(e) "Full powers" means a formal instrument issued by the competent authority of a State authorizing a given person to represent the State either for the purpose of carrying out all the acts necessary for concluding a treaty or for the particular purpose of negotiating or signing a treaty or of executing an instrument relating to a treaty.

(f) "Reservation" means a unilateral statement made by a State, when signing, ratifying, acceding to, accepting or approving a treaty, whereby it purports to exclude or vary the legal effect of some provisions of the treaty in its application to that State.

(g) "Depositary" means the State or international organization entrusted with the functions of custodian of the text of the treaty and of all instruments relating to the treaty.

2. Nothing contained in the present articles shall affect in any way the characterization or classification of international agreements under the internal law of any State.

#### Commentary

(1) The definitions, as the introductory words of the paragraph indicate, are intended only to state the meanings with which the terms in question are used in the draft articles.

(2) *Treaty*. The term "treaty" is used throughout the draft articles as a generic term covering all forms of international agreement in writing. Although the term "treaty" in one sense connotes only the single formal instrument, there also exist international agreements, such as exchanges of notes, which are not a single formal instrument nor usually subject to ratification, and yet are certainly agreements to which the law of treaties applies. Similarly, very many single instruments in daily use, such as an "agreed minute" or a "memorandum of understanding," could not appropriately be called *formal* instruments, but they are undoubtedly international agreements subject to the law

<sup>21</sup> *Yearbook of the International Law Commission, 1951* (United Nations publication, Sales No.: 57.V.6), vol. I, p. 136.

<sup>22</sup> *Yearbook of the International Law Commission, 1959* (United Nations publication, Sales No.: 59.V.I), vol. II, pp. 89 and 96.

of treaties. A general convention on the law of treaties must cover all such agreements, whether embodied in one instrument or in two or more related instruments, and whether the instrument is "formal" or "informal." The question whether, for the purpose of describing all such instruments and the law relating to them, the expression "treaties" and "law of treaties" should be employed, rather than "international agreements" and "law of international agreements" is a question of terminology rather than of substance. In the opinion of the Commission, a number of considerations point strongly in favour of using the term "treaty" for this purpose.

(3) In the first place, the treaty in simplified form, far from being at all exceptional, is very common. The number of such agreements, whether embodied in a single instrument or in two or more related instruments, is now very large and moreover their use is steadily increasing.<sup>23</sup>

(4) Secondly the juridical differences, in so far as they really exist at all, between formal treaties and treaties in simplified form lie almost exclusively in the field of form, and in the method of conclusion and entry into force. The law relating to such matters as validity, operation and effect, execution and enforcement, interpretation, and termination, applies to all classes of international agreements. In relation to these matters, there are admittedly some important differences of a juridical character between certain classes or categories of international agreements.<sup>24</sup> But these differences spring neither from the form, nor from the appellation, nor from any other outward characteristic of the instrument in which they are embodied: they spring exclusively from the content of the agreement, whatever its form. It would therefore be inadmissible to exclude certain forms of international agreements from the general scope of a convention on the law of treaties merely because, in the field of form pure and simple, and of the method of conclusion and entry into force, there may be certain differences between such agreements and formal agreements. At the most, such a situation might make it desirable, in that particular field and in the section of the convention dealing with it, to institute certain differences of treatment between different forms of international agreements.

(5) Thirdly, even in the case of single formal agreements, an extraordinarily rich and varied nomenclature has developed which serves to confuse the question of classifying international agreements. Thus, in addition to "treaty", "convention" and "protocol", one not infrequently finds titles such as "declaration", "charter", "covenant", "pact", "act", "statute", "agreement", "accordat", whilst names like "declaration" and "agreement" and "*modus vivendi*" may well be found given both to formal and less formal types of agreements. As to the latter, their nomenclature is almost illimitable, even if some names such as "agreement", "exchange of notes", "exchange of letters", "memorandum of agreement", or "agreed minutes", may be more common than others.<sup>25</sup>

<sup>23</sup> See first report by Sir Hersch Lauterpacht, *Yearbook of the International Law Commission, 1953* (United Nations publication, Sales No.: 59.V.4), vol. II, pp. 101-106.

<sup>24</sup> See on this subject the commentaries to Sir Gerald Fitzmaurice's second report (*Yearbook of the International Law Commission, 1957* (United Nations publication, Sales No.: 57.V.5), vol. II, p. 16, paras. 115, 120, 125-128 and 165-168); his third report (*Yearbook of the International Law Commission, 1958* (United Nations publication, Sales No.: 58.V.1), vol. II, p. 20, paras. 90-93).

It is true that some types of instruments are used more frequently for some purposes rather than others; it is also true that some titles are more frequently attached to some types of transaction rather than to others. But there is no exclusive or systematic use of nomenclature for particular types of transaction.

(6) Fourthly, the use of the term "treaty" as a generic term embracing all kinds of international agreements in written form is accepted by the majority of jurists.<sup>26</sup>

(7) Even more important, the generic use of the term "treaty" is supported by two provisions of the Statute of the International Court of Justice. In Article 36, paragraph 2, amongst the matters in respect of which States parties to the Statute can accept the compulsory jurisdiction of the Court, there is listed "a. the interpretation of a treaty". But clearly, this cannot be intended to mean that States cannot accept the compulsory jurisdiction of the Courts for purposes of the interpretation of international agreements not actually called treaties, or embodied in instruments having another designation. Again, in Article 38, paragraph 1, the Court is directed to apply in reaching its decisions, "a. international conventions". But equally, this cannot be intended to mean that the Court is precluded from applying other kinds of instruments embodying international agreements, but not styled "conventions". On the contrary, the Court must and does apply them. The fact that in one of these two provisions dealing with the whole range of international agreements the term employed is "treaty" and in the other the even more formal term "convention" serves to confirm that the use of the term "treaty" generically in the present articles to embrace all international agreements is perfectly legitimate. Moreover, the only real alternative would be to use for the generic term the phrase "international agreement", which would not only make the drafting more cumbersome but would sound strangely today, when the "law of treaties" is the term almost universally employed to describe this branch of international law.

(8) The term "treaty", as used in the draft article covers only international agreements made between "two or more States or other subjects of international law". The phrase "other subjects of international law" is designed to provide for treaties concluded by: (a) international organizations, (b) the Holy See, which enters into treaties on the same basis as States, and (c) other international entities, such as insurgents, which may in some circumstances enter into treaties. The phrase is not intended to include individuals or corporations created under national law, for they do not possess capacity to enter into treaties nor to enter into agreements governed by public international law.<sup>27</sup>

<sup>25</sup> In his article "The Names and Scope of Treaties" (*American Journal of International Law*, 51 (1957), No. 3, p. 574), Mr. Denis P. Myers considers no less than thirty-eight different appellations; see also the list given in Sir Hersch Lauterpacht's first report (*Yearbook 1953*, vol. II, p. 101), paragraph 1 of the commentary to his article 2. Article 1 of the General Assembly regulation concerning registration speaks of "every treaty or international agreement whatever its form and descriptive name."

<sup>26</sup> Lord McNair, *Law of Treaties* (1961) p. 22; Rousseau, *Principes généraux du droit international public*, p. 132 et seq. See also the opinion of Louis Renault as long ago as 1869: ". . . every agreement arrived at between . . . States, in whatever way it is recorded (treaty, convention, protocol, mutual declaration, exchange of unilateral declaration)." (translation) *Introduction à l'étude du droit international*, pp. 33-34.

<sup>27</sup> As to this point and the general question of the capacity of subjects of international law to enter into treaties, see further the commentary to article 3.

(9) The phrase "governed by international law" serves to distinguish between international agreements regulated by public international law and those which, although concluded between two States, are regulated by the national law of one of the parties (or by some other national law system chosen by the parties).

(10) The use of the term "treaty" in the draft articles is confined to international agreements expressed in writing. This is not to deny the legal force of oral agreements under international law or that some of the principles contained in later parts of the Commission's draft articles on the law of treaties may have relevance in regard to oral agreements. But the term "treaty" is commonly used as denoting an agreement in written form, and in any case the Commission considers that, in the interests of clarity and simplicity, its draft articles on the law of treaties must be confined to agreements in written form. On the other hand, although the classical form of treaty was a single formal instrument, in modern practice international agreements are frequently concluded not only by less formal instruments but also by means of two or more related instruments. The obvious examples are exchanges of notes and exchanges of letters. Another is the case of agreements concluded by means of "declarations" made separately but related to each other either directly or through a connecting instrument. The definition, by the phrase "whether embodied in a single instrument or two or more related instruments", brings these forms of international agreement within the term "treaty" as well as all those embodied in a single instrument.

(11) "*Treaty in simplified form*". As already indicated in paragraph 4 of the present commentary, the law of treaties for the most part applies in the same manner to formal treaties and to treaties in simplified form, but in the sphere of conclusion and entry into force some differences may be found to exist. In point of fact, formal and informal treaties are so often employed for precisely the same kind of transaction that the number of cases where it can be said with truth that different principles apply to formal and informal treaties are extremely few. Nevertheless, in one or two instances a distinction needs to be drawn between treaties in simplified form and other treaties (e.g., articles 4 and 10). The distinction is not altogether easy to express owing to the great variety in the use of treaty forms and the somewhat indiscriminate nomenclature of treaties. In general, treaties in simplified form identify themselves by the absence of one or more of the characteristics of the formal treaty. But it would be difficult to base the distinction infallibly upon the absence or presence of any one of these characteristics. Ratification, for example, though not usually required for treaties in simplified form is by no means unknown. Nevertheless, the treaty forms falling under the rubric "treaties in simplified form" do in most cases identify themselves by their simplified procedure. The Commission has, therefore, defined this form of treaty by reference to its simplified procedure and by mentioning typical examples.

(12) "*General multilateral treaty*." Multiplication of the number of States participating in the drawing up of a treaty may raise problems in regard to the procedure for the adoption, signing and authentication of the treaty and in regard to the admission of additional parties, the acceptance of reservations, entry into force and other matters. The problem is also posed whether different rules may, perhaps, apply to treaties drawn up by a limited number of States and those drawn up by a large number or between those to which only a limited group

of States may become parties and those to which all or a very large number of States may become parties. The Commission, having given close attention to these problems, found that for most purposes the relevant distinction is between treaties drawn up at a conference convened by the States themselves and those drawn up in an international organization or at a conference convened by an international organization. But in one or two cases the Commission found it necessary to have regard also to other criteria. One of these cases was the procedure for admitting additional States to participation in a multilateral treaty. Here, the Commission found that the relevant distinction is between "general multilateral treaties" and other multilateral treaties. Accordingly, it became necessary to define a "general multilateral treaty" and the Commission took as the basis of its definition the general character of the treaty from the point of view of the provisions of the treaty being a matter of general concern to the international community as a whole.

(13) "*Reservation*." The need for this definition arises from the fact that States, when signing, ratifying, acceding to, accepting or approving a treaty, not infrequently make declarations as to their understanding of some matter or as to their interpretation of a particular provision. Such a declaration may be a mere clarification of the State's position or it may amount to a reservation, according as it does or does not vary or exclude the application of the terms of the treaty as adopted.

(14) The remaining definitions do not require comment, as they are sufficiently explained in the relevant articles and commentaries.

(15) Paragraph 2 is designed to safeguard the position of States in regard to their internal law and usages, and more especially in connexion with the ratification of treaties. In many countries, the constitution requires that international agreements in a form considered under the internal law or usage of the State to be a "treaty" must be endorsed by the legislature or have their ratification authorized by it—perhaps by a specific majority—whereas other forms of international agreement are not subject to this requirement. Accordingly, it is quite essential that the definition given to the term "treaty" in the present articles should do nothing to disturb or affect in any way the existing domestic rules or usages which govern the classification of international agreements under national law.

## Article 2

### Scope of the present articles

1. Except to the extent that the particular context may otherwise require, the present articles shall apply to every treaty as defined in article 1, paragraph 1 (a).

2. The fact that the present articles do not apply to international agreements not in written form shall not be understood as affecting the legal force that such agreements possess under international law.

### Commentary

(1) Paragraph 1 of this article has to be read in conjunction with the definition of "treaty" in article 1, from which it appears that the draft articles apply to every international agreement in written form concluded between two or more subjects of international law and

governed by international law. The words "except to the extent that a particular context may otherwise require" preface the statement as to the scope of the present articles simply as a recognition of the fact that some of their provisions are, either by their express terms or by their inherent nature, only applicable to certain kinds of treaties.

(2) As already stated in paragraph 10 of the commentary to article 1, the restriction of the draft articles to agreements in written form does not mean that the Commission considers oral international agreements to be without legal force. Accordingly, in order to remove any possibility of misunderstanding, paragraph 2 of the present article, without entering further into the matter, expressly preserves such legal force as oral agreements possess under international law.

### Article 3

#### *Capacity to conclude treaties*

1. Capacity to conclude treaties under international law is possessed by States and by other subjects of international law.

2. In a federal State, the capacity of the member states of a federal union to conclude treaties depends on the federal constitution.

3. In the case of international organizations, capacity to conclude treaties depends on the constitution of the organization concerned.

#### *Commentary*

(1) Some members of the Commission were doubtful about the need for an article on capacity in international law to conclude treaties. They pointed out that capacity to enter into diplomatic relations had not been dealt with in the Vienna Convention and suggested that, if it were to be dealt with in the law of treaties, the Commission might find itself codifying the whole law concerning the "subjects" of international law. Other members felt that the question of capacity is more prominent in the law of treaties than in the law of diplomatic intercourse and immunities and that the draft articles should contain at least some general provisions concerning capacity to conclude treaties. The Commission, while holding that it would not be appropriate to enter into all the detailed problems of capacity which may arise, decided to include the present article setting out three broad provisions concerning capacity to conclude treaties.

(2) Paragraph 1 lays down the general principle that treaty-making capacity is possessed by States and by other subjects of international law. The term "State" is used here with the same meaning as in the Charter of the United Nations, the Statute of the Court, the Geneva Conventions on the Law of the Sea and the Vienna Convention on Diplomatic Relations; i.e., it means a State for the purposes of international law. The phrase "other subjects of international law" is primarily intended to cover international organizations, to remove any doubt about the Holy See and to leave room for more special cases such as an insurgent community to which a measure of recognition has been accorded.

(3) Paragraph 2<sup>28</sup> deals with the case of federal States whose constitutions, in some instances, allow to their member States a measure of treaty-making capac-

ity. It does not cover treaties made between two units of the federation. Agreements between two member States of a federal State have a certain similarity to international treaties and in some instances certain principles of treaty law have been applied to them by analogy. However, those agreements operate within the legal régime of the constitution of the federal State, and to bring them expressly within the terms of the present articles would be to risk a conflict between international and domestic law. Paragraph 2, therefore, is concerned only with treaties made by the federal Government itself, or by a unit of the federation, with an outside State. More frequently, the treaty-making capacity is vested exclusively in the federal Government, but there is no rule of international law which precludes the component States from being invested with the power to conclude treaties with third States. A question may arise in some cases as to whether the component State concludes the treaty as an organ of the federal State or in its own right. But on this point also the solution has to be sought in the provisions of the federal constitution.

(4) Paragraph 3 states that the treaty-making capacity of an international organization depends on its constitution. The term "constitution" has been chosen deliberately in preference to "constituent instrument." For the treaty-making capacity of an international organization does not depend exclusively on the terms of the constituent instrument of the organization but also on the decisions and rules of its competent organs. Comparatively few constituent treaties of international organizations contain provisions concerning the conclusion of treaties by the organization; nevertheless, the great majority of organizations have considered themselves competent to enter into treaties for the purpose of furthering the aims of the organization. Even when, as in the case of the Charter, the constituent treaty has contained express provisions concerning the making of certain treaties, they have not been considered to exhaust the treaty-making powers of the organization. In this connexion, it is only necessary to recall the dictum of the International Court in its opinion on *Reparation for Injuries Suffered in the Service of the United Nations*.<sup>29</sup> "Under international law, the organization must be deemed to have those powers which, though not expressly provided for in the Charter, are conferred upon it by necessary implication as being essential to the performance of its duties." Accordingly, important although the provisions of the constituent treaty of an organization may be in determining the proper limits of its treaty-making activity, it is the constitution as a whole—the constituent treaty together with the rules in force in the organization—that determine the capacity of an international organization to conclude treaties.

## SECTION II: CONCLUSION OF TREATIES BY STATES

### Article 4

*Authority to negotiate, draw up, authenticate, sign, ratify, accede to, approve or accept a treaty*

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

2. (a) Heads of a diplomatic mission are not required to furnish evidence of their authority to negotiate, draw up and authenticate a treaty be-

<sup>28</sup> For the reasons given by him in the summary records of the 658th and 666th meetings, Mr. Briggs does not accept the provisions of paragraph 2 of article 3.

<sup>29</sup> *I.C.J. Reports 1949*, p. 182.

tween their State and the State to which they are accredited.

(b) The same rule applies in the case of the Heads of a permanent mission to an international organization in regard to treaties drawn up under the auspices of the organization in question or between their State and the organization to which they are accredited.

3. Any other representative of a State shall be required to furnish evidence, in the form of written credentials, of his authority to negotiate, draw up and authenticate a treaty on behalf of his State.

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

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

5. In the event of an instrument of ratification, accession, approval or acceptance being signed by a representative of the State other than the Head of State, Head of Government or Foreign Minister, that representative shall be required to furnish evidence of his authority.

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

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

(c) The same rule applies to a letter or telegram sent by the Head of a permanent mission to an international organization with reference to a treaty of the kind mentioned in paragraph 2 (b) above.

#### Commentary

(1) Authority to represent the State in doing any of the acts by which treaties are negotiated and concluded is a matter to be decided by each State in accordance with its own internal laws and usages. However, other States have a legitimate interest in the matter to the extent of being entitled to reassure themselves that a representative with whom they are dealing has authority from his State to carry out the transaction in question. In some cases, the very position of the representative in the State gives this assurance; where this is not so, there is normally a right to call for evidence of authority of the person concerned to act in the particular transaction on behalf of his State. The present article seeks to specify the cases in which, according to modern practice, no evidence of authority is required and those in which a representative either must produce evidence of his authority or is liable to do so if called upon.

(2) Heads of State, Heads of Government and Foreign Ministers are considered in virtue of their offices and functions to possess an authority to act for their States in negotiating, drawing up, authenticating or signing a treaty. In the case of Foreign Ministers this was expressly recognized by the Permanent Court of International Justice in the *Eastern Greenland Case*<sup>80</sup> in connexion with the "Ihlen Declaration." Accordingly, paragraph 1 lays down that no evidence is required of the authority of these officers of State for the purposes mentioned.

(3) Similarly, in accordance with accepted practice, paragraph 2 provides that the Head of a diplomatic mission is to be considered to have authority to negotiate, draw up and authenticate a treaty between his State and the State to which he is accredited. Thus, article 3, paragraph 1 (c), of the Vienna Convention on Diplomatic Relations provides that "the functions of a diplomatic mission consist, *inter alia*, in . . . negotiating with the Government of the receiving State". However, the assumption does not extend in the case of the Head of a diplomatic mission to signing a treaty with *binding effect*; in carrying out that act he is governed by the rule in paragraph 4 of the present article. The practice of establishing permanent missions at the headquarters of certain international organizations to represent the State and to invest the permanent representatives with powers similar to those of the Head of a diplomatic mission is now extremely common. The Commission therefore considers that the rule in paragraph 2 should also apply to such permanent representatives to international organizations.

(4) Paragraph 3 lays down the general rule that representatives other than those already mentioned are under an obligation to produce evidence, in the form of written credentials, of their authority to negotiate, draw up and authenticate a treaty, even if this requirement may sometimes be overlooked or waived.

(5) As already indicated in regard to the Head of a diplomatic mission, authority to negotiate, draw up and authenticate is distinct from authority to sign. While authority to sign, if possessed by the representative at the stage of negotiation, may reasonably be held to imply authority to negotiate, the reverse is not true; and in the case of treaties not in simplified form a further authority specifically empowering him to sign is necessary before signature can be affixed. The practice of Governments in regard to treaties of which the Secretary-General of the United Nations is depositary indicates that no distinction is made for this purpose between signature and signature *ad referendum*, and the rule has accordingly been so stated in paragraph 4 (a) of the article.

(6) In the case of treaties in simplified form, the production of an instrument of full powers is not usually insisted upon in practice. As it is possible to imagine circumstances in which the other State might wish to assure itself of a representative's power to sign an exchange of notes or other treaty in simplified form, the Commission has proposed a rule in paragraph 4 (b) which dispenses with the production of full powers, "unless called for by the other negotiating State".

(7) Instruments of ratification, accession, acceptance and approval are normally signed by Heads of State, though in modern practice this is sometimes done by Heads of Government or by Foreign Ministers. In these cases, evidence of authority to sign the instrument is not required. However, in rare cases—usually because of special urgency to deposit the instrument—the Head of

<sup>80</sup> P.C.I.J., Series A/B, 53, p. 71.

a mission or a permanent representative to an organization may be instructed to sign and deposit such an instrument; in these cases, according to the practice of the Secretary-General, full powers are demanded and produced. It is these cases for which paragraph 5 seeks to provide.

(8) Paragraph 6 deals with the form of full powers and with cases where less formal evidence may provisionally be accepted in lieu of full powers. Normally, full powers are issued *ad hoc* for the execution of the particular act in question, but there does not appear to be any reason why full powers should not be couched in a wider form provided that they leave no doubt as to the scope of the powers which they confer. Some countries, it is understood, may adopt the practice of issuing to certain Ministers, as part of their normal commissions, wide full powers which, without mentioning any particular treaty, confer on the Minister authority to sign treaties or categories of treaties on behalf of the State. In addition, some permanent representatives at the headquarters of international organizations that are the depositaries of multilateral treaties are clothed by their States with such wide full powers, either included in their credentials or contained in a separate instrument. The Commission will be glad eventually to have information from Governments as to their practice in regard to these forms of full powers. In the meanwhile, it seems justifiable tentatively to insert in paragraph 6 (a) a provision allowing full powers framed to cover all treaties or specific categories of treaty.

(9) Paragraphs 6 (b) and (c) recognize a practice of comparatively recent development which is of considerable utility and should serve to render initialling and signature *ad referendum* unnecessary save in exceptional circumstances. A letter or telegram is, in case of urgency, accepted as provisional evidence of authority, subject to the production in due course of full powers executed in proper form.

### Article 5

#### *Negotiation and drawing up of a treaty*

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

#### *Commentary*

The Commission, although it recognized the contents of this article to be more descriptive than normative, decided to include it, since the process of drawing up the text is an essential preliminary to the legal act of the adoption of the text dealt with in the next article. Article 5, in short, provides a logical connecting link between article 4 and article 6.

### Article 6

#### *Adoption of the text of a treaty*

The adoption of the text of a treaty takes place:

(a) In the case of a treaty drawn up at an international conference convened by the States con-

cerned or by an international organization, by the vote of two-thirds of the States participating in the conference, unless by the same majority they shall decide to adopt another voting rule;

(b) In the case of a treaty drawn up within an organization, by the voting rule applicable in the competent organ of the organization in question;

(c) In other cases, by the mutual agreement of the States participating in the negotiations.

#### *Commentary*

(1) This article deals with the voting rule by which the text of the treaty is "adopted", i.e. the voting rule by which the form and content of the proposed treaty are settled. At this stage, the negotiating States are concerned only with drawing up the text of the treaty as a document setting out the provisions of the proposed treaty; and their votes, even when cast at the end of the negotiations in favour of adopting the text as a whole, relate solely to this process. A vote cast at this stage, therefore, is not in any sense an expression of the State's agreement to be bound by the provisions of the text, which can only become binding upon it by a further expression of its consent (signature, ratification, accession or acceptance).

(2) In former times, the adoption of the text of a treaty almost always took place by the agreement of all the States participating in the negotiations and unanimity could be said to be the general rule. The growth of the practice of drawing up treaties in large international conferences or within international organizations has, however, led to so normal a use of the procedure of majority vote that, in the opinion of the Commission, it would be unrealistic to lay down unanimity as the general rule for the adoption of the texts of treaties drawn up at conferences or within organizations. Unanimity remains the general rule for bilateral treaties and for treaties drawn up between very few States. But for other multilateral treaties a different rule must be specified, although, of course, it will always be open to the States concerned to apply the rule of unanimity in a particular case, if they should so decide.

(3) Sub-paragraph (a) of the present article deals with the case of treaties drawn up at international conferences and the main questions for the Commission were: (i) whether a distinction should be drawn between conferences convened by an international organization, and (ii) the principles upon which the voting rule should be determined.

(4) As to the first question, when the General Assembly convenes a conference, the practice of the Secretariat of the United Nations is, after consultation with the groups and interests mainly concerned, to prepare provisional or draft rules of procedure for the conference, including a suggested voting rule, for adoption by the conference itself.<sup>31</sup> But it is left to the conference to decide whether to adopt the suggested rule or replace it by another. The Commission therefore concluded that, both in the case of a conference convened by the States themselves and of one convened by an organization, the voting rule for adopting the text is a matter for the States at the conference.

(5) As to the second question, the rule proposed in

<sup>31</sup> Cf. General Assembly resolution 366 (IV) of 3 December 1949, "Rules for the calling of international conferences of States".

sub-paragraph (a) is that a two-thirds majority should be necessary for the adoption of a text at any international conference, unless the States at the conference should by the same majority decide to apply a different voting rule. While the States at the conference must retain the ultimate power to decide the voting rule by which they will adopt the text of the treaty, it appears to the Commission to be extremely desirable to fix in the present articles the procedure by which a conference is to arrive at its decision concerning that voting rule. Otherwise there is some risk of the work of the conference being delayed by long procedural debates concerning the preliminary voting rule by which it is to decide upon its substantive voting rule for adopting the text of the treaty. Some members of the Commission considered that the procedural vote should be taken by simple majority. Others felt that such a rule might not afford sufficient protection to minority groups at the conference, for the other States would be able in every case to decide by a simple majority to adopt the text of the treaty by the vote of a simple majority and in that way override the views of what might be quite a substantial minority group of States at the conference. The rule in sub-paragraph (a) takes account of the interests of minorities to the extent of requiring at least two-thirds of the States to be in favour of proceeding by simple majorities before recourse can be had to simple majority votes for adopting the text of a treaty. It leaves the ultimate decision in the hands of the conference but at the same time establishes a basis upon which the procedural questions can be speedily and fairly resolved. The Commission felt all the more justified in proposing this rule, seeing that the use of a two-thirds majority for adopting the texts of multilateral treaties is now so frequent.

(6) Sub-paragraph (b) deals with the case of treaties, like the Convention on the Prevention and Punishment of the Crime of Genocide or the Convention on the Political Rights of Women, which are drawn up actually within an international organization. Here, the voting rule for adopting the text of the treaty must clearly be the voting rule applicable in the particular organ in which the treaty is adopted.

(7) There remain bilateral treaties and a residue of multilateral treaties concluded between a small group of States otherwise than at an international conference. For all these treaties unanimity remains the rule.

### Article 7

#### *Authentication of the text*

1. Unless another procedure has been prescribed in the text or otherwise agreed upon by States participating in the adoption of the text of the treaty, authentication of the text may take place in any of the following ways:

(a) Initialling of the text by the representatives of the States concerned;

(b) Incorporation of the text in the final act of the conference in which it was adopted;

(c) Incorporation of the text in a resolution of an international organization in which it was adopted or in any other form employed in the organization concerned.

2. In addition, signature of the text, whether a full signature or signature *ad referendum*, shall automatically constitute an authentication of the text of a proposed treaty, if the text has not been previously authenticated in another form under the provisions of paragraph 1 above.

3. On authentication in accordance with the foregoing provisions of the present article, the text shall become the definitive text of the treaty.

#### *Commentary*

(1) Authentication of the text of a treaty is necessary in order that the negotiating States, before they are called upon to decide whether they will become parties to the treaty, may know finally and definitively what is the content of the treaty to which they will be subscribing. There must come a point, therefore, at which the draft which the parties have agreed upon is established as being the text of the proposed treaty. Whether the States concerned will eventually become bound by this treaty is of course another matter, and remains quite open. But they must have, as the basis for their decision on this question, a final text not susceptible of alteration. Authentication is the process by which this final text is established, and it consists in some act or procedure which certifies the text as the correct and authentic text.

(2) Previous drafts on the law of treaties have not recognized authentication as a distinct part of the treaty-making process. The reason appears to be that until comparatively recently signature was the normal method of authenticating a text, and that signature always has another and more important function. For it is also either a first step towards ratification, acceptance or approval of the treaty, or an expression of the State's consent to be bound by it. The authenticating function of signature is consequently masked by being merged in its other function.<sup>32</sup> In recent years, however, other methods of authenticating texts of treaties on behalf of all or most of the negotiating parties have been devised. Examples are the incorporation of unsigned texts of projected treaties in final acts of diplomatic conferences, the procedure of the International Labour Organisation under which the signatures of the President of the International Labour Conference and of the Director-General of the International Labour Office authenticate the texts of labour conventions, and treaties whose texts are authenticated by being incorporated in a resolution of an international organization. It is these developments in treaty-making practice which render it desirable to deal separately in the draft articles with authentication as a distinct procedural step in the conclusion of a treaty.

(3) Paragraph 1 of the article sets out the methods of authentication other than signature, and paragraph 2 covers signature as an act of authentication. Signature has been dealt with separately because it only operates as an authenticating act if the treaty has not already been authenticated in one of the ways mentioned in paragraph 1.

(4) Paragraph 3 states the legal effect of authentication as an act which renders the text definitive. This means that, after authentication, any change in the wording of the text would have to be brought out by an agreed correction of the authenticated text (see articles 26 and 27).

### Article 8

#### *Participation in a treaty*

1. In the case of a general multilateral treaty, every State may become a party to the treaty un-

<sup>32</sup> See *Yearbook of the International Law Commission, 1950* (United Nations publication, Sales No.: 57.V.3), vol. II, pp. 233-234.

less it is otherwise provided by the terms of the treaty itself or by the established rules of an international organization.

2. In all other cases, every State may become a party to the treaty:

(a) Which took part in the adoption of its text, or

(b) To which the treaty is expressly made open by its terms, or

(c) Which although it did not participate in the adoption of the text was invited to attend the conference at which the treaty was drawn up, unless the treaty otherwise provides.

#### Article 9

##### *The opening of a treaty to the participation of additional States*

1. A multilateral treaty may be opened to the participation of States other than those to which it was originally open:

(a) In the case of a treaty drawn up at an international conference convened by the States concerned, by the subsequent consent of two-thirds of the States which drew up the treaty, provided that, if the treaty is already in force and . . . years have elapsed since the date of its adoption, the consent only of two-thirds of the parties to the treaty shall be necessary;

(b) In the case of a treaty drawn up either in an international organization or at an international conference convened by an international organization, by a decision of the competent organ of the organization in question, adopted in accordance with the applicable voting rule of such organ.

2. Participation in a treaty concluded between a small group of States may be opened to States other than those mentioned in article 8 by the subsequent agreement of all the States which adopted the treaty, provided that, if the treaty is already in force and . . . years have elapsed since the date of its adoption, the agreement only of the parties to the treaties shall be necessary.

3. (a) When the depositary of a treaty receives a formal request from a State desiring to be admitted to participation in the treaty under the provisions of paragraphs 1 and 2 above, the depositary:

(i) In a case falling under paragraph 1 (a) and paragraph 2, shall communicate the request to the States whose consent to such participation is specified in paragraph 1 (a) as being material;

(ii) In a case falling under paragraph 1 (b), shall bring the request, as soon as possible, before the competent organ of the organization in question.

(b) The consent of a State to which a request has been communicated under paragraph 3 (a) (i) above shall be presumed after the expiry of twelve months from the date of the communication, if it has not notified the depositary of its objection to the request.

4. When a State is admitted to participation in a treaty under the provisions of the present article notwithstanding the objection of one or more

States, an objecting State may, if it thinks fit, notify the State in question that the treaty shall not come into force between the two States.

#### *Commentary*

(1) Articles 8 and 9 define the States to which it is open to become parties to a treaty. Article 8<sup>33</sup> covers what may be termed original participation in a treaty; that is, it defines the States which may become parties as from the date of the adoption of the text of the treaty. Article 9 lays down the conditions under which participation in treaties may be extended to additional States by decisions subsequent to the adoption of the text.

(2) The Commission gave particular attention to the problem of participation in general multilateral treaties which it considered to be of special importance in this connexion. It was unanimous in thinking that these treaties because of their special character should, in principle, be open to participation on as wide a basis as possible. Some members of the Commission considered that, as these treaties are intended to be universal in their application, they should be open to participation by every State. They took the view that it is for the general good that all States should become parties to such treaties, and that in a world community of States, no State should be excluded from participation in treaties of this character. They did not think that the principle of the freedom of States to determine for themselves the extent to which they are prepared to enter into treaty relations with other States was any obstacle to the Commission formulating a rule under which general multilateral treaties would be open to participation by every State. For it not infrequently happens already that States find themselves parties to the same treaties and members of the same international organization as States with which they have no diplomatic relations or which they do not even recognize.

(3) Other members of the Commission did not feel justified in setting aside, even in the case of general multilateral treaties, so fundamental a principle of treaty law as the freedom of the contracting States to determine, by the clauses of the treaty itself, the States which may become parties to it. On the other hand, it was considered by many members that the special character of general multilateral treaties justifies, in those cases where the treaty does not specify the categories of States to which it is to be open, a presumption that every State may become a party to it. They recognized that the general multilateral treaties of recent years, such as the Geneva Conventions on the Law of the Sea and the Vienna Convention on Diplomatic Relations, had not been made open to all States but to specified, if very wide, categories of States. Nevertheless, they considered that on grounds of principle and as a measure of progressive development of international law, the Commission should propose to Governments the rule which appears in paragraph 1 of article 8. These members also expressed the view that the problem of participation in general multilateral treaties should be kept entirely distinct from the problem of recognition of States.

(4) Another group of members, while fully sharing the view that general multilateral treaties should, in principle, be open to all States, did not think that the Commission would be justified in including such a presumption as to the intention of the contracting States, having regard to the clear indication of a contrary intention on

<sup>33</sup> For the reasons given by him in the summary records of the 648th (paras. 10-22) and 667th meetings, Mr. Briggs does not accept the provisions of article 8.

the part of States in recent practice, and especially in United Nations practice. For it had become common form in general multilateral treaties drawn up under the auspices of the United Nations and the specialized agencies, as well as in a number of other treaties, to insert a clause opening them to all Members of the United Nations and of the specialized agencies, to all parties to the Statute of the International Court of Justice and to any other State invited by the General Assembly. This formula, they considered, opens the treaty to an exceedingly wide list of States and, in effect, only excludes controversial cases. These members did not think that the Commission's proposals ought to go beyond this practice, which hinges upon the decision in doubtful cases being taken by the General Assembly or by the competent organ of some other organization of world-wide membership. Accordingly, they advocated confining article 8 to the provisions set out in paragraph 2 and leaving the case of general multilateral treaties to be covered by paragraph 1 of article 9. The effect of the latter paragraph in regard to the large body of treaties concluded under the auspices of international organizations is to put the decision in the hands of the competent organ of the organization concerned, as under existing practice, and in other cases to make it subject to a two-thirds vote of the States concerned. These members considered that a rule putting the decision in doubtful cases in the hands of the General Assembly, or of the competent organ of some other organization or of a two-thirds majority of the interested States, was also extremely desirable from the point of view of the depositary. Otherwise the Secretary-General or any other depositary would have to choose between accepting every signature, accession, etc. from any group claiming to be a State and making delicate and perhaps controversial political appreciations more appropriate to the General Assembly or some other political organ.

(5) The view that, where a general multilateral treaty is silent concerning the States to which it is open every State must be presumed to have a right to become a party to the treaty, prevailed in the Commission, and the rule is so stated in article 8, paragraph 1.

(6) There still remains, however, the problem of general multilateral treaties which specify the categories of States to which they are open and thereby exclude the principle in article 8, paragraph 1. These treaties the Commission has sought to cover in article 9, paragraph 1, which provides for them to be made open to additional States, either by a two-thirds majority of the States which drew up the treaty, or by the decision of the competent organ of an international organization. The formula "by a two-thirds majority of the States which drew up the treaty" is, of course, based on the fact that, as mentioned in the commentary on article 6, the adoption of a treaty in modern practice takes place in the great majority of cases by a two-thirds majority. In other words, the proposal is that the treaty should be made open to additional States by the same majority as will normally have been applied in adopting the participation clause of the treaty. But, where the treaty has been drawn up either within an organization or at a conference convened by an organization, the proposal is that the decision should rest with its competent organ. The Commission considered that these provisions are suitable also for the case of multilateral treaties which, though not of a general character, have been concluded between a considerable number of States. Accordingly, article 9, paragraph 1, applies to these treaties as well as to general multilateral treaties.

(7) Paragraph 2 of article 9 is therefore limited to

treaties concluded between a small group of States and for these treaties it is thought that the unanimity rule should be retained.

(8) Paragraph 3 indicates the procedures for dealing with requests for admission to treaties under the two preceding paragraphs.

(9) Paragraph 4 gives effect to the right of a State to decide whether or not it will enter into treaty relations with another State.

(10) Finally, the Commission gave particular attention to the problem of the accession of new States to general multilateral treaties, concluded in the past, whose participation clauses were limited to specific categories of States. New States may very well wish to become parties to some of these treaties and, if so, it is clearly desirable that legally they should be in a position to do so. There are, however, certain difficulties in the way of achieving this result easily through the provisions of the present draft articles. One is that, in the nature of things, there is bound to be some delay before these draft articles, assuming that ultimately a convention results from them, could become effective. Another is that a convention only binds the parties to it, and unless all the surviving parties to the older multilateral treaties in question became actual parties to the new convention on the conclusion of treaties, there might be doubt about the effectiveness of the convention to create a right of accession to the old treaties. The Commission, therefore, suggests that consideration should be given to the possibility of solving this problem more expeditiously by other procedures. It seems to be established that the opening of a treaty to accession by additional States, while it requires the consent of the States entitled to a voice in the matter, does not necessitate the negotiation of a fresh treaty amending or supplementing the earlier one. One possibility would be for administrative action to be taken through the depositaries of the individual treaties to obtain the necessary consents of the States concerned in each treaty; indeed, it is known that action of this kind has been taken in some cases. Another expedient that might be considered is whether action to obtain the necessary consents might be taken in the form of a resolution of the General Assembly by which each Member State agreed that a specified list of multilateral treaties of a universal character should be opened to accession by new States. It is true that there might be a few non-member States whose consent might also be necessary, but it should not be impossible to devise a means of obtaining the assent of these States to the terms of the resolution.

#### Article 10

##### *Signature and initialling of the treaty*

1. Where the treaty has not been signed at the conclusion of the negotiations or of the conference at which the text was adopted, the States participating in the adoption of the text may provide either in the treaty itself or in a separate agreement:

(a) That signature shall take place on a subsequent occasion; or

(b) That the treaty shall remain open for signature at a specified place either indefinitely or until a certain date.

2. (a) The treaty may be signed unconditionally; or it may be signed *ad referendum* to the competent authorities of the State concerned, in

which case the signature is subject to confirmation.

(b) Signature *ad referendum*, if and so long as it has not been confirmed, shall operate only as an act authenticating the text of the treaty.

(c) Signature *ad referendum*, when confirmed, shall have the same effect as if it had been a full signature made on the date when, and at the place where, the signature *ad referendum* was affixed to the treaty.

3. (a) The treaty, instead of being signed, may be initialled, in which event the initialling shall operate only as an authentication of the text. A further separate act of signature is required to constitute the State concerned a signatory of the treaty.

(b) When initialling is followed by the subsequent signature of the treaty, the date of the signature, not that of the initialling, shall be the date upon which the State concerned shall become a signatory of the treaty.

#### Commentary

(1) The antithesis in paragraph 1 of the present article is between the treaty that remains open for signature until a certain date—or else indefinitely—and the treaty that does not. Most treaties, in particular bilateral treaties and treaties negotiated between a small group of States, do not remain open for signature. They are signed either immediately on the conclusion of the negotiation, or on some later date especially appointed for the purpose. In either case, States intending to sign must do so on the occasion of the signature, and cannot do so thereafter. They may of course still be able to become parties to the treaty by some other means, e.g. accession or acceptance.

(2) In the case of treaties negotiated at international conferences, there is a growing tendency to include a clause leaving them open for signature until a certain date (usually six months after the conclusion of the conference). In theory, there is no reason why such treaties should not remain open for signature indefinitely, and cases of this are on record.<sup>34</sup> However, the more general practice is to leave multilateral treaties open for signature for a specific period and this practice has considerable advantages. The closing stages of international conferences are apt to be hurried. Often the Governments are not in possession of the final text, which may only have been completed at the last moment. For that reason, many representatives do not sign the treaty in its final form. Yet, even if the treaty makes it possible to become a party by accession, many Governments would prefer to do so by signature and ratification. It is also desirable to take account of the fact that Governments which are not sure of being able eventually to ratify, accept or approve a treaty may nevertheless wish for an opportunity of giving that measure of support to the treaty which signature implies. These pre-occupations can most easily be met by leaving the treaty open for signature at the seat of the "headquarters" Government or international organization.

<sup>34</sup> Article 14 of the Convention on treaties, adopted at Havana on 18 February 1928, provides as follows: "The present Convention shall be ratified by the signatory States and shall remain open for signature and for ratification by the States represented at the Conference and which have not been able to sign it". This Convention, together with seven further Conventions adopted at the Sixth Conference of American States held at Havana, merely states that the Convention shall remain open for signature and ratification, without specifying any time limit.

(3) Paragraphs 2 and 3 deal with signature *ad referendum* and initialling. Signature *ad referendum*, as indicated in paragraph 2, is not full signature, but it will rank as one if subsequently confirmed by the Government on whose behalf it was made. Initialling is not normally the equivalent of signature and operates in most cases as an act authenticating the text. The principal differences between initialling and signature *ad referendum* are:

(a) Whereas signature *ad referendum* is basically both an authenticating act (where the text has not otherwise been authenticated already) and a provisional signature of the treaty, initialling is and always remains an authenticating act only, which is incapable of being transformed into full signature by mere confirmation; and

(b) Whereas confirmation of a signature *ad referendum* has retroactive effect causing the State to rank as a signatory from the date of the signature *ad referendum*, a signature subsequent to initialling has no retroactive effect and the State concerned becomes a signatory only from the date of the subsequent act of signature.

(4) There may also be a certain difference in the occasions on which these two procedures are employed. Initialling is employed for various purposes. One is to authenticate a text at a certain stage of the negotiations, pending further consideration by the Governments concerned. It may also be employed by a representative who has authority to negotiate, but is not in possession of (and is not at the moment able to obtain) an actual authority to sign.<sup>35</sup> Sometimes it may be resorted to by a representative who, for whatever reasons, is acting on his own initiative and without instructions, but who nevertheless considers that he should authenticate the text. Signature *ad referendum* may also be resorted to in some of these cases, but at the present time is probably employed mainly on actual governmental instructions in cases where the Government wishes to perform some act in relation to the text, but is unwilling to be committed to giving it even the provisional support that a full signature would imply.

#### Article 11

##### Legal effects of a signature

1. In addition to authenticating the text of the treaty in the circumstances mentioned in article 7, paragraph 2, the signature of a treaty shall have the effects stated in the following paragraphs.

2. Where the treaty is subject to ratification, acceptance or approval, signature does not establish the consent of the signatory State to be bound by the treaty. However, the signature:

(a) Shall qualify the signatory State to proceed to the ratification, acceptance or approval of the treaty in conformity with its provisions; and

(b) Shall confirm or, as the case may be, bring into operation the obligation in article 17, paragraph 1.

3. Where the treaty is not subject to ratification, acceptance or approval, signature shall:

(a) Establish the consent of the signatory State to be bound by the treaty; and

<sup>35</sup> Today, when a telegraphic authority, pending the arrival of written full powers, would usually be accepted (see article 4 above, and the commentary thereto), the need for recourse to initialling on this ground ought only to arise infrequently.

(b) If the treaty is not yet in force, shall bring into operation the obligation in article 17, paragraph 2.

### Commentary

(1) Paragraph 1 recalls, for the sake of completeness, the rule that, if the text has not already been authenticated in one of the ways mentioned in article 7, paragraph 1, signature will automatically constitute an authentication of the text by the signatory State.

(2) Paragraph 2 deals with the cases where the signature does not constitute a final expression of the State's consent to be bound by the treaty but requires a further act of ratification, acceptance or approval to have that effect. This may happen either because the treaty itself provides for signature plus ratification (or acceptance or approval) or because the signature of the particular State is expressed to be subject to ratification (or acceptance or approval). The primary effect of the signature in these cases is to establish the right of the signatory State to become a party to the treaty by subsequently completing the necessary act of ratification or, as the case may be, acceptance or approval of the treaty; and paragraph 2 (a) so provides.

(3) Paragraph 2 (b) concerns the obligation which attaches to a State which has signed a treaty "subject to ratification, acceptance or approval" even though it has not yet established its consent to be bound by the treaty. This obligation is set out in article 17, paragraph 1, where it is provided that such a State is "under an obligation of good faith, unless and until it shall have signified that it does not intend to become a party to the treaty, to refrain from acts calculated to frustrate the objects of the treaty, if and when it should come into force". In most cases, a signatory State will already be under this obligation by reason of having taken part in the negotiation, drawing up or adoption of the treaty; but, when a treaty is made open to signature by States which did not take part in the negotiation, drawing up or adoption of the treaty, they will come under the same obligation if they sign "subject to ratification, acceptance or approval".

(4) There is also some authority for the proposition that a State which signs a treaty "subject to ratification, acceptance or approval" comes under a certain, if somewhat intangible, obligation of good faith subsequently to give consideration to the ratification, acceptance or approval of the treaty. The precise extent of the supposed obligation is not clear. That there is no actual obligation to ratify under modern customary law is certain, but it has been suggested<sup>86</sup> that signature "implies an 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". This formulation, logical and attractive though it may be, appears to go beyond any obligation that is recognized in State practice. For there are many examples of treaties that have been signed and never submitted afterwards to the constitutional organ of the State competent to authorize the ratification of treaties, without any suggestion being made that it involved a

breach of an international obligation. Governments, if political or economic difficulties present themselves, undoubtedly hold themselves free to refrain from submitting the treaty to parliament or to whatever other body is competent to authorize ratification. The Commission felt that the most that could be said on the point was that the Government of a signatory State might be under some kind of obligation to examine in good faith whether it should become a party to the treaty. The Commission hesitated to include such a rule in the draft articles. The position is, of course, different if the treaty itself, or the rules in force in an international organization, place signatory States under some form of obligation to submit the question of the ratification, acceptance or approval of the treaty to their respective constitutional authorities. In those cases, there is an express obligation flowing from the particular treaty or the particular rules of the organization in question (e.g. the International Labour Organisation).

(5) Paragraph 3 deals with cases where the treaty is not subject to ratification, acceptance or approval. Signature then suffices by itself to establish the State's consent to be bound by the treaty and the rule is so formulated in sub-paragraph (a). If the treaty is already in force (or is brought into force by the signature) it goes without saying that the signatory State becomes subject to the provisions of the treaty. But even if the conditions for the entry into force of the treaty have not yet been fulfilled, the signatory State is subject *a fortiori* to an obligation of good faith to refrain from acts calculated to frustrate the objects of the treaty, and sub-paragraph (b) so provides.

## Article 12

### Ratification

1. Treaties in principle require ratification unless they fall within one of the exceptions provided for in paragraph 2 below.

2. A treaty shall be presumed not to be subject to ratification by a signatory State where:

(a) The treaty itself provides that it shall come into force upon signature;

(b) The credentials, full powers or other instrument issued to the representative of the State in question authorize him by his signature alone to establish the consent of the State to be bound by the treaty, without ratification;

(c) The intention to dispense with ratification clearly appears from statements made in the course of the negotiations or from other circumstances evidencing such an intention;

(d) The treaty is one in simplified form

3. However, even in cases falling under paragraphs 2 (a) and 2 (d) above, ratification is necessary where:

(a) The treaty itself expressly contemplates that it shall be subject to ratification by the signatory States;

(b) The intention that the treaty shall be subject to ratification clearly appears from statements made in the course of the negotiations or from other circumstances evidencing such an intention;

(c) The representative of the State in question has expressly signed "subject to ratification" or his credentials, full powers or other instrument duly exhibited by him to the representatives of the other negotiating States expressly limit the author-

<sup>86</sup> See first report of Sir Hersch Lauterpacht, *Yearbook of the International Law Commission, 1953* (United Nations publication, Sales No.: 59.V.4), vol. II, pp. 108-112. See also first report of Sir Gerald Fitzmaurice, *Yearbook of the International Law Commission, 1956* (United Nations publication, Sales No.: 56.V.3), vol. II, pp. 112-113 and 121-122.

ity conferred upon him to signing "subject to ratification".

### Commentary

(1) This article sets out the rules determining the cases in which ratification is necessary in addition to signature in order to establish the State's consent to be bound by the treaty. The word "ratification", as the definition in article 1 indicates, is used here and throughout these draft articles exclusively in the sense of ratification on the international plane. Parliamentary "ratification" or "approval" of a treaty under municipal law is not, of course, unconnected with "ratification" on the international plane, since without it the necessary constitutional authority to perform the international act of ratification may be lacking. But it remains true that the international and constitutional ratifications of a treaty are entirely separate procedural acts carried out on two different planes.

(2) The modern institution of ratification in international law developed in the course of the nineteenth century. Earlier, ratification had been an essentially formal and limited act by which, after a treaty had been drawn up, a sovereign confirmed, or finally verified, the full powers previously issued to his representative to negotiate the treaty. It was then not an approval of the treaty itself but a confirmation that the representative had been invested with authority to negotiate it and, that being so, there was an obligation upon the sovereign to ratify his representative's full powers, if these had been in order. Ratification came, however, to be used in the majority of cases as the means of submitting the treaty-making power of the executive to parliamentary control, and ultimately the doctrine of ratification underwent a fundamental change. It was established that the treaty itself was subject to subsequent ratification by the State before it became binding. Furthermore, this development took place at a time when the great majority of international agreements were formal treaties. Not unnaturally, therefore, it came to be the opinion that the general rule is that ratification is necessary to render a treaty binding.<sup>37</sup>

(3) Meanwhile, however, the expansion of intercourse between States, especially in economic and technical fields, led to an ever-increasing use of less formal types of international agreements, amongst which were exchanges of notes, and these agreements are usually intended by the parties to become binding by signature alone. On the other hand, an exchange of notes or other informal agreement, though employed for its ease and convenience, has sometimes expressly been made subject to ratification because of constitutional requirements in one or the other of the contracting States.

(4) The general result of these developments has been to complicate the law concerning the conditions under which treaties need ratification in order to make them binding. The controversy which surrounds the subject is, however, largely theoretical, as previous rapporteurs on the law of treaties have pointed out.<sup>38</sup> The

<sup>37</sup> See, for example, Crandall, *Treaties, their Making and Enforcement*, para. 3; Fauchille, *Traité de droit international public*, tome I, part III, p. 317; Oppenheim, *International Law*, vol. I, para. 512; *Harvard Research Draft*, A.J.I.L., vol. 29, Special Supplement, p. 756.

<sup>38</sup> See reports of Sir Hersch Lauterpacht, *Yearbook of the International Law Commission, 1953* (United Nations publication, Sales No.: 59.V.4), vol. II, p. 112; and *Ibid.*, 1954 (Sales No. 59.V.7), vol. II, p. 127; and first report of Sir Gerald Fitzmaurice, *Yearbook of the International Law Commission, 1956* (United Nations publication, Sales No.: 56.V.3), vol. II, p. 123.

more formal types of instrument include, almost without exception, express provisions on the subject of ratification, and occasionally this is so even in the case of exchanges of notes or other instruments in simplified form. Moreover, whether they are of a formal or informal type, treaties normally either provide that the instrument shall be ratified or, by laying down that it shall enter into force upon signature or upon a specified date or event, dispense with ratification. Total silence on the subject is exceptional, and the number of cases that remain to be covered by a general rule is very small. This does not necessarily mean that there is no need to formulate a rule for the small residuum of cases in which the parties have left the question open. For it is one of the purposes of codification to provide for such cases where the question is not regulated by the parties, and only if a clear presumptive rule is laid down will the parties themselves know in future whether or not an express provision is necessary to give effect to their intentions. But, if the general rule is taken to be that ratification is necessary unless it is expressly or impliedly excluded, large exceptions qualifying the rule have to be inserted in order to bring it into accord with modern practice, with the result that the number of cases calling for the operation of the general rule is small. Indeed, the practical effect of choosing that version of the general rule or the opposite rule that ratification is unnecessary unless expressly agreed upon by the parties is not very substantial.

(5) The Commission considered whether it should refrain from formulating any general rule and simply state the law by reference to the intentions of the parties or whether it should formulate a general rule to apply in cases where the treaty is silent upon the question of ratification. Some members were not in favour of stating that a treaty is to be presumed to be subject to ratification unless the contrary is indicated. They thought that in modern practice there is no specific rule concerning the need for ratification and that it is always a question of ascertaining what the parties intended. In favour of this view is the fact that in modern practice a great many treaties are concluded in simplified form and that a large percentage of the total number of treaties enter into force without ratification. The view which prevailed in the Commission, however, was that the numerical statistics may be a little misleading in that many treaties in simplified form deal with comparatively unimportant matters, and that weight should be given to the constitutional requirements for the exercise of the treaty-making power which exist in many States with respect to more important matters. The Commission felt that a general rule excluding the need for ratification unless a contrary intention was expressed would not be acceptable to these States, whereas the opposite rule would not cause the same difficulty to States without such constitutional requirements. On the other hand, there was general agreement that there is no presumption in favour of ratification being necessary in the case of treaties in simplified form.

(6) Taking account of the different considerations, the Commission decided that a general rule should be stated and that this should be a rule requiring ratification unless the case falls within one of a number of recognized exceptions; paragraph 1 of the article accordingly so provides.

(7) Paragraph 2 sets out four cases in which the general rule does not in principle apply. In the first three cases an intention to set aside the rule is to be found either in the treaty itself, the documents ex-

pressing the powers of the representatives or in the circumstances of the negotiations. In the fourth case, it is to be implied from the choice by the parties of an instrument in simplified form. This implication, as already indicated, is justified by the fact that the great majority of these forms of treaty in fact enter into force today without ratification.

(8) On the other hand, the intention to set aside the need for ratification which is found in paragraphs 2 (a) and 2 (d) is presumed from, in the one case, the fact that the treaty is expressed to come into force upon signature and, in the other, the use of a simplified form. These presumptions, strong though they are, must give way in face of a clear expression of contrary intention, and paragraph 3 accordingly makes provision for the cases where such a contrary intention appears. It may not be very often that a treaty expressed to come into force upon signature is made subject to ratification; but this does sometimes happen in practice when a treaty which is subject to ratification is expressed to come into force provisionally upon signature.

### Article 13 Accession

A State may become a party to a treaty by accession in conformity with the provisions of articles 8 and 9 when:

(a) It has not signed the treaty and either the treaty specifies accession as the procedure to be used by such a State for becoming a party; or

(b) The treaty has become open to accession by the State in question under the provisions of article 9.

### Commentary

(1) Accession is the traditional method by which a State, in certain circumstances, becomes a party to a treaty of which it is not a signatory. One type of accession is that where the treaty expressly provides that certain States or categories of States may accede to it. Another type is that where a State which was not entitled to become a party to a treaty under its terms is subsequently invited to become a party under the conditions set out in article 9.

(2) Divergent opinions have been expressed in the past as to whether it is legally possible to accede to a treaty which is not yet in force, and there is some support for the view that it is not possible.<sup>39</sup> However, an examination of the most recent treaty practice shows that in practically all modern treaties which contain accession clauses the right to accede is made independent of the entry into force of the treaty, either expressly by allowing accession to take place before the date fixed for the entry into force of the treaty, or impliedly by making the entry into force of the treaty conditional on the deposit, *inter alia*, of instruments of accession. The modern practice has gone so far in this direction that the Commission does not consider it appropriate to give any currency, even in the form of a residuary rule, to the doctrine that treaties are not open to accession until they are in force. In this connexion it recalls the following observation of a previous special rapporteur.

<sup>39</sup> See *Harvard Research Draft*, p. 822; Sir Gerald Fitzmaurice's first report on the law of treaties, *Yearbook of the International Law Commission*, 1956, vol. II, p. 125-26, and Professor Briery's second report, *Yearbook of the International Law Commission*, 1951, vol. II, p. 73.

"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."<sup>40</sup>

Accordingly, in the present article accession is not made dependent upon the treaty's having entered into force.

(3) Occasionally, a purported instrument of accession is expressed to be "subject to ratification" and the Commission considered whether anything should be said on the point either in the present article or in article 15 dealing with instruments of accession. The question arises whether it should be indicated in the present article that the deposit of an instrument of accession in this form is ineffective as an accession. The question was considered by the Assembly of the League of Nations in 1927 which, however, contented itself with emphasizing that an instrument of accession would be taken to be final, unless the contrary were expressly stated. At the same time it said that the procedure was one which "the League should neither discourage nor encourage".<sup>41</sup> As to the actual practice today, the Secretary-General has stated that he takes a position similar to that taken by the Secretariat of the League of Nations. He considers the instrument "simply as a notification of the Government's intention to become a party", and he does not notify the other States of its receipt. Furthermore, he draws the attention of the Government to the fact that the instrument does not entitle it to become a party and underlines that "it is only when an instrument containing no reference to subsequent ratification is deposited that the State will be included among the parties to the agreement and the other Governments concerned notified to that effect".<sup>42</sup> The attitude adopted by the Secretary-General towards an instrument of accession expressed to be "subject to ratification" is considered by the Commission to be entirely correct. The procedure of accession subject to ratification is somewhat anomalous, but it is infrequent and does not appear to cause difficulty in practice. The Commission has not, therefore, thought it necessary to deal with it specifically in those articles.

### Article 14

#### Acceptance or approval

A State may become a party to a treaty by acceptance or by approval in conformity with the provisions of articles 8 and 9 when:

(a) The treaty provides that it shall be open to signature subject to acceptance or approval and the State in question has so signed the treaty; or

(b) The treaty provides that it shall be open to participation by simple acceptance or approval without prior signature.

### Commentary

(1) Acceptance has become established in treaty practice during the past twenty years as a new proce-

<sup>40</sup> See Sir H. Lauterpacht, *Yearbook of the International Law Commission*, 1953, vol. II, p. 120.

<sup>41</sup> *Official Journal of the League of Nations, Eighth Ordinary Session, Plenary Meetings*, p. 141.

<sup>42</sup> *Summary of the practice of the Secretary-General as depositary of multilateral agreements (ST/LEG/7)*, para. 48.

ture for becoming a party to treaties. But it would probably be more correct to say that "acceptance" has become established as a name given to two new procedures, one analogous to ratification and the other to accession. For, on the international plane "acceptance" is an innovation which is more one of terminology than of method. If a treaty provides that it shall be open to signature "subject to acceptance", the process on the international plane is very like "signature subject to ratification". Similarly, if a treaty is made open to "acceptance" without prior signature, the process is very like accession. In either case the question whether the instrument is framed in the terms of "acceptance", on the one hand, or of ratification or accession, on the other, simply depends on the phraseology used in the treaty.<sup>43</sup> Accordingly, the same name is found in connection with two different procedures; but there can be no doubt that today "acceptance" takes two forms, the one an act establishing the State's consent to be bound after a prior signature and the other without any prior signature. The first of these forms is covered in sub-paragraph (a) of article 14 and the second in sub-paragraph (b).

(2) To say that on the international plane the procedure of "acceptance", on the one hand, and the procedures of ratification and accession, on the other, differ primarily in the terminology used in the treaty is not to deny the existence of any differences in the use of "acceptance" and the other two procedures. "Signature subject to acceptance" was introduced into treaty-practice principally in order to provide a simplified form of "ratification" or "accession" which would allow the Government a further opportunity to examine the treaty without necessarily involving it in a submission of the treaty to the State's constitutional procedure for obtaining parliamentary sanction for concluding the treaty. Accordingly, the procedure of "signature subject to acceptance" is employed more particularly in the case of treaties whose form or subject matter is not such as would normally bring them under the constitutional requirements of parliamentary "ratification" in force in many States. In some cases, in order to make it as easy as possible for States with their varying constitutional requirements to enter into the treaty, its terms provide for either ratification or acceptance. Nevertheless, it remains broadly true that "acceptance" is generally used as a simplified procedure of "ratification" or "accession."

(3) The observations in the preceding paragraph apply *mutatis mutandis* to "approval", whose introduction into the terminology of treaty-making is even more recent than that of "acceptance". "Approval", perhaps, appears more often in the form of "signature subject to approval" than in the form of a treaty which is simply made open to "approval" without signature.<sup>44</sup> But it appears in both forms. Its introduction into treaty-making practice seems, in fact, to have been inspired by the constitutional procedures or practices of approving treaties which exist in some countries.

### Article 15

#### *The procedure of ratification, accession, acceptance and approval*

##### 1. (a) Ratification, accession, acceptance or ap-

<sup>43</sup> For examples, see *Handbook of Final Clauses* (ST/LEG/6, pp. 6-17).

<sup>44</sup> The *Handbook of Final Clauses* (ST/LEG/6, p. 18) even gives an example of the formula "signature subject to approval followed by acceptance".

proval shall be carried out by means of a written instrument.

(b) Unless the treaty itself expressly contemplates that the participating States may elect to become bound by a part or parts only of the treaty, the instrument must apply to the treaty as a whole.

(c) If a treaty offers to the participating States a choice between two differing texts, the instrument of ratification must indicate to which text it refers.

2. If the treaty itself lays down the procedure by which an instrument of ratification, accession, acceptance or approval is to be communicated, the instrument becomes operative on compliance with that procedure. If no procedure has been specified in the treaty or otherwise agreed by the signatory States, the instrument shall become operative:

(a) In the case of a treaty for which there is no depositary, upon the formal communication of the instrument to the other party or parties, and in the case of a bilateral treaty normally by means of an exchange of the instrument in question, duly certified by the representatives of the States carrying out the exchange;

(b) In other cases, upon deposit of the instrument with the depositary of the treaty.

3. When an instrument of ratification, accession, acceptance or approval is deposited with a depositary in accordance with paragraph 2 (b) above, the State in question shall be given an acknowledgement of the deposit of its instrument, and the other signatory States shall be notified promptly both of the fact of such deposit and the terms of the instrument.

#### *Commentary*

(1) Ratification, accession, acceptance and approval, being acts which commit the State to become a party to the treaty, must be carried out by a formal instrument. The actual form of the instrument is, however, a matter which is governed by the internal law and practice of each State and paragraph 1 (a) merely provides that it must be in writing.

(2) Occasionally, treaties are found which expressly authorize States to consent to a part or parts only of the treaty or to exclude certain parts, and then, of course, partial ratification, accession, acceptance or approval is admissible. But in the absence of such a provision, the established rule is that laid down in paragraph 1 (b); the ratification, accession etc. must relate to the treaty as a whole. Although it may be admissible to formulate reservations to selected provisions of the treaty under the rules stated in article 18, it is inadmissible to subscribe only to selected parts of the treaty.

(3) Paragraph 1 (c) takes account of a practice which is not very common but which is sometimes found in treaties concluded under the auspices of certain international organizations, e.g. the International Labour Organisation. The treaty offers to each State a choice between two different texts of the treaty.

(4) Paragraph 2 concerns the act by which an instrument of ratification, accession etc. is rendered legally effective on the international plane; namely, by its delivery—its communication—to the other States concerned. Normally, the procedure for accomplishing this is laid down in the treaty itself and paragraph 2 recognizes that fact. It goes on, however, to make provision for cases where the treaty is silent as to the procedure and

specifies for such cases the procedures most commonly found in modern practice. A query might be raised whether in cases where there is a depositary the date upon which the instrument becomes effective is the date of deposit or the date when notice of the instrument actually reaches the other States concerned. The Commission considered that, by using a depositary as their agent for accepting the deposit of instruments relating to the treaty, the States which drew up the treaty give their consent to the act of deposit being regarded as the act which renders the instrument effective. Accordingly, the date of deposit has to be regarded as the effective date, even if this means that in some cases there may be a small time-lag before the other States become aware that the treaty is in force between them and the State depositing the instrument. In this connexion reference may be made to the decision of the International Court of Justice, in the *Right of Passage Case*<sup>45</sup> concerning the moment at which declarations under the optional clause take effect.

(5) Paragraph 3 does not call for any comment.

#### Article 16

#### *Legal effects of ratification, accession, acceptance and approval*

The communication of an instrument of ratification, accession, acceptance or approval in conformity with the provisions of article 15:

(a) Establishes the consent of the ratifying, acceding, accepting or approving State to be bound by the treaty; and

(b) If the treaty is not yet in force, brings into operation the applicable provisions of article 17, paragraph 2.

#### Commentary

(1) The essential legal effect of the exchange or deposit of instruments of ratification, accession, acceptance or approval is to establish the consent of the State concerned to be bound by the treaty. It commits the State to becoming a party to the treaty. Whether it also has the effect of bringing the treaty into force for the State exchanging or depositing the instrument depends upon the conditions under which the treaty is to enter into force, a matter which is dealt with in articles 23 and 24.

(2) A further effect, if the exchange or deposit of the instrument does not bring the treaty into force at once, is to place the State concerned under the obligation of good faith set out in article 17. This, in general terms, is an obligation, pending the entry into force of the treaty, to refrain from acts calculated to frustrate its objects.

(3) The Commission considered whether it should include in this article a provision expressly declaring that, unless the treaty otherwise states, ratification has no retroactive effects. Formerly, when ratification was regarded as a confirmation of the authority to sign, it was generally said to operate retrospectively and to make the treaty effective as from signature. This view continued to be echoed by writers and by some municipal courts, even after the institution of ratification had undergone the fundamental change which has already been described in the commentary to article 12 above. But the theory of the retroactive operation of ratification is now universally rejected and the Commission

decided that it would be sufficient to mention the point in this commentary and to draw attention to article 23, paragraph 4. This paragraph, by providing that the rights and obligations of a treaty "become effective for each party from the date when the treaty comes into force with respect to that party", excludes the doctrine of the retroactive operation of ratification.

#### Article 17

#### *The rights and obligations of States prior to the entry into force of the treaty*

1. A State which takes part in the negotiation, drawing up or adoption of a treaty, or which has signed a treaty subject to ratification, acceptance or approval, is under an obligation of good faith, unless and until it shall have signified that it does not intend to become a party to the treaty, to refrain from acts calculated to frustrate the objects of the treaty, if and when it should come into force.

2. Pending the entry into force of a treaty and provided that such entry into force is not unduly delayed, the same obligation shall apply to the State which, by signature, ratification, accession, acceptance or approval, has established its consent to be bound by the treaty.

#### Commentary

(1) Reference has already been made to the provisions of this article in the commentaries to articles 11 and 16. That an obligation of good faith to refrain from acts calculated to frustrate objects of the treaty attaches to a State which has signed a treaty subject to ratification appears to be generally accepted. Certainly, in the *Polish Upper Silesia Case*,<sup>46</sup> the Permanent Court of International Justice appears to have recognized that, if ratification takes place, a signatory State's misuse of its rights in the interval preceding ratification may amount to a violation of its obligations in respect of the treaty.<sup>47</sup> The Commission considers that this obligation begins when a State takes part in the negotiation of a treaty or in the drawing up or adoption of its text. *A fortiori*, it attaches to a State which actually ratifies, accedes to, accepts or approves a treaty if there is an interval before the treaty actually comes into force.

(2) Paragraph 1 of the article covers the cases where the State has not yet established its consent to be bound by the treaty. In those cases the obligation of good faith continues until either the State signifies that it does not intend to become a party or it establishes its consent to be bound by the treaty, when it falls under paragraph 2 of the article.

(3) Paragraph 2 deals with the cases where the State has committed itself to be bound by the treaty and then the obligation continues until either the treaty comes into force or its entry into force has been unduly delayed.

### SECTION III. RESERVATIONS

#### Article 18

#### *Formulation of reservations*

1. A State may, when signing, ratifying, acced-

<sup>46</sup> P.C.I.J., Series A, No. 7, p. 30.

<sup>47</sup> See also McNair, *Law of Treaties* (1961), pp. 199-205; Fauchille, *Traité de droit international public* (1926), tome I, partie III, p. 320; Bin Cheng, *General Principles of Law*, pp. 109-111; *Megaliadis v. Turkey*, *Annual Digest of International Law Cases* (1927-1928), Case No. 272.

<sup>45</sup> I.C.J. Reports 1956, p. 170.

ing to, accepting or approving a treaty, formulate a reservation unless:

(a) The making of reservations is prohibited by the terms of the treaty or by the established rules of an international organization; or

(b) The treaty expressly prohibits the making of reservations to specified provisions of the treaty and the reservation in question relates to one of the said provisions; or

(c) The treaty expressly authorizes the making of a specified category of reservations, in which case the formulation of reservations falling outside the authorized category is by implication excluded; or

(d) In the case where the treaty is silent concerning the making of reservations, the reservation is incompatible with the object and purpose of the treaty.

2. (a) Reservations, which must be in writing, may be formulated:

(i) Upon the occasion of the adoption of the text of the treaty, either on the face of the treaty itself or in the final act of the conference at which the treaty was adopted, or in some other instrument drawn up in connexion with the adoption of the treaty;

(ii) Upon signing the treaty at a subsequent date; or

(iii) Upon the occasion of the exchange or deposit of instruments of ratification, accession, acceptance or approval, either in the instrument itself or in a *procès-verbal* or other instrument accompanying it.

(b) A reservation formulated upon the occasion of the adoption of the text of a treaty or upon signing a treaty subject to ratification, acceptance or approval shall only be effective if the reserving State, when carrying out the act establishing its own consent to be bound by the treaty, confirms formally its intention to maintain its reservation.

3. A reservation formulated subsequently to the adoption of the text of the treaty must be communicated:

(a) In the case of a treaty for which there is no depositary, to every other State party to the treaty or to which it is open to become a party to the treaty; and

(b) In other cases, to the depositary which shall transmit the text of the reservation to every such State.

#### Article 19

##### *Acceptance of and objection to reservations*

1. Acceptance of a reservation not provided for by the treaty itself may be expressed or implied.

2. A reservation may be accepted expressly:

(a) In any appropriate formal manner on the occasion of the adoption or signature of a treaty, or of the exchange or deposit of instruments of ratification, accession, acceptance or approval; or

(b) By a formal notification of the acceptance of the reservation addressed to the depositary of the treaty or, if there is no depositary, to the reserving State and every other State entitled to become a party to the treaty.

3. A reservation shall be regarded as having been

accepted by a State if it shall have raised no objection to the reservation during a period of twelve months after it received formal notice of the reservation.

4. An objection by a State which has not yet established its own consent to be bound by the treaty shall have no effect if after the expiry of two years from the date when it gave formal notice of its objection it has still not established its consent to be bound by the treaty.

5. An objection to a reservation shall be formulated in writing and shall be notified:

(a) In the case of a treaty for which there is no depositary, to the reserving State and to every other State party to the treaty or to which it is open to become a party; and

(b) In other cases, to the depositary.

#### Article 20

##### *The effect of reservations*

(a) A reservation expressly or impliedly permitted by the terms of the treaty does not require any further acceptance.

(b) Where the treaty is silent in regard to the making of reservations, the provisions of paragraphs 2 to 4 below shall apply.

2. Except in cases falling under paragraphs 3 and 4 below and unless the treaty otherwise provides:

(a) Acceptance of a reservation by any State to which it is open to become a party to the treaty constitutes the reserving State a party to the treaty in relation to such State, as soon as the treaty is in force;

(b) An objection to a reservation by a State which considers it to be incompatible with the object and purpose of the treaty precludes the entry into force of the treaty as between the objecting and the reserving State, unless a contrary intention shall have been expressed by the objecting State.

3. Except in a case falling under paragraph 4 below, the effect of a reservation to a treaty which has been concluded between a small group of States shall be conditional upon its acceptance by all the States concerned unless:

(a) The treaty otherwise provides; or

(b) The States are members of an international organization which applies a different rule to treaties concluded under its auspices.

4. Where the treaty is the constituent instrument of an international organization and objection has been taken to a reservation, the effect of the reservation shall be determined by decision of the competent organ of the organization in question, unless the treaty otherwise provides.

#### Commentary

##### *Introduction*

(1) Articles 18, 19 and 20<sup>48</sup> have to be read together because the legal effect of a reservation, when formulated, is dependent on its acceptance or rejection by the other States concerned. A reservation to a bilateral treaty

<sup>48</sup> For the reasons given by him in the summary records of the 637th, 651st, 652nd, 656th and 667th meetings, Mr. Briggs does not accept the provisions of article 20.

presents no problem, because it amounts to a new proposal reopening the negotiations between the two States concerning the terms of the treaty. If they arrive at an agreement—either adopting or rejecting the reservation—the treaty will be concluded; if not, it will fall to the ground. But as soon as more than two States are involved problems arise, since one State may be disposed to accept the reservation while another objects to it; and, when large multilateral treaties are in question, these problems become decidedly complex.

(2) The subject of reservations to multilateral treaties has been much discussed during the past twelve years and has been considered by the General Assembly itself on more than one occasion,<sup>49</sup> as well as by the International Court of Justice in its opinion concerning the Genocide Convention.<sup>50</sup> Divergent views have been expressed both in the Court and in the General Assembly on the fundamental question of the extent to which the consent of other interested States is necessary to the effectiveness of a reservation to this type of treaty.

(3) In 1951, the doctrine under which a reservation, in order to be valid, must have the assent of all the other interested States was not accepted by the majority of the Court as applicable in the particular circumstances of the Genocide Convention; moreover, while they considered the “traditional” doctrine to be of “undisputed value”, they did not consider it to have been “transformed into a rule of law”.<sup>51</sup> Four judges, on the other hand, dissented from this view and set out their reasons for holding that the traditional doctrine must be regarded as a generally accepted rule of customary law. The Court’s reply to the questions put to it by the General Assembly was as follows:

“On Question I:

“that a State which has made and maintained a reservation which has been objected to by one or more of the parties to the Convention but not by others, can be regarded as being a party to the Convention if the reservation is compatible with the object and purpose of the Convention; otherwise, that State cannot be regarded as being a party to the Convention.

“On Question II:

“(a) That if a party to the Convention objects to a reservation which it considers to be incompatible with the object and purpose of the Convention, it can in fact consider that the reserving State is not a party to the Convention;

“(b) That if, on the other hand, a party accepts the reservation as being compatible with the object and purpose of the Convention, it can in fact consider that the reserving State is a party to the Convention.

“On Question III:

“(a) That an objection to a reservation made by a signatory State which has not yet ratified the Convention can have the legal effect indicated in the reply to Question I only upon ratification. Until that moment it merely serves as a notice to the other State of the eventual attitude of the signatory State;

“(b) That an objection to a reservation made by a State which is entitled to sign or accede but which has not yet done so, is without legal effect.”<sup>52</sup>

<sup>49</sup> Notably in 1951 in connexion with reservations to the Genocide Convention and in 1959 concerning the Indian “reservation” to the Convention of the Inter-Governmental Maritime Consultative Organization.

<sup>50</sup> *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, I.C.J. Reports 1951*, p. 15.

<sup>51</sup> *Ibid.*, p. 24.

<sup>52</sup> *Ibid.*, pp. 29 and 30.

In giving these replies to the General Assembly’s questions the Court emphasized that they were strictly limited to the Genocide Convention; and said that, in determining what kind of reservations might be made to the Genocide Convention and what kind of objections might be taken to such reservations, the solution must be found in the special characteristics of that Convention. Amongst these special characteristics it mentioned: (a) the fact that the principles underlying the Convention—the condemnation and punishment of genocide—are principles recognized by civilized nations as binding upon Governments even without a convention; (b) the consequently universal character of the Convention; and (c) its purely humanitarian and civilizing purpose without individual advantages or disadvantages for the contracting States.

(4) Although limiting its replies to the case of the Genocide Convention itself, the Court expressed itself more generally on certain points amongst which may be mentioned:

(a) In its treaty relations a State cannot be bound without its consent and, consequently, no reservation can be effective against any State without its agreement thereto.

(b) The traditional concept, that no reservation is valid unless it has been accepted by all the contracting parties without exception, as would have been required if it had been stated during the negotiations, is of undisputed value.

(c) Nevertheless, extensive participation in Conventions of the type of the Genocide Convention has already given rise to greater flexibility in the international practice concerning multilateral conventions, as manifested by the more general resort to reservations, the very great allowance made for tacit assent to reservations and the existence of practices which, despite the fact that a reservation has been rejected by certain States, go so far as to admit the reserving State as a party to the Convention *vis-à-vis* those States which have accepted it.

(d) In the present state of international practice it cannot be inferred from the mere absence of any article providing for reservations in a multilateral convention that the contracting States are prohibited from making certain reservations. The character of a multilateral convention, its purpose, provisions, mode of preparation and adoption, are factors which must be considered in determining, in the absence of any express provision on the subject, the possibility of making reservations, as well as their validity and effect.

(e) The principle of the integrity of the convention, which subjects the admissibility of a reservation to the express or tacit assent of all the contracting parties, does not appear to have been transformed into a rule of law.

(5) Later in 1951, as had been requested by the General Assembly, the Commission presented a general report on reservations to multilateral conventions.<sup>53</sup> It expressed the view that the Court’s criterion—“compatibility with the object and purpose of the convention”—was open to objection as a criterion of general application, because it considered the question of “compatibility with the object and purpose of the convention” to be too subjective for application to multilateral conventions generally. Noting that the Court’s opinion was specifically confined to the Genocide Convention and recognizing that no single rule uniformly applied could be wholly

<sup>53</sup> *Official Records of the General Assembly, Sixth Session, Supplement No. 9 (A/1858)*, paras. 12-34.

satisfactory to cover all cases, the Commission recommended the adoption of the doctrine requiring unanimous consent for the admission of a State as a party to a treaty subject to a reservation. At the same time, it proposed certain minor modification in the application of the rule.

(6) The Court's opinion and the Commission's report were considered together at the sixth session of the General Assembly, which adopted resolution 598 (VI) dealing with the particular question of reservations to the Genocide Convention separately from that of reservations to other multilateral conventions. With regard to the Genocide Convention it requested the Secretary-General to conform his practice to the Court's Advisory Opinion and recommended to States that they should be guided by it. With regard to all other future multilateral conventions concluded under the auspices of the United Nations of which he is the depositary, it requested the Secretary-General:

"(i) To continue to act as depositary in connexion with the deposit of documents containing reservations or objections, without passing upon the legal effect of such documents; and

"(ii) To communicate the text of such documents relating to reservations or objections to all States concerned, leaving it to each State to draw legal consequences from such communications."

The resolution, being confined to future conventions, was limited to conventions concluded after 12 January 1952, the date of the adoption of the resolution, so that the former practice still applied to conventions concluded before that date. As to future conventions, the General Assembly did not endorse the Commission's proposal to retain the former practice subject to minor modifications. Instead, it directed the Secretary-General, in effect, to act simply as an agent for receiving and circulating instruments containing reservations or objections to reservations, without drawing any legal consequences from them.

(7) In the General Assembly, as already mentioned, opinion was divided in the debates on this question in 1951. One group of States favoured the unanimity doctrine, though there was some support in this group for replacing the need for unanimous consent by one of acceptance by a two-thirds majority of the States concerned. Another group of States, however, was definitely opposed to the unanimity doctrine and favoured a flexible system making the acceptance and rejection of reservations a matter for each State individually. They argued that such a system would safeguard the position of out-voted minorities and make possible a wider acceptance of conventions. The opposing group maintained, on the other hand, that a flexible system of this kind, although it might be suitable for a homogeneous community like the Pan-American Union, was not suitable for universal application. Opinion being divided in the United Nations, the only concrete result was the directives given to the Secretary-General for the performance of his depositary functions with respect to reservations.

(8) The situation with regard to this whole question has changed in certain respects since 1951. First, the international community has undergone rapid expansion since 1951, so that the very number of potential participants in multilateral treaties now seems to make the unanimity principle less appropriate and less practicable. Secondly, since 12 January 1952, i.e. during the past ten years, the system which has been in operation *de facto* for all new multilateral treaties of which the Secretary-

General is the depositary has approximated to the "flexible" system. For the Secretariat's practice with regard to all treaties concluded after the General Assembly's resolution of 12 January 1952 has been officially stated to be as follows:

"In the absence of any clause on reservations in agreements concluded after the General Assembly resolution on reservations to multilateral conventions, the Secretary-General adheres to the provisions of that resolution and communicates to the States concerned the text of the reservation accompanying an instrument of ratification or accession without passing on the legal effect of such documents, and 'leaving it to each State to draw legal consequences from such communications'. He transmits the observations received on reservations to the States concerned, also without comment. A general table is kept up to date for each convention, showing the reservations made and the observations transmitted thereon by the States concerned. A State which has deposited an instrument accompanied by reservations is counted among the parties required for the entry into force of the agreement."<sup>64</sup>

It is true that the Secretary-General, in compliance with the General Assembly's resolution, does not "pass upon" the legal effect either of reservations or of objections to reservations, and each State is free to draw its own conclusions regarding their legal effects. But, having regard to the opposition of many States to the unanimity principle and to the Court's refusal to consider that principle as having been "transformed into a rule of law", a State making a reservation is now in practice considered a party to the convention by the majority of those States which do not give notice of their objection to the reservation.

(9) A further point is that in 1959 the question of reservations to multilateral conventions again came before the General Assembly in the particular context of a convention which was the constituent instrument of an international organization—namely, the Inter-Governmental Maritime Consultative Organization. The actual issue raised by India's declaration in accepting that Convention was remitted to I.M.C.O. and settled without the legal questions having been resolved. But the General Assembly reaffirmed its previous directive to the Secretary-General concerning his depositary functions and extended it to cover all conventions concluded under the auspices of the United Nations (unless they contain contrary provisions), not merely those concluded after 12 January 1952.

(10) At the present session, the Commission was agreed that, where the treaty itself deals with the question of reservations, the matter is concluded by the terms of the treaty. Reservations expressly or impliedly prohibited by the terms of the treaty are excluded, while those expressly or impliedly authorized are *ipso facto* effective. The problem concerns only the cases where the treaty is silent in regard to reservations, and here the Commission was agreed that the Court's principle of "compatibility with the object and purpose of the treaty" is one suitable for adoption as a general criterion of the legitimacy of reservations to multilateral treaties and of objections to them. The difficulty lies in the process by which that principle is to be applied, and especially where there is no tribunal or other organ invested with standing competence to interpret the treaty. Where the treaty is a constituent instrument of an international organization, the Commission was agreed that the question is one for determination by its competent organ. It was

<sup>64</sup> Summary of the Practice of the Secretary-General as Depositary of Multilateral Agreements (ST/LEG/7, para. 80).

also agreed that where the treaty is one concluded between a small group of States, unanimous agreement to the acceptance of a reservation must be presumed to be necessary in the absence of any contrary indication. Accordingly the problem essentially concerns multilateral treaties which are not constituent instruments of international organizations and which contain no provisions in regard to reservations. On this problem, opinion in the Commission, as in the Court and the General Assembly, was divided.

(11) Some members of the Commission considered it essential that the effectiveness of a reservation to a multilateral treaty should be dependent on at least some measure of common acceptance of it by the other States concerned. They thought it inadmissible that a State, having formulated a reservation incompatible with the objects of a multilateral treaty, should be entitled to regard itself as a party to the treaty, on the basis of the acceptance of the reservation by a single State or by very few States. The reservation might be one which other States considered to undermine the basis of the treaty or a clause embodying a compromise which the States concerned had all sacrificed part of their interests to obtain. As tacit consent, derived from a failure to object to a reservation, plays a large role in the practice concerning multilateral treaties and is provided for in the draft articles, such a rule would mean in practice that a reserving State, however objectionable its reservation, could always be sure of being able to consider itself a party to the treaty *vis-à-vis* a certain number of States. Accordingly, these members advocated a rule under which, if more than a certain proportion of the interested States (for example, one-third) objected to a reservation, the reserving State would be barred altogether from considering itself a party to the treaty unless it withdrew the reservation.

(12) The other members of the Commission, however, did not share this view, especially with respect to general multilateral treaties. These members, while giving full weight to the arguments in favour of maintaining the integrity of the convention as adopted to the greatest extent possible, felt that the detrimental effect of reservations upon the integrity of the treaty could easily be exaggerated. The treaty itself remains the sole authentic statement of the common agreement between the participating States. The majority of reservations relate to a particular point which a particular State for one reason or another finds difficult to accept, and the effect of the reservation on the general integrity of the treaty is minimal; the same is true even if the reservation in question relates to a comparatively important provision of the treaty, so long as the reservation is not made by more than a few States. In short, the integrity of the treaty would only be materially affected if a reservation of a somewhat substantial kind were to be formulated by a number of States. This might, no doubt, happen; but even then the treaty itself would remain the master agreement between the other participating States. What is essential to ensure both the effectiveness and the integrity of the treaty is that a sufficient number of States should become parties to it, accepting the great bulk of its provisions. The Commission in 1951 said that the history of the conventions adopted by the Conference of American States had failed to convince it "that an approach to universality is necessarily assured or promoted by permitting a State which offers a reservation to which objection is taken to become a party *vis-à-vis* non-objecting States".<sup>55</sup>

<sup>55</sup> *Official Records of the General Assembly, Sixth Session, Supplement No. 9 (A/1858), para. 22.*

Nevertheless, a power to formulate reservations must in the nature of things tend to make it easier for some States to execute the act necessary to bind themselves finally to participating in the treaty and therefore tend to promote a greater measure of universality in the application of the treaty. Moreover, in the case of general multilateral treaties, it appears that not infrequently a number of States have, to all appearances, only found it possible to participate in the treaty subject to one or more reservations. Whether these States, if objection had been taken to their reservations, would have preferred to remain outside the treaty rather than to withdraw their reservation is a matter which is not known. But when today the number of the negotiating States may not be far short of one hundred States with very diverse cultural, economic and political conditions, it seems legitimate to assume that the power to make reservations without the risk of being totally excluded by the objection of one or even of a few States may be a factor in promoting a more general acceptance of multilateral treaties. It may not unreasonably be thought that the failure of negotiating States to take the necessary steps to become parties to multilateral treaties at all is a greater obstacle to the development of international law through the medium of treaties than the possibility that the integrity of such treaties may be unduly weakened by the free admission of reserving States as parties to them. There may also perhaps be some justification for the view that, in the present era of change and of challenge to traditional concepts, the rule calculated to promote the widest possible acceptance of whatever measure of common agreement can be achieved and expressed in a multilateral treaty may be the one most suited to the immediate needs of the international community.

(13) Another consideration which influenced these members of the Commission is that, in any event, the essential interests of individual States are in large measure safeguarded by the two well-established rules:

(a) That a State which within a reasonable time signifies its objection to a reservation is entitled to regard the treaty as not in force between itself and the reserving State;

(b) That a State which assents to another State's reservation is nevertheless entitled to object to any attempt by the reserving State to invoke against it the obligations of the treaty from which the reserving State has exempted itself by its reservation.

It has, it is true, been suggested that the equality between a reserving and non-reserving State, which is the aim of the above-mentioned rules, may in practice be less than complete. For a non-reserving State, by reason of its obligations towards other non-reserving States, may feel bound to comply with the whole of the treaty, including the provisions from which the reserving State has exempted itself by its reservation. Accordingly, the reserving State may be in the position of being exempt itself from certain of the provisions of the treaty, while having the assurance that the non-reserving States will observe those provisions. Normally, however, a State wishing to make a reservation would equally have the assurance that the non-reserving State would be obliged to comply with the provisions of the treaty by reason of its obligations to other States, even if the reserving State remained completely outside the treaty. By entering into the treaty subject to its reservation, the reserving State at least submits itself in some measure to the régime of the treaty. The position of the non-reserving State is not therefore made more onerous if the reserving State becomes a party to the treaty on a limited basis by reason of its reserva-

tion. Even in those cases where there is such a close connexion between the provisions to which the reservation relates and other parts of the treaty that the non-reserving State is not prepared to become a party to the treaty at all *vis-à-vis* the reserving State on the limited basis which the latter proposes, the non-reserving State can prevent the treaty from coming into force between itself and the reserving State by objecting to the reservation. Thus, the point only appears to have significance in cases where the non-reserving State would never itself have consented to become a party to the treaty, if it had known that the other State would do so subject to the reservation in question. And it may not be unreasonable to suggest that, if a State attaches so much importance to maintaining the absolute integrity of particular provisions, its appropriate course is to protect itself during the drafting of the treaty by obtaining the insertion of an express clause prohibiting the making of the reservations which it considers to be so objectionable.

(14) The Commission concluded that, in the case of general multilateral treaties, the considerations in favour of a flexible system, under which it is for each State individually to decide whether to accept a reservation and to regard the reserving State as a party to the treaty for the purpose of the relations between the two States, outweigh the arguments advanced in favour of retaining a "collegiate" system under which the reserving State would only become a party if the reservation were accepted by a given proportion of the other States concerned. Having arrived at this decision, the Commission also decided that there were insufficient reasons for making a distinction between multilateral treaties not of a general character between a considerable number of States and general multilateral treaties. The rules proposed by the Commission therefore cover all multilateral treaties, except those concluded between a small number of States, for which the unanimity rule is retained.

*Commentary to article 18*

(15) This article deals with the conditions under which a State may formulate a reservation. Paragraph 1 sets out the general principle that the formulation of reservations is permitted except in four cases. The first three are cases in which the reservation is expressly or impliedly prohibited by the treaty itself. The fourth case, mentioned under (d), is that where the treaty is silent in regard to reservation but the particular reservation is incompatible with the object and purpose of the treaty. Paragraph 1 (d), in short, adopts the Court's criterion as a general rule governing the formulation of reservations not provided for in the treaty. Paragraph 1 (d) has to be read in conjunction with article 20 which deals with the effect of a reservation formulated in cases where the treaty contains no provisions concerning reservations.

(16) Paragraph 2 deals with the modalities of formulating reservations and only requires two comments. The first relates to paragraph 2 (a) (i) which concerns reservations formulated at the time of the adoption of the text of the treaty, that is, at the conclusion of the negotiations. A statement of reservation is sometimes made during the negotiation and duly recorded in the *procès-verbaux*. Such embryo reservations have sometimes been relied upon afterwards as amounting to formal reservations. It seems essential, however, that the State concerned should formally reiterate the statement in some manner in order that its intention actually to formulate a reservation should be clear. Accordingly, a statement during the negotiations expressing a reservation has not been included in paragraph 2 as one of the methods of formulating a reservation. The second comment relates

to an analogous point in paragraph 2 (b), where it is expressly provided that a reservation formulated upon the adoption of the text or upon a signature, subject to ratification, acceptance or approval must, if it is to be effective, be formally maintained when the State establishes its consent to be bound.

(17) Paragraph 3 provides for the communication of the reservation to the other interested States.

*Commentary to article 19*

(18) Paragraphs 1, 2 and 5 of this article do not appear to require comment.

(19) Paragraph 3 deals with implied consent to a reservation. That the principle of implying consent to a reservation from absence of objection has been admitted into State practice cannot be doubted; for the Court itself in the *Reservations to the Genocide Convention* case spoke of "very great allowance" being made in international practice for "tacit assent to reservations". Moreover, a rule specifically stating that consent will be presumed after a period of three, or in some cases six, months is to be found in some modern conventions,<sup>56</sup> while other conventions achieve the same result by limiting the right of objection to a period of three months.<sup>57</sup> Again, in 1959, the Inter-American Council of Jurists<sup>58</sup> recommended that, if no reply had been received from a State to which a reservation had been communicated, it should be presumed after one year that the State concerned had no objection to the reservation.

(20) It has to be admitted that there may be a certain degree of rigidity in a rule under which tacit consent will be presumed after the lapse of a fixed period. Nevertheless, it seems undesirable that a State, by refraining from making any comment upon a reservation, should be enabled more or less indefinitely to maintain an equivocal attitude as to the relations between itself and the reserving State under a multilateral treaty. The risk would be that a State which had kept silent in regard to another State's reservation would only take a clear position in the matter after a dispute had arisen between it and the reserving State. Seeing that in a number of treaties States had found it possible to accept periods as short as three or six months, the question may be asked why it has been considered necessary to propose a period of twelve months in the present draft. But there are, it is thought, good reasons for proposing the adoption of the longer period. First, it is one thing to agree upon a short period for the purposes of a particular treaty whose contents are known, another to agree upon it as a general rule applicable to every treaty which does not lay down a rule on the point.

(21) Paragraph 4 proposes, *de lege ferenda*, a rule under which an objection to a reservation will lapse if the objecting State does not, within two years after lodging its objection, establish its own consent to be bound. The application of the rule would be of particular importance in connexion with treaties concluded between a small group of States where the objection of one State suffices to exclude a reserving State from becoming a party to the treaty. But it is thought that, in general, an objection should lapse if the objecting State does not itself

<sup>56</sup> E.g., International Convention to Facilitate the Importation of Commercial Samples and Advertising Material, 1952 (90 days); and International Convention for the Suppression of Counterfeiting Currency, 1929 (6 months).

<sup>57</sup> E.g., Conventions on the Declaration of Death of Missing Persons, 1950, and on the Nationality of Married Women, 1957 (both 90 days).

<sup>58</sup> Final Act of the Fourth Meeting of the Inter-American Council of Jurists, p. 29.

become bound within a reasonable period. The Commission hesitated as to the length of the period and has proposed two years, pending the comments by Governments upon the point.

*Commentary to article 20*

(22) Paragraph 1 requires no comment. Paragraph 2, in conjunction with article 18, paragraph 1 (*d*), contains the essence of the Commission's proposals concerning reservations to multilateral treaties which are silent upon the question of reservations. Article 18, paragraph 1 (*d*), it may be recalled, permits the formulation of reservations in such cases provided that they are not incompatible with the object and purpose of the treaty. The criterion of "compatibility with the object and purpose of the treaty", as pointed out in the introduction to these three articles, is to some extent a matter of subjective appreciation and yet, in the absence of a tribunal or organ with standing competence, the only means of applying it in most cases will be through the individual State's acceptance or rejection of the reservation. This necessarily means that there may be divergent interpretations of the compatibility of a particular reservation with the object and purpose of a given treaty. But such a result seems to the Commission to be almost inevitable in the circumstances and the only question is what are to be the effects of the determinations made by individual States.

(23) Paragraph 2 (*a*) provides that acceptance of a reservation is conclusive as to the effectiveness of the reservation as between the accepting and the reserving State. Paragraph 2 (*b*) equally provides that an objection operates only as between the objecting and the reserving State and precludes the treaty from coming into force between them, unless the objecting State should express a contrary intention. These are the two basic rules of the "flexible" system. They may certainly have the result that a reserving State may be a party to the treaty with regard to State X, but not with regard to State Y, although States X and Y are mutually bound by the treaty. But in the case of a general multilateral treaty or of a treaty concluded between a considerable number of States, this result appears to the Commission not to be as unsatisfactory as allowing State Y, by its objection, to prevent the treaty from coming into force between the reserving State and State X, which has accepted the reservation.

(24) Paragraph 3, as foreshadowed in the introduction to the commentary of these three articles, excludes treaties between a small group of States from the operation of the "flexible" system and applies the rule of unanimity. In treaties between small groups, consultation is easier concerning the acceptability of a reservation, while the considerations in favour of maintaining the integrity of the convention may be more compelling than in the case of general multilateral treaties or other treaties between large groups of States. The Commission appreciated that the expression "a small group of States" lacks precision, but felt that it was a sufficient general description by which it would be possible to distinguish most treaties falling outside the "flexible" system.

(25) Paragraph 4 states the rule, also foreshadowed in the introduction to the commentary of these three articles, whereby an objection to a reservation to the constituent instrument of an international organization is to be determined by the competent organ of the organization in question. The question has arisen a number of times and the Secretary-General's report in 1959 in

regard to his handling of an alleged "reservation" to the IMCO Convention stated that it had "invariably been treated as one for reference to the body having authority to interpret the Convention in question".<sup>59</sup> The Commission considers that in the case of instruments which form the constitutions of international organizations, the integrity of the instrument is a consideration which outweighs other considerations and that it must be for the members of the organization, acting through its competent organ, to determine how far any relaxation of the integrity of the instrument is acceptable.

*Article 21*

*The application of reservations*

1. A reservation established in accordance with the provisions of article 20 operates:

(a) To modify for the reserving State the provisions of the treaty to which the reservation relates to the extent of the reservation; and

(b) Reciprocally to entitle any other State party to the treaty to claim the same modification of the provisions of the treaty in its relations with the reserving State.

2. A reservation operates only in the relations between the other parties to the treaty which have accepted the reservation and the reserving State; it does not affect in any way the rights or obligations of the other parties to the treaty *inter se*.

*Commentary*

This article sets out the rules concerning the legal effects of a reservation which has been established under the provisions of articles 18, 19 and 20, assuming that the treaty is in force. These rules, which appear not to be questioned, follow directly from the consensual basis of the relations between parties to a treaty. A reservation operates reciprocally between the reserving State and any other party, so that it modifies the application of the treaty for both of them in their mutual relations to the extent of the reserved provisions, but has no effect on the application of the treaty to the other parties to the treaty, *inter se*, since they have not accepted it as a term of the treaty in their mutual relations.

*Article 22*

*The withdrawal of reservations*

1. A reservation may be withdrawn at any time and the consent of a State which has accepted the reservation is not required for its withdrawal. Such withdrawal takes effect when notice of it has been received by the other States concerned.

2. Upon withdrawal of a reservation the provisions of article 21 cease to apply.

*Commentary*

(1) It has sometimes been contended that when a reservation has been accepted by another State it may not be withdrawn without the latter's consent, as the acceptance of the reservation establishes a régime between the two States which cannot be changed without the agreement of both. The Commission, however, con-

<sup>59</sup> *Official Records of the General Assembly, Fourteenth Session, Annexes, agenda item 65, document A/4235.*

siders that the preferable rule is that the reserving State should in all cases be authorized, if it is willing to do so, to bring its position into full conformity with the provisions of the treaty as adopted.

(2) Another point in this article perhaps calling for comment is the provision concerning the time at which the withdrawal of a reservation is to take effect. Since a reservation is a modification of the treaty made at the instance of the reserving State, the Commission considers that the onus should lie upon that State to bring the withdrawal to the notice of the other States; and that the latter could not be held responsible for a breach of a term of the treaty to which the reservation relates committed in ignorance of the withdrawal of the reservation.

#### SECTION IV. ENTRY INTO FORCE AND REGISTRATION

##### Article 23

###### *Entry into force of treaties*

1. A treaty enters into force in such manner and on such date as the treaty itself may prescribe.

2. (a) Where a treaty, without specifying the date upon which it is to come into force, fixes a date by which ratification, acceptance, or approval is to take place, it shall come into force upon that date if the exchange or deposit of the instruments in question shall have taken place.

(b) The same rule applies *mutatis mutandis* where a treaty which is not subject to ratification, acceptance or approval fixes a date by which signature is to take place.

(c) However, where the treaty specifies that its entry into force is conditional upon a given number, or a given category, of States having signed, ratified, acceded to, accepted or approved the treaty and this has not yet occurred, the treaty shall not come into force until the condition shall have been fulfilled.

3. In other cases, where a treaty does not specify the date of its entry into force, the date shall be determined by agreement between the States which took part in the adoption of the text.

4. The rights and obligations contained in a treaty become effective for each party as from the date when the treaty enters into force with respect to that party, unless the treaty expressly provides otherwise.

##### *Commentary*

(1) Paragraph 1 concerns the case where the treaty itself provides for the manner and date of its entry into force. Paragraph 2 covers the case where the treaty does not do so specifically, but does fix a date by which the acts establishing consent to be bound are to take place. In that case, it seems to be accepted that the treaty is to be presumed to have been intended to come into force upon that date, provided that the necessary instruments of ratification, acceptance etc. have been exchanged or deposited or the necessary signatures have been affixed to the treaty. On the other hand, if the treaty also specifies that a certain number of States must have signed, ratified etc. before it enters into force, this condition must of course also have been fulfilled.

(2) The Commission considered whether other provisions in a treaty might be said to raise presumptions as to the date of its entry into force, but it concluded

that it should not try to fill in all the gaps which the drafting of treaties might leave in regard to its entry into force. To do this would be to go too far into the interpretation of the intention of the parties in particular treaties. Moreover, it considered that in the event of a treaty failing to give a clear indication as to the date, it was a matter for agreement between the parties, and paragraph 3 so provides.

(3) Paragraph 4 lays down what is believed to be an undisputed rule of modern treaty law, namely, that a treaty becomes effective for each party on the date when it enters into force with respect to that party. The rule in this paragraph therefore excludes the idea that ratification may have retroactive effect to the date of signature. It requires a clear provision in the treaty itself to give the treaty retroactive effect, as it does also to suspend its effectiveness until a future date.

##### Article 24

###### *Provisional entry into force*

A treaty may prescribe that, pending its entry into force by the exchange or deposit of instruments of ratification, accession, acceptance or approval, it shall come into force provisionally, in whole or in part, on a given date or on the fulfilment of specified requirements. In that case the treaty shall come into force as prescribed and shall continue in force on a provisional basis until either the treaty shall have entered into force definitively or the States concerned shall have agreed to terminate the provisional application of the treaty.

##### *Commentary*

(1) This article recognizes a practice which occurs with some frequency today and requires notice in the draft articles. Owing to the urgency of the matters dealt with in the treaty or for other reasons the States concerned may provide in a treaty, which it is necessary for them to bring before their constitutional authorities for ratification or approval, that it shall come into force provisionally. Whether in these cases the treaty is to be considered as entering into force in virtue of the treaty or of a subsidiary agreement concluded between the States concerned in adopting the text may be a question. But there can be no doubt that such clauses have legal effect and bring the treaty into force on a provisional basis.

(2) Clearly, the "provisional" application of the treaty will terminate upon the treaty being duly ratified or approved in accordance with the terms of the treaty or upon it becoming clear that the treaty is not going to be ratified or approved by one of the parties. It may sometimes happen that the event is delayed and that the States concerned agree to put an end to the provisional application of the treaty, if not to annul the treaty itself.

##### Article 25

###### *The registration and publication of treaties*

1. The registration and publication of treaties entered into by Members of the United Nations shall be governed by the provisions of Article 102 of the Charter of the United Nations.

2. Treaties entered into by any party to the present articles, shall as soon as possible be registered with present articles, not a Member of the United Na-

the Secretariat of the United Nations and published by it.

3. The procedure for the registration and publication of treaties shall be governed by the regulations in force for the application of Article 102 of the Charter.

#### *Commentary*

(1) This article recalls, in paragraph 1, the obligation of Members of the United Nations under Article 102 of the Charter to register treaties entered into by them.

(2) Paragraph 2 also places an obligation on States, not Members of the United Nations, to register treaties entered into by them. Although the Charter obligation is limited to Member States, many non-member States have in practice "registered" their treaties habitually with the Secretariat of the United Nations. Under article 10 of the General Assembly's regulations governing the registration of treaties (see next paragraph), the term given to such "registration" by non-members is "filing and recording", but in substance it is a form of voluntary registration. The Commission considers that it would be appropriate that States becoming a party to a convention on the conclusion of treaties should undertake a positive obligation to register their treaties. Whether this should then continue to be termed "filing" rather than registration in United Nations regulations of the General Assembly would be a matter for the General Assembly and the Secretary-General to decide. The Commission hesitated to propose that the sanction applicable under Article 102 of the Charter should also be applied to non-members; since it is a matter which touches the procedures of organs of the United Nations, it also thought that breach of such an obligation accepted by non-members in a general convention could logically be regarded in practice as attracting that sanction.

(3) The Commission also considered whether it should incorporate in the draft articles the provisions of the General Assembly's regulations adopted in its resolution 97 (I) of 14 December 1946 (as amended by its resolutions 364 B (IV) of 1 December 1949 and 482 (V) of 12 December 1950). These regulations are important as they define the conditions for the application of Article 102 of the Charter. However, having regard to the administrative character of these regulations and to the fact that they are subject to amendment by the General Assembly, the Commission concluded that it should limit itself to incorporating the regulations in article 25 by reference to them in general terms. For convenience of reference, the regulations are attached as an annex to the present report.

#### SECTION V. CORRECTION OF ERRORS AND THE FUNCTIONS OF DEPOSITARIES

##### *Article 26*

*The correction of errors in the texts of treaties for which there is no depositary*

1. Where an error is discovered in the text of a treaty for which there is no depositary after the text has been authenticated, the interested States shall by mutual agreement correct the error either:

(a) By having the appropriate correction made in the text of the treaty and causing the correction to be initialled in the margin by representatives duly authorized for that purpose;

(b) By executing a separate protocol, a *procès-verbal*, an exchange of notes or similar instrument, setting out the error in the text of the treaty and the corrections which the parties have agreed to make; or

(c) By executing a corrected text of the whole treaty by the same procedure as was employed for the erroneous text.

2. The provisions of paragraph 1 above shall also apply where there are two or more authentic texts of a treaty which are not concordant and where it is proposed to correct the wording of one of the texts.

3. Whenever the text of a treaty has been corrected under paragraphs 1 and 2 above, the corrected text shall replace the original text as from the date the latter was adopted, unless the parties shall otherwise determine.

4. Notice of any correction to the text of a treaty made under the provisions of this article shall be communicated to the Secretariat of the United Nations.

#### *Commentary*

(1) Errors and inconsistencies are not uncommonly found in the text of treaties and it seems desirable to include provisions in the draft articles concerning methods of rectifying them. The present article deals with the situation where an error is discovered in a treaty for which there is no depositary, and also with the situation where there are two or more authentic texts of such a treaty and they are discovered not to be concordant. In these cases the correction of the error or inconsistencies would seem to be essentially a matter for agreement between the signatories to the treaty. There is a certain amount of evidence of the practice in the matter<sup>60</sup> and the provisions of the present article are based on that evidence and on information available to members of the Commission.

(2) The correction of errors in the text is dealt with in paragraph 1. The errors in question may be due either to typographical mistakes or to a misdescription or mis-statement due to a misunderstanding and the correction may affect the substantive meaning of the text as authenticated. If the States concerned are not agreed as to the text being erroneous, there cannot, of course, be any question of a unilateral correction of the text. In that case, there is a dispute and it becomes a problem of "mistake" which belongs to another branch of the law of treaties. It is only when the States are agreed as to the existence of the error that the matter is one simply of correction of errors falling under the present article. The normal techniques used for correcting error appear to be those in paragraphs 1 (a) and 1 (b). Only in the extreme case of a whole series of errors would there be any occasion for starting afresh with a new text as contemplated in paragraph 1 (c); since, however, one such instance is given in Hackworth,<sup>60</sup> the United States-Liberia Extradition Treaty of 1937, the Commission has included a provision allowing for the substitution of a completely new text.

(3) The same techniques appear to be appropriate for the rectification of discordant texts where there are two or more authentic texts in different languages. Thus, a number of precedents concern the rectification

<sup>60</sup> Hackworth, *Digest of International Law*, vol. 5, pp. 93-101.

of discordant passages in one of two authentic texts.<sup>61</sup>

(4) Since what is involved is merely the correction or rectification of an already accepted text, it seems clear that, unless the parties otherwise agree, the corrected or rectified text should be deemed to operate from the date when the original text came into force. Whether such a correction or rectification falls under the terms of article 2 of the General Assembly's regulations concerning the registration and publication of treaties and international agreements, when it takes the form merely of an alteration made to the text itself, is perhaps open to question.<sup>62</sup> But it would clearly be in accordance with the spirit of that article that a correction to a treaty should be registered with the Secretary-General and this has therefore been provided for in paragraph 4 of the present article.

(5) The procedure for correction of errors is also applicable to the correction of a lack of concordance in different language versions of the authentic text, where such lack of concordance is merely the result of errors made before the adoption of the authentic text. The Commission noted that the question may also arise of correcting not the authentic text itself but versions of it prepared in other languages; in other words, of correcting errors of translation. As, however, this is not a matter of altering an authentic text of the treaty, the Commission did not think it necessary that the article should cover the point. In these cases, it would be open to the States concerned to modify the translation by mutual agreement without any special formality. Accordingly, the Commission thought it sufficient to mention the point in the present commentary.

### Article 27

#### *The correction of errors in the texts of treaties for which there is a depositary*

1. (a) Where an error is discovered in the text of a treaty for which there is a depositary, after the text has been authenticated, the depositary shall bring the error to the attention of all the States which participated in the adoption of the text and to the attention of any other States which may subsequently have signed or accepted the treaty, and shall inform them that it is proposed to correct the error if within a specified time limit no objection shall have been raised to the making of the correction.

(b) If on the expiry of the specified time limit no objection has been raised to the correction of the text, the depositary shall make the correction in the text of the treaty, initialling the correction in the margin, and shall draw up and execute a *procès-verbal* of the rectification of the text and transmit a copy of the *procès-verbal* to each of the States which are or may become parties to the treaty.

2. Where an error is discovered in a certified copy of a treaty, the depositary shall draw up and execute a *procès-verbal* specifying both the error

and the correct version of the text, and shall transmit a copy of the *procès-verbal* to all the States mentioned in paragraph 1 (b) above.

3. The provisions of paragraph 1 above shall likewise apply where two or more authentic texts of a treaty are not concordant and a proposal is made that the wording of one of the texts should be corrected.

4. If an objection is raised to a proposal to correct a text under the provisions of paragraphs 1 or 3 above, the depositary shall notify the objection to all the States concerned, together with any other replies received in response to the notifications mentioned in paragraphs 1 and 3. However, if the treaty is one drawn up either within an international organization or at a conference convened by an international organization, the depositary shall also refer the proposal to correct the text and the objection to such proposal to the competent organ of the organization concerned.

5. Whenever the text of a treaty has been corrected under the preceding paragraphs of the present article, the corrected text shall replace the faulty text as from the date on which the latter text was adopted, unless the States concerned shall otherwise decide.

6. Notice of any correction to the text of a treaty made under the provisions of this article shall be communicated to the Secretariat of the United Nations.

#### Commentary

(1) This article covers the same problems as article 26, but in cases where the treaty is a multilateral treaty for which there is a depositary. Here the process of obtaining the agreement of the interested States to the correction or rectification of the text is affected by the number of the States and it is only natural that the techniques used should hinge upon the depositary. In formulating the provisions set out in the article, the Commission has based itself upon the information contained in the *Summary of the Practice of the Secretary-General as Depositary of Multilateral Agreements*.<sup>63</sup>

(2) The technique employed is for the depositary to notify all the States that took part in the adoption of the treaty or have subsequently signed or accepted it of the error or inconsistency and of the proposal to correct the text, while at the same time specifying an appropriate time limit within which any objection must be raised. Then, if no objection is raised, the depositary, as agent for the interested States, proceeds to make the correction, draw up a *procès-verbal* recording the fact and circulate a copy of the *procès-verbal* to the States concerned. The precedent on page 9 of the *Summary of Practice* perhaps suggests that the Secretary-General considers it enough, in the case of a typographical error, to obtain the consent of those States which have already signed the offending text. In laying down a general rule, however, it seems safer to say that notifications should be sent to all the interested States, since it is conceivable that arguments might arise as to whether the text did or did not contain a typographical error, e.g. in the case of punctuation that may affect the meaning.

(3) A further point that may call for comment is, perhaps, the mention in paragraph 4 of the reference of a difference concerning the correction of a text to the

<sup>61</sup> See, for example, the Commercial Treaty of 1938 between the United States and Norway and the Naturalisation Convention of 1907 between the United States and Peru, in Hackworth, *op. cit.*, pp. 93 and 96.

<sup>62</sup> Article 2 reads: "When a treaty or international agreement has been registered with the Secretariat, a certified statement regarding any subsequent action which effects a change in the parties thereto, or the terms, scope or application thereof, shall also be registered with the Secretariat".

<sup>63</sup> See pp. 8-10, 12, 19-20, 39 (footnote), and annexes 1 and 2.

competent organ of the international organization concerned, where the treaty was either drawn up in the organization or at a conference convened by it. This provision is inspired by the precedent of the rectification of the Chinese text of the Genocide Convention mentioned on page 10 of the *Summary of Practice*.

(4) Paragraphs 4 and 5 of the commentary to article 26 also apply to the present article.

### Article 28

#### *The depositary of multilateral treaties*

1. Where a multilateral treaty fails to designate a depositary of the treaty, and unless the States which adopted it shall have otherwise determined, the depositary shall be:

(a) In the case of a treaty drawn up within an international organization or at an international conference convened by an international organization, the competent organ of that international organization;

(b) In the case of a treaty drawn up at a conference convened by the States concerned, the State on whose territory the conference is convened.

2. In the event of a depositary declining, failing or ceasing to take up its functions, the negotiating States shall consult together concerning the nomination of another depositary.

#### *Commentary*

(1) A multilateral treaty normally designates a particular State or international organization as depositary. However, if the States concerned should fail to nominate a depositary in the treaty itself, paragraph 1 of this article provides either for an international organization or for the "host" State of the conference at which the treaty was drawn up to act as depositary. The actual provisions of paragraph 1 reflect existing practice in the designation of depositaries in multilateral treaties.

(2) Cases may possibly occur where a depositary declines, fails or ceases to act, and cases of the last type are known to have occurred. Accordingly, the Commission thought it prudent to cover this possibility in paragraph 2 of the present article.

### Article 29

#### *The functions of a depositary*

1. A depositary exercises the functions of custodian of the authentic text and of all instruments relating to the treaty on behalf of all States parties to the treaty or to which it is open to become parties. A depositary is therefore under an obligation to act impartially in the performance of these functions.

2. In addition to any functions expressly provided for in the treaty, and unless the treaty otherwise provides, a depositary has the functions set out in paragraphs 3 to 8 below.

3. The depositary shall have the duty:

(a) To prepare any further texts in such additional language as may be required either under the terms of the treaty or the rules in force in an international organization;

(b) To prepare certified copies of the original

text or texts and transmit such copies to the States mentioned in paragraph 1 above;

(c) To receive in deposit all instruments and notifications relating to the treaty and to execute a *procès-verbal* of any signature of the treaty or of the deposit of any instrument relating to the treaty;

(d) To furnish to the State concerned an acknowledgment in writing of the receipt of any instrument or notification relating to the treaty and promptly to inform the other States mentioned in paragraph 1 of the receipt of such instrument or notification.

4. On a signature of the treaty or on the deposit of an instrument of ratification, accession, acceptance or approval, the depositary shall have the duty of examining whether the signature or instrument is in conformity with the provisions of the treaty in question, as well as with the provisions of the present articles relating to signature and to the execution and deposit of such instruments.

5. On a reservation having been formulated, the depositary shall have the duty:

(a) To examine whether the formulation of the reservation is in conformity with the provisions of the treaty and of the present articles relating to the formulation of reservations, and, if need be, to communicate on the point with the State which formulated the reservations;

(b) To communicate the text of any reservation and any notifications of its acceptance or objection to the interested States as prescribed in articles 18 and 19.

6. On receiving a request from a State desiring to accede to a treaty under the provisions of article 9, the depositary shall as soon as possible carry out the duties mentioned in paragraph 3 of that article.

7. Where a treaty is to come into force upon its signature by a specified number of States or upon the deposit of a specified number of instruments of ratification, acceptance or accession or upon some uncertain event, the depositary shall have the duty:

(a) Promptly to inform all the States mentioned in paragraph 1 above when, in the opinion of the depositary, the conditions laid down in the treaty for its entry into force have been fulfilled;

(b) To draw up a *procès-verbal* of the entry into force of the treaty, if the provisions of the treaty so require.

8. In the event of any difference arising between a State and the depositary as to the performance of these functions or as to the application of the provisions of the treaty concerning signature, the execution or deposit of instruments, reservations, ratifications or any such matters, the depositary shall, if the State concerned or the depositary itself deems it necessary, bring the question to the attention of the other interested States or of the competent organ of the organization concerned.

#### *Commentary*

(1) The depositary of a treaty plays a significant role in what is really the administration of the procedural clauses of the treaty, and a number of the func-

tions of a depositary have already been mentioned in connexion with preceding provisions of the present articles. It is thought convenient, however, to collect together in a single article the main functions of a depositary relating to the conclusion and entry into force of treaties and that is the purpose of article 29. In drafting its provisions the Commission has naturally paid particular attention to the *Summary of the Practice of the Secretary-General as Depositary of Multilateral Agreements*.

(2) Paragraph 1 states the general principle that a depositary, whether a State or an international organization, acts on behalf of all the parties to the treaty as their delegate to hold the authentic text of the treaty and to receive and communicate all instruments and notifications relating to the treaty. In this capacity, the depositary must be impartial and perform its functions with objectivity. On the other hand, the fact that a State is a depositary does not disqualify it from exercising the normal rights of a State which is a party to a treaty, or took part in the adoption of its text, in regard to the procedural clauses of the treaty. In that capacity it may express its own policies, but it must carry out its duties as depositary with impartiality and objectivity.

(3) Paragraph 2 of the article requires no comment. Paragraph 3 deals with the functions of the depositary in relation to the original text of the treaty, and as to all instruments and notifications relating to the treaty. Paragraph 4 makes it clear that the depositary has a certain duty to examine whether any signatures or instruments are in due form.

(4) Paragraph 5 recalls the duties of the depositary under article 18 concerning reservations. Here again it is made clear that the depositary has a certain duty to examine whether a reservation has been formulated in conformity with the provisions of the treaty. On the other hand, it is not the function of a depositary to adjudicate upon the validity of a reservation. If a reservation appears to be irregular, the proper course of a depositary is to draw the attention of the reserving State to the matter and, if the latter does not concur with the depositary, to communicate the reservation to the other

interested States and bring the question of the apparent irregularity to their attention in accordance with paragraph 8 of the present article.

(5) Paragraph 6 recalls the duties placed upon a depositary in the event of a State applying to become a party to a treaty under article 9.

(6) Paragraph 7 deals with the depositary's duty to notify the interested States of the coming into force of the treaty, when the conditions for its entry into force have been fulfilled. The question whether the required number of signatures or of instruments of ratification, accession, etc. has been reached may sometimes pose a problem, as when questionable reservations have been made. In this connexion, as in others, although the depositary has the function of making a preliminary examination of the matter, it is not invested with competence to make a final determination of the entry into force of the treaty binding upon the other States concerned. However normal it may be for States to accept the depositary's appreciation of the date of the entry into force of a treaty, it seems clear that this appreciation may be challenged by another State and that then it would be the duty of the depositary to consult all the other interested States as provided in paragraph 8 of the present article. Accordingly, paragraph 7 does not go beyond requiring the depositary to inform the interested States of the date when, in its opinion, the conditions for the entry into force of the treaty have been fulfilled.

(7) Paragraph 8 lays down the general principle that, in the event of any difference arising between the depositary and another State, the duty of the depositary is to consult all the other interested States. Since the depositary is not invested with competence to make final determinations on matters arising out of the performance of its functions, the matter must be referred to all the States interested in the treaty. If the State concerned or the depositary itself deems it necessary, they may bring the question to the attention of the other interested States. The rule has been formulated in that way because there might be cases where the State having a difference with a depositary might prefer not to insist upon the matter being referred to the other States.

## Chapter III

### FUTURE WORK IN THE FIELD OF THE CODIFICATION AND PROGRESSIVE DEVELOPMENT OF INTERNATIONAL LAW

24. In its resolution 1505 (XV) of 12 December 1960, the General Assembly decided to place on the provisional agenda of its sixteenth session the item "Future work in the field of the codification and progressive development of international law", "in order to study and survey the whole field of international law and make necessary suggestions with regard to the preparation of a new list of topics for codification and for the progressive development of international law".

25. The resolution also invited Member States to submit in writing to the Secretary-General, before 1 July 1961, any views or suggestions they might have on this question for consideration by the General Assembly.

26. In reply to a circular letter dated 25 January 1961, the Secretary received the observations of seventeen Governments, which were communicated to Member States.<sup>64</sup> An analysis of these observations, prepared by the Secretariat, has been published.<sup>65</sup>

27. The International Law Commission devoted its 614th-616th meetings to this question at its thirteenth session, in 1961.<sup>66</sup>

28. In accordance with resolution 1505 (XV), the General Assembly placed the question on the agenda of its sixteenth session and referred it, for study and report, to the Sixth Committee, which considered it at its 713th-730th meetings, from 14 November to 13 December 1961.

29. On the recommendation of the Sixth Committee, the General Assembly, on 18 December 1961, adopted resolution 1686 (XVI), reading as follows:

*"The General Assembly,*

*"Recalling its resolution 1505 (XV) of 12 December 1960,*

*"Considering that the conditions prevailing in the world today give increased importance to the role of international law in relations among nations,*

*"Emphasizing the important role of codification and progressive development of international law with a view to making international law a more effective means of furthering the purposes and principles set forth in Articles 1 and 2 of the Charter of the United Nations,*

*"Mindful of its responsibilities under Article 13, paragraph 1 a, of the Charter to encourage the progressive development of international law and its codification,*

*"Having surveyed the present state of international law with particular regard to the preparation of a*

new list of topics for codification and progressive development of international law,

*"1. Expresses its appreciation to the International Law Commission for the valuable work it has already accomplished in the codification and progressive development of international law;*

*"2. Takes note of chapter III of the report of the International Law Commission covering the work of its thirteenth session;*

*"3. Recommends the International Law Commission:*

*"(a) To continue its work in the field of the law of treaties and of State responsibility and to include on its priority list the topic of succession of States and Governments;*

*"(b) To consider at its fourteenth session its future programme of work, on the basis of sub-paragraph (a) above and in the light of the discussion in the Sixth Committee at the fifteenth and sixteenth sessions of the General Assembly and of the observations of Member States submitted pursuant to resolution 1505 (XV), and to report to the Assembly at its seventeenth session on the conclusions it has reached;*

*"4. Decides to place on the provisional agenda of its seventeenth session the question entitled 'Consideration of principles of international law concerning friendly relations and co-operation among States in accordance with the Charter of the United Nations'."*

30. The question of future work in the field of the codification and progressive development of international law was placed on the agenda of the fourteenth session of the Commission, which discussed it at its 629th-637th meetings, from 25 April to 7 May 1962, and at its 668th meeting, on 26 June 1962.

31. The Commission held a general debate on its whole programme of future work, including the topics mentioned in paragraph 3 (a) of resolution 1686 (XVI). It had before it a working paper prepared by the Secretariat (A/CN.4/145). The introduction to the working paper enumerates the topics referred to the Commission by the General Assembly. Parts I and II of the document set out the topics proposed for codification by Governments in their replies, which were transmitted in accordance with General Assembly resolution 1505 (XV) (see above, para. 26). Some of these topics are included either among those whose codification the Commission had considered in 1949,<sup>67</sup> or in the provisional list of fourteen topics selected by the Commission for codification.<sup>68</sup> The other topics proposed by Governments are new, in the sense that the Commission has never considered their codification.

<sup>64</sup> *Official Records of the General Assembly, Sixteenth Session, Annexes*, agenda item 70, documents A/4796 and Add.1-8.

<sup>65</sup> *Ibid.*, document A/C.6/L.491.

<sup>66</sup> *Ibid.*, *Sixteenth Session, Supplement No. 9 (A/4843)*, paras. 40 and 41.

<sup>67</sup> *Ibid.*, *Fourth Session, Supplement No. 10 (A/925)*, para. 15.

<sup>68</sup> *Ibid.*, para. 16.

### I. Topics referred to in paragraph 3 (a) of General Assembly resolution 1686 (XVI)

#### LAW OF TREATIES

32. It was agreed that the Commission should continue the study of the law of treaties, which was on the agenda of the present session and which it had discussed at several earlier sessions. It was also agreed that this topic would receive priority at both the present and future sessions. The Commission considered that no change should be made in the plan of work which it had followed up to the present in its consideration of the topic. It will therefore continue its consideration of the topic on the basis of the reports prepared by the Special Rapporteur (see chapters II and IV of this report).

#### STATE RESPONSIBILITY

33. The idea that the topic of State responsibility should be one of those which are to receive priority in the Commission's work met with the approval of all the members. There were divergent views at the outset, however, concerning the best approach to the study of the question and the issues which the study should cover.

34. Some members pointed out that it would not be a question, as the General Assembly recommended, of merely continuing work already begun on State responsibility; the reports of the preceding Special Rapporteur, who is no longer a member of the Commission, could not now serve as a basis for the Commission's work, as it had not accepted them in principle; the study of the topic would therefore have to start from the beginning, and the first thing to determine was how the study should be approached.

35. Other members pointed out that State responsibility was an extremely complex subject and covered such a large part of international law that the Commission should first enumerate certain general principles. They considered that it would be possible to prepare such a draft, but they were doubtful whether an acceptable draft concerning responsibility for damage caused to aliens could be produced within a reasonable period of time.

36. Other members considered that if the Commission intended to examine only one particular aspect of the question of State responsibility it could not choose a more appropriate aspect than the responsibility for damage caused to aliens.

37. When studying the problem one could not but be impressed by the great number of cases in which international tribunals had ruled on the question of responsibility for damage caused to aliens. The violation of rules of international law in this respect had given rise to numerous international claims in which the responsibility of States was involved. These problems were of particular importance today in connexion with the treatment of foreign property and foreign investments, which played so important a part.

38. While it was true that the responsibility for damage caused to aliens was not the only aspect of international responsibility, it had to be admitted that, if the Commission prepared a draft on international responsibility in which this aspect were ignored, its work would be incomplete.

39. The opinion was also expressed that, in defining the subject, the Commission should not allow itself to be led astray by historical considerations. While ad-

mittedly the theory of the responsibility of the State had evolved from a body of case-law concerned particularly with violations of rights of aliens, nevertheless the distinction between the two questions should be stressed. Those two questions were, firstly, the international responsibility of the State in general, and, secondly, the State's treatment of aliens. It was necessary first to establish what were the basic rules and what were the obligations of States with regard to aliens. By contrast, the State's international responsibility as such arose in circumstances in which a subject of international law infringed a rule of international law—any rule whatever. Still other members, while agreeing that certain problems which are usually dealt with under the heading "responsibility of States"—such as the responsibility of a State for damage caused to the person or property of aliens, expropriation and nationalization included—would fall under the heading of "treatment of aliens", considered however that as such they ought to be dealt with by the Commission.

40. Some members pointed out that it was the Commission's duty to examine all aspects of the question in the light of recent developments in international life. In the past, the theory of State responsibility had been centred on the treatment of aliens. Under modern international law, State responsibility arose less in connexion with the treatment of aliens than as a result of acts which endangered or might endanger international peace, such as aggression, denial of national independence, or of exchange of friendly relations with States, and violations of provisions of the United Nations Charter. In the traditional international law concerning State responsibility, attention had been focused on such problems as denial of justice, the rule on the exhaustion of local remedies and indemnification. Those problems had not become obsolete but their relative importance had greatly diminished in modern international law. The Commission would of course be doing useful work by studying those problems but it should not stop there; it should go further and study particularly the problems arising in practice. Some other members expressed the view that the Commission should not confine its study to more theoretical and less controversial subjects such as general principles governing the responsibility of States. By doing so it would unduly limit the problem which the General Assembly requested it to study. Finally it was suggested that the Commission should first engage in a study of the general principles of responsibility and then proceed to a more detailed analysis within which the problems of responsibility for damage caused to aliens and its redress would find their proper place.

41. Different opinions were also expressed concerning the method of work which should be adopted for the consideration of the question of State responsibility.

42. In the view of some members, the Commission should follow its usual method of work and appoint a special rapporteur for the study of the topic. Other members considered that, owing to the particular difficulty involved in the study of State responsibility, the Commission should vary its practice and appoint a sub-committee composed of a small number of its members, which would be asked to submit a report not on the substance of the matter but on purely preliminary questions, the approach to the subject and the aspects which should be considered.

43. Some of the members who favoured the appointment of a special rapporteur believed that he should be appointed at the present session. The immediate ap-

pointment of a special rapporteur should not prevent the adoption of constructive suggestions to improve the Commission's methods of work. For example, the special rapporteur would find it useful to draw on the knowledge and experience of his colleagues on the Commission. Possibly, it was said, the members interested in the question of international responsibility might meet a few days before the beginning of the fifteenth session to discuss the results of the special rapporteur's work with him before the session actually opened.

44. In another view, it would be unwise to set up a sub-committee before appointing a special rapporteur. If the Commission should decide to set up such a sub-committee, it should logically first appoint a special rapporteur, who might be assisted by an advisory sub-committee. The sub-committee would hold a few meetings during the present session in order to consider, jointly with the special rapporteur, the scope of the study to be undertaken. At the next session the special rapporteur would submit a preliminary report after having consulted the sub-committee. As soon as the report was submitted, the sub-committee would cease to exist.

45. Some members had doubts on the advisability of appointing a special rapporteur on State responsibility forthwith. The topic was so complex and so ill-defined, they said, that the Commission could not embark on a study without the necessary preparatory work. It was lack of preparation which, in their opinion, had led to the present situation, after years of work and a succession of reports. Accordingly, they considered that the Commission should set up a small sub-committee to define the scope of the subject and deal with other preliminary matters. The sub-committee should be set up at the present session and be allowed sufficient time to give a considered opinion on the various preliminary aspects of the question. It should not be a standing body, but should cease to exist as soon as it had reported to the Commission. After discussing the sub-committee's report, the Commission would decide on the best method of dealing with the subject.

46. Article 19, paragraph 1, of the Commission's Statute, which provides that the Commission should "adopt a plan of work appropriate to each case", was quoted in support of the proposal to set up such a sub-committee. Supporters of the proposal also claimed that it was desirable for the Commission to revise its method of work in respect of State responsibility and not to appoint a special rapporteur until preliminary research carried out by an adequately representative sub-committee was available.

47. As a result of the discussion, the Commission agreed that it would be necessary to undertake preparatory work before a special rapporteur was appointed. Accordingly, at its 637th meeting on 7 May 1962, the Commission decided to set up a Sub-Committee with the following ten members: Mr. Ago (Chairman), Mr. Briggs, Mr. Gros, Mr. Jiménez de Aréchaga, Mr. Lachs, Mr. de Luna, Mr. Paredes, Mr. Tsuruoka, Mr. Tunkin and Mr. Yasseen. The task of the Sub-Committee was to submit to the Commission at its next session a preliminary report containing suggestions concerning the scope and approach of the future study. The Sub-Committee met on 21 June 1962 and made a number of suggestions which were submitted to the Commission at its 668th meeting on 26 June 1962.

48. The Commission approved a suggestion that the Sub-Committee should confine its debates to the gen-

eral aspects of State responsibility. It also adopted a number of other suggestions concerning the organization of the Sub-Committee's work (see para. 68 below).

#### SUCCESSION OF STATES AND GOVERNMENTS

49. In principle, all members were in favour of including the topic of succession of States and Governments in the list of priorities for the Commission's work.

50. Some members, however, indicated that they were not entirely convinced that general principles governing the subject existed in international law, though they were prepared to admit that it would be possible to derive certain rules from practice and from the provisions of existing treaties. They considered the subject extremely important, especially at the present time, and since the last war, when the independence of a large number of States had given rise to so many problems concerning the succession of States. Many examples were quoted to illustrate the variety of succession problems which these new States had to face and for which a general solution was necessary. It was stressed that the subject was of practical even more than theoretical importance and that the Commission should therefore not relegate it to second place and should not postpone its investigation.

51. Other members, while in favour of the study, pointed out that the Commission must first obtain the necessary documentation. To obtain the relevant information, it was proposed that a questionnaire should be sent to Governments and that the Secretariat should be requested to prepare some documents on the subject.

52. Some members considered that the succession of States and of Governments comprised two distinct questions and that at the present juncture the Commission should take up the question of succession of States, leaving the question of succession of Governments until later. Others, on the contrary, considered that the succession of States should, at least in the preliminary stage, be studied at the same time as the succession of Governments, since international practice proved that it was not always easy to draw a distinction between the two. The Commission has not yet taken a decision on this issue.

53. With that consideration in mind, some members drew the Commission's attention to the complexity of the subject and proposed that a start should be made by defining its scope. They believed that the Commission would be wise to draw up at the current session a list of items to be covered by the future study, to facilitate the task of the special rapporteur and serve as a basis for his report. Suggestions for a new method of work concerning the succession of States and Governments were similar to those made in connexion with the method of work on State responsibility (see paras. 41-46 above).

54. In the light of these observations, the Commission, at its 637th meeting on 7 May 1962, decided to set up a Sub-Committee composed of the following ten of its members: Mr. Lachs (Chairman), Mr. Bartoš, Mr. Briggs, Mr. Castrén, Mr. El-Erian, Mr. Elias, Mr. Liu, Mr. Rosenne, Mr. Tabibi and Mr. Tunkin. The task of the Sub-Committee was to submit to the Commission a preliminary report containing suggestions on the scope of the subject, the method of approach for a study and the means of providing the necessary documentation.

55. The Sub-Committee held two meetings, on 16 May and 21 June 1962, and drew up a number of sug-

gestions, which were submitted to the Commission at its 668th meeting on 26 June 1962.

56. At that meeting the Commission took certain decisions concerning the organization of the Sub-Committee's work (see para. 72 below).

## **II. The Commission's future programme of work (General Assembly resolution 1686 (XVI), paragraph 3(b))**

57. In the course of the discussion, some members referred to General Assembly resolution 1686 (XVI) on the Commission's future programme of work and said that that programme did not need to be enlarged. Others argued that, in view of recent developments in international law and of the need for promoting friendly relations and co-operation among States, the Commission's programme should be reviewed and amended so as to include additional topics of definite current interest.

58. Various comments were also made on the possible choice of additional topics. Some members thought that the Commission might consider studying certain topics on which opinions were divided, though not topics of a markedly political nature. Other members pointed out, on the other hand, that, as its task comprised both the codification and the progressive development of international law, the Commission should not rule out complex topics, even though they had political overtones. The Commission would be the most appropriate body to formulate principles of international law capable of serving the cause of international co-operation.

59. At its 634th meeting held on 2 May 1962, the Commission set up a Committee of eight members to consider the future programme of work in accordance with General Assembly resolution 1686 (XVI), paragraph 3 (b). The Committee, which was composed of Mr. Amado (Chairman), Mr. Ago, Mr. Bartoš, Mr. Cadieux, Mr. Castrén, Mr. Jiménez de Aréchaga, Mr.

Pessou and Mr. Tunkin, met on 21 June 1962 when it considered the question on the basis of the working paper prepared by the Secretariat (see para. 31 above). The Committee formulated a number of suggestions which were submitted to the plenary Commission at its 668th meeting on 26 June 1962.

60. The Commission, on the recommendation of the Committee, agreed to limit the future programme of work for the time being to the three main topics under study or to be studied pursuant to General Assembly resolution 1686 (XVI), paragraph 3 (a), namely, the law of treaties, State responsibility, and succession of States and Governments. It further decided to include in the programme four additional topics of more limited scope which had been referred to it by earlier General Assembly resolutions, namely, the question of special missions (resolution 1687 (XVI)), the question of relations between States and inter-governmental organizations (resolution 1289 (XIII)), the right of asylum (resolution 1400 (XIV)), and the juridical régime of historic waters, including historic bays (resolution 1453 (XIV)).

61. The Commission considered that many of the topics proposed by Governments deserved study with a view to codification. In drawing up its future programme of work, however, it is obliged to take account of its resources. The law of treaties, State responsibility and succession of States and Governments are such broad topics that they alone are likely to keep it occupied for several sessions. The Commission accordingly considers it inadvisable for the time being to add anything further to the already long list of topics on its agenda.

62. The Commission established two Sub-Committees, which are to meet between this session and the next for the purpose of undertaking the necessary preparatory work on the topics of State responsibility and the succession of States and Governments.

## Chapter IV

### PLANNING OF THE WORK OF THE COMMISSION FOR THE NEXT SESSION

63. As stated in paragraph 60 above, the Commission decided to include the following seven subjects in the programme for its future work: (1) Law of treaties; (2) State responsibility; (3) Succession of States and Governments; (4) Special missions; (5) Relations between States and inter-governmental organizations; (6) Principles and rules of international law relating to the right of asylum; (7) Juridical régime of historic waters, including historic bays.

64. The Commission adopted a number of decisions relating to the planning of its work on the law of treaties, on State responsibility, on the succession of States and Governments, on the relations between States and inter-governmental organizations and on special missions. To facilitate its work on the responsibility of States and the succession of States and Governments, the Commission established two Sub-Committees to undertake the necessary preparatory work (see paras. 47, 54 and 62 above).

#### I. Law of treaties

65. The Commission, having studied at the present session the report of the Special Rapporteur, Sir Humphrey Waldock, on the conclusion, entry into force and registration of treaties, will proceed to the consideration of his second report dealing with the validity and duration of treaties.

66. In connexion with its future work on the law of treaties, the Commission requested the Secretariat to present to its next session a memorandum reproducing various decisions taken by the General Assembly on the law of treaties and pertinent extracts from the reports of the Sixth Committee to the plenary Assembly, which constituted an explanation of the Assembly's decisions.

#### II. State responsibility

67. The Sub-Committee on State Responsibility held one private meeting on 21 June 1962. It had two working papers before it, one entitled "The duty to compensate for the nationalization of foreign property", submitted by Mr. Jiménez de Aréchaga, the other entitled "An approach to State responsibility", submitted by Mr. Paredes.

68. During that meeting, views were expressed on the organization of the Sub-Committee's work. The Sub-Committee formulated a number of suggestions which were submitted to the Commission at its 668th meeting on 26 June 1962. In the light of these suggestions, the Commission adopted the following decisions: (1) the Sub-Committee will meet at Geneva between the Commission's current session and its next session from 7 to 16 January 1963; (2) its work will be devoted primarily to the general aspects of State responsi-

bility; (3) the members of the Sub-Committee will prepare for it specific memoranda relating to the main aspects of the subject, these memoranda to be submitted to the Secretariat not later than 1 December 1962 so that they may be reproduced and circulated before the meeting of the Sub-Committee in January 1963; (4) the Chairman of the Sub-Committee will prepare a report on the results of its work to be submitted to the Commission at its next session.

69. At its 669th meeting on 27 June 1962, the Commission decided to include an item entitled "Report of the Sub-Committee on State Responsibility" in the agenda of its next session.

#### III. Succession of States and Governments

70. The Sub-Committee on the Succession of States and Governments held two private meetings, on 16 May and 21 June 1962 respectively.

71. At its first meeting, the Sub-Committee held an exchange of views on the question. A certain number of problems had been suggested which might constitute elements of a future report by the Sub-Committee. At the second meeting, after a further exchange of views, it was decided that more thought must be given to the scope of and approach to the subject. Accordingly, the Sub-Committee confined itself to considerations regarding the preparatory work that would be required. At the same meeting, the Chairman drew attention to a working paper submitted by Mr. Elias, entitled "Delimitation of the scope of succession of States and Governments".

72. In the light of the Sub-Committee's suggestions, the Commission took the following decisions at its 668th meeting on 26 June 1962: (1) The Sub-Committee will meet at Geneva on 17 January 1963, immediately after the session of the Sub-Committee on State Responsibility, for as long as necessary but not beyond 25 January 1963; (2) the Commission took note of the Secretary's statement in the Sub-Committee regarding the following three studies to be undertaken by the Secretariat: (a) a memorandum on the problem of succession in relation to membership of the United Nations, (b) a paper on the succession of States under general multilateral treaties of which the Secretary-General is the depositary, (c) a digest of the decisions of international tribunals in the matter of State succession; (3) the members of the Sub-Committee will submit individual memoranda dealing essentially with the scope of and approach to the subject, the reports to be submitted to the Secretariat not later than 1 December 1962 to permit reproduction and circulation before the January 1963 meeting of the Sub-Committee; (4) its Chairman will submit to the Sub-Committee, at its next meeting or, if possible, a few days in advance, a

working paper containing a summary of the views expressed in the individual reports; (5) the Chairman of the Sub-Committee will prepare a report on the results achieved for submission to the next session of the Commission.

73. The Secretary-General has sent a circular note to Governments inviting them to submit the texts of any treaties, laws, decrees, regulations, diplomatic correspondence, etc. concerning the procedure of succession relating to the States which have achieved independence after the Second World War.

74. At its 669th meeting on 27 June 1962, the Commission decided to place on the agenda of its next session the item entitled "Report of the Sub-Committee on Succession of States and Governments".

#### **IV. Relations between States and inter-governmental organizations**

75. At its 669th meeting on 27 June 1962, the Commission appointed Mr. El-Erian Special Rapporteur on relations between States and inter-governmental organizations. The Special Rapporteur will submit a report on this subject to the next session of the Commission. The Commission decided to place the question on the agenda of its next session.

#### **V. Special missions**

76. The Commission decided, at its 669th meeting on 27 June 1962, to place the question of special missions on the agenda of its next session. The Secretariat will prepare a working paper on this subject.

## Chapter V

### OTHER DECISIONS AND CONCLUSIONS OF THE COMMISSION

#### I. Co-operation with other bodies

77. At its 656th meeting the Commission considered the item concerning co-operation with other bodies.

78. It noted the report of Mr. Radhabinod Pal (A/CN.4/146) on the fifth session of the Asian-African Legal Consultative Committee held at Rangoon from 17 to 30 January, which Mr. Pal had attended as an observer for the Commission.

79. The Secretary brought to the Commission's attention the two letters which had been received from the Secretary of the Asian-African Legal Consultative Committee. In the first of those letters, the Secretary of the Committee stated that the Committee had been unable to be represented by an observer at the Commission's session. By the second letter the Commission was invited to send an observer to the sixth session of the Committee in 1963, the agenda for which was to include the topic of State responsibility and possibly the law of treaties and the question of the legality of atomic tests.

80. The Inter-American Juridical Committee was represented at the session by Mr. Hugo Juan Gobbi, who addressed the Commission on the Committee's behalf. The Secretary informed the Commission that the next session of the Inter-American Council of Jurists was to be held in El Salvador on a date which had not yet been fixed.

81. The Commission decided to be represented by observers at the next sessions of the Asian-African Legal Consultative Committee and of the Inter-American Council of Jurists. It authorized the Chairman to appoint the observers as soon as the place and date of the sessions of these bodies were known.

#### II. Date and place of the next session

82. The Commission noted that, owing to the decision of the General Assembly to convene a conference of plenipotentiaries on consular intercourse at Vienna early in March 1963, difficulties of a practical nature might arise if the Commission's session was scheduled to open on a date close to the end of the Vienna conference. In the first place, several members of the Commission would have to attend the conference as representatives of their countries; in the second place, it was not impossible that the conference might continue beyond the expected date of its closure. Consequently, in order to allow for a reasonable interval between the

end of the Vienna conference and the beginning of the Commission's next session, it was decided, after consultation with the Secretary-General, that the fifteenth session of the Commission would be held at Geneva from 6 May to 12 July 1963.

83. Under the terms of the five-year "pattern of conferences" established by resolution 1202 (XII) adopted by the General Assembly on 13 December 1957, the Commission may meet at Geneva only if there is no overlapping with the summer session of the Economic and Social Council. Since this pattern of conferences is to be discussed at the General Assembly's next session, the Commission held an exchange of views on the subject. During the discussion, many members drew attention to the difficulties to which the present arrangements give rise for those of them who are university professors. In the circumstances, the first Monday in May was decided on as the most convenient opening date for the session, since it would reduce to the minimum both the duration of overlapping with the session of the Council and the period during which several members of the Commission have difficulty in securing release from their professional duties and hence in taking part in the Commission's work.

#### III. Production of documents, summary records and translation facilities

84. In connexion with its future work the Commission is bound to draw the attention of the competent organs of the United Nations to the inadequate facilities relating to the production of documents, summary records and translations put at its disposal. The Commission wishes to emphasize that technical inadequacies and delays in the production of documents, summary records and draft texts in the working languages of the Commission created serious inconvenience and considerably delayed its work.

85. The Commission wishes to put on record its hope that proper arrangements will be made to avoid the repetition of these inadequacies and that in future it will have proper services at its disposal.

#### IV. Representation at the seventeenth session of the General Assembly

86. The Commission decided that it should be represented at the seventeenth session of the General Assembly, for purposes of consultation, by its Chairman, Mr. Radhabinod Pal.

## ANNEX

### Registration and publication of treaties and international agreements: regulations to give effect to Article 102 of the Charter of the United Nations<sup>a</sup>

#### PART ONE

#### REGISTRATION

##### Article 1

1. Every treaty or international agreement, whatever its form and descriptive name, entered into by one or more Members of the United Nations after 24 October 1945, the date of the coming into force of the Charter, shall as soon as possible be registered with the Secretariat in accordance with these regulations.

2. Registration shall not take place until the treaty or international agreement has come into force between two or more of the parties thereto.

3. Such registration may be effected by any party or in accordance with article 4 of these regulations.

4. The Secretariat shall record the treaties and international agreements so registered in a Register established for that purpose.

##### Article 2

1. When a treaty or international agreement has been registered with the Secretariat, a certified statement regarding any subsequent action which effects a change in the parties thereto, or the terms, scope or application thereof, shall also be registered with the Secretariat.

2. The Secretariat shall record the certified statement so registered in the register established under article 1 of these regulations.

##### Article 3

1. Registration by a party, in accordance with article 1 of these regulations, relieves all other parties of the obligation to register.

2. Registration effected in accordance with article 4 of these regulations relieves all parties of the obligation to register.

##### Article 4

1. Every treaty or international agreement subject to article 1 of these regulations shall be registered *ex officio* by the United Nations in the following cases:

(a) Where the United Nations is a party to the treaty or agreement;

(b) Where the United Nations has been authorized by the treaty or agreement to effect registration;

(c) Where the United Nations is the Depositary of a multi-lateral treaty or agreement,

2. A treaty or international agreement subject to article 1 of these regulations may be registered with the Secretariat by a specialized agency in the following cases:

(a) Where the constituent instrument of the specialized agency provides for such registration;

(b) Where the treaty or agreement has been registered with the specialized agency pursuant to the terms of its constituent instrument;

(c) Where the specialized agency has been authorized by the treaty or agreement to effect registration.

##### Article 5

1. A party or specialized agency, registering a treaty or international agreement under article 1 or 4 of these regulations,

shall certify that the text is a true and complete copy thereof and includes all reservations made by parties thereto.

2. The certified copy shall reproduce the text in all the languages in which the treaty or agreement was concluded and shall be accompanied by two additional copies and by a statement setting forth, in respect of each party:

(a) The date on which the treaty or agreement has come into force;

(b) The method whereby it has come into force (for example: by signature, by ratification or acceptance, by accession, et cetera).

##### Article 6

The date of receipt by the Secretariat of the United Nations of the treaty or international agreement registered shall be deemed to be the date of registration, provided that the date of registration of a treaty or agreement registered *ex officio* by the United Nations shall be the date on which the treaty or agreement first came into force between two or more of the parties thereto.

##### Article 7

A certificate of registration signed by the Secretary-General or his representative shall be issued to the registering party or agency and also, upon request, to any party to the treaty or international agreement registered.

##### Article 8

1. The register shall be kept in the English and French languages. The register shall comprise, in respect of each treaty or international agreement, a record of:

(a) The serial number given in the order of registration;

(b) The title given to the instrument by the parties;

(c) The names of the parties between whom it was concluded;

(d) The dates of signature, ratification or acceptance, exchange of ratification, accession, and entry into force;

(e) The duration;

(f) The language or languages in which it was drawn up;

(g) The name of the party or specialized agency which registers the instrument and the date of such registration;

(h) Particulars of publication in the treaty series of the United Nations.

2. Such information shall also be included in the register in regard to the statements registered under article 2 of these regulations.

3. The texts registered shall be marked "*ne varietur*" by the Secretary-General or his representative, and shall remain in the custody of the Secretariat.

##### Article 9

The Secretary-General, or his representative, shall issue certified extracts from the register at the request of any Member of the United Nations or any party to the treaty or international agreement concerned. In other cases he may issue such extracts at his discretion.

<sup>a</sup> Adopted by General Assembly resolution 97 (I) of 14 December 1946 and amended by General Assembly resolutions 364 B (IV) of 1 December 1949 and 482 (V) of 12 December 1950.

## PART TWO

## FILING AND RECORDING

*Article 10*

The Secretariat shall file and record treaties and international agreements, other than those subject to registration under article 1 of these regulations, if they fall in the following categories:

(a) Treaties or international agreements entered into by the United Nations or by one or more of the specialized agencies;

(b) Treaties or international agreements transmitted by a Member of the United Nations which were entered into before the coming into force of the Charter, but which were not included in the treaty series of the League of Nations;

(c) Treaties or international agreements transmitted by a party not a Member of the United Nations which were entered into before or after the coming into force of the Charter which were not included in the treaty series of the League of Nations, provided, however, that this paragraph shall be applied with full regard to the provisions of the resolution of the General Assembly of 10 February 1946 set forth in the Annex to these regulations.<sup>b</sup>

*Article 11*

The provisions of articles 2, 5, and 8 of these regulations shall apply, *mutatis mutandis*, to all treaties and international agreements filed and recorded under article 10 of these regulations.

<sup>b</sup> Not reproduced here.

## PART THREE

## PUBLICATION

*Article 12*

1. The Secretariat shall publish as soon as possible in a single series every treaty or international agreement which is registered, or filed and recorded, in the original language or languages, followed by a translation in English and in French. The certified statements referred to in article 2 of these regulations shall be published in the same manner.

2. The Secretariat shall, when publishing a treaty or agreement under paragraph 1 of this article, include the following information; the serial number in order of registration or recording; the date of registration or recording; the name of the party or specialized agency which registered it or transmitted it for filing; and in respect of each party the date on which it has come into force and the method whereby it has come into force.

*Article 13*

The Secretariat shall publish every month a statement of the treaties and international agreements registered, or filed and recorded, during the preceding month, giving the dates and numbers of registration and recording.

*Article 14*

The Secretariat shall send to all Members of the United Nations the series referred to in article 12 and the monthly statement referred to in article 13 of these regulations.