Document:-
A/CN.4/101

Report on the Law of Treaties by Mr. G.G. Fitzmaurice.

Topic:
Law of Treaties

Extract from the Yearbook of the International Law Commission:-
1956 , **vol. II**

LAW OF TREATIES

DOCUMENT A/CN.4/101

Report by G. G. Fitzmaurice, Special Rapporteur

[*Original text: English*]
[*14 March 1956*]

CONTENTS

INTRODUCTION

A. Basis and scope of the present report

1. The first task of the present Rapporteur was to decide whether to adopt the work of his distinguished predecessors, so far as this had proceeded, and to take the subject up at the point where they left off, or whether to review once more the topics covered by this earlier work—to which, it should be said at once, the present Rapporteur is very greatly indebted. As these topics were left, in particular by Sir Hersch Lauterpacht, they consisted of three parts entitled "Definition and nature of treaties", "Conclusion of treaties", and "Conditions of validity of treaties". It was Sir Hersch Lauterpacht's intention to prepare in due course further sections of the work: on operation and enforcement, interpretation, termination, and so on.

2. The present Rapporteur would have preferred, if possible, to proceed with this further work at once, and was conscious, moreover, that it might seem otiose to travel once again over ground already twice covered by earlier reports. Yet this is what he has in fact been led to do, principally for two reasons. In the first place, it was suggested to him by one or two members of the Commission that, in view of the considerable differences between certain of the articles proposed by Sir Hersch Lauterpacht and those which had been adopted by the Commission during its second and third sessions (A/CN.4/L.55), which themselves differed considerably from various articles proposed by Professor Brierly, a review and synthesis of these provisions would prove useful.

3. In the second place, the present Rapporteur, when considering in particular the topic of the making and conclusion of treaties, was struck by the following circumstance. His predecessors had presented an

admirably full and informative commentary, containing all that was necessary for an understanding of the law on the subject; but the articles themselves to which this commentary related were few in number and to some extent general in character—at any rate their authors had clearly not intended to go into much detail. Such a method has its advantages, but nevertheless it is bound to leave out of account a number of points—and more especially situations—that in practice tend frequently to occur in the process of treaty-making, and give rise to difficulty or uncertainty.

4. This raises the question of how specialized a code should be—a question not easily answered in the case of a topic such as the conclusion of treaties, where often no entirely clear dividing line can be drawn between what are matters of strict law, and what are matters of practice, common usage, or protocol. Nevertheless, basing himself on his own experience in treaty-making, the present Rapporteur believes that most chancelleries are probably reasonably familiar with the broad principles of treaty law, but that it is precisely on certain of the more specialized, but all the same important points, that they would welcome greater certainty and a more systematic treatment. He believes, accordingly, that a code on the law of treaties should deal with at any rate the more prominent of these points, without, on the other hand, going too far into what are fundamentally matters of practice that do not raise strictly legal issues.

5. The Rapporteur has therefore, in the present report, concentrated almost entirely on the topic of the framing and conclusion of treaties—apart from a section devoted to certain basic principles of treaty law, which, it may be thought, ought to figure at the outset of any code on the subject. Except for these and certain introductory and general articles, thirty out of the forty-two articles now presented deal entirely with the process of treaty-making. This compares with some six articles on the making or conclusion of treaties in each of the previous reports. The articles themselves are also fuller, so that much more space is given to this topic than before. The Rapporteur makes no apology for this more entensive treatment, which he believes to be necessary, although he thinks that after the Commission has given a preliminary consideration to the matter it may be possible to shorten the draft. There is a double aspect about many rules of treaty law that admittedly tends to cause overlapping. Nevertheless, even though it may be possible to summarize treaty law in the one sentence that anything can be done that the parties agree upon, it is still desirable to make clear what it is that will usually require specific agreement, and what is to be the position if there is none.

6. On the other hand, if the present Rapporteur has felt obliged to expand the articles, the work done by his predecessors, especially Sir Hersch Lauterpacht, has enabled him greatly to reduce the commentary that might otherwise have been called for. He has avoided repetition, and has confined himself to commenting on new points, or points that may be thought to be doubtful or especially controversial. He has also tried to draft the articles themselves in such a way that they are self-explanatory and their legal basis manifest.

B. Scope of future reports

7. The next report will deal with the topics of the (essential or substantive) validity of treaties, and of the termination of treaties. In the same or a further report, the topics of interpretation, operation, enforcement, and the like will be covered, and this will still leave a number of matters to be dealt with.

8. Here a word may be said on the difficult subject of arrangement. The law of treaties lends itself to several different methods of arrangement. How different these can be will be apparent to anyone who, for instance, compares so well-known a text as the Harvard draft convention on the law of treaties with the arrangement adopted by Professor Charles Rousseau in volume I of his *Principes généraux du droit international public.*[1] Thus the topic of the making (conclusion) of treaties covered by the present report, can be regarded either as a process (*opération à procédure*) governed by certain legal rules, or as a substantive topic relating to the validity of treaties—i.e., so far as this is concerned, their formal validity. In the same way, termination can be regarded as a process, or equally as part of the topic of validity (validity of the treaty in point of time or duration). Chronologically, the two topics of the conclusion and termination of treaties are at opposite ends of the scale; but substantially they can be regarded as belonging (together with the topic of essential validity) to the general chapter of "validity". In between them, chronologically, are the topics of interpretation, operation, and enforcement, the effect of the treaty as regards third parties, etc., all of which may be regarded as constituting a second main chapter of treaty law—the "effect" of treaties (interpretation, for instance, is closely allied to application). It is possible, up to a point, to combine these conceptions, though not entirely. Provisionally, the present report adopts, in the main, the arrangement adumbrated in the previous ones, since it is simplest, and most in accordance with the way in which things occur, to view a treaty as a process in time. Treaties are born, they live, produce their effects, and, perhaps, eventually die. But it may be thought desirable to displace the subject of termination, and make it part III of a first chapter on "Validity", of which formal validity would constitute part I, and essential validity part II. Tentatively this is the arrangement now proposed. Most of the rest of the subject could then be grouped under a second chapter on "Effect". However, a final decision on this question is probably best deferred until a comparatively late stage of the whole work.

9. Certain other matters of form or method may be mentioned. The first has already been touched on. So far as the process of treaty-making and conclusion is concerned, the problems connected with it cannot clearly emerge, unless the code attempts, within certain limits, to paint a picture—unless in fact it has a descriptive element. Secondly, the Rapporteur believes that any codification of the law of treaties, such as the Commission is called upon to carry out, should take the form of a *code*

[1] Charles Rousseau, *Principes généraux du droit international public* (Paris, Editions A. Pedone, 1944).

and not of a draft convention. There are two reasons for this. 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.

10. Finally, reference may be made to certain inherent difficulties in drafting any code on treaty law, arising out of the attempt to give a unified treatment to the subject. This is the system apparently favoured by the Commission and the previous Rapporteurs, which the present Rapporteur has tried to follow. But in a sense it attempts too much. For instance, it may be *possible* to frame an article so as to apply indifferently to the case of a full treaty and also to that of an exchange of notes; but a certain artificiality is involved. Some expressions are suited to the one case and not to the other, and vice versa. A somewhat similar position exists as regards bilateral treaties on the one hand, and multilateral treaties on the other. Again, the same thing is found if treaty-making by or on behalf of States is related to the same process when effected by or on behalf of international organizations. It is for consideration whether, eventually, it may not be better to modify the attempt at a completely uniform treatment, and introduce a certain number of special sections on particular aspects of the subject. But in reading the present articles, it is necessary to bear in mind that they are intended to cover in one clause. *all* the different forms of instruments and types of cases. The reader who, for instance, has mainly general multilateral conventions in mind, should remember that there are also such things as bilateral agreements and exchanges of notes, and, moreover, *that the latter outnumber the former by a very large margin.*

I. TEXT OF ARTICLES OF CODE

Introduction: scope and general principles

A. Scope and related definitions

Article 1. Scope

1. The present Code relates to treaties and other international agreements in the nature of treaties, embodied in a single instrument, as described in paragraph 1 of article 2 below; and to international agreements embodied in other forms, as described in paragraph 2 of article 2; provided always that they are in writing. The present Code does not, as such, apply to international agreements not in written form, the validity of which is not, however, on that account to be regarded as prejudiced.

2. Subject to the provisions of article 2, paragraph 2, the present Code applies to treaties and other international agreements regardless of their form or designation, and regardless of whether they are expressed in one or more instruments.

[3. The provisions of the present Code relating to the powers, faculties, rights and obligations of States relative to treaties, are applicable, *mutatis mutandis*, to international organizations, and to treaties made between them, or between one of them and a State, unless the contrary is indicated or results necessarily from the context.]

Article 2. Definition of "Treaty"

1. For the purposes of the application of the present Code, a treaty is an international agreement embodied in a single formal instrument (whatever its name, title or designation) made between entities both or all of which are subjects of international law possessed of international personality and treaty-making capacity, and intended to create rights and obligations, or to establish relationships, governed by international law.

2. However, there being no general rule of law requiring any particular international agreement to be cast into the form of a "treaty", as such, an international agreement intended to serve the same purposes and made between any of the above-mentioned entities, may be embodied in another form than a treaty as described in the preceding paragraph—in particular in more than one instrument, such as an exchange of notes, letters or memoranda. The term "treaty", and the provisions of the present Code, shall be regarded as applicable *mutatis mutandis* to these other forms of international agreement, unless the contrary is expressly stated, or results necessarily from the language of the provision concerned, or from the character of the agreement itself.

3. For the purposes of the present Code, a treaty implies an instrument, or complex of instruments forming an integral whole, the parties to which number two or more of the entities mentioned in paragraph 1 above. A unilateral instrument, declaration, or affirmation may be binding internationally, but it is not a treaty, though it may in some cases amount to, or constitute, an adherence to a treaty, or acceptance of a treaty or other international obligation.

4. The fact that an instrument is or is not, as the case may be, regarded as a treaty for the purposes of the present Code, does not in any way affect its status in relation to the constitutional requirements of particular States regarding the treaty-making power.

Article 3. Certain related definitions

For the purposes of the present Code:

(*a*) In addition to the case of entities recognized as being States on special grounds, the term "State":

(i) Means an entity consisting of a people inhabiting a defined territory, under an organized system of government, and having the capacity to enter into international relations binding the entity as such, either directly or through some other State; but this is without prejudice to the question of the methods by, or channel through

which a treaty on behalf or any given State must be negotiated—depending on its status and international affiliations;

(ii) Includes the government of the State;

[(iii) Subject to article 1, paragraph 3, includes international organizations;]

[(*b*) The term "international organization" means a collectivity of States established by treaty, with a constitution and common organs, having a personality distinct from that of its member-States, and being a subject of international law with treaty-making capacity;]

(*c*) The term "party" (to a treaty) means primarily a State actually bound by a treaty which is in force; it may on occasion be used to denote States presumptively bound by a treaty not yet in force, by reason of having taken all the steps necessary for participation.

B. Certain fundamental principles of treaty law

Article 4. Ex consensu advenit vinculum

1. The foundation of the treaty obligation is consent, coupled with the fundamental principle of law that consent gives rise to obligation.

2. For the obligation to exist, the consent must be true consent. However, in certain circumstances consent is an inference from the facts, and a State may not deny the reality of its consent apparently regularly given.

Article 5. Pacta sunt servanda

1. Subject to the provisions of the present Code, States are bound to carry out in good faith the obligations they have assumed by treaty.

2. All treaty rights and obligations attach to the State as an entity, and as an international personality and subject of international law, whether the treaty has actually been made in the name of the State as such, or of the Head of the State, the government, a department of government, or a Minister.

3. Since treaty obligations bind the State, they are not affected by changes of government, administration, dynasty or régime, within the State. A new government, administration, dynasty or régime, whatever its origin or the process by which it has assumed control, is bound to carry out the treaty obligations of the State, unless these can be terminated according to the terms of the treaty, or be otherwise lawfully brought to an end.

4. Territorial changes in a State, not affecting its personality as a separate international entity, do not of themselves alter its treaty rights and obligations, except in so far as these relate specifically to territory no longer under control of the State, or have otherwise become impossible of enjoyment or performance.

5. A State which has become bound by a treaty in a regular and lawful manner, is not absolved from carrying it out by reason of any requirements of, or lacunae in, its law or constitution, or any impediments resulting from its administrative or judicial system.

6. The particular form or designation of a treaty can never be a ground for not carrying it out, if it embodies an agreement, and is valid formally, substantially and temporally.

7. Changed conditions are equally never a ground for refusing to comply with a treaty, though they may, in exceptional circumstances, cause it to be determined by operation of law.

Article 6. Res inter alios acta

A treaty only creates rights, obligations or relationships for the States that are parties to it. However, in the circumstances contemplated in articles ... of the present Code,[2] a State may indirectly acquire rights, come under obligations, or be placed in a relationship, by reason of a treaty to which it is not a party.

Article 7. The law governing treaties

Unless the treaty itself otherwise provides, or such an intention is clearly apparent from the text, or from surrounding circumstances, all questions relating to its conclusion, validity, force, effect, application, execution, interpretation and termination, will be governed by international law.

Article 8. Classification of treaties

Treaties may, on grounds of practical convenience and for certain procedural purposes, be classified in various ways, according to their form, subject matter or object, and according to whether they are bilateral, plurilateral, or multilateral contractual *(traités-contrats)* or law-making or "normative" *(traités-lois)*. However, subject to the provisions of the present Code, there is no substantial juridical difference between any of these classes of treaties as regards the legal requirements governing their validity, interpretation and effect, since they are all based on agreement, and derive their legal force from its existence.

Article 9. The exercise of the treaty-making power

1. Treaty-making and all other acts connected with treaties are, *on the international plane*, executive acts, and the function of the executive authority. Whatever legislative processes have to be gone through in order to make such acts effective on the domestic plane, on the international plane they are authentic.

2. On the international plane, therefore, the treaty-making power is exercised:

(*a*) In the case of a State, by the competent executive authority (Head of State, government): it is for each State to determine for itself what constitutional processes are necessary in order to place the executive authority in a position, on the domestic plane, to exercise this power; but, on the international plane, its exercise is the act of the executive authority;

[(*b*) In the case of an international organization, by such methods as are provided for in its constitution, or decided upon by its competent organs acting within the limits of their functions; but, if nothing else is indicated or decided on, by the Secretary-General of the organization.]

[2] The articles will figure in a later report.

3. No State is obliged, or, strictly speaking, entitled, to accept as internationally authentic the acts of another State in relation to a treaty, unless they are the acts of the executive authority; but because a State is bound to accept them if they are of this character, they necessarily bind the State whence they emanate, which, having performed them through its executive authority, may not then deny their international authenticity.

First chapter. The validity of treaties

INTRODUCTORY PART: DEFINITION AND CONDITIONS OF VALIDITY

Article 10. Definition of validity

1. Validity is the condition necessary to give a treaty operative force and effect in law, and consists in the fulfilment of the aggregate of those requirements prescribed by the law in order that a treaty may have such force and effect.

2. Correspondingly, *mutatis mutandis*, the validity of a treaty for any particular State denotes the existence of all the conditions necessary to give a treaty, in itself valid, operative force and effect for that State.

3. Validity comprises "formal validity", "essential validity" and "temporal validity"—all of which must be present, both in respect of the treaty itself, and for any particular State said to be bound by it.

4. The term "formal validity" denotes validity in point of form, with reference to negotiation, conclusion and entry into force; "essential validity" denotes validity in point of substance, having regard to the requirements of contractual jurisprudence; "temporal validity" denotes validity in point of duration, having regard to the legal considerations governing the termination of a treaty, whether in itself or for any particular State.

Article 11. General conditions of the operative effect of a treaty considered in itself

1. A treaty has operative effect only if it is (*a*) valid, (*b*) in force (has temporal validity).

2. In order to be valid, a treaty must have (*a*) formal validity, (*b*) essential validity, as defined in article 10, paragraph 4, and in accordance with the requirements hereinafter specified.

3. In order to be in force (temporally valid), a treaty must (*a*) have entered or been brought into force; (*b*) remain in force—that is to say—must not have been terminated or have come to an end, according to its terms, or by operation of law as hereinafter provided.

Article 12. General conditions of the operative effect of a treaty for any particular State

1. A treaty is binding upon a particular State only if (*a*) the treaty itself has operative effect as specified in article 11 above; (*b*) the State concerned has the capacity to participate in the treaty; (*c*) there exists a valid and continuing acceptance of the treaty on behalf of that State.

2. A State has the capacity to participate in a given treaty (*a*) if its general treaty-making capacity is not limited so as to exclude participation in that treaty or class of treaty; (*b*) if it fulfils any special conditions of participation that may be laid down by the treaty itself.

3. A continuing acceptance of a treaty on behalf of a State exists if (*a*) a final acceptance has been given by such means as many be prescribed by the treaty itself, or by the present Code; (*b*) that acceptance is (i) valid according to the provisions of the present Code, and (ii) is still in force, and has not been terminated according to the terms of the treaty, or by operation of law as hereinafter provided.

Part I. Formal validity (framing and conclusion of treaties)

A. GENERAL CONDITIONS OF FORMAL VALIDITY

Article 13. Definitions

For the purposes of the present Code:

(*a*) "Negotiation", "drawing up" or "framing" is the process of *establishing* the text of a treaty; and "conclusion" is the act by which any two or more States signify, subject if necessary to eventual confirmation, their *consent* to the text as a text;

(*b*) "Full powers" or "credentials" means the formal instrument or document authorizing a given person to represent a State for the purpose of negotiating or concluding, or of negotiating and concluding, a treaty, as the case may be;

(*c*) "Establishment" or "authentication" is the act whereby the *text* of the treaty is finalized *ne varietur;*

(*d*) "Participation" (in a treaty) consists in having taken the final steps necessary in the particular case to become actually bound by it, if it is in force or when it comes into force;

(*e*) "Signature" which (subject to the provisions of article 21 of the present Code) includes initialling, is the act whereby a duly authorized representative signs or initials the text of a treaty on behalf of a State;

(*f*) "Signature *ad referendum*" is a signature made expressly subject to reference to the government concerned, with the consequence that it does not take effect as a full signature without subsequent confirmation by that government;

(*g*) A "signatory" or "signatory State" means a State on behalf of which a signature to a treaty has been given, such signature not being *ad referendum*, or, if *ad referendum*, having been duly converted by confirmation into a full signature; but the term "signatory" may sometimes be understood as denoting the individual person signing, if the context so requires;

(*h*) "Ratification" is the act whereby a signatory State ratifies its signature;

(*i*) "Accession" is the act whereby a State not a signatory to a treaty can adhere to it in certain circumstances;

(*j*) "Acceptance" is the act whereby, in lieu of signature, ratification or accession, or of any of these acts, as the case may be, a State "accepts" a treaty as binding, where the treaty provides for this procedure;

(*k*) The term "instrument of ratification", "accession" or "acceptance" denotes, as the case may be, the formal instrument embodying a ratification, accession or acceptance, transmitted to the other signatory State or States, or parties to the treaty, or deposited with the government or authority specified therein;

(*l*) A "reservation" is a unilateral statement appended to a signature, ratification, accession or acceptance, by which the State making it purports not to be bound by some particular substantive part or parts of the treaty, or reserves the right not to carry out, or to vary, the application of that part or parts; but it does not include mere statements as to how the State concerned proposes to implement the treaty, or declarations of understanding or interpretation, unless these imply a variation on the substantive terms or effect of the treaty;

(*m*) The terms "coming [or entry] into force" and "date of coming [entry] into force" mean, in relation to the treaty itself, the process by, and date on which it becomes binding and operative for the States which have already given a final acceptance of it, in whatever manner the treaty provides; and, in relation to any other State, the process by, and date on, which a treaty already in force becomes binding and operative for that particular State.

Article 14. The treaty considered as text and as legal transaction

1. A treaty is both a legal transaction (agreement) and a document embodying that transaction. In the latter sense, the treaty evidences but does not constitute the agreement.

2. For evidential purposes the text alone is sufficient, provided it has been duly drawn up, and established or authenticated in the manner provided for in section B below.

3. In order to be or become a legal transaction, the text, so drawn up and established or authenticated, must be concluded as an agreed text and participated in and brought into force as a legal act, in the manner provided for in section C below.

4. The process of treaty-making consequently involves four stages, though in certain cases (e.g. exchanges of notes) these may be simultaneous: (*a*) establishment and authentication of the text, as a text; (*b*) consent to the text as a potential basis of agreement (conclusion—usually by signature); (*c*) agreement to be bound by the text—sometimes by signature, more usually by ratification or other means; (*d*) entry into force of the treaty as such.

B. Negotiation, drawing up and establishment (authentication) of the text

Article 15. Drawing up of the text

1. A treaty is drawn up by a process of negotiation which may take place through a diplomatic or other convenient administrative channel, or by means of meetings of delegates or at an international conference. Delegates and representatives must, subject to the provisions of articles 21 to 23 hereof, be duly authorized to carry out the negotiation, and except in the case of persons, such as Heads of States, Ministers or Ambassadors, having inherent authority deriving from the nature of their functions, must furnish or exhibit credentials to that effect; but they need not be in possession of full-powers to conclude the treaty by signature or otherwise.

2. Agreement on any text or part thereof must be unanimous unless, before or at the start of the negotiation, meeting or conference, a decision has been taken, by common consent of the participants, for the adoption of texts by a majority vote.

Article 16. Certain essentials of the text

1. Subject to the provisions of the following paragraphs, it is not a juridical requirement of a treaty that it should contain any particular rubric, such as a preamble or conclusion, or other special clauses.

2. It is essential to the formal validity of a treaty that it should indicate the States on behalf of which it was initially drawn up. Such indication may be given by means of a preambular recital, or in connexion with the signatures affixed, or may be inferred from those signatures themselves.

3. Where a treaty is made on behalf of a dependent territory, or protected or semi-sovereign State, it must indicate the State making it, on whom will rest the international responsibility for its due execution.

4. It is conducive, but not essential, to the formal validity of a treaty that it should provide for the date and method of its entry into force, the manner of participation of the parties, the period of its duration, and for such other formal and procedural matters as may be requisite.

5. However, in the absence of any indication to the contrary in the treaty itself, or necessarily to be implied from the circumstances, or if nothing is stated or indicated, a treaty will be deemed to come into force on signature, to be binding on the signatory States *ipso facto*, to be open to participation by them alone (unless at any time they agree to admit another State or States), and to continue in force until terminated by the mutual consent of all the parties. In the same circumstances, all other questions of form or procedure will be deemed to be matters for regulation by means of *ad hoc* arrangements to be made between the signatory States, by mutual agreement.

6. In those cases where a treaty provides expressly that it shall remain open for signature, or provides for ratification, accession, acceptance, coming into force, termination or denunciation, or any other matter affecting the operation of the treaty, it must if possible indicate the methods by which, and the government or authority through whom, these processes are to be carried out and the requisite communications to the interested States are to be made. In the absence of any such indication, however, it will be for each interested State itself to carry out the necessary operations, and to furnish and request the necessary communications and information.

Article 17. Legal consequences of drawing up the text

1. Participation in a negotiation, even where decisions have been taken by unanimity, does not involve any

obligation to accept the text as finally agreed, or to perform or refrain from performing any act in relation to the subject matter of the text.

2. In principle, such participation equally confers no rights, other than a right to sign, if signature takes place. But, particularly where a treaty remains open for signature until a later date, or is open to accession, participation in the negotiation may confer certain ancillary or inchoate rights—e.g., a right to be consulted about any proposed reservations.

Article 18. Establishment and authentication of the text

1. The final establishment of the text of a treaty *ne varietur* and its authentication is effected in one of the following ways:

(*a*) The signature or initialling of the text on behalf of the States which have taken part in its negotiation—such signature or initialling being carried out (subject to the provisions of articles 21 to 23 hereof) by persons duly authorized to that effect;

(*b*) Incorporation in the Final Act of the conference at which the text was negotiated;

(*c*) Incorporation in a resolution of an organ of an international organization, in accordance with the constitutional practice of that organization;

(*d*) Such other formal means as may be prescribed in the text itself, or specially agreed upon by the negotiating States.

2. Sealing is not a necessary element of authentication or formal validity, even in those cases where a formula reciting the affixation of seals is employed.

Article 19. Legal effects of establishment and authentication

1. The establishment and authentication of the text of a treaty, in accordance with article 18, confer formal validity on it as a text, unless any flaw in the procedure adopted can be shown, and are a necessary condition of any further steps in connexion with it, and of its entry into force, whether immediate or eventual.

2. The text, once established, is final, and cannot subsequently be varied prior to entry into force, except by the same means as were employed for drawing it up; and after entry into force, only by such means as the treaty itself prescribes, or by the mutual consent of all the parties.

Article 20. Signature and initialling (status)

1. The text of a treaty may be signed or initialled. If signed, the signature may be outright (full signature) or *ad referendum* to the government concerned, by the addition of those words, or an equivalent formula, to the signature.

2. Signature *ad referendum* and initialling—except as provided in article 21, paragraph 1—have in general the same effect. They are acts of authentication, not of consent, though both may imply personal approval of the treaty on the part of the individual person signing or initialling.

3. Full signature, on the other hand, has a double status. It is both an act of authentication of the text, and an act implying consent to the text as such, though not necessarily agreement to be bound by it. It may have a third aspect in those cases where it operates also as an agreement to be bound, and *pro tanto* brings the treaty into force.

Article 21. Initialling and signature ad referendum *as acts of authentication of the text*

1. Initialling is only equivalent to signature when carried out by persons whose status and functions will cause it to have that effect, such as Heads of States, Prime Ministers or Foreign Ministers, and provided the circumstances do not indicate a contrary intention.

2. In all other cases, initialling is equivalent to a signature *ad referendum* and is itself, *ipso facto, ad referendum,* whether stated so to be or not. In such cases the use of initialling is only justified in the following circumstances:

(*a*) Where the representative is acting on his own initiative in the negotiation and without specific authority from his government;

(*b*) Where the arrival of an authority to sign has been delayed or impeded by difficulties in transmission;

(*c*) Where the government concerned, although ready to participate in the establishment of a text, is not willing to be committed to the extent of a full signature.

3. Signature *ad referendum* is equally to be confined to the three cases (*a*), (*b*) and (*c*) specified in the preceding paragraph.

4. In the cases indicated in paragraphs 2 and 3 above, initialling and signature *ad referendum* have effect only as acts authenticating the text. They may sometimes imply a personal recommendation of the treaty by the representative concerned to his government, but do not amount to a signature on behalf of that government, and will require to be completed, either by a full signature, subsequently affixed, or by a formal intimation by the government that these acts are to be considered as a signature.

Article 22. Authority to sign

1. Except where made *ad referendum, signature,* which is the act of the State, can only be effected (*a*) under a full-power issued to the representative concerned, either specially for the particular occasion, or generally by virtue of his office as Ambassador, Minister of Foreign Affairs or otherwise; (*b*) by a person having inherent capacity to bind the State by virtue of his position or office as Head of State, Prime Minister or Minister of Foreign Affairs.

2. Authority to sign may be give to the representative who conducted the negotation of the treaty, or to some other representative specially empowered to that effect, but authority to negotiate is not equivalent to authority to sign, and must, for the latter purpose, be completed or supplemented.

3. Full-powers must be communicated or exhibited, and must be verified by such means as are convenient. They must be in appropriate form, which may be Heads

of State or governmental, according to the nature of the occasion. In cases where transmission of full-powers is delayed, a telegraphic authority, or a letter from the head of the diplomatic mission of the country concerned in the country of negotiation, may be accepted, subject to eventual production of the full-powers.

4. Except in the case of exchanges of notes or letters, or of agreed minutes, or memoranda, or other cases where authority is implied by the act of signature, or is inherent in the office of the person signing, the treaty must contain a statement or recital to the effect that the representatives of the signatory States have authority to sign it, or some other indication (such as the use of the term "Plenipotentiaries") that such authority exists.

Article 23. Subsequent validation of unauthorized acts

The provisions of article 15 to 22 above are, wherever this is relevant, to be read subject to the understanding that the unauthorized acts of an agent are always open to validation on the part of his government, by means of a specific confirmation, or by conduct manifesting an unmistakable intention to adopt them as its own.

Article 24. States which have a right to sign

1. Every State participating in the negotiation of a treaty has the right to sign it, in all cases where signature is the method of authentication adopted.

2. The right of signature is, in principle, confined to the States participating in the negotiation, but other States may be admitted to sign the treaty if it so provides, or if this is agreed to by all the original signatory or (where the treaty remains open for signature) negotiating States.

Article 25. Time and place of signature

1. If the text of the treaty does not otherwise provide, signature takes place on the occasion of the conclusion of the negotiation, or of the meeting or conference at which the text has been drawn up. The treaty may, however, provide for signature on a subsequent occasion, or that it remain open for signature at some specified place, either indefinitely or until a certain date.

2. Unless the treaty provides otherwise, as indicated in paragraph 1 above, signature, as such, can only take place on the occasion of the negotiation, meeting or conference concerned, or on such subsequent occasion (if any) as may be specified. No further signature may thereafter be affixed, except by special agreement of the signatory States to admit it.

C. Conclusion of and participation in the treaty

Article 26. Conclusion of the treaty

1. The conclusion of a treaty—which is not the same thing as bringing it into force, though the same act may do both—is the process of giving active assent to the next of the treaty as the basis of an agreement, but not necessarily a consent then and there to be bound by it.

2. Conclusion is usually effected by signature (provided it is full signature), but other acts may have a concluding aspect as provided in article 28 below.

Article 27. Methods of participation in a treaty

1. States take part in a treaty by an act of participation. Depending on the terms of the treaty, they may do so in the following ways:

(*a*) By simple signature, provided that it is full signature, or that, if given *ad referendum* or in the form of initialling, it has subsequently been converted into a full signature by confirmation; and provided it is not subject to ratification or acceptance;

(*b*) By signature as in sub-paragraph (*a*), followed by ratification or acceptance;

(*c*) By acceptance alone;

(*d*) By accession.

2. The circumstances in which any of these acts binds the State, and their legal consequences, are specified in the remaining provisions of this section.

Article 28. Concluding and operative effect of acts of participation

1. The same act may be concluding or operative, or both. It is concluding when it gives consent to the text, without giving the States final agreement to be bound by it. It is operative when it gives the latter. It will be both when, giving the latter, it has not been preceded by any concluding act.

2. Thus, signature subject to ratification or acceptance is concluding but not operative; signature not so subject is both concluding and operative, and is not therefore, in those circumstances, strictly an act of participation; ratification is operative but not concluding, because preceded by conclusion in the form of a signature; acceptance preceded by signature is in the same position as ratification, and finally, accession, and acceptance not preceded by signature, are acts simultaneously concluding and operative, or else are operative, in respect of a treaty already concluded *aliunde*.

Article 29. Legal effects of signature considered as an operative act

1. Signature brings the treaty into force:

(*a*) In those cases where the treaty itself specifically so provides;

(*b*) Where, although it is not specifically so provided, the form of the treaty or the attendant circumstances indicates an intention to bring the treaty into force on signature.

2. In general, the absence of any specific provision for, or failure to indicate any other method of, coming into force will create a presumption that the treaty is intended to come into force on signature.

3. In those cases where the representative of a State in only empowered to sign subject to ratification, and provided the conditions specified in article 32, paragraph 4, are complied with, his signature cannot bring the treaty into force for that State. However, such a limitation cannot of itself prevent the treaty coming into force for the other signatory States, except in those cases where it is a condition of the operation of the

treaty that all the signatory States shall be bound on signature.

Article 30. Legal effects of signature considered as a concluding act only

1. In those cases where signature does not *per se* bring the treaty into force, it has no directly operative effect, and is only concluding. In that case, it does not bind the signatory States, and does not involve for them any obligation either to ratify or finally accept the treaty, or to act in accordance with its provisions. However, the signature:

(*a*) Will constitute the necessary basis for any subsequent ratification or acceptance, and will involve an obligation to comply with the provisions of the treaty concerning the modalities of ratification, acceptance, and other procedural matters;

(*b*) May, in appropriate circumstances, imply that, subject to subsequent consideration, the government of the signatory State will, in the absence of any change in conditions or other unforeseen event, be willing to proceed to ratification or acceptance in due course, or to seek it from, or recommend it to, the competent constitutional organ;

(*c*) May involve an obligation for the government of the signatory State, pending a final decision about ratification, or during a reasonable period, not to take any action calculated to impair or prejudice the objects of the treaty.

2. Signature not bringing the treaty into force equally confers no substantive rights under the treaty on the signatory States. But it entitles them to certain rights inherent in the status of signatory, such as—depending on the circumstances, and the terms of the treaty—a right to object to reservations, a right to object to the admission of additional signatories, and a right to insist on the due observance of the provisions of the treaty respecting ratification, the class of States admitted to accede to it, and other procedural matters.

Article 31. Ratification (legal character and modalities)

1. Ratification is a confirmation of a consent to a treaty already provisionally given by signature, and signifies a final intention to be bound by it. It therefore implies a previous signature given on behalf of the ratifying State, being either full and unqualified or, if *ad referendum*, having been duly confirmed. Without signature, ratification, as such, cannot take place.

2. Ratification in the international sense, and for treaty purposes, consists in the communication, exchange or depositing, by the competent executive authority of the State, of a formal instrument embodying and conveying the ratification of the State on the international plane. Domestic processes of ratification, or other domestic steps leading up to it, are not themselves a ratification of the treaty, and require to be completed by the drawing up and transmission by the executive authority, of a formal international instrument.

3. Ratification must be unconditional. Its operative effect cannot, for instance, be made dependent on the receipt or deposit or ratifications by other States. Any condition purported to be attached to a ratification is equivalent to a reservation, and its validity and effect will be governed by the same considerations as are applicable to a reservation made on ratification.

4. Ratification, being a confirmation of a signature already given, must relate to what the signature relates to, and must therefore relate to the treaty in its entirety, and as such, and not merely to a part of it, unless the treaty itself provides that States may elect to become bound by a certain part or parts only.

5. Ratification once made cannot, as such, be withdrawn.

6. Ratification may, exceptionally, be effected by conduct, that is to say by executing the treaty; and a State which proceeds to execute a treaty it has signed will be deemed to have given its ratification.

Article 32. Ratification (circumstances in which necessary)

1. Ratification, on the international plane, is, in principle, discretionary, and its exercise is facultative. Subject to article 42, paragraph 5, no State, can be obliged to ratify a treaty, and its signature can imply no undertaking to do so, even in those cases where the treaty appears to make ratification mandatory, or where the full-powers of a representative to sign contain a form of words implying a promise of eventual ratification.

2. Treaties are subject to ratification in all those cases where they so specify; otherwise, in general, they are not. There is no principle or rule of law according to which treaties are tacitly to be assumed to be subject to ratification, whether this is provided for or not.

3. Since a treaty necessarily takes effect on signature if the contrary is not provided for, or clearly to be inferred from the circumstances, it is for the prospective signatory States to insert a provision for ratification if they require one—whether on account of the character of the substantive contents of the treaty, or because they are precluded by the requirements of their domestic laws or constitutions from final participation except on a basis of ratification.

4. However, in those cases where the authority of a representative is limited to signing subject to ratification, or is made subject to a condition that his signature will not constitute a final acceptance by the State, and provided the existence of this limitation or condition has been communicated to the other prospective signatories by the exhibition of the representative's full-powers, or by other formal means, the treaty will not come into force for that State on signature. The same will apply if the signature itself is given expressly subject ratification or further acceptance. The treaty will nevertheless so come into force for the other signatory States, unless they decide to the contrary, or unless it is a condition of the operation of the treaty that all the signatory States shall be or become bound. If, in the circumstances contemplated, the signature of the representative having a limited or conditional authority is nevertheless affixed with the agreement, express or tacit, of the other signatories, this will imply a faculty for the State concerned

to deposit a subsequent ratification, and the acceptance of that State as a party if it does.

5. An unconditional signature given on behalf of a State to a treaty that comes into force on signature, binds that State.

Article 33. Ratification (legal effects)

1. Ratification which, once given, cannot, as such, be withdrawn, has the effect of making the ratifying State a presumptive party to the treaty, if the latter is not yet in force, and an actual party if it is, or as soon as it comes into force. By its ratification, the State assumes an obligation to carry out the provisions of the treaty, and acquires a right to the benefits of the treaty, and to its observance by the other parties, if the treaty is in force or comes into force subsequently.

2. In the case of ratifications given prior to coming into force, the ratifying State, while bound by the treaty *in posse*, is not yet under any duty to carry it out, nor, correspondingly, can it claim the benefits of the treaty, or the observance of it by other ratifying States. In such circumstances the ratifying State is, however, under a general duty of good faith, pending the coming into force of the treaty—and provided this is not unreasonably long delayed—to take no action calculated to impede its eventual performance, or to frustrate its objects.

3. A ratification given prior to the coming into force of the treaty constitutes a final but suspensive acceptance of the treaty. Therefore, if and when the coming into force of the treaty eventually takes place, the ratification will operate *ispo facto* and automatically to bind the ratifying State at and from that moment, without the necessity of any further action or assent on its part. Correspondingly, the ratification will operate at and from that moment to entitle the ratifying State to the benefits of the treaty, and to require its observance by the other parties. A ratification given on, or subsequent to, the coming into force of the treaty, or which itself brings the treaty into force, has these effects from the moment of its communication or deposit.

4. Unless otherwise provided in the treaty, ratification, while confirming the signature, has no retroactive effect as an operative act.

Article 34. Accession (legal character and modalities)

1. Treaties may be closed or open—i.e., limited to the signatory, or signatory and ratifying States, as the case may be, or open to participation by other States, by means of an accession.

2. Participation in a treaty by accession is not an inherent right. It can only take place where the treaty so provides, unless (*a*) provision for participation by accession is specially made by a separate instrument in cases where, signature of the treaty has been entirely dispensed with—as for instance those contemplated by paragraph 5 below; or (*b*) exceptionally, if a treaty being in force, the parties, after consultation with any States still entitled to become parties by ratification, decide to permit accession by a State which, by reason of not having signed the treaty, or because of any limitation in the treaty itself (e.g., the expiry of a time limit), cannot otherwise become a party.

3. The treaty may limit the right of accession to certain specified States, or to a certain class of State, or it may impose a time limit after which no further accessions can take place. In such cases, subject to the provisions of paragraph 2 above, a purported accession not in accordance with the conditions specified, will be invalid and irreceivable.

4. In contrast with ratification, which implies a pre-existent signature, accession is only open to States which did not originally sign the treaty, and cannot subsequently do so because the treaty was not left open for signature. A signatory State gives it final acceptance of a treaty by ratification; and a non-signatory State, to whom signature is still open, proceeds equally by way of signature, followed, where necessary, by ratification. Accession is permissible only where these procedures are not open to the State concerned.

5. In some cases a treaty may be neither signed, nor open to signature—for instance, if its text, after being drawn up, was embodied in the Final Act of a conference, or in a resolution of an international organization, without any provision being made for its signature as a separate instrument; or where the States concerned have otherwise intended to dispense with signature. In these cases, accession, or its equivalent, constitutes the only method of participation in the treaty.

6. Accession, which is essentially an acceptance of a contract already entered into, and not a participation in the framing of the contract, implies an operative instrument to accede to. It can therefore, properly speaking, only be made to a treaty already in force, and is a method of participation that comes into play after the entry into force of the treaty. Exceptionally, however, a treaty may provide that accession can take place prior to entry into force, on the part of non-signatory States to whom signature is not open; or where signature has been dispensed with entirely, as in the cases contemplated in paragraph 5 above.

7. Accession is carried out by the transmission or deposit of a formal instrument of accession emanating from the executive authority of the State. In so far as any question of prior authorization by the competent domestic organs of the State arises, the provisions of article 31, paragraph 2, concerning ratification, apply *mutatis mutandis*, to accession.

8. The provisions of article 31, paragraphs 3 to 5, apply equally, *mutatis mutandis*, to accessions.

Article 35. Accession (legal effects)

1. Accession implies in itself a final acceptance of the treaty. It may not be made subject to ratification or other form of confirmation.

2. The legal effect of accession is the same in all respects as that of ratification and there is, in principle, no difference of any kind as regards the status, rights or obligations of States participating by way of accession, as compared with those of States participating by way of signature followed by ratification. The treaty may, how-

ever, reserve certain rights to signatory or signatory and ratifying States, such as the right to effect modifications in the text.

3. The provisions of article 33 apply *mutatis mutandis* to accessions according to whether these are effected before or after the coming into force of the treaty.

Article 36. Acceptance (character, modalities, and legal effects)

1. Acceptance is a method of participation that may be employed when specially provided for by the treaty. A treaty may, in addition to providing for participation by signature alone, without reservation as to acceptance, provide for participation by (*a*) signature with reservation as to acceptance, followed by acceptance; or (*b*) acceptance alone. In the first case the acceptance is equivalent to a ratification, and is governed by the same rules, *mutatis mutandis*, as apply to ratification; and in the second it is equivalent to an accession, and is governed by the same rules, *mutatis mutandis*, as apply to accession, except that the provisions of the first sentence of article 34, paragraph 6, will normally be inapplicable to the procedure by way of acceptance.

2. Acceptance is effected by the transmission or deposit of a formal instrument of acceptance, emanating from the executive authority of the State. The provisions of article 31, paragraph 2, are applicable to all acceptances.

3. Acceptance is a final act, and cannot be made subject to any further confirmation.

4. The legal consequences of acceptance are the same as for ratification and accession, and the provisions of articles 33 and 35, paragraph 2, are applicable to acceptance, in the same way as to ratification and accessions, as the case may be.

Article 37. Reservations (fundamental rule)

1. Only those reservations which involve a derogation of some kind from the substantive provisions of the treaty concerned are properly to be regarded as such, and the term reservation herein is to be understood as limited in that sense.

2. Reservations must be formally framed and proposed in writing, or recorded in some form in the minutes of a meeting or conference; must be brought to the knowledge of the other interested States; and, subject to articles 38 and 39 below, must be assented to expressly or tacitly by all those States.

3. In those cases where the treaty itself permits certain specific reservations, or a class of reservations, to be made, there is a presumption that any other reservations are excluded and cannot be accepted.

4. In no case can a reservation be made or admitted to any article of a treaty providing for the settlement of differences or disputes concerning the interpretation or application of that treaty, by means of a reference to the International Court of Justice or other international tribunal, to arbitration, conciliation, or by other specified means.

Article 38. Reservations to bilateral treaties and other treaties with limited participation

In the case of bilateral treaties, or plurilateral treaties made between a limited number of States for purposes specially interesting those States, no reservations may be made, unless the treaty in terms so permits, or all the other negotiating States expressly so agree.

Article 39. Reservation to multilateral treaties

1. In the case of general multilateral treaties, a State may, subject to paragraphs 3 and 4 of article 37 above, make a reservation, when signing, ratifying, accepting or acceding to it:

(*a*) If the treaty expressly permits reservations to be made, either generally, or as regards a particular article or articles, or class of provision, and the reservation concerned falls within the terms of the treaty;

(*b*) Provided there is nothing to the contrary in the treaty:

(i) If the intention to make a particular reservation or reservations has been specially mentioned during the negotiation and drawing up of the treaty, and has not met with any objection (i.e., has been acquiesced in, expressly or tacitly);

(ii) If the reservation has subsequently been circulated to all the States which have taken part in the negotiation and drawing up of the treaty or which, by giving their signature, ratification, accession or acceptance, have manifested their interest in it, and the reservation has similarly not met with objection; provided that if the treaty has been in force for not less than five years, the reservation need only be circulated to and be met with absence of objection on the part of the States actually parties to the treaty at the date of circulation, so long as these number not less than twenty per cent of the States originally entitled to become parties.

2. For the purpose of these provisions, tacit acquiescence includes acquiescence *sub silentio*, and may be assumed if no objection is evinced prior to the signature of the treaty or, in the case of reservations proposed later, within three months of the date of their circulation.

3. If a reservation meets with objection, and if the objection is maintained nothwithstanding any explanations or assurances given by the reserving State, the latter cannot become, or rank as, a party to the treaty unless the reservation is withdrawn.

4. Unless and until a reservation has been circulated, and is ascertained to have met with no final objection, and thus to have been accepted, the reserving State cannot be taken into account in any computation of the number of the parties to the treaty for example, if the treaty is to come into force on being ratified by a certain number of States, or for the purpose of determining the number of States parties to the treaty under the proviso to paragraph 1 (*b*) (ii) above.

Article 40. Reservations (legal effects if admitted)

1. If a reservation is admitted in accordance with the preceding articles, its effect is:

(*a*) To permit the reserving State to derogate from the provisions of the treaty to the extent, or in the manner, indicated in the reservation, but no more—the terms of the reservation being construed strictly for this purpose;

(*b*) To permit a similar derogation on the part of the other parties to the treaty in their relations with the reserving State, which cannot claim from them a greater degree of compliance with the treaty than it undertakes itself.

2. A reservation admitted for one party to a treaty, only affects relations between the reserving State and each of the other parties, and has no effect on the relations of the other parties *inter se*.

3. A reservation, though admitted, may be withdrawn by formal notice at any time. If this occurs, the previously reserving State becomes automatically bound to comply fully with the provision of the treaty to which the reservation related, and is equally entitled to claim compliance with that provision by the other parties.

Article 41. Entry into force (modalities)

1. A treaty enters into force on such date, or in such events, or in such manner as it may specifically provide, so long as at least two States are bound by it. In the absence of any, or of any other, provision on the subject, the treaty must be taken to enter into force on signature.

2. In those cases where a treaty provides for ratification, but makes no express provision for coming into force, it will be deemed to come into force on the date of the exchange of ratifications, or of the deposit of the last of the ratifications required.

3 In those cases where a treaty provides for ratification by a certain date, but makes no provision for coming into force, it will come into force on that date, if all the necessary ratifications have been effected. If not, it will come into force on that date for the States which have then ratified it, provided these number not less than two-thirds of those entitled to do so, or so soon as that number is reached, unless, in this situation, the signatory States otherwise specially argee, or unless it is clear from the nature of the treaty that ratification by all the signatories is necessary, in which case coming into force will be deferred until the deposit of the last such ratification.

4. For any particular State, a treaty can only enter into force (become binding) on the date when both the treaty itself is in force, according to its terms, and according to the preceding paragraphs, and also that State has signified its final intention to be bound by the treaty, by giving its signature, ratification, accession or acceptance, whichever is applicable in the particular case.

5. A treaty may come into force whatever its terms, if the signatories proceed to execute its terms, if the signatories proceed to execute it, or, *pro tanto*, if it is put into application between a limited number of them.

Article 42. Entry into force (legal effects)

1. Entry into force is definitive, unless it is provided that the treaty shall cease to be in force on the non-occurrence of some event considered to be essential to its operation. A treaty may, however, provide that it shall come into force provisionally on a certain date, or upon the happening of a certain event, such as the deposit of a specified number of ratifications. In such cases an obligation to execute the treaty on a provisional basis will arise, but, subject to any special agreement to the contrary, will come to an end if final entry into force is unreasonably delayed or clearly ceases to be probable.

2. On entry into force, the treaty automatically binds all the States that have signed it (if entry into force takes place on signature) or that have, up to that date, ratified, accepted or acceded to it, as well as all States subsequently ratifying, accepting or acceding.

3. Up to the date of its entry into force, a treaty does not create any rights, obligations, or relationships for any State, though such States as have already ratified, accepted or acceded to it, may become subject to certain obligations of good faith, as stated in articles 33, paragraph 2, 35 and 36 above, deriving from their ratification, acceptance or accession.

4. Nevertheless, prior to its entry into force, a treaty has an operative effect, arising from the establishment of its text and its signature, so far as concerns those of its provisions that regulate the processes of ratification, acceptance and similar matters, and the date or manner of entry into force itself, these being matters precedent to such entry into force—unless, in any particular case, provision for regulating them is made under a separate instrument, taking immediate effect.

5. In those cases where a treaty purports to oblige the signatories to ratify by a certain date, or to impose on one or more specified States an obligation to ratify, but at the same time provides for its entry into force independently and irrespective of any such ratifications, it must be assumed that the signature of the treaty creates in itself an obligation for the signatory States, or for the States specially mentioned, to conform to these requirements. Failure to do so on their part will not prevent the treaty coming into force according to its terms, but will involve them in a breach of the treaty.

6. Entry into force can never be retroactive, either generally or for any particular State, in the absence of express provision to the contrary.

II. COMMENTARY ON THE ARTICLES

[*Note.* The texts of the articles are not repeated in the commentary, but can easily be found by reference to the table of contents at the beginning of the report.]

General observation. In writing this commentary familiarity on the part of the reader with the reports of Professor Brierly and Sir Hersch Lauterpacht [3] has been assumed, as also with the basic principles of treaty law, and only those points calling specially for remark in connexion with the articles now proposed have been commented on.

[3] Professor J. L. Brierly prepared three reports: documents A/CN.4/23 of 14 April 1950, A/CN.4/43 of 10 April 1951, and A/CN.4/54 of 10 April 1952. Sir Hersch Lauterpacht prepared two reports: documents A/CN.4/63 of 24 March 1953 and A/CN.4/87 of 8 July 1954.

Introduction: scope and general principles

A. Scope and related definitions

Article 1. Scope

1. This article is intended to make it clear that the draft Code relates to all forms of international agreements, provided they are in writing. A valid international agreement not in writing is of course possible, though today rare. But it is not a treaty.[4] On the other hand, there is no reason for confining the present Code to treaties *eo nomine*, or even to instruments that clearly are treaties though not so called—such as conventions. The designation is irrelevant. Equally, the Code should cover not only agreements that take the form of a single instrument—whatever its form or style—but also those that are made up of several instruments, such as exchanges of notes, letters or memoranda. This form of "treaty-making" is being increasingly utilized. Whether it is always appropriate to deal with both the single and the multi-instrument type by means of one and the same provision of a code is a question that has already been raised in the introduction to the present report (paragraph 10). The former type is, generally speaking (not invariably), negotiated and signed mediately, and comes into force by a *deferred* process of ratification or its equivalent. The latter type is the direct act of principal agents (Ministers, Ambassadors), signed as such, and having *immediate* effect, on signature. However, it is also possible for single instruments to be negotiated and signed directly by Heads of States, Prime Ministers or Foreign Ministers, and to come into force on signature.

2. *Paragraph 3* has been placed in square brackets, the decision to include treaties entered into by international organizations being provisional.

Article 2. Definition of "Treaty"

3. "... made between ... subjects of international law possessed of international personality and treaty-making capacity ..." (paragraph 1). This formula, it is believed, includes States, and the types of international organizations that would be covered by the judgement of the International Court in the case of injuries suffered in the service of the United Nations;[5] but it would exclude individuals (even if these were to be regarded as subjects of international law), and all entities, private or public (including perhaps certain kinds of States[6]) that do not possess treaty-making capacity, and it may thus resolve some of the difficulties referred to by Sir Hersch Lauterpacht.[7] Since the Commission, has not excluded the idea of covering treaty-making by international organizations in the present Code,[8] this general formula may be acceptable.

4. "... made between entities *both or all of which are* subjects of international law ..." (paragraph 1). An agreement between a State and a foreign individual or corporation, for instance, is not a treaty or international agreement, though it might in certain circumstances be governed, or might in part—or as to certain aspects—be governed by international law.

5. "... entities ...". Where Heads of State make a treaty, they do so not in their capacity as persons but as agents of the State, which is the entity involved.

6. "... intended to ... establish relationships ..." (paragraph 1). This phrase included by Brierly, but dropped by Lauterpacht,[9] is re-introduced here because it seems difficult to refuse the designation of treaty to an instrument—such as for instance a treaty of peace and amity, or of alliance—even if it only establishes a bare relationship, and leaves the consequences to rest on the basis of an implication as to the rights and obligations involved, without these being expressed in any definite articles.

7. "... governed by international law" (paragraph 1). The present Rapporteur, while agreeing with much that is contained in the first report of Lauterpacht,[10] feels that while it may be possible to have certain agreements between States that are not governed by international law,[11] it is not possible to have, or admit of, a case of a *treaty* (even using that term in its widest sense) that would not be so governed. Hence, this should be explicitly stated. Not all international agreements are governed by international law, but, if they are not, or to the extent that they are not, they are not treaties within the meaning of the present Code.

8. *Paragraph 3.* It is obvious that a treaty must have at least two *parties*. A "treaty" within the meaning of the present Code may, of course, be constituted by two or more *instruments*, each made or given by or on behalf of one of the parties only. But a purely unilateral instrument, neither referring to or connected with any other, can never amount to an international agreement, still less a treaty. It may be the cource of an international obligation[12] but the obligation cannot be a treaty obligation.

9. *Paragraph 4.* This is intended to ensure that the type of instrument considered under the domestic law of any State to be a "treaty" for the purposes of the functioning of its constitutional processes, shall not

---

[4] See A/CN.4/23 (first report by Brierly), paras. 21-24. Would an oral agreement recorded (*a*) with the knowledge and by the intention of both parties, (*b*) secretly by one of them only, on a disc or tape recorder, amount to an agreement in writing?

[5] *Reparation for injuries suffered in the service of the United Nations, Advisory Opinion: I.C.J. Reports 1949*, p. 174.

[6] This should be read in conjunction with the definition of "State" (article 3 (*a*)), and with article 14, paragraph 3, and the relevant commentary.

[7] See A/CN.4/63, comment on article 1.

[8] See A/CN.4/L.55, para. 6, and A/CN.4/SR.98, paras. 1 and 20.

[9] See A/CN.4/23 (first report by Brierly), paras. 25-30, and A/CN.4/63 (first report by Lauterpacht), comment on article 1.

[10] See A/CN.4/63, notes on article 1.

[11] Lauterpacht in his first report A/CN.4/63 is correct in saying that in the last resort all agreements between States are governed by international law. But in the intermediate sense, the agreement, or its incidents, may be governed by the domestic law of one of the parties — for instance, State A makes an agreement with State B for the purchase, for use as an Embassy, of property belonging to the public domain in State B. Furthermore such agreements although "international" may often be effected through an Ambassador or a national bank and take the form of what looks like an ordinary private law contract.

[12] This is arguable of course. Some would say that it cannot be so in the absence of at least a quasi-contractual element.

cease so to be *for those purposes* by reason of anything in the present Code—nor, equally, that it shall become so.

10. *Registration with the United Nations under Article 102 of the Charter.* It will be observed that the present Rapporteur has not adopted the suggestion made in Lauterpacht's second report[13], that registration with the United Nations should be a partial test of whether an instrument is in fact a treaty or international agreement. There are two reasons for this, one theoretical and the other practical. Under Article 102, it is only instru- an instrument is in fact a treaty or international agree- that are registrable. They must therefore have this character before the obligation to register can arise at all. Consequently, registration cannot itself *confer* this character on them, though it may be some evidence that they have it. Secondly, and from the practical standpoint, such a test would have its dangers. *Either* party to an instrument can register it unilaterally, and this constantly occurs. It would be inadmissible, however, that treaty status should be conferred on an instrument merely by the unilateral act of one of the States concerned, accepted by the Secretary-General of the United Nations, who may well regard himself as not competent to reject it.

Article 3. Certain related definitions

11. Apart from the references to international organizations, and a definition of the same—reserved in square brackets for reasons already indicated—this article is mainly concerned to define the term "State", in order to make it clear by implication that semi-sovereign or protected States can be parties to treaties (though in many cases only mediately), while at the same time bringing out the limitations on, and modalities of this position. Apart from international organizations, only States can be parties to treaties; and only those entities are States that are capable *as such* (and not merely as part of a larger entity) of being bound by a treaty. For this reason, a constituent State of a Federation can never be a State *internationally* or, as such, party to a treaty—for the treaty will bind the Federation, and will bind the constituent State not as such, but only as an (internationally) indistinguishable part of the Federation.[14] But an internationally self-contained State, even if it is a protected State, can be bound as such, even if only with the consent, general or specific, or through the medium, of the protecting State.[15]

12. "..entities recognized as being States on special grounds...": this would include the Vatican State.

B. CERTAIN FUNDAMENTAL PRINCIPLES OF TREATY LAW

Articles 4-9

13. *General comment.* It is for consideration whether these articles, which may in any case require further development, should figure here or later, i.e., mainly in the sections on operation and effect which will be the subject of a future report, and to which logically they strictly belong. Yet it may seem undesirable in an international code on treaty law to defer making even a bare statement of these important general principles, fundamental to the whole subject, until a comparatively late stage of the work. However, in view of the uncertainty as to their location, the comment here offered is of the briefest, and the articles are left to speak for themselves.

14. *Article 4, paragraph 2.* One aspect of the point here involved is considered again more particularly in connexion with the topic of ratification.

15. *Article 5, paragraph 2.* This is an obvious condition of the international workability of treaties. The remaining paragraphs are really applications of the same theme.

16. *Article 6.* The articles mentioned in blank will be in the second chapter of the Code, on operation and effect. For a commentary on the point of substance involved see the last paragraph of Lauterpacht's comment on article 1 in his first report (A/CN.4/63).

17. *Article 7.* Possibly redundant, or even slightly inconsistent, in view of the definition of a treaty as an instrument governed by international law (see comment on article 2, paragraph 1, in paragraph 7 above). But something of the kind seems desirable.

18. *Article 8.* This is an attempt, while recognizing the convenience for working purposes of dividing treaties into different categories and classes, to simplify consideration of them for legal purposes by denying the existence of any fundamental juridical distinction between these categories and classes, especially as the same treaty may belong to more than one of them, under different aspects.[16]

19. *Article 9.* It is important to know through what organ a State or an international organization must act on the international plane, in order that its actions may be effective *vis-à-vis* other States, and, so to speak, receivable by them. Domestic processes may be necessary, but only on the domestic plane, and they only produce their direct effects on that plane. They cannot of themselves operate on the international plane, unless embodied

[13] A/CN.4/87, comment on article 1.

[14] The present Rapporteur feels great difficulty in accepting the view suggested in Lauterpacht's first report (A/CN.4/63, comments on articles 1 and 10). It may be true that in certain cases component parts of a Federal State, such as Swiss Cantons, have, or appear to have, concluded treaties with neighbouring German States. But *in law* these are really cases where the component part has simply acted as the agent to bind the Federation as a whole, in respect of a particular part of its territory, since a component *part* of a State cannot itself be a State (internationally) or have —except as agent—treaty-making capacity. Incidentally, Lauterpacht is mistaken in saying that the Sultanate of Muscat and Oman is a British Protectorate. (A/CN.4/63, comment on article 1). It is a fully sovereign independent principality.

[15] The point is more fully dealt with in an article by the present Rapporteur in *The British Year Book of International Law* 1953, pp. 2-5.

[16] For the idea of this simplication, the Rapporteur is indebted to Professor Charles Rousseau (*op. cit.*, vol. I, pp. 133-7 and 156-8). But Professor Rousseau draws attention to the *formal* distinction—in some sense also a legal one—between what he designates for his purposes as "*traités*" *stricto sensu* and "*accords en forme simplifiée*" (e.g., exchange of notes). This is, in effect, the distinction made in paragraphs 1 and 2 of article 2 of the present Code.

in or completed by some executive act.[17] The consequences of this position are (see paragraph 3 of the article) that if States are bound to accept as internationally authentic the executive acts of another State, that State (having performed such acts) may not itself subsequently deny their international authenticity, and is bound by them. By " accept as authentic " is meant of course their status as *acts of the State*, not their legal validity under treaty or general international law. The same act may be both authentic and invalid.[18] But if it is not authentic, it is not the act of the State at all, and the question of its validity does not arise.

First chapter. The validity of treaties

General comment

20. This chapter will eventually cover all the requisites of validity, namely formal validity, conditions of essential or substantive validity, and duration (temporal validity), i.e., conditions of termination. The present report only covers the topic of formal validity.

INTRODUCTORY PART: DEFINITION AND CONDITIONS OF VALIDITY

Articles 10-12

21. These articles are intended to make clear the two essential points relative to validity in general, namely, that validity:

(*a*) Is a composite of three factors—form, substance and temporal existence;

(*b*) Has two aspects—the validity of the treaty in itself, and its validity for any particular State—which do not necessarily coincide.

Part I. Formal validity (framing and conclusion of treaties)

General comment

22. The remainder of the present report deals with this topic, on which it presents a complete set of articles. They are divided into two main sections: the negotiation, drawing up and establishment of the *text*; and the conclusion of, and participation in, the *treaty*. These are preceded by a section containing definitions of relevant technical terms, and a general provision.

A. General conditions of formal validity

Article 13. Definitions

23. The various definitions are for the most part self-explanatory and are not commented on at this point because such issues of substance as they may involve will recur later in connexion with particular articles. There is a *general* question, whether a definitions article, as such, is desirable at all, or whether it would not be preferable to define each term, so far as necessary, in the particular article in connexion with which it principally occurs. However, as many of these terms are liable to occur in different connexions, the Rapporteur has thought that, for the time being, they might be grouped in one article for purposes of definition.

Article 14. The treaty considered as text and as legal transaction

24. Formal validity has two constituents, the text and the formal acts giving the text the character of a legal transaction. Considered purely as a *text*, the treaty is a document, rather than a legal act or transaction. In all talk of treaties there is this ambiguity—a treaty is both the document embodying an agreement, and the agreement itself.[19]. In the former sense, there can be a treaty although it is not in force, or has ceased to be in force (i.e., although there is no subsisting agreement as a legal act). Nevertheless, it is essential to the validity of the ultimate agreement that the text should have been drawn up and established or authenticated by the correct means, and in the correct form; for if the text does not itself constitute in law the agreement, it is nevertheless the indispensable, and usually the sole, evidence of what that agreement is. The primary value of the *text* of a treaty, considered purely as such, is therefore evidential. Hence, it must be authentic evidence, and must for that purpose conform to certain requirements of form and method. This aspect is dealt with in section B. Section C deals with the ensuing process of converting the text into a legal transaction, by the initial act of conclusion (usually signature) [20] followed where necessary by final acts of participation, such as ratification, and by the entry into force of the treaty itself.

B. Negotiation, drawing up and establishment (authentication) of the text

Article 15. Drawing up of the text

25. "... through the diplomatic ... channel ..." (*Paragraph 1*). Not only can treaty engagements take the form of correspondence (exchanges of notes, letters etc.) but they can in effect be negotiated by correspondence. This can also occur with the negotiation of more formal instruments.[21] It is as well to record this fact in any

[17] Even in the case of the United States, ratification by the Senate is not *per se* operative on the international plane. The international *instrument* of ratification has still to be framed and transmitted by the President, and is his act, though it recites the Senatorial act.

[18] For instance, a denunciation of a treaty, effected by the executive authority of a State and regular so far as domestic constitutional considerations are concerned, but contrary to the terms of the treaty. Conversely, a denunciation in compliance with the treaty would be "valid", but would have no effect if it did not emanate from an authority competent to act for the State internationally, since it would not be (internationally) authentic, whatever its status domestically.

[19] See A/CN.4/23 (first report by Brierly), para. 30.

[20] The difficulties and ambiguities surrounding the notions of signature and conclusion are considered later—see paragraphs 47-52.

[21] So important an instrument as the Japanese Peace Treaty of 1951 was negotiated without any conference, by a mixed process of diplomatic interchanges and consultations. It was *concluded* by the signature ceremony at San Francisco.

Bilateral treaty engagements and even formal instruments of all kinds are constantly negotiated without any delegation from the one country attending at the capital of the other. The use of the local diplomatic mission, supplemented by one or two experts sent out *ad hoc*, is often all that is needed.

Code, as a corrective, since it seems often to be assumed as necessary that some sort of meeting or conference should have been held.

26. "Delegates... must be duly *authorized* to carry out the negotiation... but they need not be in possession of *full-powers to conclude* the treaty..." (*Paragraph 1*). Negotiation and conclusion are not the same thing. The same person may of course be authorized to do both. Or, one person having negotiated, another may be empowered to conclude, by signature or otherwise. But authority to negotiate does not *per se* include authority to sign. For negotiation, full-powers are not necessary. Any form of authority such as a letter, or an intimation to the local government through the diplomatic channel, giving the delegate's name will suffice. But for conclusion (for example, by signature) full-powers are necessary (*see*, comment *on* article 22).

27. *Paragraph 2.* It is necessary to have some fundamental rule to govern the process of the adoption of texts. This seems the only possible rule, in practice.

Article 16. Certain essentials of the text

28. *Paragraph 1.* It is necessary to make clear the absence *in general* of any juridical necessity for formal or special clauses, in order to cover the kind of case (for example, exchange of letters) where usually or often there are none.

29. *Paragraph 2.* However, a treaty must indicate the countries making it, though it may suffice if this can be inferred from the signatures affixed—as in a exchange of notes.[22]

30. *Paragraph 3.* Similarly, it is necessary that the quarter in which the international responsibility lies should be indicated in the case of treaties entered into mediately or through another State.

31. *Paragraphs 4, 5 and 6.* It is necessary to provide for those cases where either (*a*) the parties fail to make any, or adequate, provision for such matters as coming into force and termination, or (*b*) the form of the "treaty" is such (for example, an exchange of letters) that it will probably not do so. The problem is masked by the fact that most formal instruments do make provision for these things. But the treaty cannot be regarded as invalid merely because they do not, if legitimate inferences of a legal character can be drawn; and it is believed that in the absence of any indication to the contrary, these inferences must be as stated in these paragraphs, which also provide for a number of procedural matters.

Article 17. Legal consequences of drawing up the text

32. No comment is required on this article, which is self-explanatory. But see paragraphs 59 and 80 below.

Article 18. Establishment and authentication of the text

33. The text of this article is the same (with slight verbal changes, and the addition of a second paragraph) as that adopted by the Commission at its third session.[23]

[22] In the case of exchanges of notes or letters, the letter paper heading will usually afford an additional indication.

[23] See A/CN.4/L.28 and A/CN.4/L.55.

Article 19. Legal effects of establishment and authentication

34. No comment is required, except as to the words "...confer formal validity on it *as a text*..." (*Paragraph 1*). They mark the fact that the treaty is still only a text at this stage, and has no validity as an agreement.

Article 20. Signature and initialling (status)

35. *Paragraphs 1 and 3.* With signature, or initialling, a further stage in the treaty-making process is reached. But signature, if it is full signature, has a double and sometimes a treble aspect, as stated in the text. In the present section, however, it is considered only as an act of authentication of the text.

36. *Paragraph 2.* Initialling, on the other hand, save exceptionally (as to which see article 21, paragraph 1), and signature *ad referendum*, can never in themselves be more than acts authenticating the text. They can never be acceptances of the text in any form, by or for the State concerned, unless subsequently confirmed or completed. These matters, which have been the subject of some misconception and confusion, are elaborated in the succeeding articles.

Article 21. Initialling and signature ad referendum *as acts of authentication of the text*

37. *Paragraph 1* states the cases in which initialling may constitute a signature.

38. *Paragraphs 2 and 3*, without being limitative, enumerate the cases to which, as a rule, initialling and signature *ad referendum ought* to be confined, if these are to be given a proper role. These are cases where signature would not be justified, but initialling (or signature *ad referendum*, which has broadly the same effect) would be appropriate.

39. *Paragraph 3* states the effect of initialling and signature *ad referendum*, and requires no comment.

Article 22. Authority to sign

40. *Paragraph 1.* No comment is necessary.

41. *Paragraph 2.* For comment, see paragraph 26 above on article 15. Negotiation may be regarded as in some sense the act of the individual negotiator, and so may initialling and signature *ad referendum*. But full signature is the act of the State.

42. *Paragraph 3.* The second sentence consecrates a practice that is very usual and has great convenience.

43. *Paragraph 4.* No comment is necessary.

Article 23. Subsequent validation of unauthorized acts

44. This is believed to be good law, and it is certainly convenient practice.

Article 24. States which have a right to sign

45. The right to sign a treaty is necessarily circumscribed. In the absence of special provision or agreement, no State can claim to be entitled to sign a treaty in the negotiation of which it did not participate.

Article 25. Time and place of signature

46. There must equally be limits in principle on the time within which, or occasion on which, signature may be affixed. In the absence of special provision or agreement, no State—even a negotiating State—can claim to sign after the date or occasion appointed for that purpose.

C. Conclusion of and participation in the treaty

General comment

47. This section assumes the existence of an established and duly authenticated text. But though *established* as a text, this text has not yet received any assent. It has been authenticated as accurate, that is all, though it may have been authenticated by an act, such as full signature, that also implies assent (having a double aspect—see article 20). It is now necessary that the treaty should be concluded and participated in, and brought into force, before it can pass from the status of text or document to that of agreement or legal transaction (see comment in paragraph 24 on article 14). Conclusion of the treaty and participation in it by any State may coincide, but they are juridically separate concepts and acts. A State that signs a treaty subject to ratification or final acceptance concludes, but does not yet participate in it.[24] A State that ratifies a treaty participates in it, having already concluded it by signature. A State that accedes to a treaty, or gives an acceptance not preceded by a signature, simultaneously concludes it (so far as that State is concerned) and also participates in it. Or it is perhaps more accurate to say, in this last case, that the treaty being already concluded independently of that State, it proceeds to participate in it.

48. Thus, while *authentication* is the act certifying, so to speak, that the text is the text that was drawn up during a certain negotiation or at a certain conference, *conclusion* is the act by which an active assent is given to this text, as being the one by which the State is willing to be bound if it eventually decides to become finally bound. This decision may itself coincide with the conclusion, as when signature also brings the treaty into force (for example, exchanges of notes). Failing that, conclusion gives assent to the text as the basis of the agreement, but it does not itself constitute agreement. Agreement (to be bound) follows with *participation*, which is always a final act so far as the State making it is concerned. By it, that State takes all the steps open to and necessary for it to become bound. But the State may not yet be actually bound, if the treaty itself is not yet in force. *Entry into force* is then necessary, and is the final stage in the series. It may coinside with the relevant acts of participation, as when two States bring a bilateral treaty into force by exchanging their ratifications of it; or it may be independent of any particular act of participation, as when a multilateral treaty comes into force on the happening of certain specified events, and not until then, even though a number of States have previously deposited ratifications.

49. The foregoing considerations will serve in particular as a general comment on articles 26 to 28.

[24] See A/CN.4/43 (second report by Brierly), comments on articles 1 and 4.

Article 26. Conclusion of the treaty

50. See general comment above. The term conclusion is ambiguous, and has always given rise to difficulties. When can a treaty be said to be "concluded"? When it is signed, for instance, or when it comes into force? If the former, there is the difficulty that the treaty may never actually come into force. Can a treaty that never comes into force be said to be concluded? On the other hand, there is no doubt that a treaty is always given the date of its signature (i.e., conclusion), never that of its entry into force unless that coincides with signature.

51. The solution lies in regarding conclusion as the process by which the States concerned definitely give their consent to the text, though not necessarily their agreement to be bound by it. It is more than authentication, which merely verifies that a certain instrument or document correctly embodies a certain text, but conveys no degree of substantive assent at all to that text. Conclusion involves a measure of substantive assent, though not final agreement. By it, States say not merely "This is the text we have established, and which we certify to be correct", but also "This is the text by which we are willing to be bound if we become bound at all."

52. Once it is understood that authentication, conclusion, participation and entry into force, are juridically separate concepts (see paragraph 48), no further difficulty arises, except from the confusion engendered by the fact that two or more of these acts may coincide. Thus signature, in those cases where the treaty comes into force on signature, accomplishes all four simultaneously. In other circumstances, two or three may coincide. Or all four may be separate, as when a treaty is first signed *ad referendum* or embodied in the Final Act of a conference (see article 18), then signed in full or confirmed, then ratified, and finally brought into force when so many ratifications have been deposited. But variable as practice may be, it is essential, juridically, to keep these concepts distinct, so as to be able to determine the status and exact legal effect of any given act.

Article 27. Methods of participation in a treaty

53. Participation by simple signature takes place in those cases (and only in those cases) where the treaty is not subject to ratification or, if the acceptance procedure is adopted (see article 36), where signature is given without reservation as to acceptance. As already noticed, the acts of participation specified in the present article 27 may or may not also be acts bringing the treaty into force, or coinciding with its entry into force. But they are all final so far as the State performing them is concerned.

Article 28. Concluding and operative effect of acts of participation

54. See comment in paragraphs 47 to 52 above. This article is largely formal, but its inclusion may be useful for purposes of clarification. An act purely concluding, such as signature subject to subsequent ratification or acceptance, is not of course an act of participation in the strict sense at all. Acts of participation proper pre-

suppose conclusion, or are themselves concluding as well as operative.

Article 29. Legal effects of signature considered as an operative act

55. *Paragraph 1.* The case here contemplated is where the treaty comes into force on signature, or at any rate where the signature is not subject to any ratification or further acceptance, so that it will suffice to bind the State if and when any other events on which coming into force depends have duly occurred. For the reasons given in Lauterpacht's first report [25] it is necessary to provide for this case. There is an almost inveterate tendency, particularly in the milieu of international organizations, to view all treaties as if they consisted exclusively of general multilateral and semi-law-making conventions, of the kind that are almost always subject to ratification. In actual fact, such conventions form a minority in comparison with the hundreds which, on the bilateral or semi-multilateral or purilateral [26] plane, come into force on signature (exchanges of notes, protocols, acts, declarations, memorandums of understanding, *modus vivendi*, etc.).[27]

56. *Paragraph 2.* As is also indicated in article 32, if the parties want ratification or other confirmatory act, it is open to them to provide for it. If they fail to do so, the presumption—particularly having regard to the considerations noticed in paragraph 55 above—must be that they did not intend it. In any case, there must be some basic rule to govern the case where a treaty is clearly intended to become operative (i.e., come into force), but fails specifically to indicate the method by which it is to do so.

57. *Paragraph 3.* Equally, it is always open to any particular State to safeguard its position by authorizing its representative to sign only subject to ratification, or by limiting his full powers in that way. In that case, his signature cannot bind that State, though the treaty may nevertheless come into force on signature for the other States.

Article 30. Legal effects of signature considered as a concluding act only

58. *Paragraph 1.* This deals with the case where signature only concludes the treaty, and does not operate as a final acceptance of it. But it may nevertheless have certain legal consequences even on that basis, and these are set out in sub-paragraphs (*a*) to (*c*). The point made in (*a*) will more conveniently be considered in connexion with article 42, paragraph 4. The reasons for points (*b*) and (*c*) are fully and very cogently set out in Lauterpacht's first report.[28] The present Rapporteur accepts that view, but considers it desirable to state the proposition in question in somewhat cautious and qualified terms.

59. *Paragraph 2.* Equally, while a merely "concluding" signature can confer no substantive rights under the treaty, it may confer certain rights in connexion with it. This matter is also referred to in Lauterpacht's first report.[29] Certainly signature confers a status, and with it the rights inherent in that status. The whole balance of a treaty is capable of being altered after its signature by the admission of reservations, or of other acceding parties, so that a signatory State may find that the treaty it has signed, and which it has the right to ratify, is, in effect, no longer the same treaty.

Article 31. Ratification (legal character and modalities)

60. *Paragraph 1.* The main point here is that ratification implies a previous signature (to be ratified).[30] Where there has been no signature there can be no ratification, though other means of participation may be available (e.g. accession), or there may still be time to affix a signature, if the treaty was left open for signature (see article 25).

61. *Paragraph 2.* It is necessary to insist—in order to avoid serious confusions—that on the *international* plane ratification is an executive act, and is effected by transmitting or depositing an *instrument* of ratification, drawn up by the executive authority. "Ratification" by the legislature is a purely domestic process. It is not always necessary. In some countries it is never necessary. Basically, a parliamentary "ratification" is no more than a vote, however recorded, approving the treaty and empowering the executive to proceed to *actual* ratification. Without this further act, there is, internationally, no ratification.

62. *Paragraph 3.* This paragraph is not intended to exclude reservations made on ratification where otherwise permissible (see articles 37 to 39). It is directed to a different type of condition. It has sometimes been suggested [31] that the operation of a ratification may be made dependent on another State or States also ratifying. This would be liable to cause considerable difficulties, for example, in those cases where entry into force of the treaty is made dependent on the deposit of a specified number of ratifications. Again, if by chance all the ratifying States made such a condition, none would have any operative effect. Ratification may be accompanied by a reservation as to some part of the *treaty*, but must in itself—as an act—be unconditional.

63. *Paragraph 4.* This is a necessary corollary of the fact that what is ratified is a signature to the text as a whole. But sometimes a treaty (for instance the London

[25] A/CN.4/63, comment and notes on article 5.

[26] It is equally constantly overlooked that not every multilateral treaty is a *general* multilateral treaty. Many such treaties are only plurilateral, involving three or four, or six or eight, or other limited number of States having some common interest or object affecting them only.

[27] See the very striking statistical data given in Lauterpacht's first and second reports (A/CN.4/63 and A/CN.4/87, comments on article 6), showing the greatly preponderating number of international agreements coming into force on signature or its equivalent, and the comparatively small number that are subject to ratification.

[28] A/CN.4/63, comment and notes on article 5.

[29] *Ibid.*, comment on article 5.

[30] As a matter of convenience, it is usually said that the treaty is ratified. Strictly, it is the signature given to the treaty that is ratified; or alternatively, ratification is a final confirmation of the provisional consent given by signature.

[31] That is, the present Rapporteur has heard it suggested.

Naval Treaty of 1930) permits States to subscribe to one part of it only, or to exclude certain parts.

64. *Paragraph 5.* For instance, if there is an interval between the deposit of the ratification and the coming into force of the treaty, the ratification cannot be withdrawn during that interval. The State concerned must await coming into force, and then take any steps open to it under the treaty to terminate its participation, or must obtain a special release by consent.

65. *Paragraph 6.* See also article 42, paragraph 5. This case is no doubt a comparatively rare one. But it can occur, especially when a State takes benefits under a treaty, or by its actions in regard to it causes other States to alter their positions, or affects those positions.

Article 32. Ratification (circumstances in which necessary)

66. *Paragraph 1.* This gives effect to the principle of the facultative character of ratification as an *international* act. No State can be obliged to assume treaty obligations. Therefore, even though it has signed a treaty, it cannot be obliged to ratify it. In Lauterpacht's first report cogent reasons are given for thinking that in many cases States may be under a strong moral obligation to ratify a treaty they have signed.[32] But this can never be a legal obligation, or ratification would lose its meaning. The reference to the case contemplated by article 42, paragraph 5, illustrates this, for in those cases the State concerned is really bound by its signature. The last few lines of the paragraph are intended to cover the fact that, for historical and traditional reasons, many common forms of full-powers imply, or seem to imply, a promise that ratification will be forthcoming in dus course.[33]

67. *Paragraphs 2 and 3.* These paragraphs deal with the important theoretical question (a question of perhaps much lesser practical importance, however, for the reasons given in Lauterpacht's reports [34]) of the *residuary rule* to be applied in those cases where the treaty is either silent on the subject of ratification, or fails to indicate positively that ratification is necessary. The controversy is an old one, but as the arguments are fully set out in Lauterpacht's reports [35], it is unnecessary to repeat them. The present Rapporteur holds to the view he expressed over twenty years ago,[36] that the residuary rule must be the one stated in the proposed text of paragraphs 2 and 3 of article 32. Writing in 1934,[36] the Rapporteur thought that despite the weight of text-book authority in favour of the view that ratification must be assumed to be necessary unless expressly dispensed with, this view no longer corresponded (even then) with modern practice, and he gave illustrations to that effect. This view is even less in accordance with practice today, as is clearly brought out by the data in Lauterpacht's reports. [37]

68. Such a view is in fact decisively refuted by the fact that States have never been content to rely on it—to rely on the existence of any basic rule in favour of the necessity for ratification—but on the contrary have always insisted on providing expressly for ratification in those cases where they wanted it; while on the other hand being quite content to rely on silence precisely in those cases where they did not want it. This latter fact is very striking. There hardly exists—if there exists at all—a treaty providing in terms that it shall *not* be subject to ratification, as might have been expected had there been any basic rule that, in the absence of provision to the contrary,[38] ratification was necessary. *Per contra*, there are innumerable cases of treaties providing expressly for ratification. It is true that where ratification is to take place there are mechanical reasons for making special mention of the fact, since it has to be specified how ratification is to be effected, where, at what time, etc. But this very fact (see paragraph 70 below) adds to the difficulty of presuming a necessity for ratification in cases of silence.[39]

69. The above considerations, coupled with those arising from the increasing use of instruments coming into force on signature, the decreasing proportion of treaties and conventions made subject to ratification,[40] the fact that any necessity for ratification is largely a domestic matter, and that States which require it can always insist on express provision being made for it, or on reserving to themselves a special right of ratification —all lead to the conclusion that the residuary rule must be to the effect that, in the absence of such provision, it must be assumed that ratification was not intended. Lauterpacht in his reports indeed reaches this conclusion, so far as what might be called the weight of practice goes, but refuses finally to concede it, on the ground that the inference from practice is not an absolutely inescapable one; that although " in an increasing number of cases Governments attach importance to treaties—however designated—entering into force without ratification ", it sill does not follow that they consider non-ratification to be " the presumptive rule to which, in the absence of provisions to the contrary, they must be deemed to have submitted themselves ".[41] To the present Rapporteur however, this inference seems to be a legitimate and necessary one, having regard to the fact that the parties are at perfect liberty to provide for ratification it they feel they require it, or to insist on a form

[32] A/CN.4/63, comment and notes on article 5.

[33] For a discussion of this see: Harvard Law School, *Research in International Law, III. Law of Treaties,* Supplement to *The American Journal of International Law,* Vol. 29 (1935), pp. 770 and 772-775.

[34] A/CN.4/63 and A/CN.4/87, comments on article 6.

[35] *Ibid.*, comments and notes on article 6.

[36] " Do Treaties Need Ratification ? " *The British Year Book of International Law,* 1934, especially pp. 122-9.

[37] A/CN.4/63 and A/CN.4/87, comments on article 6.

[38] Such provision no doubt results indirectly in many cases from, for example, a clause providing that the treaty is to come into force on signature. Yet is absence in any direct form is striking.

[39] Alternatively, it might be said that by their conduct countries have given up the protection of any general rule in favour of the necessity of ratification, if such existed, and have elected to rely on making express provision for it whenever they intend it; and this being so, they can no longer fall back on, or plead the existence of a general rule in those cases where they fail to make express provision for ratification.

[40] See A/CN.4/87 (Lauterpacht's second report), comment on article 6.

[41] *Ibid.*

of treaty in which it would be natural to insert a provision for ratification [42]; that they often do this, but still more often do not; and that, so far as can be ascertained, they never fail to do it in those cases where they really intend ratification. As Lauterpacht in his second report points out, if there were a rule presuming the necessity for ratification, the exceptions to it would have to be so wide as almost to do away with the rule.[43]

70. Furthermore, no other course would be practicable. If the treaty is silent about ratification, there will *ex hypothesi* be no provision for the exchange or deposit of ratifications, not will it be specified where, or with what authority, this is to be effected. Some States will ratify—others not. There will also *ex hypothesi* be no provision about coming into force.[44] Some States will consider that the treaty does not come into force until it has received the necessary ratifications (but which, and how many ?); others will regard it as operative from the date of signature. It must be assumed at the present day that Chancelleries and Foreign Ministries, all well versed in treaty law and practice, are aware of the inconveniences bound to result from such a position, and that if they make, and allow their representatives to sign, an international agreement not providing for ratification, this must be because they do not intend it.

71. In this connexion, it is worth remembering the changes effected by modern communications. At a time when a representative might be out of touch with his Government for prolonged periods, or unable to obtain final instructions before proceeding to signature, a fundamental rule presuming the necessity for ratification if no contrary indication was given, would be understandable and perhaps necessary.[45] It is so no longer.

72. *Paragraph 4.* This provides as before (see article 29 and paragraph 57 above) for the case where, whatever the treaty says, a signature is, as such, only given subject to ratification, or a representative's full powers are limited by a reservation as to ratification. Here, therefore, is another " escape clause " that Governments can always make use of if they want to, provided the correct procedure is observed—a fact further reinforcing the considerations set out in paragraphs 67 to 71 above.

73. *Paragraph 5.* This is merely consequential.

74. *Constitutional limitations.* The whole subject of the necessity for ratification is of course closely connected with that of constitutional or other domestic limitations on the treaty-making power. But that subject, though it most often arises with reference to the question of ratification, is not peculiar to it. It can just as well arise with reference to the question of the validity (under the domestic law or constitution) of an accession or acceptance. By some authorities [46] this is treated as a matter affecting the formal validity of the treaty, i.e., is the ratification or accession *operative*, or is it a nullity ? On this might depend the question whether the treaty comes into force. By other authorities (par example, the Harvard *Research in International Law*), the matter seems to be treated as one of substantive or essential validity, i.e., has a true consent been given ? The same view is taken in the first report of Lauterpacht where the matter is discussed under the heading of conditions of validity, and not under that of the making and conclusion of treaties.[47]

75. This is also the view taken by the present Rapporteur, despite the close connexion of the subject with the treaty-making process as such. His reason is as follows. *Internationally* an *instrument* of ratification drawn up in the prescribed form by the competent executive authority, and transmitted or deposited through the ordinary channels in an ostensibly regular manner, must be deemed to be valid—indeed is valid (as an instrument or act) internationally. Its invalidity—if it is invalid—is on the domestic plane. The issue therefore goes deeper. There is a valid (formal) act, just as there is when a contract is signed in error, or as a consequence of a misrepresentation. But is it the act of the State as a whole—or must it be deemed so to be, and if so, in what circumstances? These are questions partly of capacity, partly of the nature of consent, and involve issues of essential or substantive, rather than merely formal, validity. For the time being therefore, this question is left over for later consideration.

Article 33. Ratification (legal effects)

76. *Paragraphs 1-3.* These paragraphs are directed to making clear five points: (*a*) that ratification places the State in the position that it has finally accepted the treaty —a position from which it cannot now withdraw; (*b*) that it may nevertheless not be actually *bound* by the treaty, if the treaty itself is not yet in force; (*c*) that the moment the treaty does come into force, the State will *ipso facto* be bound, without further act or room for choice on its part; (*d*) that in the meantime it will be under certain obligations of good faith (see also article 30 and comment in paragraph 58 above); and finally (*e*) that should the treaty already be in force at the time of ratification, or come into force *by virtue of* that act, the obligation of the State is immediate.

---

[42] This is perhaps the heart of the problem. It would be natural to maintain that if Governments do not want ratification they should choose some form of agreement—such as an exchange of notes—that clearly does not call for it; but that if they choose full treaty form, they must be assumed to intend it. Yet it is precisely in the full treaty cases that express provision for ratification is almost always inserted. On the other hand, it frequently does not figure in those instruments where there might be room for genuine doubt, for example, something not a full treaty, but not an exchange of notes either.

[43] A/CN.4/87, comment on article 6.

[44] Because if coming into force on signature or on a specified date were indicated, this, by inference, would exclude the idea of ratification being necessary; while if the treaty provided for entry into force on or after ratification, this would, by inference, be a provision for ratification.

[45] It is this that probably accounts for the fact that the older authorities predicated the existence of a presumption in favour of ratification (see paragraph 67 and footnote 36 above). But the object was far less to protect the constitutional positions of States, than to insure that Governments were not committed to a text the final version of which they might never even have seen. This can seldom happen now.

[46] For instance Rousseau, *op. cit.*, pp. 235-248.

[47] A/CN.4/63.

77. *Paragraph 4.* Ratification confirms signature, but is not *operatively* retroactive. It constitutes an agreement to be bound by an assent provisionally given earlier. But it is only operative from its own date, not the earlier date.

Article 34. Accession (legal character and modalities)

78. *Paragraph 1* indicates that accession is *par excellence* the process employed to render participation possible on the part of States which took no part in the original negotiation or framing of the treaty. That is its real *raison d'être.* Another method, of course, is to leave the treaty open for signature, in which case later signatories will become parties by ratification, if the treaty is subject to ratification. But even where this is done, it is not usually convenient to leave the treaty open indefinitely for signature, so that at some point accession will become the only means by which a " new " State can participate.

79. *Paragraph 2.* Accession is not a right, except where it is provided for. States that took no part in the framing of a treaty, and which did not sign it, have no legal claim to be allowed to participate in it. A State cannot, *ex cathedra,* deposit a purported accession to any treaty it develops an interest in. A faculty to do so must exist under the treaty itself, or be granted by one of the methods indicated in paragraph 2 of this article.

80. "... after consultation with any States still entitled to become parties by ratification..." (paragraph 2). See article 30, paragraph 2, and paragraph 59 above. A signatory State which is entitled to ratify, and may at any time become party to the treaty by doing so, has at least a right to be consulted if it is proposed to enlarge the class or number of States entitled to participate in the treaty, or specifically to admit some particular State. Some would say that a signatory State should have a right of veto in such cases [48]—and probably this is the correct position as a matter of *lex lata.* However, this might enable a State which had little real intention of ratifying to block indefinitely a desirable accession, and, *de lege ferenda,* the rule proposed—i.e., a right of consultation—is probably adequate to safeguard the rights of signatories.

81. *Paragraph 3.* This is the corollary of the absence of any unfettered right to accede resulting from paragraph 2.

82. *Paragraphs 4 and 5.* These paragraphs are intended to mark the fact that, even where accession is provided for, it can only properly be resorted to by States to whom signature (followed, if necessary, by ratification) is not open as a means of participation, or where the treaty is not to be signed at all. It is incorrect and inadmissible for a State that has signed a treaty to " accede " to it. Such a State ratifies.

83. *Paragraph 6.* Strictly, accession implies, and should only be made to, a treaty already in force. It is essentially a method of joining a " going concern " so to speak, and this results from the fact (which constitutes the fundamental difference between accession and signature) that accession is essentially the acceptance of something already done—not a participation in the doing of it. Exceptionally, however—and particularly in the type of case where there is no signature at all—accessions prior to coming into force may be admitted and may have to be admitted. The cases cited in Lauterpacht's first report [49] represent a lax practice (mainly pre-war) that ought not to be encouraged, because it is not only wrong in principle but entirely unnecessary—except in those cases where signature of the treaty has never been possible at all.

84. *Paragraphs 7 and 8* are self-explanatory.

Article 35. Accession (legal effects)

85. *Paragraph 1.* This is unquestionably the correct rule. " Accession ", or as it is sometimes called " adherence ", implies a definitive act. The treaty is adhered to. An accession subject to ratification is not an accession, and also represents an attempt to secure the status of a signatory after the moment for that has gone by [50] (see also comment in paragraph 83 above). It is desirable that the various acts and concepts involved in treaty-making should preserve their respective special uses and distinctive juridical characteristics, and not become blurred by being resorted to out of place.

86. *Paragraph 2.* Accession is, in its juridical nature, a very different process from signature and ratification. But broadly its *results* are the same. It makes the acceding State a party to the treaty, with all the rights and obligations of a party, and on a basis of equality.[51] It may be suggested, however, that as a logical corollary of the fact that an acceding State accepts, but does not make a contract, it can have no voice in any subsequent amendment of that contract, though it need not of course accept the amendment. According to this view, an acceding State would not have any right to be consulted about, or participate in, any subsequent amendments to the treaty, though it would have an automatic right to terminate its adherence to the treaty if it disagreed with the result. According to normal practice, however, an

[48] For any particular signatory State, the prospective balance and possibly the utility of a treaty might, so far as it was concerned, be seriously affected (e.g. in the matter of weight of voting) by the unforeseen admission of one or more States whose participation had not originally been contemplated.

[49] A/CN.4/63, comment on article 7.

[50] Professor Rousseau (*op. cit.*, p. 280) says " Rationellement, la règle de la ratification paraît étrangère aux adhésions....: aucun accord de volontés du type contractuel n'intervenant en effet entre les Etats signataires et l'Etat adhérent, celui-ci n'a pas à confirmer après coup un acte qui n'est en rien l'équivalent d'une signature. Au point de vue pratique, ce serait là une procédure défectueuse entraînant des complications inutiles."

He point out, however, that in the League of Nations a practice of acceding subject to ratification was introduced, and to some extent admitted. No case is known to have occurred since 1945, and it seems desirable that a code on treaty law should rule it out.

[51] Pradier-Fodéré (*Traité de droit international public européen et américain* (Paris, G. Pedone-Lauriel, 1885), Vol. 2, p. 829) says " L'accession place l'Etat qui la donne sur la même ligne que les parties principales qui ont conclu et signé le traité, elle lui confère les mêmes droits comme elle lui impose les mêmes obligations réciproques envers tous les Etats intéressés: la puissance qui accède devient partie contractante directe, en obtenant par son accession tous les droits et en se chargeant de toutes les obligations qui lui seraient échues ou qui auraient été mises à sa charge si elle eût signé immédiatement le document principal ".

acceding State is admitted to participate in the discussion and voting on any proposals for amendment, in exactly the same way as other parties. Therefore, unless the treaty itself reserved some privilege in this matter to signatory and ratifying States (which position the acceding State would have accepted by its accession) no difference of status can exist.

87. *Paragraph 3.* This merely provides for the case, which should be exceptional (see paragraph 83 above) where accession takes place prior to the entry into force of the treaty.

Article 36. Acceptance (character, modalities, and legal effects)

88. *Paragraph 1.* Acceptance, which is a permissible method of participation only where the treaty provides for it, nevertheless involves no new principle.[52] It is either, in effect, a ratification (where it follows on a signature given subject to reservation of acceptance) or it is an accession (where there has been no previous signature and the treaty provides for participation by simple acceptance alone). However the rule that accession implies, in general, a treaty already in force does not apply to cases of participation by simple acceptance, since it is normally clear in those cases, from the terms of the treaty, that acceptance can be given at any time.

89. *Paragraph 2* is self-explanatory.

90. *Paragraph 3.* See paragraph 85 above. A State accepts or it does not.

91. *Paragraph 4.* No comment is required.

Article 37. Reservations (fundamental rule)

92. *General comment.* The question of reservations has now been a controversial one for some time—though more particularly in regard to reservations to general multilateral conventions, and where the reservation is wholly unilateral and has not been agreed to by the other interested States or has been definitely objected to by some of them. A history of this controversy and a discussion of the whole matter will be found in an article by the present Rapporteur in *The International and Comparative Law Quarterly* entitled "Reservations to Multilateral Conventions".[53] A very full discussion will also be found in Lauterpacht's reports.[54] The Rapporteur feels that in any code on the law of treaties the Commission should adhere to the same basic view as that which inspired chapter II of its report on the work of its third session.[55] This of course had reference to multilateral conventions, but the considerations involved are applicable *a fortiori* to bilateral and plurilateral agreements. The Rapporteur has thought, however, that even as a matter of *lex data*, the strict traditional rule about reservations could be regarded as mitigated in practice by the following considerations which, taken together, allow an appreciable amount of latitude to States in this matter, and should meet all reasonable needs:

(*a*) By definition (see article 13, paragraph (*l*)) mere explanatory declarations, or statements of intention (and, within limits, of interpretation) are not regarded as reservations, and are permissible;

(*b*) A reservation only counts as such if it purports to derogate from a substantive provision of the treaty;

(*c*) Any State negotiating a treaty has a faculty to seek the insertion in it of an express provision permitting specific reservations, or certain classes of reservations;

(*d*) Any State has the right to ask specific acquiescence in any reservation it desires to make, even in those cases where the treaty makes no provision for reservations;

(*e*) Provided a proposed reservation has been clearly brought to the notice of another State, either during the negotiation of the treaty or afterwards, its tacit acquiescence (or lack of actual objection) may, at any rate in the case of general multilateral treaties, be inferred from silence, and this will suffice to constitute consent;

(*f*) Experience has shown that States do not normally refuse consent or object to reservations, unless these are clearly unreasonable and such as ought not to be admitted.

If to these considerations, more or less *de lege data*, are added the following, *de lege ferenda*, in the case of general multilateral treaties,[56] all legitimate requirements should be met:

(1) That in the case of reservations proposed after the treaty has been drawn up, acquiescence on the part of any particular State will be presumed if, within three months, no objection has been received;

(2) That in the same circumstances, although normally there must be acquiescence by all the States who have shown their interest in the treaty by signing it, even if they have not actually become parties to it, when the treaty has been in force for a certain period, in order to prevent a signatory State which does not seem likely to become a party from blocking a reservation not objected to by other States, the right of objection would be confined to actual parties to the treaty, provided these represented a reasonable proportion of those entitled to become parties.

These particular ideas are embodied in article 39 of the draft.

93. *Paragraph 1.* This has already been explained.

94. *Paragraph 2.* This poses the fundamental requirement of acceptance.

---

[52] The observations in Brierly's first report (A/CN.4/23, paras. 66-75) are most pertinent and should be given full weight. Lauterpacht's first report (A/CN.4/63, comment and note on article 8) is equally correct in its implications that no real juridical issue is raised by the "acceptance" procedure. Nevertheless, it is desirable to recognize the considerable practical conveniences of this method. It has mainly been adopted with reference to treaties concluded on the American continent, though only in a limited number of cases.

[53] *The International and Comparative Law Quarterly*, Vol. 2 (January 1953), pp. 1-26.

[54] A/CN.4/63 and A/CN.4/87, comments and notes on article 9.

[55] *Official Records of the General Assembly, Sixth Session, Supplement No. 9.*

[56] Because, in the case of bilateral or plurilateral treaties, it is impossible to admit reservations that are not actively agreed to by the participating States.

95. *Paragraph 3.* If a treaty specifically permits certain reservations, or a certain class of reservations, it must be presumed that no others were intended.

96. *Paragraph 4.* It is considered inadmissible that there should be parties to a treaty who are not bound by an obligation for the settlement of disputes arising under it, if this is binding on other parties. It is one thing to make a reservation concerning a substantive obligation of the treaty, if this receives the necessary assents; but it is another thing to assume the substantive obligations of the treaty, and yet refuse to be bound by the very provision which is intended to afford some guarantee that these obligations will be carried out, or to give the other parties a right of recourse if they are not. Such a provision is too fundamental to the scheme and order of any treaty containing it to permit of any reservation, and a State purporting to make such a reservation is virtually reserving a right to execute the treaty only at its discretion. It is sometimes argued that States can only be obliged to submit disputes to arbitration or judicial settlement if they consent to do so. This is true, but such consent need not be given *ad hoc* in every individual case. It can be given generally, and in advance, for any class or classes of case, as the optional clause procedure under article 36, paragraph 2, of the Statute of the International Court of Justice shows. A State which becomes a party to a treaty containing a provision for arbitration or judicial settlement thereby *ipso facto* consents to settle by those means any dispute in which it becomes involved under the treaty.

Article 38. Reservations to bilateral treaties and other treaties with limited participation

97. A distinction must be drawn between general multilateral treaties and bilateral treaties or merely plurilateral treaties made between a restricted number of States having some common interest or object. Whereas in the case of general multilateral treaties there may be grounds, arising from their character and the circumstances in which such treaties are framed, for permitting a fairly liberal practice about reservations, quite different considerations apply to bilateral treaties and other treaties with restricted participation. Such treaties are almost always framed by a process involving the unanimous consent of the negotiating States to each article, and indeed each sentence; and every word in the treaty is usually the result of careful and prolonged consideration, and constitutes the *ne plus ultra* of the agreement that can be reached. The element of contract and common accord is so strong, that the admission of reservations (except where the treaty provides for them, or they are specially agreed to) would be contrary to the whole spirit of the negotiation, and to the basis and balance of the treaty itself.

Article 39. Reservation to multilateral treaties

98. Here some latitude may be allowed, on lines already explained (see paragraph 92 above). The period of five years, and the figure of twenty per cent specified in paragraph 1 (*b*) (ii), and the period of three months specified in paragraph (2), are of course matters for discussion.

99. *Paragraph 3.* This lays down the necessary consequence if a reservation is objected to, and the objection is maintained.

100. *Paragraph 4.* Despite certain mechanical difficulties, this is believed to represent the right rule, as compared with that propounded in the paragraph numbered 1 in alternative A to article 9 of the Lauterpacht draft.[57] A State which has entered a reservation not yet accepted—or which fails to secure acceptance—cannot be said to be a party, and its ratification or accession, etc., must remain in suspense until the reservation is either accepted or withdrawn.

Article 40. Reservation (legal effect if admitted)

101. It is considered useful to state these consequences, but they require no explanation.

Article 41. Entry into force (modalities)

102. *Paragraph 1.* This is self-explanatory. The residuary rule mentioned is the only practicable one.

103. *Paragraph 2.* This is a not uncommon case, and a rule should be provided for it.

104. *Paragraph 3.* It seems necessary to try and propound a rule *de lege ferenda* for the not uncommon case where a treaty provides that the ratifications are to be exchanged or deposited by a certain date, but says no more; and when the date arrives the ratifications are not exchanged, or not all of them have been deposited. If all are there, then the date named may be taken as the date of coming into force. If not, the problem arises whether the treaty comes into force on that date for the States which have then ratified it, or whether entry into force must await the later ratifications, which may possibly never arrive. It is thought that in such circumstances, unless it is clear from the nature of the treaty that ratification by all concerned is intended before entry into force can take place, the best rule is to bring the treaty into force on the date named for the exchange or deposit of ratifications, provided a substantial number of the States concerned have by then ratified it, or as soon as a substantial number have duly done so.

105. *Paragraphs 4 and 5.* These are self-explanatory.

Article 42. Entry into force (legal effects)

106. *Paragraph 1.* This covers the case of *provisional* entry into force and states the rule applicable in case this situation becomes unduly prolonged.

107. *Paragraphs 2-4.* These paragraphs are self-explanatory, and certain aspects of them have already been discussed under other headings. Strictly, a separate instrument, to come into force on signature, should deal with all such matters as ratification, entry into force, etc. Logically, a treaty which, *ex hypothesi,* is not yet in force, cannot provide for its own entry into force since, until that occurs, the clause so providing can itself have no force. The real truth is that, by a tacit assumption invariably made, the clauses of a treaty providing for ratification, accession, entry into force and certain other possible matters, are deemed to come into force separately

[57] See A/CN.4/63, comment on article 9, section II.

and at once, on signature—or are treated as if they did—even though the substance of the treaty does not.

108. *Paragraph 5.* This case is not a common one, but it occurs. For instance, peace treaties not infrequently provide that they must be ratified by certain States, but that they will come into force if and when they are ratified by certain other States. Ratification by States of the first group will not therefore bring the treaty into force. On the other hand, ratification by States of the second will, and will do so for the first group of States also, even if they have not yet ratified. This group is, in that event, really in breach of the treaty, and the correct legal position would seem to be that the States of the first group are bound from the start by their signature (*a*) to ratify [58] and (*b*) to carry out the substantive provisions of the treaty as from the date when ratification by the second group of States brings the treaty into force.

109. *Paragraph 6.* This is self-explanatory.

[58] Of course in these circumstances ratification loses its *raison d'être* juridically, and becomes strictly otiose. The real object of this procedure is a political one, namely to secure a parliamentary endorsement of the treaty, with a view to preventing any eventual attempt at a repudiation of it on such grounds as, for instance, that the representatives signing the treaty exceeded their authority, or had no right to agree to certain of its clauses.