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LAW OF TREATIES

[Agenda item 1]

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Introduction

A. SUMMARY OF THE COMMISSION'S PROCEEDINGS¹

(1) At its first session in 1949 the International Law Commission placed the "Law of Treaties" amongst the topics listed in paragraphs 15 and 16 of its report for that year as being suitable for codification and appointed Mr. J. L. Brierly as Special Rapporteur for the subject. It also decided to give this subject priority. However, owing to the various special tasks assigned to the Commission by the General Assembly and to the necessity for completing for the Assembly subjects like the law of the sea and diplomatic—and consular—intercourse and immunities, the Commission found it necessary again and again to postpone its consideration of the law of treaties. A number of important reports were produced by its successive Special Rapporteurs; but—with the exception of a special report on the subject of reservations to multilateral conventions in 1951, and work in 1959 on a substantial part of Sir G. Fitzmaurice's report on the framing, conclusion and entry into force of treaties—the Commission was not able to do much more than give occasional glances at these reports.

(2) At its second session in 1950 the Commission devoted its 49th to 53rd meetings to a preliminary discussion of Mr. J. L. Brierly's first report (A/CN.4/23) and also had available to it replies of Governments (A/CN.4/19) to a questionnaire addressed to them under article 19, paragraph 2, of its Statute. The Commission's report for this session contained the following observations (A/1316, paragraphs 161 and 162):

"The Commission devoted some time to a consideration of the scope of the subject to be covered in its study. Though it took a provisional decision that exchanges of notes should be covered, it did not undertake to say what position should be given to

them by the Special Rapporteur. A majority of the Commission favoured the explanation of the term 'treaty' as a 'formal instrument' rather than as an 'agreement recorded in writing'. Mention was frequently made by members of the Commission of the desirability of emphasizing the binding character of the obligations under international law established by a treaty.

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

(3) At its third session in 1951, the Commission had before it two reports from Mr. Brierly, one (A/CN.4/43) a continuation of the Commission's general work on the law of treaties and the other (A/CN.4/41) a special report on "reservations to multilateral conventions" called for by the General Assembly at the same time as it had requested an advisory opinion from the International Court of Justice on the particular problem of reservations to the Convention on the Prevention and Punishment of the Crime of Genocide. As to the Commission's opinions and recommendations on the special subject of reservations to multilateral conventions, there is no need to summarize them here, since this is done with some fullness in an appendix to the present report. Its general work on the law of treaties at its third session was summarized by the Commission in its report for 1951 as follows (A/1858, paragraphs 74 and 75):

"At the third session of the Commission, Mr. Brierly presented a second report on the law of treaties. In this report, the special rapporteur submitted a number of draft articles which he had proposed in the draft convention contained in his report to the previous session.

"In the course of eight meetings (namely the 84th to 88th, and 98th to 100th meetings), the Commission considered these draft articles as well as some others contained in the first report of the special

¹ This summary is based upon paragraphs 8-11 in chapter II of the Commission's report to the General Assembly in 1959 (document A/4169); *Yearbook of the International Law Commission, 1959* (United Nations publication, Sales No.: 59.V.1, vol. II), pp. 88-9.

rapporteur. Various amendments were adopted and tentative texts were provisionally agreed upon. These texts were referred to the special rapporteur, who was requested to present to the Commission, at its fourth session, a final draft, together with a commentary thereon. The special rapporteur was also requested to do further work on the topic of the law of treaties as a whole and to submit a report thereon to the Commission."

But the Commission also took a further decision at that session concerning the question of international organizations already mentioned in its report for 1950. At its 98th meeting, it adopted "the suggestion put forward the previous year by Mr. Hudson, and supported by other members of the Commission, that it should leave aside, for the moment, the question of the capacity of international organizations to make treaties, that it should draft the articles with reference to States only and that it should examine later whether they could be applied to international organizations as they stood or whether they required modifications".

(4) At its fourth session in 1952 the Commission had before it a "Third Report on the Law of Treaties" (A/CN.4/54) prepared by Mr. Brierly, who, however, had meanwhile resigned his membership of the Commission. In the absence of its author the Commission did not think it expedient to discuss that report, and it confined itself to electing Mr. H. Lauterpacht to succeed Mr. Brierly as Special Rapporteur.

(5) At its fifth session in 1953 the Commission received a report from Mr. Lauterpacht (A/CN.4/63) containing draft articles and commentaries on a number of topics in the law of treaties but, owing to its other commitments, was unable to take up the report at that session. It therefore instructed Mr. Lauterpacht to continue his work and present a further report. At its sixth session in 1954 the Commission duly received Mr. H. Lauterpacht's second report (A/CN.4/87) but was again unable to take up the subject. Meanwhile Mr. (by then Sir H.) Lauterpacht had resigned from the Commission on his election as judge of the International Court of Justice, and at its seventh session in 1955 the Commission elected Sir G. Fitzmaurice as Special Rapporteur in his place.

(6) At the next five sessions of the Commission, from 1956 to 1960, Sir G. Fitzmaurice presented five separate and comprehensive reports on the law of treaties, covering respectively (a) the framing, conclusion and entry into force of treaties (A/CN.4/101), (b) the termination of treaties (A/CN.4/107), (c) essential and substantial validity of treaties (A/CN.4/115), (d) effects of treaties as between the parties (operation, execution and enforcement) (A/CN.4/120) and (e) treaties and third States (A/CN.4/130). During these years the Commission's time was largely taken up with its work on the law of the sea and on diplomatic and consular intercourse and immunities, so that, apart from a brief discussion of certain general questions of treaty law at the 368th to 370th meetings of its 1956 session, it was only able to concentrate upon the law of treaties at its eleventh session in 1959. At that session it devoted some twenty-six meetings² to a discussion of Sir G. Fitzmaurice's first report on the framing, conclusion and entry into force of treaties, and provisionally adopted the texts of fourteen articles, together with their commentaries (A/4169, chapter II).

² 480th to 496th, 500th to 504th and 519th to 522nd meetings.

However, the time available was not sufficient to enable the Commission to complete its series of draft articles on this part of the law of treaties.³ In its report for 1959 the Commission drew particular attention (*ibid.*, paragraph 18) to the fact that it did not envisage its work on the law of treaties as taking the form of one or more international conventions but had favoured the idea of "a code of a general character". The reasons for preferring a "code" were stated to be twofold (*ibid.*, citation from Sir G. Fitzmaurice's first report):

"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."

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

(7) The twelfth session, in 1960, was almost entirely taken up with consular intercourse and immunities and *ad hoc* diplomacy, so that no further progress was made with the law of treaties during that session. Then Sir G. Fitzmaurice had himself to retire from the Commission on his election as judge of the International Court of Justice, and at the thirteenth session, in 1961, the Commission elected Sir H. Waldock to succeed him as Special Rapporteur for the law of treaties. At the same time the Commission took the following general decisions as to its work on the law of treaties (A/4843, paragraph 39):

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

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

"(iii) That the Special Rapporteur should begin with the question of the conclusion of treaties and then proceed with the remainder of the subject, if possible covering the whole subject in two years."

The first of these decisions, as will be appreciated from the observation in the report for 1959, marked a radical change in the Commission's approach to its work on the law of treaties. Instead of a mere expository statement

³ Chapter II of the Commission's report for 1959 contains article 1-10, and 14-17 of a proposed chapter of a comprehensive code on the law of treaties.

of the law, it now envisaged the preparation of draft articles capable of serving as the basis for a multilateral convention. Only in this way, it felt, were really concrete results likely to be obtained from its work on this subject.

B. SCOPE OF THE PRESENT DRAFT ARTICLES

(8) The Special Rapporteur, in accordance with the Commission's decision, has aimed at preparing a group of draft articles which might provide the basis for a convention on the "conclusion" of treaties. "Entry into force" has been regarded as naturally associated with, if not actually part of, "conclusion", while the subject of "registration of treaties" has been added as belonging essentially to the procedure of treaty-making and as being closely linked in point of time to entry into force.⁴ It is believed that, if the Commission finds it possible to reach a wide measure of agreement upon draft articles covering these three topics, they will furnish the basis either for a self-contained convention on the "conclusion, entry into force and registration of treaties" or for a separate chapter in a larger convention covering the whole or a large part of the law of treaties. Having regard to the success achieved in the law of the sea by dealing successively in a series of separate conventions with more or less self-contained sections of the subject, and bearing in mind the almost unmanageable size of the total corpus of the law of treaties, it is believed that a somewhat similar procedure could usefully be adopted also for this subject. Accordingly, the Special Rapporteur has thought it right to try and prepare for the Commission's consideration as closely integrated and self-contained a group of articles on the conclusion, entry into force and registration of treaties as possible.

(9) The present articles differ considerably from those adopted by the Commission in 1959, in more than one respect. First, in draft articles on the conclusion of treaties it has not seemed appropriate to include articles 3 and 4 of the 1959 draft, which dealt with the "concept of validity" and "general conditions of obligatory force". These two articles found a place at the beginning of the 1959 draft because in that draft the "conclusion" of treaties was envisaged as part of a general chapter on the "validity" of treaties, belonging more particularly to the subject of "formal validity". This method of arrangement may have been appropriate enough for an expository code, but it seems to be somewhat too jurisprudential for a convention. As Sir G. Fitzmaurice pointed out in his first report (A/CN.4/101), the "conclusion" of treaties can be regarded either as a process or as a substantive matter relating to the validity of treaties. Clearly, the topic of "conclusion" of treaties has both aspects; but in the draft articles of a convention on the "conclusion, entry into force and registration of treaties" it would appear unnecessary — and perhaps rather artificial — to begin with solemn pronouncements about the concept of the validity of treaties and the general conditions of obligatory force. Secondly, and also for the reason that the Commission has changed from an expository code to the draft articles of a convention, the purely explanatory material in article 5 and paragraph 1 of article 6 of the 1959 draft has been omitted. Thirdly, the present draft

aims at a more complete statement of the procedural aspects of treaty-making by adding such matters as the correction of errors in the text and the functions of a depositary and, as already mentioned, registration of treaties, which were not included in Sir G. Fitzmaurice's draft of this topic. This seems to be not only justifiable but even necessary, if the emphasis is shifted, as the Special Rapporteur thinks that it must be in a convention, from the "validity" to the "process" aspect of conclusion of treaties.

(10) The present draft naturally owes much to the valuable studies of Mr. Brierly and Sir H. Lauterpacht and especially to the detailed scientific exposition of the various topics by Sir G. Fitzmaurice. It also takes account of the provisional conclusions reached by the Commission itself at previous sessions, and has drawn inspiration from the debates at those sessions. But, although much of the ground covered by the present articles has been covered in previous reports, the conversion of the previous draft into the basis for a convention has necessitated a complete re-examination of it. Moreover, the previous work of the Commission had left unresolved a number of important and controversial matters, such as capacity to enter into treaties, ratification, reservations to multilateral conventions and the question of a "right" to participate in multilateral conventions, which provided difficult problems for the Special Rapporteur and must now engage the attention of the Commission. The draft articles have been arranged provisionally in five chapters, (a) "general provisions", (b) "the rules governing the conclusion of treaties by States", (c) "the entry into force and registration of treaties", (d) "corrections of errors and the functions of depositaries", and (e) "the treaties of international organizations".

(11) The last chapter is purely tentative and the Commission may not wish to carry its examination of treaty-making by international organizations very far until it has had the comments at any rate of the United Nations and the specialized agencies. In 1959 (A/4169, chapter II, para. 6 of commentary to article 2), as previously in 1951 (98th meeting), the Commission decided to leave aside for the moment the question of the capacity of international organizations to make treaties; it decided to draft the articles with reference to States only and to examine later whether they could be applied to international organizations as they stood, or whether they required modifications. On the other hand, the Commission fully accepted that international organizations may possess treaty-making capacity and that international agreements concluded by international organizations possessing such capacity fall within the scope of the law of treaties. For in explaining what it meant by the phrase "other subjects of international law possessed of treaty-making capacity" the Commission said that the "obvious case" is that of international organizations.⁵ One course, no doubt, might be to leave aside altogether the question of the treaties of international organizations until the whole of the Commission's work on the law of treaties, as it affects States, is complete and then to consider just how much of it is applicable to organizations. But, as already pointed out, the conclusion, entry into force and registration of treaties, with which the present articles are concerned, is to a large extent a self-contained branch of the law

⁴ Article 102 of the Charter requires treaties to be registered "as soon as possible", while the Regulations adopted by the General Assembly on 14 December 1946 provide that they shall not be registered until they have entered into force; see further the Commentary to article 22.

⁵ A/4169, *loc. cit.* In truth, international organizations now figure almost as prominently as States in the United Nations Treaty Series.

of treaties and, unless it is unavoidable, it seems better not to postpone all consideration of treaty-making by international organizations until some comparatively distant date, by which time the Commission will have dealt with many other matters not very closely related to this part of the law of treaties. The solution suggested is similar to that adopted by the Commission for the case of honorary consuls in its draft articles on consular intercourse and immunities (A/4843, chapter II), namely, a separate chapter specifying the extent to which the provisions of the draft articles apply to the treaties of organizations and formulating any particular rules peculiar to these treaties.

(12) There is one topic in the present articles which is of special complexity and difficulty, namely, "reservations to multilateral treaties". It is, moreover, a topic which during the past eleven years has occupied the attention of the International Court of Justice, the Commission itself, the General Assembly and the Organization of American States, as well as of the Commission's Special Rapporteurs. It may, it is believed, be convenient to members of the Commission to have before them a summary of the discussion of this question in recent years, and such a summary has therefore been provided in the form of an appendix to the present report.

(13) Finally, the Special Rapporteur has begun work on a further section of the law of treaties with the idea of including in a second series of articles all the matters dealt with in Sir G. Fitzmaurice's second and third reports. These matters, it is thought, can suitably be grouped together so as to form the subject of a second possible convention covering the various aspects of the validity, that is, substantive validity, and duration of treaties. It should then be possible to dispose of the matters comprised in Sir G. Fitzmaurice's fourth and fifth reports in a third series of draft articles. The programme is, therefore, likely to occupy three years rather than the two years contemplated in the above-mentioned decision of the Commission.

The conclusion, entry into force and registration of treaties

Text of draft articles with commentary

Chapter I. General provisions

ARTICLE 1. DEFINITIONS

For the purposes of the present articles, the following expressions shall have the meanings hereunder assigned to them:

(a) "*International agreement*" means an agreement intended to be governed by international law and concluded between two or more States or other subjects of international law possessing international personality and having capacity to enter into treaties under the rules set out in article 3 below.

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

(c) "*Party*" means a State or other subject of international law, possessing international personality and

having capacity to enter into treaties under the rules set out in article 3 below, which has executed acts by which it has definitively given its consent to be bound by a treaty in force; "*Presumptive party*" means a State or other subject of international law which has qualified itself to be a "party" to a treaty which has not yet entered into force.

(d) "*Bilateral treaty*" means a treaty participation in which is limited to two parties and no more. "*Plurilateral treaty*" means a treaty participation in which is open to a restricted number of parties and the provisions of which purport to deal with matters of concern only to such parties. "*Multilateral treaty*" means a treaty which, by its terms or by the terms of a related instrument, has either been made open to participation by any State without restriction, or has been made open to participation by a considerable number of parties and either purports to lay down general norms of international law or to deal in a general manner with matters of general concern to other States as well as to the parties to the treaty.

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

(f) "*Adoption*" means the act whereby the negotiating States express their final concurrence in the formulation of the text of a proposed treaty.

(g) "*Authentication*" means the act whereby the text of a treaty is rendered definitive and final *ne varietur*.

(h) "*Signature*" means the acts whereby a duly authorized representative of a State or other Subject of international law signs the treaty on behalf of such State or other Subject of international law, and includes initialling where, under the provisions of article 8 below, initialling is equivalent to a full signature. "*Signature ad referendum*" means a signature expressly made conditional upon reference to and confirmation by the State or other subject of international law whose representative has so worded his signature.

(i) "*Ratification*" means the international act whereby a State, which has affixed its signature to a treaty upon condition of subsequent ratification or approval, confirms and renders definitive its consent to be bound by the treaty.

(j) "*Accession*" means the international act whereby a State which is not a signatory to a treaty, under a power conferred upon it by the terms of the treaty or of another instrument, expresses its will to "accede" or "adhere" to the treaty and thereby definitively gives its consent to be bound by the treaty.

(k) "*Acceptance*" means the international act whereby a State gives its consent to be bound by a treaty, either as a definitive confirmation of a signature previously affixed to the treaty or as an original and definitive expression of its consent to be bound.

(l) "*Reservation*" means a unilateral statement whereby a State, when signing, ratifying, acceding to or accepting a treaty, specifies as a condition of its consent to be bound by the treaty a certain term which will vary the legal effect of the treaty in its application between that State and the other party or parties to the treaty. An explanatory statement or statement of intention or of understanding as to the meaning of the treaty, which does not amount to a variation in

the legal effect of the treaty, does not constitute a reservation.

(m) "*Depositary*" means the State or international organization designated in a treaty to be the custodian of the authentic text and of all instruments relating to the treaty and to perform with reference to such treaty and instruments the functions set out in article 25 below.

Commentary

(1) Paragraphs (a) and (b) of article 1 give effect to decisions previously reached by the Commission. After some initial hesitation in 1950 (50th, 51st and 52nd meetings) the Commission decided in 1951 and again in 1959 (A/4169, chapter II, articles 1 and 2) that its codification of the law of treaties should cover all international agreements in writing, whatever their form or appellation, and that it should deal with treaties concluded by international organizations as well as by States.

(2) Paragraph (a) defines an "international agreement" which is, of course, the essential basis for the existence of a "treaty". The definition is in somewhat broader terms than that found in article 2 of the 1959 draft,⁶ some of the elements in the 1959 draft—written form and expression in a single instrument or in related instruments—appear to belong rather to the definition of "treaty" and will be found in paragraph (b). The two main elements in the present definition are (i) "intended to be governed by international law" and (ii) "between two States or other subjects of international law possessing international personality and having capacity to enter into treaties". As to the first element, the Commission felt in 1959 that the element of subjection to international law is so essential a part of an international agreement that it should be expressly mentioned in the definition. There may be agreements between States, such as agreements for the acquisition of premises for a diplomatic mission or for some purely commercial transaction, the incidents of which are regulated by the local law of one of the parties or by a private law system determined by reference to conflict of laws principles. Whether in such cases the two States are *internationally* accountable to each other at all may be a nice question; but even if that were held to be so, it would not follow that the basis of their international accountability was a *treaty* obligation. At any rate, the Commission was clear that it ought to confine the notion of an "international agreement" for the purposes of the law of treaties to one the whole formation and execution of which (as well as the *obligation* to execute) is governed by international law.

(3) The second element in the definition concerns the character and capacity that the parties to an agreement must possess, if it is to be considered an international agreement. Capacity to enter into treaties is dealt with in article 3, and on this point, therefore, reference should be made to the commentary attached to that article, where the question of statehood and personality as an element in treaty-making capacity is also discussed. Here it is enough to indicate what the words "two or more States or other subjects of international law possessing international personality and having capacity to enter into treaties" are intended, on the one hand, to include and, on the other, to exclude. The phrase "other subjects of international

law" is designed (a) to leave no doubt as to the right of entities such as the Holy See to be considered parties to international agreements and (b) to admit the possibility of international organizations being parties to international agreements. The obvious case is the United Nations, whose capacity to be a party to treaties was expressly recognized in the Regulations adopted on 14 December 1946 by the General Assembly, concerning the Registration and Publication of Treaties and International Agreements,⁷ and whose international personality and treaty-making capacity was affirmed by the International Court of Justice in the case of *Reparations for Injuries Suffered in the Service of the United Nations*.⁸ In fact, the number of international agreements concluded by international organizations in their own names, both with States and with each other, and registered as such with the Secretariat of the United Nations, is now very large, so that inclusion in the general definition of "international agreements" for the purposes of the present articles seems really to be essential.

(4) But it is not enough that the party to the agreement should be a "State" or that it should be a "subject of international law"; it must also possess "international personality" and have "capacity to enter into treaties". This requirement is designed to exclude a State which is subordinated to another State, whether under a federal constitution or otherwise, and which under the applicable constitutional agreements or arrangement does not possess any distinct international personality and treaty-making capacity (see paragraphs 2-5 of the commentary to article 3). It is also designed to exclude any question of agreements made by States or organizations with private individuals or with corporate legal persons from the category of international agreements. While opinions may differ—and the Commission itself was divided in 1959—on the question whether individuals and corporations can be regarded as subjects of international law, there seems to be no disposition to dissent from the view that agreements made by them cannot fall within the concept of an "international agreement" or a "treaty" for the purposes of the present articles. It is true that the question has been raised by some authorities as to whether a concession or contract between a State and a foreign corporation may not in certain circumstances be governed by the "general principles of law", as a system of what has been referred to as "trans-national law"—a system more or less intermediate between municipal and international law.⁹ Whether or not that view is accepted, there does not appear to be any question of foreign concessions or contracts being considered to be governed by the law of "treaties" or of "international agreements" as this law has hitherto been understood and applied. Certainly, the International Court of Justice in the *Anglo-Iranian Oil Company Case*¹⁰ appears to have regarded the concessionary "convention" between Iran and the foreign company as something fundamentally different from a treaty or international agreement.

(5) Paragraph (d) embraces within the term "treaty" every international agreement in writing, whether formal or informal, whether embodied in a

⁷ See article 4, paragraph 1 (a).

⁸ *I.C.J. Reports*, 1949, at page 179.

⁹ Cf. Jessup, *Transnational Law*; Lord McNair, "The General Principles of Law recognized by Civilized Nations", *British Year Book of International Law*, vol. 33, p. 1.

¹⁰ *I.C.J. Reports*, 1952, p. 112.

⁶ The expression "1959 draft" means, in the context of this report, the draft articles 1-10 and 14-17 adopted by the Commission at its eleventh session (A/4169, chapter II).

single instrument or in two or more related instruments and whatever title or name is given to it. The wording of the definition of "treaty" in paragraph (b) differs to some extent from that in article 1, paragraph 1, of the Commission's 1959 draft, primarily because, as already indicated above, some elements of the present definition of "treaty" were attached in 1959 to the definition of "international agreement". But the substance of the present definition and of that in the 1959 draft is believed to be the same. The adoption of this broad definition, which sweeps into the law of treaties every form of international agreement in writing, is held by the Commission to be called for by reason of the following considerations.¹¹

(6) Although the term "treaty" in one sense connotes a particular type of international agreement, the single formal instrument which is commonly subject to ratification, there also exist international agreements, such as exchanges of notes, which are not a single formal instrument nor usually subject to ratification, and yet are certainly agreements to which the law of treaties applies. Similarly, very many single instruments in daily use, such as an "agreed minute" or a "memorandum of understanding", could not appropriately be called *formal* instruments, and yet they are undoubtedly international agreements subject to the law of treaties. A general code on the law of treaties must cover all such agreements, whether embodied in one instrument or in two or more related instruments, and whether the instrument is "formal" or "informal". The question whether, for the purpose of describing all such instruments and the law relating to them, the expressions "treaties" and "law of treaties" should be employed, rather than "international agreements" and "law of international agreements", is a question of terminology rather than of substance.

(7) This view is in conformity with the pronouncement of the Permanent Court of International Justice in the *Austro-German Customs Régime Case*,¹² where the Court said:

"From the standpoint of the obligatory character of international engagements, it is well known that such engagements may be taken¹³ in the form of treaties, conventions, declarations, agreements, protocols or exchanges of notes."

Much the same view is generally to be found amongst writers and was expressed as long ago as 1869 by the eminent jurist Louis Renault,¹⁴ when he spoke of a treaty as being:

"... every agreement arrived at between... States, in whatever way it is recorded (treaty, convention, protocol, mutual declaration, exchange of unilateral declaration)" [translation].

(8) Two further factors militate strongly in favour of this view:

(a) In the first place, the "*accord en forme simplifiée*"—to use the apt French term—so far from being

at all exceptional, is very common. The number of such agreements, whether embodied in a single instrument or in two or more related instruments, is now very large—much larger than that of the treaty or convention *stricto sensu*, i.e., the single formal instrument. Their use is moreover steadily increasing, as was convincingly shown by Sir H. Lauterpacht in his first report (A/CN.4/63, commentary to article 2).

(b) The juridical differences, in so far as they really exist at all, between treaties *stricto sensu* and "*accords en forme simplifiée*" lie almost exclusively in the field of form, and of the method of conclusion and entry into force. The law relating to such matters as validity, operation and effect, execution and enforcement, interpretation, and termination, applies to all classes of international agreements. In relation to these matters, there are admittedly some important differences of a juridical character between certain classes or categories of international agreements.¹⁵ But these differences spring neither from the form, the appellation, nor any other outward characteristic of the *instrument* in which they are embodied: they spring exclusively from the content of the agreement, whatever its form, and from the particular character, not of that form, but of that content. It would therefore be inadmissible to exclude certain forms of international agreements from the general scope of a code on the law of treaties merely because, in the field of form pure and simple, and of the method of conclusion and entry into force, there may be certain differences between such agreements and treaties *stricto sensu*. At the most, such a situation might make it desirable, in that particular field and in the section of the code dealing with it, to institute certain differences of treatment between different forms of international agreements. But the question arises whether it is necessary to do even that.

(9) None of the Special Rapporteurs has in fact found it necessary to distinguish between the different kinds of treaty in that way. Distinctions, where they exist, normally reveal themselves unaided owing to the nature of their subject-matter, and do not need to be expressly characterized as applicable only to certain forms of international agreements. For example, the legal incidents of ratification can have no application to classes of agreements that do not require ratification. But if the code indicates in what circumstances agreements are not subject to ratification, there is no need to make express distinctions between different forms of agreements. Moreover, as Sir H. Lauterpacht pointed out, even in the case of ratification, where the designation of agreements as "treaties" may appear to have particular relevance, there are no classes of international agreements which are inherently *incapable* of ratification. An "exchange of notes", for example, although normally not subject to ratification, is sometimes made so by an express provision in the notes exchanged.

(10) The present Rapporteur is of the view that it is undesirable and unnecessary to draw distinctions between different categories of international agreements merely on the basis of their form and designation. As was pointed out by the Commission in 1959, distinctions of other kinds do exist, for example,

¹¹ The ensuing four paragraphs reproduce, with some modifications, paragraphs 2-4 of the commentary upon article 1 of the 1959 draft.

¹² Series A/B, No. 41, p. 47.

¹³ The English text of the judgement is probably a translation from an original French text. A better English rendering would be "such engagements may be assumed in the form of", or better still, simply "may take the form of treaties, etc."

¹⁴ *Introduction à l'étude du droit international*, pp. 33-34.

¹⁵ See on this subject the commentaries to Sir G. Fitzmaurice's second report (A/CN.4/107), paras. 115, 120, 125-128 and 165-168; his third report (A/CN.4/115), paras. 90-93; and fourth report (A/CN.4/120), paras. 81 and 101.

between bilateral, plurilateral and multilateral treaties, and, where appropriate, these distinctions find a place in the draft articles (e.g. articles 5, 13, 18, 19 and 20).

(11) Another consideration is that, even in the case of single formal agreements—treaties in the narrower sense of the word—an extraordinarily rich and varied nomenclature has developed which serves to confuse the question of classifying international agreements. Thus, in addition to “treaty”, “convention” and “protocol”, we not infrequently find titles such as “declaration”, “charter”, “covenant”, “pact”, “act”, “statute”, “agreement”, “concordat”, whilst names like “declaration” and “agreement” and “*modus vivendi*” may well be found given both to formal and less formal types of agreements. As to the latter, their nomenclature is almost illimitable, even if some names such as “agreement”, “exchange of notes”, “exchange of letters”, “memorandum of agreement”, or “agreed minutes”, may be more common than others.¹⁶

(12) Accordingly, the need for some generic term to cover all forms and designations of international agreements is evident. Although some of the members of the Commission in 1959 would have preferred to confine the use of the word “treaty” to its classical meaning of a single formal instrument, the general feeling was that it is the right word to use as the generic term embracing written international agreement. Its use for this purpose is supported by two important provisions of the Statute of the International Court of Justice. In Article 36, paragraph 2, amongst the matters in respect of which States parties to the Statute can accept the compulsory jurisdiction of the Court, there is listed “a. the interpretation of a treaty”. But clearly, this cannot be intended to mean that States cannot accept the compulsory jurisdiction of the Courts for purposes of the interpretation of international agreements not actually called treaties, or embodied in instruments having another designation. Again, in Article 38, paragraph 1, amongst the elements which the Court is directed to apply in reaching its decisions, there is listed “a. international conventions”. But equally, this cannot be intended to mean that the Court is precluded from applying other kinds of instruments embodying international agreements, but not styled “conventions”. On the contrary, the Court must and does apply them. The fact that in one of these two provisions dealing with the whole range of international agreements the term employed is “treaty” and in the other the even more formal term “convention” serves to confirm that use of the term “treaty” generically in the present articles to embrace all international agreements is perfectly legitimate. Moreover, the only real alternative would be to use for the generic term the phrase “international agreement”, which would not only make the drafting more cumbersome but would sound strangely today, when the “law of treaties” is the term almost universally employed to describe this branch of international law.

(13) The word “treaty” has accordingly been used throughout the present articles as a generic term covering international agreements as a whole. In its 1959 draft (article 1, paragraph 2), the Commission pre-

ferred its definition of “treaty” as a generic term with the words “Unless the context otherwise requires”. These words have been omitted from paragraph (b) of the present article, because it is thought that, if the word “treaty” is defined as having a generic meaning for the purpose of the draft articles, its use with a particular meaning ought, if possible, to be avoided. It has not been found necessary to employ the word in its particular sense in the present articles concerning the conclusion, entry into force and registration of treaties, and it may be doubted whether the need will be found to exist in other branches of the law of treaties. The one place where it might have been very convenient to have a term covering treaties in the classical sense is in article 10, for the purpose of distinguishing agreements presumed to be subject to ratification from those presumed not to require it. If it is considered that a satisfactory formula has been found, or can be devised, to distinguish between formal and less formal agreements in that context, then the Special Rapporteur believes that it will be possible to confine the use of the term “treaty” to its generic sense.¹⁷

(14) With one exception, the remaining paragraphs do not appear to require any explanation, since the definitions explain themselves, or at least do so when read in conjunction with the articles to whose subject-matter they particularly relate. The exception is subparagraph (d), which defines “bilateral”, “plurilateral” and “multilateral” treaty. The first of these definitions needs no comment, but the second and third make a distinction which is important but not easy to draw with precision. The distinction finds a place in article 5, concerning the adoption of the text of the treaty, articles 7 and 13, concerning respectively the right to sign and the right to accede to a treaty, articles 18 and 19, concerning consent and objection to reservations, and article 20, concerning entry into force of treaties. In its 1959 draft, the Commission itself drew a distinction between plurilateral and multilateral treaties in article 6 (adoption of the text) and article 17 (the right to sign) without, however, formulating a fully considered definition of the two terms. In its commentary upon article 1, paragraph 1, the Commission referred to a “plurilateral” treaty as one made “between a restricted number or group of States”, and referred to a “multilateral” treaty as “e.g. a general multilateral convention concluded at a conference convened under the auspices of an international organization”. The text of article 6 paragraph 4 (b) spoke of “treaties negotiated between a restricted group of States”, evidently meaning “plurilateral” treaties, and distinguished these treaties from the “multilateral treaties negotiated at an international conference” and from the “treaties drawn up in an international organization or at an international conference convened by an international organization” which were dealt with in subparagraphs (c) and (d). The text of article 17 spoke of “plurilateral treaties negotiated between a regional or other restricted group of States”, contrasting them with “general multilateral treaties”. The commentary upon that article, in discussing the question whether international law recognizes the existence of any abstract right of participation, said that no prob-

¹⁶ In his article “The Names and Scope of Treaties” (*American Journal of International Law*, 51 (1957), No. 3, p. 574), Mr. Denys P. Myers considers no less than thirty-eight different appellations. See also the list given in Sir H. Lauterpacht’s first report (A/CN.4/63), paragraph 1 of the commentary to his article 2.

¹⁷ Truth to tell, if “treaty” were to be given a secondary meaning of “*treaty stricto sensu*”, the formulation of that secondary meaning might not be free from difficulty in drafting, e.g. with regard to “Protocol”, “Final Act” and “Procès-verbal”.

lem could arise with reference to "treaties (e.g. of a regional character) negotiated between a restricted number or group of States"; and it added: "The problem was therefore confined to general multilateral treaties or conventions, and even so not necessarily all of them, for it was only in relation to such as could be said to be of general interest to *all States* or intended to create norms of general international law, that it was suggested that international law did, or should, postulate an inherent right of participation for every State." Thus the 1959 report gives certain indications as to what the Commission had in mind in distinguishing between "plurilateral" and "multilateral" treaties; but these indications scarcely constitute the kind of definition which might provide a sufficient basis for distinguishing between "plurilateral" and "multilateral" treaties for the purpose of applying to them differing legal régimes. If the treaty is expressly made open to participation by any State, it identifies itself as a multilateral treaty. But for other cases the definition is not one which it is easy to formulate with any degree of precision. In the first place, mere restriction of the treaty to specified States is not a sufficient criterion because many multilateral treaties are so restricted, even although the class of participating States may be a very wide one; indeed, it is because participation in the treaty is technically "closed" that the question of the existence of a *right* of accession for other States arises. Secondly, a purely numerical test would scarcely be feasible, for it would be a nice question to determine when the number of States becomes sufficiently large for the treaty to be regarded as having passed from the *plurilateral* to the *multilateral* category. Moreover, it is possible for a treaty to be concluded by a considerable number of States on a regional or other limited basis. Nor in some cases will it necessarily be clear whether a treaty deals with a matter which is properly to be considered as one of "general concern". From one point of view, a regional treaty fixing common tariffs is very much a treaty which deals with a matter of general concern, since outside States are directly affected by it; yet the treaty is certainly a plurilateral treaty. A treaty would seem rather to be of general concern when it deals with a matter of general interest, such as the supply of meteorological information or the white slave traffic, and deals with it in a general manner. The definition tentatively put forward in the text seeks to combine the element of "number" with that of the general character of the subject-matter of the treaty.

ARTICLE 2. SCOPE OF THE PRESENT ARTICLES

1. Except to the extent that the particular context may otherwise require, the present articles shall apply to every international agreement which under the definitions laid down in article 1, paragraphs (a) and (b), constitutes a treaty for the purpose of these articles.

2. The fact that, by reason of the definitions in article 1, paragraphs (a) and (b), an international agreement not in written form or a unilateral declaration or any other form of international act is excluded from the application of the present articles shall not be understood as affecting in any way such legal force as these agreements or acts may possess under general international law.

3. Nothing contained in the present articles shall affect in any way the characterization or classification of particular international agreements under the in-

ternal law of any State, whether for the purposes of its domestic constitutional processes or otherwise.

Commentary

(1) Paragraph 1 is sufficiently explained by the discussion of "international agreement" and "treaty" in the commentary on paragraphs (a) and (b) of article 1. Here, the words "except to the extent that a particular context may otherwise require" preface the statement as to the scope of the present articles simply as a recognition of the fact that some of their provisions are, either by their express terms or by their inherent nature, only applicable to certain kinds of treaties. A provision relating to multilateral treaties could hardly, for example, have any application to "exchanges of notes".

(2) Paragraph 2 does two things. First, it emphasizes that the draft articles do not cover international agreements not drawn up in written form, and that they have no reference to unilateral declarations or to any other international act falling outside the definitions in article 1, paragraphs (a) and (b). Secondly, it preserves whatever legal force such oral agreements and unilateral instruments or acts may possess under general international law. In short, without going any further into the matter, paragraph 2 acknowledges the existence of oral agreements such as that resulting from the Ihlen Declaration in the *Eastern Greenland Case*¹⁸ and of written undertakings such as declarations under the Optional Clause of the Statute of the Court; and it puts on record that their omission from the draft articles is not to be understood as in any way altering the legal position in regard to them.

(3) Paragraph 3 is designed to safeguard the position of States in regard to their internal law and usages, and more especially in connexion with the ratification of treaties. In many countries, it is a constitutional requirement that international agreements in a form considered under the internal law or usage of the State to be a "treaty" must be "ratified" by the legislature or have their ratification authorized by it—perhaps by a specific majority; whereas other forms of international agreement are not subject to this requirement. Moreover, recourse is not infrequently had to less formal types of international agreement for the very purpose of obviating the need of bringing the agreement before the legislature, either because its subject-matter appears to render this unnecessary or for other reasons.¹⁹ Accordingly, it is quite essential that the definition given to the term "treaty" in the present articles should do nothing to disturb or affect in any way the existing domestic rules or usages which govern the classification of international agreements.

ARTICLE 3. CAPACITY TO BECOME A PARTY TO TREATIES

1. Capacity in international law (hereafter referred to as international capacity) to become a party to treaties is possessed by every independent State, whether a unitary State, a federation or other form of union of States, and by other subjects of international law invested with such capacity by treaty or by international custom.

¹⁸ Series A/B No. 53.

¹⁹ This point is referred to again in the commentary on article 10.

2. (a) In the case of a federation or other union of States, international capacity to be a party to treaties is in principle possessed exclusively by the federal State or by the Union. Accordingly, if the constitution of a federation or Union confers upon its constituent States power to enter into agreements directly with foreign States, the constituent State normally exercises this power in the capacity only of an organ of the federal State or Union, as the case may be.

(b) International capacity to be a party to treaties may, however, be possessed by a constituent State of a federation or union, upon which the power to enter into agreements directly with foreign States has been conferred by the Constitution:

- (i) If it is a member of the United Nations, or
- (ii) If it is recognized by the federal State or Union and by the other contracting State or States to possess an international personality of its own.

3. (a) In the case of a dependent State the conduct of whose international relations has been entrusted to another State, international capacity to enter into treaties affecting the dependent State is vested in the State responsible for conducting its international relations, except in the cases mentioned in sub-paragraph (b).

(b) A dependent State may, however, possess international capacity to enter into treaties if and in so far as:

- (i) The agreements or arrangements between it and the State responsible for the conduct of its foreign relations may reserve to it the power to enter into treaties in its own name; and
- (ii) The other contracting parties accept its participation in the treaty in its own name separately from the State which is responsible for the conduct of its international relations.

4. International capacity to become a party to treaties is also possessed by international organizations and agencies which have a separate legal personality under international law if, and to the extent that, such treaty-making capacity is expressly created, or necessarily implied, in the instrument or instruments prescribing the constitution and functions of the organization or agency in question.

Commentary

(1) The draft articles adopted by the Commission in 1959 did not contain an article on capacity to conclude treaties. The reason was that, without in any way committing itself, the Commission had provisionally adopted a plan for the intended code of treaty law under which the question of "capacity of parties" was to be dealt with in part II of the code as one of the topics of the "essential or substantive validity" of treaties, part I being confined to matters relating to the "formal" validity of treaties (A/4169, chapter II, paragraph 14). Capacity under international law to become a party to treaties has, however, a dual aspect, since it touches the question, what kind of legal persons are necessary as parties to an agreement if it is to be considered a treaty, as well as the question of the validity under international law of the agreement claimed to be a treaty. No doubt, it was for this reason that Sir H. Lauterpacht in his first report (A/CN.4/63) dealt in detail with capacity to enter into treaties, both in his commentary upon his article 1, covering the

essential requirements of a treaty, and in his article 10, covering "capacity of the parties" in its relation to the substantive validity of a treaty. Now that the Commission is engaged in formulating draft articles for a possible convention on treaty law, it may feel that to omit "capacity of parties" from the provisions concerning the conclusion of treaties would leave a noticeable gap in the articles, and the Special Rapporteur has accordingly prepared the present article for the Commission's consideration.

(2) Paragraph 1 sets out the general rule in regard to treaty-making capacity. In formulating it, the Special Rapporteur has taken account of the opinion expressed by the Commission in its commentary on article 2 of its 1959 draft that, whereas treaty-making capacity involves international personality in the sense that all entities having treaty-making capacity necessarily have international personality, it does not follow that all international persons have treaty-making capacity. The phrase "other subjects of international law invested with such capacity by treaty or by international custom" is designed primarily to cover the cases of international organizations and agencies and other entities like the Holy See. In its 1959 commentary the Commission said:

"It has always been a principle of international law that entities other than States might possess international personality and treaty-making capacity. An example is afforded by the case of the Papacy, particularly in the period immediately preceding the Lateran Treaty of 1929, when the Papacy exercised no territorial sovereignty. The Holy See was nevertheless regarded as possessing international treaty-making capacity. Even now, although there is a Vatican State which is under the territorial sovereignty of the Holy See, treaties entered into by the Papacy are, in general, entered into not by reason of territorial sovereignty over the Vatican State, but on behalf of the Holy See, which exists separately from that State."

States, including dependent States, and international organizations are dealt with in more detail in the further paragraphs of this article, but it has not been thought necessary to deal more specifically with the Holy See.

(3) Paragraph 2 seeks to cover the cases of federal States or Unions of States where the treaty-making capacity may under their constitutions be to some extent shared between the federation or Union and its component units. The subject is not free from difficulty, as can be seen from its somewhat different treatment in the reports of Sir H. Lauterpacht and Sir G. Fitzmaurice. The former, who did not, however, formulate any draft rules on the point, appears to have considered that the component States of a federation may in certain circumstances have a measure of treaty-making capacity, and even that agreements between the two component States of a federation can be considered treaties in the international sense (A/CN.4/63, commentary on articles 1 and 10). He referred in this connexion to the application by municipal tribunals of the doctrine of *rebus sic stantibus* to "treaties" between two component States of the German Federation in the case of *Bremen v. Prussia*²⁰ and of the Swiss Federation in the case of *Canton of Thurgau v. Canton*

²⁰ *Annual Digest of Public International Law Cases, 1925-6, Case No. 266.*

of *St. Gallen*.²¹ Sir G. Fitzmaurice, on the other hand, in article 8 of his draft on the essential validity of treaties (A/CN.4/115) strictly confined international capacity to conclude treaties to the federation itself and declined to attribute any treaty-making *capacity* to a component State *in its own right*; and he regarded any treaty-making *authority* conferred upon a component State simply as the authority of a subordinate agent or organ contracting on behalf of the federation. In other words, what is given in paragraph (a) of the present draft article as the normal rule was put forward by Sir G. Fitzmaurice as the sole rule.

(4) However close the analogy may be between international treaties and agreements between two component units of a federation or Union of States, it seems impossible to regard the latter agreements as examples of the exercise of *international* treaty-making capacity without risking confusion between the spheres of operation of international and domestic law. Normally, at any rate, agreements between component States of a federation operate within the régime of the constitutional law of the federation; if the federation subsequently dissolves, questions may arise as to the status of the agreements, but that problem belongs to another branch of the law of treaties. Accordingly, although in certain types of federation inter-State or inter-provincial agreements may appear to be similar to treaties, it does not seem appropriate to classify these agreements as arising from the exercise of *international* treaty-making capacity. No such agreement, it is believed, has ever been registered under the relevant provisions of the Covenant or Charter.

On the other hand, it may perhaps be thought to go too far in the opposite direction to deny altogether the possibility of any separate treaty-making capacity for the component State of a federation or union, even in those cases where both the domestic constitution and foreign States have recognized the component State to possess a measure of international personality. The examples, if not numerous, are important and difficult to overlook in draft articles on the law of treaties; for the Ukraine and Byelorussia are not only Members of the United Nations but have also been admitted as parties to many multilateral treaties in their own right. If both the federal constitution and third States recognize a component State to possess a measure of separate international personality, it seems difficult to deny it any international treaty-making capacity in the present articles. Nor is the question purely academic, because it may be necessary to know in a given case whether the other contracting States must look to the component State alone for the performance of the obligations undertaken in the treaty or whether the federation is also liable for the non-performance of the treaty by the component State. It is indeed possible that the component State might make a reservation not made by the federation itself. Accordingly, a rule has been formulated in paragraph (b) of the present article which, while not contemplating an unrestricted right for component States to claim treaty-making capacity, admits such capacity to the extent that the State's separate international personality is recognized both by the constitution of the federation and by the other contracting State or States.

(5) An analogous problem is posed by protectorates and other dependent States in cases where the treaties

or arrangements establishing the status of dependency place the general conduct of the State's foreign relations in the hands of another State but do not exclude all possibility of agreements being made directly between the dependent State and a foreign State. For example, the Court said in the case concerning the *Rights of Nationals of the United States of America in Morocco*,²² that Morocco had "made an arrangement of a contractual character whereby France undertook to exercise certain sovereign powers in the name and on behalf of Morocco, and, in principle, all of the international relations of Morocco"; but that Morocco had nevertheless "remained a sovereign State" and had "retained its personality as a State under international law"; moreover, as was mentioned by Sir H. Lauterpacht (A/CN.4/63, commentary to article 10), Morocco was admitted to the signature of a number of multilateral treaties as a separate party in its own right, even while still under the protection of France. And Tunisia was another example of the same kind. In such cases, the protected State would seem to retain a measure of treaty-making capacity in its own right, even although its exercise may be subject to the consent of the protecting Power. It scarcely seems possible, however, to attribute the same measure of treaty-making capacity to a self-governing territory not possessing the character of a State. It is true that a dependent self-governing territory has sometimes been admitted to separate participation in multilateral treaties, usually of a technical or economic character, in its own name.²³ But it seems doubtful whether in such cases the other contracting parties do or can legally look upon the self-governing territory as a distinct juridical person and a responsible party to the treaty entirely separate from the parent State.

(6) Paragraph 4 of this article seeks to state the general rule in regard to the treaty-making capacity of international organizations and agencies. The view has previously been expressed in the introduction to this report that the appropriate method of dealing with treaty-making by international organizations is to deal with it in a separate chapter, and it may be wondered why it is proposed to include a rule concerning their treaty-making capacity in the present article. The reason is that it seems logical to regard treaty-making capacity as a general matter distinct from the procedure of treaty-making, and to include it in chapter I. If this arrangement is accepted, then the appropriate place for the general rule concerning the treaty-making capacity of organizations is in the present article. As to the rule proposed in paragraph 4, it is based upon principles analogous to those laid down by the International Court of Justice in its opinion on "Reparations for Injuries Suffered in the Service of the United Nations"²⁴ for determining the capacity of the United Nations to present an international claim. In particular, it is based upon the statement²⁵ of the Court that: "Under international law, the Organization must be deemed to have those powers which, though not expressly provided for in the Charter, are conferred upon it by necessary implication as being essential to the performance of its duties."

²² *I.C.J. Reports*, 1952, pp. 182 and 185.

²³ E.g. Universal Postal Union, World Health Organization and International Trade Organization.

²⁴ *I.C.J. Reports*, 1949, p. 171, at p. 179.

²⁵ *Ibid.*, p. 182.

²¹ *Ibid.*, 1927-8, Case No. 289.

Chapter II. The rules governing the conclusion of treaties by States

ARTICLE 4. AUTHORITY TO NEGOTIATE, SIGN, RATIFY, ACCEDE TO OR ACCEPT A TREATY

1. A representative of a State purporting to have authority to negotiate and draw up the terms of a treaty on behalf of his State shall be required, except in the cases mentioned in paragraph 3, to furnish or exhibit credentials issued by the competent authority in the State concerned and providing evidence of such authority. He is not, however, required for these purposes to be in possession of full-powers to sign the treaty.

2. (a) A representative of a State purporting to have authority to sign (whether in full or *ad referendum*), ratify, accede to or accept a treaty on behalf of his State shall be required, except in the cases mentioned in paragraph 3 (b) below, to produce full-powers which invest him with authority to execute the act in question.

(b) Full-powers shall be in the form prescribed by the law and practice of the State concerned and shall emanate from the competent authority in that State. They may either be in a form restricted to the execution of the particular act concerned or in the form of a general grant of full-powers which covers the execution of that particular act.

(c) In case of delay in the transmission of the instrument of full-powers, a letter or telegram evidencing the grant of full-powers sent by the competent authority of the State concerned or by the head of its diplomatic mission in the country where the treaty is negotiated may be employed provisionally as a substitute for full-powers, subject to the production in due course of an instrument of full-powers, executed in proper form. Similarly, full-powers issued by a State's permanent representative to an international organization may also be employed provisionally as a substitute for full-powers issued by the competent authority of the State concerned, subject to the production in due course of an instrument of full-powers executed in proper form.

3. (a) Heads of a diplomatic mission have authority *ex officio* to negotiate a bilateral treaty between their State and the State to which they are accredited and to authenticate its text. They are, however, bound to comply with the provisions of paragraph 2 of this article, concerning the production of full-powers for the purpose of signing or ratifying the treaty on behalf of their State.

(b) Heads of State, Heads of Government and Foreign Ministers have authority, *ex officio*, to negotiate and authenticate a treaty on behalf of their State, and to sign, ratify, accede to or accept a treaty on its behalf; and they are not required to furnish any evidence of specific authority to execute any of these acts.

Commentary

(1) In the Commission's 1959 draft articles the authority of representatives to negotiate was dealt with in article 6, paragraphs 2 and 3, and their authority to sign in article 15. The Commission itself did not have time to consider the questions of ratification, accession and acceptance, so that there is no provision in the 1959 draft articles concerning authority to execute these acts; and Sir G. Fitzmaurice's drafts on

these matters do not cover the point. Nevertheless, the question of the representative's authority does arise also in regard to ratification, accession and acceptance; and, in order to avoid repetition, it seems better to cover all four cases of authority to exercise the treaty-making power on behalf of a State in a single article. The present article, therefore, contains the substance of the provisions of article 6, paragraphs 2 and 3, and article 15 of the Commission's 1959 draft, with some modifications and additions; while the present commentary also incorporates the relevant parts of the 1959 Commentary.

(2) Paragraph 1 deals with authority to negotiate, as distinct from authority to sign. While authority to sign, if possessed by the representative at the stage of negotiation, may reasonably be held to imply authority to negotiate, the reverse is not true; and, except in the cases mentioned in paragraph 3 (a), a further authority specifically empowering him to sign will be required before signature can be affixed. *Per contra* it is not necessary, for the purposes of negotiating and drawing up a treaty, to be in possession of full-powers to sign; credentials or *ex officio* authority under paragraph 3 suffice for these purposes.

(3) Paragraph 2 (a) lays down the general rule that, except for Heads of State, Heads of Government or Foreign Ministers, who are exempted in paragraph 3 (a), a representative is required to produce full-powers specifically authorizing him, as the case may be, to sign, ratify, accede to or accept the treaty in question. In point of fact, the normal practice in regard to instruments of ratification, accession and acceptance appears to be that the instruments are executed directly by the Head of State or Head of Government or by the Minister of Foreign Affairs, in which case they fall under the exception in paragraph 3 (a). Nevertheless, the execution of these acts is sometimes entrusted to the head of a diplomatic mission or the permanent representative of the State at the headquarters of an international organization, and then the production of full-powers will be necessary.²⁶

In 1959, the Commission was divided on the question whether full-powers are necessary for signature *ad referendum* as well as for signature in full, partly because it lacked information as to the actual practice of Governments and partly because of differences of view as to the exact legal effect of signature *ad referendum*. The practice of Governments in regard to treaties of which the Secretary-General of the United Nations is depositary indicates that no distinction is made for this purpose between signature in full and signature *ad referendum*.²⁷ The Commission may feel that it now has a sufficient basis for framing the rule in that sense, and paragraph 2 (a) has therefore been drafted in that form for the Commission's consideration.

(4) Paragraph 2 (b) deals with the form of full-powers. While the procedure of ratification of an international act is regulated by international law, the particular forms used for full-powers and the particular authorities within the State which issues them are matters which, in principle, are left to be determined by the domestic laws and usages of each State. Normally, full-powers are issued *ad hoc* for the execution of the particular act in question, but there does not

²⁶ See *Summary of the Practice of the Secretary-General as Depositary of Multilateral Agreements* (ST/LEG/7), paragraph 37.

²⁷ See *ibid.*, paragraph 31.

appear to be any reason why full-powers should not be couched in a general form provided that they leave no doubt as to the scope of the powers which they confer. Some countries, it is believed, may adopt the practice of issuing to certain Ministers, as part of their normal commissions, general or standing full-powers which, without mentioning any particular treaty, confer on the Minister general authority to sign treaties or categories of treaties on behalf of the State.²⁸ In addition, some permanent representatives at the headquarters of international organizations, that are the depositaries of multilateral treaties, are clothed by their States with general full-powers, either included in their credentials or contained in a separate instrument. It also appears that during regular sessions of the General Assembly the permanent representatives are sometimes given general full-powers with respect to agreements which may be concluded during the session (see *Summary of the Practice of the Secretary-General* (ST/LEG/7), paragraph 35). The Commission will be glad eventually to have information from Governments as to their practice in regard to "general" full-powers. In the meanwhile, it seems justifiable tentatively to insert in paragraph 2 (b) a provision admitting the sufficiency of full-powers framed to cover treaties generally or specific categories of treaty. But, whether the full-powers be general or particular, they must be sufficient to invest the representative with authority to execute the particular act in question—signature, ratification, accession or acceptance, as the case may be.

(5) Paragraph 2 (c) recognizes a practice of comparatively recent development which is of considerable utility and should serve to render initialling and signature *ad referendum* unnecessary save in exceptional circumstances. If the promised full-powers do not in due course arrive, the signature provisionally admitted on the emergency basis contemplated in this subparagraph naturally becomes a nullity and the State concerned is in the same position as if its signature had never been affixed to the treaty.

The *Summary of the Practice of the Secretary-General* (ST/LEG/7), paragraph 29, states that since 1949 "full-powers issued by a permanent representative to the United Nations acting on instructions from his Government have in practice been accepted as having the same validity as full-powers transmitted by telegraph for purposes of signing conventions which are subject to ratification". The part played by permanent representatives to international organizations in modern diplomatic life is now so well recognized and so important that it seems desirable to take account of the practice of the Secretariat of the United Nations in the present connexion. If the head of a diplomatic mission may issue a letter provisionally evidencing the grant of full-powers, there would certainly seem to be no reason why the Head of a permanent mission to an international organization should not do the equivalent on the same provisional basis for the purpose of signing, ratifying, acceding to or accepting a treaty for which the organization is the depositary. A sentence covering this point has accordingly been inserted in paragraph 2 (c) and is submitted for the Commission's consideration.

(6) Paragraph 3 (a) notices a well-established exception to the rule that the representative of a State deputed to negotiate a treaty on its behalf must furnish

credentials evidencing his authority to negotiate the treaty. Such authority is inherent in the Head of a diplomatic mission in virtue of his credentials as such and the functions of his office. Thus, article 3 (c) of the Vienna Convention on Diplomatic Relations provides that "the functions of a diplomatic mission consist, *inter alia*, in . . . negotiating with the Government of the receiving State".

Paragraph 3 (b) notices equally well-established exceptions not only to the rule concerning the furnishing of credentials but also to the rule concerning the furnishing of full-powers. It is inherent in the office and function of Heads of State, Heads of Government and Foreign Ministers that they possess authority both to negotiate a treaty and to sign, ratify, accede to or accept a treaty on behalf of their State. In the case of Foreign Ministers, the inherent authority of the Minister to bind his Government in negotiations with a foreign State was expressly recognized by the Permanent Court of International Justice in the *Eastern Greenland* case²⁹ in connexion with an oral undertaking by the Foreign Minister of Norway, commonly referred to as the "Thlen Declaration".

ARTICLE 5. ADOPTION OF THE TEXT OF A TREATY

1. The adoption of the text or texts setting out the provisions of a proposed treaty takes place:

(a) In the case of a bilateral treaty, by mutual consent of the parties;

(b) In the case of a plurilateral treaty, by unanimity unless the States concerned shall decide by common consent to apply another voting rule;

(c) In the case of a multilateral treaty drawn up at an international conference convened by the States concerned, by any voting rule that the conference shall, by a simple majority, decide to apply;

(d) In the case of a multilateral treaty drawn up at an international conference convened by an international organization, by any voting rule that may be prescribed in the constitution of the organization, or in a decision of the organ competent to determine the voting rule, and, failing any such decision, by the rule that the conference shall by a simple majority decide to apply;

(e) In the case of a multilateral treaty drawn up in an international organization, by any voting rule that may be prescribed in the constitution of the organization or, failing any such constitutional provision, in a decision of the organ competent to decide the voting rule.

2. The participation of a State in the adoption of the text of a treaty, whether in negotiation or at an international conference, shall not place it under any obligation to proceed afterwards to sign, ratify, accede to, or accept the said treaty. *A fortiori*, such participation shall not place it under any obligation to carry out the provisions of the treaty.

3. Nothing contained in paragraph 2 of this article shall, however, affect any obligation that a State participating in the drawing up of a treaty may have, under general principles of international law, to refrain for the time being from any action that might frustrate or prejudice the purposes of the proposed treaty, if and when it should come into force.

²⁸ See paragraph 3 of the commentary on article 15 of the Commission's 1959 draft.

²⁹ Series A/B 53, p. 71.

Commentary

(1) This article incorporates the substance of article 6, paragraph 4, and of article 8 of the draft articles approved by the Commission in 1959. It does not seem to the Special Rapporteur that the provisions of article 7 of the 1959 draft are suitable for inclusion in a convention, as distinct from an expository code. Article 7 of that draft read as follows:

"Elements of the text

"1. It is not a juridical requirement of the text of a treaty that it should contain any particular rubric, such as a preamble or conclusion, or other special clause.

"2. However, in addition to a statement of its purpose and an indication of the parties, provisions normally found in the text of a treaty are those concerning the date and method of the entry into force of the treaty, the manner of participation of the parties, the period of its duration, and other formal and procedural matters.

"3. 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 should indicate the manner in which these processes are to be carried out and the requisite communications to the interested States which are to be made."

These provisions appear to point out what it is desirable that a model text of a treaty should contain rather than to state rules of law. The Special Rapporteur therefore suggests that it is unnecessary to do more than to recall them in the commentary to the present article.

(2) Paragraph 1 of the present article embodies and largely repeats the rules set out in paragraph 4 of article 6 of the 1959 draft concerning the voting rules for the adoption of the text of a treaty, with the difference that those rules are here set out under five heads instead of four. The reason which led the Special Rapporteur to make this change is that paragraphs (c) and (d) of the 1959 draft really cover three, not two, distinct types of case, and it seemed simpler to treat them in three separate paragraphs.

(3) Paragraph 1 of the present article deals with the voting rule by which the text of the treaty is "adopted", i.e., the voting rule by which the form and content of the *proposed* treaty is settled. At this stage, the negotiating States are concerned only with drawing up the text of the treaty as a document setting out the provisions of the proposed treaty, and their votes, even when cast at the end of the negotiations in favour of adopting the text as a whole, relate solely to this process. A vote cast at this stage, therefore, is not in any sense an expression of the State's agreement to be bound by the text, which can only become binding upon it by a further expression of its consent (signature, ratification, accession or acceptance) in accordance with the provisions of articles 7 to 16 of these draft articles.

(4) Sub-paragraphs (a) and (b) of paragraphs 1 express the obvious principles (a) that the text of a bilateral treaty can only be adopted by mutual consent and (b) that the rule of unanimity must also apply in the case of treaties negotiated between a small number or a restricted group of States for some

specific common purpose, unless they agree—by unanimous vote—to adopt a different voting rule.

(5) The main problem is the voting rules for adopting general multilateral treaties, and here a distinction has to be made between treaties drawn up at conferences convened by the negotiating States themselves and those drawn up either within an international organization or at a conference called by an international organization. For in the latter type of case the organization itself may play a role in settling the voting rule.

(6) Sub-paragraph (c) deals with the first type of case, where the conference is convened by the States themselves. There seems to be little doubt that up to the First World War the unanimity rule generally applied also at this type of conference, and in 1959 some members of the Commission considered this still to be the basic rule in the absence of an express decision to the contrary. The general feeling in the Commission, however, was that in recent times the practice at large international conferences of adopting texts by some kind of majority had become so invariable that it would now be unrealistic to postulate any other system. A conference can still, of course, *decide* to proceed by unanimity, but in the absence of any such decision it must now be assumed that it will proceed on the basis of a majority voting rule. The only questions now are, what is the majority to be and how is the conference to decide on that majority—i.e., does this initial decision itself require to be taken by unanimity, or can it equally be taken by majority vote and, if so, by what majority?

(7) The commission had some initial doubts in 1959 as to exactly how far it is appropriate for a code of treaty law to lay down voting rules for an international conference convened by States for the purpose of drawing up the text of a treaty. Ultimately, however, while considering that it should refrain from laying down a hard and fast voting rule for the adoption of the treaty, the Commission concluded that it is essential to prescribe by what means the conference should arrive at its decision concerning the voting rule. It might be true that a conference would usually arrive at it somehow, but perhaps only after long procedural debates, delaying the start of the substantive work of the conference. Once this view had been adopted by the Commission, there was general agreement that the rule of the simple majority as the basis of the adoption by the conference of its rules of procedure, including its *substantive* voting rule, was the only practicable one. The Conference's substantive voting rule—i.e., for the *adoption of texts, and for taking any other non-procedural*³⁰ decisions, would then be such as the Conference, by a simple majority, decided upon. This substantive voting rule might itself be a simple majority rule, or it might be two-thirds, or even, theoretically, unanimity.

(8) Sub-paragraph (d) deals with the case, now increasingly common, where a multilateral treaty is drawn up at a conference convened by an international organization. The constitutions of some organizations, such as the International Labour Organisation, prescribe in detail the method by which treaties concluded under their auspices shall be drawn up. Those of others do not. However, the appropriate organ of the

³⁰ The rule of the simple majority vote for *procedural* decisions is universally admitted; but the discussion here relates to substantive decisions—in particular those leading to the adoption of texts.

organization, if it is constitutionally empowered to do so, may, in deciding to convene a conference, prescribe the voting rule in advance as one of the conditions for doing so. In the absence of any rule having been laid down in advance either by the constitution or by the decision of the organization, the determination of the voting rule clearly rests with the conference itself, and that determination, as in cases under sub-paragraph (c), should itself be made by a simple majority. Thus, according to the Secretary of the Commission, the practice of the Secretariat of the United Nations, when the General Assembly convenes a conference, is, after consultation with the groups and interests mainly concerned, to prepare provisional or draft rules of procedure for the conference, including a suggested voting rule, for adoption by the conference itself. But it is left to the conference to decide whether to adopt the suggested rule or replace it by another.

(9) Sub-paragraph (e) deals with the case where the treaty is drawn up within the international organization itself. In these cases it would seem that, if the constitution of the organization does not prescribe the voting rule, the determination of the rule must rest with the organ competent under the constitution to lay down the voting rule; in other words, either with the organ within which the treaty is to be drawn up or some other organ competent to give directions to it concerning the voting rule to be applied.

(10) Paragraphs 2 and 3 of the present article embody, with some redrafting, the two paragraphs of article 8 of the 1959 draft, which was entitled "Legal consequences of drawing up the text". This title, as the 1959 commentary conceded, was "slightly elliptical", in that the primary rule stated in the article, as in paragraphs 2 and 3 of the present article, was that adoption of the text of a treaty does not involve legal consequences. That being so, the present Rapporteur does not think it justifiable to place these paragraphs in a separate article, and suggests that the proper place for them is in the present article. Truth to tell such "direct or positive" legal consequences as might seem to follow from participation in the adoption of the text of a treaty really attach to participation in the "authentication" of the text, which falls under the next article. This seems to the Special Rapporteur to be another reason why it may be better not to have a separate article which deals with the so-called "legal consequences of drawing up the text".

(11) Paragraph 2 of the present article has been drafted somewhat differently from article 8, paragraph 1, of the 1959 draft, to which it corresponds. The phrase "does not involve any obligation to accept the text", found in the 1959 draft, seems to the Special Rapporteur to be open to objection on two grounds. First, the "acceptance" of a treaty text is a technical process in treaty-making (see article 16 of the present draft) and it seems better to avoid the use of the word "accept" in its non-technical meaning, so far as possible. Secondly, the phrase "accept the text" is ambiguous and confusing in the context of this paragraph. For the chief object of this paragraph is to underline the distinction between "adopting" the "text" and "agreeing" to the "treaty" itself. The intention in the paragraph, as the 1959 commentary confirms, was to emphasize that adoption of the *text* does not involve any obligation to carry out the *treaty*, but the words "accept the text" used in the paragraph do not express that intention and may confuse the issue. In any

event, it seems desirable also to make the point that participation in the adoption of the text involves no obligation to proceed afterwards to become a party to the treaty; this point has accordingly been added.

ARTICLE 6. AUTHENTICATION OF THE TEXT AS DEFINITIVE

1. Unless another procedure has been prescribed in the text or agreed upon by the negotiating States, the text of the treaty as finally adopted may be authenticated in any of the following ways:

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

(b) Incorporation of the text in the Final Act of the conference in which it was adopted;

(c) Incorporation of the text in a resolution of an international organization in which it was adopted or in a resolution of one of its organs or in any other manner prescribed by the Constitution of the organization concerned.

2. In addition, signature of the text by a representative of a negotiating State, whether a full signature or signature *ad referendum*, shall automatically constitute an authentication of the text of a proposed treaty, if the text has not been previously authenticated in another manner with respect to that State under the provisions of paragraph 1 of this article.

3. On authentication in accordance with the foregoing provisions of the present article, the text shall become the definitive text of the treaty. No additions or amendments may afterwards be made to the text except by means of the adoption and authentication of a further text providing for such additions or amendments.

Commentary

(1) This article repeats, with minor drafting changes, the provisions of article 9 of the 1959 draft, and the commentary which follows repeats, in abbreviated form, the 1959 commentary.

(2) Authentication of the text is necessary in order that, before the negotiating States are called upon to decide whether they will become parties to the treaty or not—or in some cases before they are called upon to decide whether they will even sign it, as an act of provisional consent to the treaty—they may know finally and definitively what is the text of the treaty which, if they take these decisions, they will be signing or becoming parties to. It is clear that such steps as signature, ratification, accession, bringing into force, etc., can only take place on the basis of a text the terms of which have been settled, and are not open to change. There must come a point, therefore, at which the process of negotiation or discussion is halted, and the text which the parties have agreed as a text is *established* as being the text of the proposed treaty. Whether the States concerned will eventually become bound by this treaty is of course another matter, and remains quite open. None is committed at that stage. But if they are eventually to become bound, they must have, as the basis of any further action, a final text not susceptible of alteration. Authentication is the process by which this final act is established, and it consists in some act or procedure which certifies the text as the correct and authentic text.

(3) Accordingly, once a recognized procedure of authentication has been carried out in relation to a

text, any subsequent alteration of it results not merely in an amended text, but in a *new* text, which will then itself require authentication or reauthentication in some way. Thus, where signature is itself the method of authentication, changes effected after signature would require the text to be re-signed or re-initialled, or a new text to be drawn up and signed; or alternatively a separate protocol registering and authenticating the changes would have to be drawn up and signed. In general, no changes could be made to the original signed text or signature copy itself, for then the parties would be on record as having signed a text different from the one which, at the actual date of signature, they did sign. If changes should be made on the original signed text or signature copy, they would themselves require to be signed or initialled, and *dated*. The document as a whole would then stand authenticated as the actual text of the treaty. But final establishment of the text at some point there must be, and, in order to register and stabilize this text as the basis for ratification (where necessary) and entry into force, there must be an eventual authentication of it in its final form by some recognized method.

(4) The same considerations apply, *mutatis mutandis*, and perhaps even more obviously, where authentication of the original text has taken place, not by signature but, e.g., by embodiment of the text in the final act of a conference, or in a resolution of an organ of an international organization.⁸¹ Any subsequent alteration of it would result in a new text, itself requiring authentication by the same or some other recognized means.

(5) Previous drafts and codes of the law of treaties have not recognized authentication as a distinct and necessary part of the treaty-making process. The reason appears to be that until comparatively recently signature was the normal method of authenticating a text and that signature always has another and more important function; for it also operates as an expression of the State's consent to be bound by the treaty (either conditionally upon ratification or unconditionally if the treaty is not subject to ratification). The authenticating aspect of signature is consequently masked by being merged in its consent aspect. This was pointed out by Professor Brierly in his first report (A/CN.4/23, commentary on his article 6), where he went on to explain that in recent years other methods of authenticating texts of treaties on behalf of all or most of the negotiating parties have been devised. He gave as examples the incorporation of unsigned texts of projected treaties in signed Final Acts of diplomatic conferences, the special procedure of the International Labour Organisation under which the signatures of the President of the International Labour Conference and of the Director-General of the International Labour Office authenticate the texts of labour conventions,

⁸¹ The practice of the United Nations for purposes of authentication is to use the latter two methods specified in paragraph 1 of article 6, rather than the first alternative of initialling. The custom of initialling has never been used in the United Nations for the purposes of authenticating the text of a multilateral convention. Initialling for the purposes of authentication has been supplanted, in the more institutionalized treaty-making processes of the United Nations, by such standard machinery as the recorded vote on a resolution embodying or incorporating the text, or by incorporation into a final act. As stated in paragraph 4 of the above commentary, any subsequent alteration of a text authenticated by these means would be, in effect, the drawing up of a new text, itself requiring authentication by the same or other recognized means.

and treaties which are not signed at all but opened for accession and whose texts are authenticated by being incorporated in a resolution of an international organization. Professor Brierly considered, as is the view also of the Commission, that these developments in treaty-making practice render it desirable to emphasize in the draft the distinction between signature of the texts of treaties as a means of mere authentication and signature as the process, or part of the process, whereby a State or international organization expresses its consent to be bound by the treaty.

(6) The foregoing comments, it is thought, provide a sufficient explanation of the provisions of the present article. It may, however, be added that signature has been dealt with separately in paragraph 2, instead of being included in paragraph 1, primarily for the reason that, whereas the processes listed in paragraph 1 are always, or almost always, acts of authentication, this is not the case with signature, which may not be an act of authentication if the text has already been authenticated by another process, such as incorporation in the Final Act of a conference.

(7) The Commission decided in 1959 that there is no need to provide expressly in the draft that "sealing", i.e., the affixing of seals as well as signatures to the treaty, which was a common practice in the past, is unnecessary despite the appearance in a treaty of the common-form recital "have signed the present treaty and affixed thereto their seals". The Commission—and the present Special Rapporteur is of the same view—thought it would be sufficient to mention the point in the commentary.

ARTICLE 7. THE STATES ENTITLED TO SIGN THE TREATY

1. In the case of bilateral and plurilateral treaties the right to sign the treaty shall be confined to the States participating in the adoption of the text and to such other States as, by the terms of the treaty or otherwise, they may agree to admit to the signature of the treaty.

2. In the case of multilateral treaties the right to sign shall be governed by the following rules:

(a) Where the treaty specifies the particular States or categories of States which are to be entitled to sign it, only those States or categories of States have the right to sign;

(b) Where the treaty does not contain any provision on the matter, every State invited to participate in the negotiations, or to attend the conference at which the text of the treaty is drawn up shall have the right to sign the treaty.

(c) Where the treaty does not contain any provision on the matter and is one which has been left open for signature, States other than those referred to in sub-paragraph (b) may be admitted to the signature of the treaty:

(i) If the treaty is already in force and more than four years have elapsed since the adoption of the text, then with the consent of two-thirds of the parties to the treaty;

(ii) If the treaty is already in force but not more than four years have elapsed since the adoption of the text, or if the treaty is not yet in force, then with the consent of two-thirds of the States that participated in the negotiations, or attended the conference, at which the text was drawn up.

Commentary

(1) This article repeats, with some changes, the provisions in article 17 of the 1959 draft articles, which were approved by the Commission; and the present commentary reproduces the substance of the 1959 commentary, though with considerable abbreviation of the first five paragraphs. The present Special Rapporteur's explanations of certain changes in the text of the article are given in paragraphs 8 and following below.

(2) The article deals with the conditions under which a State may have a right to sign a treaty, and touches one aspect of the question whether a State can ever be said to have a right to insist on becoming a party to multilateral treaties which are of general interest or lay down norms of general international law. No problem exists in the case of bilateral or plurilateral treaties, since it is clear that outside States can only become parties to these treaties with the consent of the other States concerned, either expressed in the treaty itself or in an agreement separately arrived at. In the case of multilateral treaties, however, the problem is a real one, and especially today, since there are many newly created States, and numbers of multilateral treaties may, by their terms, no longer be open to signature or accession. The Commission in 1959, while recognizing the need to lay down provisions on this matter, considered that any abstract right of participation in a multilateral treaty that may exist or be thought desirable cannot be wholly divorced from the method by which it may be exercised in a concrete case. In other words, any *right* of participation in multilateral treaties of a general character must be related to the existing procedures of treaty-making in the international community, and to the accepted methods of admitting States to participation in multilateral treaties. If this conclusion is accepted, the problem resolves itself into considering, with reference to each method separately (signature, ratification, accession, acceptance), what States or categories of States have or should have the right to participate in the treaty through the particular method concerned. This was the solution adopted by the Commission in 1959, and it did not then attempt to reach a final decision concerning the inclusion of a general article about participation in multilateral treaties. It decided to defer this decision until after the drafting of the individual articles on the right to sign, ratify, accede, etc. The exchange of views in the Commission on the question of a general right of participation is, however, relevant to the understanding of the provisions contained in the present article concerning the right to sign, and in those of articles 13 and 16, concerning the right to accede to or accept a treaty; and it will therefore be summarized in the paragraphs which now follow.

(3) The discussion centred upon the question whether international law does, or ought to, postulate an *inherent right* of participation for every State in multilateral treaties which are intended to create general norms of international law or are otherwise of general interest to all States. Some members of the Commission considered that such an inherent right ought to be postulated on the ground that it is for the general good that all States should become parties to such treaties, and that in a world community of States, no State should be excluded from participation in treaties of this character.

(4) Other members of the Commission, who did not share this view, pointed out that, even if the right were to be admitted in principle, great practical difficulties would arise in putting it into effect. Either a treaty of this kind makes provision for the States or category of States to be admitted to participation, or it does not. If it does not, either expressly or by implication, exclude any State then there is no problem. Any State may participate in the treaty by taking the prescribed steps. If on the other hand the treaty contains some limitation, then it is virtually impossible to admit that a State not covered can, by pleading an alleged inherent right, insist on participation, thus overriding the wishes and intentions of the framers of the treaty, as expressed in it.

(5) These members pointed out that the problem really arises at an earlier stage, when the decision is taken who are to be the "framers of the treaty"—in short, who are to be invited to the conference at which the treaty is drawn up? As a rule, participation in the conference (or the right to participate, whether exercised or not) normally determines the right of participation in the treaty. If the eventual treaty does not limit the class of States which may participate, no difficulty arises; if, however, it does impose a limitation, it would usually be found that the designated class was the same as that invited to the conference. In so far as there is a problem, therefore, it can only be dealt with at the invitation stage. It cannot be met by a rule overriding the express provisions of the treaty about participation, which would not, indeed, be juridically possible.

(6) The further point was made that any inherent right of participation, if admitted, would give rise to serious difficulties in relation to the recognition or non-recognition of States or Governments. Even although the mere fact that a State is a party to a multilateral treaty does not of itself involve recognition of that State or its Government by other parties, nevertheless serious political and other problems would arise if parties to a treaty found themselves obliged to admit as a party States or Governments which they might perhaps have expressly intended to exclude by the wording of the participation clause.

(7) As to the problem of the new State which wants to become a party to an old treaty, the Commission, although considering this to be an important matter, thought that it is mainly a question of accession and belonged more particularly to that subject. It was pointed out that the dimensions of the problems are in practice slight. Most general treaties of the kind involved have accession clauses. The problem arises primarily in the case of the older treaties which are no longer open for signature and which either do not expressly provide for accession or which, like The Hague Conventions of 1899 and 1907 concerning the Pacific Settlement of International Disputes or the Barcelona Convention of 1921,³² contain an accession clause limiting the right of accession to certain States.

(8) Paragraph 1 of the present article contains the substance of paragraph 1 of article 17 of the Commission's draft, the differences in the wording being merely drafting changes. Paragraph 2 contains the substance of paragraph 2 of the Commission's former article 17, and the wording of sub-paragraphs (a) and

³² Convention on the Régime of Navigable Waterways of International Concern, Barcelona, 1921, League of Nations, *Treaty Series*, vol. VII, pp. 36-63.

(b) is almost the same as that of the corresponding sub-paragraphs of the Commission's draft. These two sub-paragraphs have, however, been transposed because the reverse order seems to be rather more logical and to give a somewhat neater draft. No further explanations of paragraph 1 and paragraph 2 (a) and 2 (b) seem to be necessary, beyond those already contained in paragraphs 1-7 of the present commentary.

(9) It is, however, necessary to provide a more detailed commentary on paragraph 2 (c). It is clear that where a treaty is not left open for signature, States which do not sign on the occasion of the signature cannot do so afterwards. Where, however, the treaty remains open for signature, the question may arise of signature by a State not included amongst the sub-paragraph (b) category of States, i.e., those invited to participate in the negotiation or conference. The existing rule is that, in principle, the treaty is not open to signature by such a State. But it seems desirable to encourage the States concerned to consider allowing such a State to become a signatory in certain circumstances, and a specific provision has been inserted in the draft articles for this purpose. The insertion of this provision seems to be particularly necessary in order to cover the possibility of a signature by a new State which may have attained independence after the close of the negotiations or conference but while the treaty is still open to signature. Accordingly, paragraph 2 (c) provides that the signature of a State not included in the categories in paragraph 2 (b) should be admitted if two-thirds of the States entitled to a voice in the matter consent.

Opinions may differ as to what States are, or ought to be, entitled to a voice in deciding whether States not included in the categories in paragraph 2 (b) should be admitted to the signature of the treaty. If, for example, the treaty, while still open to signature by States comprised in the categories mentioned in paragraph 2 (b), is already in force, it is arguable that the right to open the treaty to signature by additional States should be confined to actual parties to the treaty; but it is not absolutely clear that this is necessarily the right solution, because some treaties are expressed to come into force after very few signatures and the "actual parties" might represent a very small proportion of the interested States. In the other case, where the treaty is not yet in force, it is arguable that all the States which actually attended the negotiations or conference,³³ whether signatories or not, should be entitled to a voice in the decision; but here again, it is not clear that the right of negotiating States which have refrained from signing for so long that they may be thought not to have the intention to sign at all ought to be recognized. In 1959, the Commission thought that to cover all the various uncertainties would require a considerable elaboration of the article, which it did not feel called upon to undertake at that time. As, however, the Commission is now required to submit the present draft articles in their final form, the Special Rapporteur has thought it incumbent upon him to consider whether any further elaboration of paragraph 2 (c) is desirable to take account of those uncertainties. It seems to him that the second type of case, where the treaty is not in force, can properly be left out of account because the probability will then be that

comparatively few States will have taken the steps necessary for actual participation in the treaty and there is no very strong argument for limiting the right of decision to them. On the other hand, it does seem desirable to place some limit on the right of negotiating States to a voice in the matter if the treaty is in force and a considerable time has elapsed without their having become parties to it. Accordingly, paragraph 2 (c) limits their right to a period of four years after the adoption of the text, after which only the actual parties are to have a voice in the matter. It would be possible, perhaps, to devise other more complicated formulae based on the proportion of the actual parties to the number of the States that negotiated the treaty which might be considered more scientific. A somewhat simpler rule on the lines of the present draft is, however, believed to be preferable.

(10) It will be appreciated, from what has been said above, that the provisions of paragraph 2 (c) of the present article relate only to the right to *sign* a treaty. The more general question whether and to what extent a State may have a right to become a party to multilateral treaties is dealt with in article 13 in connexion with the right to *accede* to a treaty.

ARTICLE 8. THE SIGNATURE OR INITIALLING OF THE TREATY

1. (a) Signature of a treaty shall normally take place at the conclusion of the negotiations or of the meeting or conference at which the text has been adopted.

(b) The States participating in the adoption of the text may, however, provide either in the treaty itself or in a separate agreement:

- (i) That signature shall take place on a subsequent occasion; or
- (ii) That the treaty shall remain open for signature at a specified place either indefinitely or until a certain date.

2. (a) The treaty may be signed unconditionally; or it may be signed *ad referendum* to the Government of the State concerned, in which case the signature is provisional and subject to confirmation within a reasonable time by the State on whose behalf it was made.

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

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

3. (a) The treaty, instead of being signed, may be initialled, in which event the effect of the initialling shall be as follows:

- (i) If it is carried out by a Head of State, Head of Government or Foreign Minister with the intention that it shall be the equivalent of a full signature, it shall operate as a full signature of the treaty on behalf of the State concerned;
- (ii) In other cases it shall operate only as an authentication of the text, and a further separate act of signature is required to constitute the State concerned a signatory of the treaty.

(b) When initialling is followed by the subsequent signature of the treaty, the date of the signature, not

³³ States which, although invited, failed to attend could not, however, have any legitimate claim to a voice in the decision.

that of the initialling, shall be the date upon which the State concerned shall become a signatory of the treaty.

Commentary

(1) The present article contains the substance of articles 16 and 10 of the Commission's 1959 draft articles, and the commentary which follows incorporates the appropriate parts of the 1959 commentaries relating to these two articles. It seems convenient to bring the provisions of the two articles together, rather than to place them in two quite widely separated articles, as was the case in the 1959 draft. For both articles concern the carrying out of the act (or sometimes an embryo act) of signature, and both touch the question of the date upon which a State becomes the signatory to a treaty. Moreover, from one point of view the question of the time and place of signature dealt with in article 16 of the 1959 draft would seem logically to precede the questions of signature *ad referendum* and initialling.

(2) The antithesis in paragraph 1 of the present article is between the treaty that remains open for signature until a certain date—or else indefinitely—and the treaty that does not. Most treaties, in particular bilateral treaties and treaties negotiated between a restricted number or group of States, do not remain open for signature. They are signed either immediately on the conclusion of the negotiation, or on some later date especially appointed for the purpose. In either case, States intending to sign must do so on the occasion of the signature, and cannot do so thereafter. They may of course still be able to become parties to the treaty by some other means, e.g., accession (as to which see articles 13-16).

In the case of general multilateral treaties, or conventions negotiated at international conferences, there has for some time been a growing tendency to include a clause leaving them open for signature until a certain date (usually six months after the conclusion of the conference). In theory, there is no reason why such treaties should not remain open for signature indefinitely, and cases of this are on record:³⁴ however, the utility and practicability of that must depend on the character of the particular treaty. The practice of leaving multilateral treaties open for signature, at least for a reasonable period, has considerable advantages. The closing stages of international conferences are apt to be hurried. Often the Governments at home are not in possession of the final text, which may only have been completed at the last moment. For that reason, many of the representatives are not in possession of authority to sign the treaty in its final form. Yet even in those cases where it is possible to become a party to a treaty by accession, many Governments would prefer to do so by signature and ratification. It is also desirable to take account of the fact that Governments which are not sure of being able eventually to ratify (or accede) may nevertheless wish for an opportunity of giving that provisional

measure of assent to the treaty which signature implies. These preoccupations can most easily be met by leaving the treaty open for signature at the seat of the "headquarters" Government or international organization. It can then be signed by any person producing a valid full-power to do so, such as the diplomatic or permanent representative of the signing State at the seat in question, or by a Foreign Minister or other authorized person present there, or having gone specially for the purpose.

(3) Paragraphs 2 and 3 deal with the mysteries of signature *ad referendum* and initialling. Signature *ad referendum*, as indicated in paragraph 2, is not of course a full signature, but it will rank as one if subsequently confirmed by the Government on whose behalf it was made. Initialling, as appears in paragraph 3, is capable of being the equivalent of a full signature only if two conditions are fulfilled:

- (i) That it is carried out by a person having inherent authority by reason of his office to bind his State; and
- (ii) That it is done with the intention that it shall be the equivalent of a full signature.³⁵

In all other cases initialling is an act only of authentication of the text.

The principal differences between initialling and signature *ad referendum* therefore are:

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

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

(4) There may also be a certain difference in the occasions on which these two procedures are employed. Initialling is employed for various purposes. One is to authenticate a text at a certain stage of the negotiations, pending further consideration by the Governments concerned. It may also be employed by a representative who has authority to negotiate, but is not in possession of (and is not at the moment able to obtain) an actual authority to sign.³⁶ Sometimes it may be resorted to by a representative who, for whatever reasons, is acting on his own initiative and without instructions, but who nevertheless considers that he should carry out some sort of act in relation to the text. Signature *ad referendum* may also be resorted to in some of these cases, but at the present time is probably employed mainly on actual governmental instructions in cases where the Government wishes to perform some act in relation to the text, but is unwilling to be committed to giving it even the provisional consent that a full signature would imply.

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

³⁵ Such cases are infrequent but have occurred. The intention may be inferred from the instrument as a whole or from the surrounding circumstances.

³⁶ Today, when a telegraphic authority, pending the arrival of written full powers, would usually be accepted (see article 4 above, and the commentary thereto), the need for recourse to initialling on this ground ought only to arise infrequently.

ARTICLE 9. LEGAL EFFECTS OF A FULL SIGNATURE

1. Full signature of a treaty, as stated in paragraph 2 of article 6, automatically constitutes an act authenticating the text of the treaty, if such authentication has not already taken place by another procedure.

2. In cases where the treaty signed is subject to ratification or acceptance, or where the signature itself has been given subject to subsequent ratification or acceptance, full signature shall not constitute the State concerned a party, whether actual or presumptive, to the treaty but shall only constitute it a signatory to the treaty with the following effects:

(a) The signatory State shall be entitled to proceed to the ratification or, as the case may be, acceptance of the treaty on compliance with any provisions in the treaty relating to ratification or acceptance.

(b) The signatory State shall be under an obligation to examine the question of the ratification or, as the case may be, acceptance of the treaty in good faith with a view to its submission to the competent organs of the State for ratification or acceptance; and if the treaty itself or the constitution of an international organization within which the treaty was adopted expressly so provides, the signatory State shall be under an obligation to submit the question of the ratification or, as the case may be, acceptance of the treaty to the consideration of its competent organs.

(c) The signatory State, during the period before it shall have notified to the other States concerned its decision in regard to the ratification or acceptance of the treaty or, failing any such notification, during a reasonable period, shall be under an obligation in good faith to refrain from any action calculated to frustrate the objects of the treaty or to impair its eventual performance.

(d) The signatory State shall have the right, as regards any other State concerned, to insist upon the observance of the provisions of the treaty regulating signature, ratification, acceptance, accession, reservations, deposit of instruments and any other such matters.

(e) The signatory State shall also be entitled to exercise any other rights specifically conferred by the treaty itself or by the present articles upon a signatory State.

3. (a) In cases where the treaty signed is not subject to ratification and where the signature itself makes no mention of its being conditional upon subsequent ratification or acceptance by the State on whose behalf it is affixed to the treaty, full signature shall have the following effects:

(i) If the treaty is to come into force upon the occasion of its signature by the negotiating States, or if it is already in force or is brought into force by the particular signature in question, the signature shall constitute the State concerned an actual party to the treaty immediately.

(ii) If the treaty is to come into force upon a future date or event, the signature shall constitute the State concerned a presumptive party to the treaty pending its entry into force, and an actual party if and when the treaty comes into force.

(b) A signatory State which, under the provisions of sub-paragraph 3 (a) (ii) above, is merely a presumptive party to the treaty, pending the entry into force of the treaty:

(i) Shall be under an obligation in good faith to refrain from any action calculated to frustrate the objects of the treaty, provided that, if after the lapse of a reasonable time from the date of signature the treaty is not yet in force, it shall be at liberty to notify the other signatory States that it no longer considers itself bound by such obligation;

(ii) Shall be entitled to exercise the rights mentioned in paragraph 2 (d) and (e) of the present article as possessed by a signatory State whose signature is subject to ratification or acceptance.

Commentary

(1) The matters covered by this article were not dealt with in the Commission's 1959 draft, but they were the subject of article 5 in Sir H. Lauterpacht's report (A/CN.4/63) and articles 28-30 in that of Sir G. Fitzmaurice (A/CN.4/101). It is not easy to state the legal effects of full signature in a satisfactory, and still less in a simple, manner; for the legal effects of signature are connected also with the subjects of authentication and ratification, while the legal incidents of a signature which is subject to ratification or acceptance are by no means free from uncertainty.

(2) In order to underline the difference between the legal effects of a signature which gives the State's final consent to be bound by the treaty and one which is conditional upon a further act of ratification or acceptance, Sir G. Fitzmaurice's draft made a distinction between the "concluding" and the "operative" effects of signature. The difficulty about making this distinction is that it involves erecting the phrase "to conclude a treaty" into a technical term and attributing to it a meaning different from that with which it seems to be used in everyday speech. The phrase "to conclude a treaty", as Sir G. Fitzmaurice himself recognized, is an ambiguous one and, in truth, it seems as often as not to be used even by lawyers with the opposite meaning of reaching a final agreement to be bound by a treaty. Another difficulty is that it may be a little misleading to place so much emphasis on the "concluding" effects of a signature which is still subject to ratification or acceptance, because it is quite clear that the subsequent ratification or acceptance may introduce new reservations materially changing for the ratifying or accepting State the terms of the treaty to which the signature was attached. Accordingly, while retaining the idea of the distinction between the legal effects of a signature which requires a further act of ratification or acceptance and one which does not, the present draft article does not explain this distinction in terms of a difference between the "concluding" and "operative" effects of signature.

(3) Paragraph 1 restates, for the sake of completeness, the rule that, if the text has not already been authenticated in one of the ways mentioned in article 6, paragraph 1, full signature (and signature *ad referendum*) will automatically constitute an authentication of the text by the signatory State.

(4) Paragraph 2 deals with the cases where the signature does not constitute a final expression of the State's consent to be bound by the treaty but requires a further act of ratification or of acceptance to have that

effect. This may happen either because the treaty itself provides for signature plus ratification (or acceptance) or because the signature of the particular State is expressed to be subject to ratification (or acceptance). The primary effect of the signature in these cases is to establish the right of the signatory State to participation in the treaty by subsequently proceeding to ratification or, as the case may be, acceptance of the treaty; and sub-paragraph 2 (a) records that primary right.

(5) Sub-paragraph 2 (b) follows the opinion of Sir H. Lauterpacht and Sir G. Fitzmaurice that the signatory State in these cases is under a certain, if somewhat intangible, obligation of good faith subsequently to give consideration to the ratification (or acceptance) of the treaty. The precise extent of this obligation is not clear. That there is no actual obligation to ratify under modern customary law is certain, and the rule concerning ratification is so stated in the article which follows. Sir H. Lauterpacht considered that signature "implies an obligation to be fulfilled in good faith to submit the instrument to the proper constitutional authorities for examination with the view to ratification or rejection". This formulation, logical and attractive though it may be, appears to go beyond any obligation that is recognized in State practice. For there are many examples of treaties that have been signed and never submitted afterwards to the constitutional organ of the State competent to authorize the ratification of treaties, without any suggestion being made that it involved a breach of an international obligation. Governments, if political or economic difficulties present themselves, undoubtedly hold themselves free to refrain from submitting the treaty to parliament or to whatever other body is competent to authorize ratification. No doubt it was for this reason that Sir G. Fitzmaurice felt bound to "state the proposition in somewhat cautious and qualified terms". In fact, the proposition ultimately formulated in article 30 (b) of his draft is so qualified by reservations and alternatives that it is doubtful whether it retains even the shadow of an obligation. The Special Rapporteur recognizes that even the obligation formulated in the present draft is both tenuous and imperfect; but imperfect obligations of good faith are not uncommon in international law, and treaty practice, as it is today, would scarcely seem to justify the Commission in stating the obligation in any higher terms. The second provision of sub-paragraph (b) is intended to cover cases where either the treaty itself or the constitution of an international organization in which the treaty was drawn up specifies an actual obligation to submit the treaty to the consideration of the competent authorities for ratification (or acceptance). Such an obligation is, for example, imposed by the Constitution of the International Labour Organisation.

(6) Sub-paragraph (c) again follows the line taken by Sir H. Lauterpacht and Sir G. Fitzmaurice, who gave their support to the proposition in the Harvard Research Draft³⁷ that "It would seem that one signatory State has the right to assume that the other will regard the signature as having been seriously given, that ordinarily it will proceed to ratification, and that in the meantime it will not adopt a policy which would render ratification useless or which would place obstacles in the way of the execution of the provisions of the treaty, once ratification has been given". Although, as has been

said previously, this proposition seems to state the question of "proceeding to ratification" more strongly than State practice warrants, its recognition of a general obligation of good faith to refrain during at least some period from acts calculated to frustrate the objects of the treaty appears to be both generally accepted by writers who have examined the point and supported by decisions of international tribunals. The Permanent Court itself, as Sir H. Lauterpacht pointed out, seems to have recognized in the *Case of certain German interests in Polish Upper Silesia*³⁸ that a signatory State's misuse of its rights in the interval before ratification may amount to a breach of the treaty; and see also McNair, *Law of Treaties* (1961), pp. 199-205; Fauchille, *Traité de droit international public* (1926), vol. 1, part III, p. 320; Bin Cheng, *General Principles of Law*, pp. 109-111; *Megalidis v. Turkey*, 1927-8 *Annual Digest of International Law Cases*, Case No. 272. The failure to specify the duration of the obligation may appear to introduce an element of uncertainty into the rule, but what is the appropriate period may well vary with the circumstances of the treaty, and the Special Rapporteur hesitates to suggest a specific period of years.

(7) Signature of a treaty, it appears to be accepted, confers a certain limited status upon the signatory State with respect to the treaty, though the precise nature of this status may not be easy to define.³⁹ A signatory State has a certain interest, presumably of a contractual kind, in the execution of the procedural provisions of the treaty and, at any rate until the treaty is in force, is entitled to a voice in any decision in regard to the execution of these provisions. For example, it has a right, within certain limits, to a voice in opening the treaty to signature or accession by additional States, and a right to object to reservations outside the terms of the treaty made by other signatories. In its Advisory Opinion on *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*⁴⁰ the Court itself recognized that signature "establishes a provisional status" in favour of the signatory State which entitles it to formulate objections of a provisional kind to reservations made by other signatories. Sub-paragraph (d) seeks to formulate the rights of a signatory in regard to what Lord McNair terms the "mechanics" of the treaty. And sub-paragraph (e) notices the possibility that the treaty itself may contain specific provisions in regard to the rights of signatories, whilst the present articles recognize that a signatory has a certain right to object to reservations and certain other rights, although these may sometimes also be enjoyed by States which participated in the negotiations but did not sign the treaty.

(8) Paragraph 3 deals with the case of a signature which is finally binding. Sub-paragraph (a) makes the obvious point that the signatory State becomes an actual party to the treaty, if the treaty is either already in force or actually brought into force by the signature, but in other cases only makes it a "presumptive" party until the date when the treaty enters into force.

(9) A signatory State which is an actual party is, of course, fully subject to all the rights and obligations of the treaty; but it is thought that this is a point which "goes without saying" and need not be mentioned in the text. The status of a signatory State, however, that is,

³⁷ Harvard Law School: *Research in International Law, III, Law of Treaties in American Journal of International Law*, vol. 29 (1935), Supplement, comment to article 9.

³⁸ Series A, No. 7, p. 30.

³⁹ See McNair, *Law of Treaties*, 1961, pp. 199-205.

⁴⁰ *I.C.J. Reports*, 1951.

of a "presumptive" party, is less clear and raises problems analogous to those of a signatory whose signature is subject to ratification. Accordingly, the obligations and rights of a "presumptive" party are set out in sub-paragraph 3 (b) in a manner parallel to those of a signatory whose signature is subject to ratification.

ARTICLE 10. TREATIES SUBJECT TO RATIFICATION

1. Ratification, as defined in article 1, is necessary in order to render definitive a State's consent to be bound by a treaty in cases where the treaty itself expressly contemplates that it shall be subject to ratification by the signatory States.

2. (a) In cases where the treaty contains no provisions in regard to its ratification, the treaty shall not require ratification by the signatory States:

- (i) If the treaty is one signed by the Heads of the Contracting States;
- (ii) If the treaty itself provides that it shall come into force upon signature or upon a particular date or event;
- (iii) If an intention to dispense with ratification is to be inferred from the fact that the treaty modifies, adds to or annuls a prior treaty which was not itself made subject to ratification, or from other circumstances, showing that the signatures were intended, without ratification, to constitute the final expression of the State's consent to be bound by the treaty;
- (iv) If the treaty is in the form of an exchange of notes, exchange of letters, agreed minute, memorandum of agreement, agreed arrangement, inter-governmental agreement or other such less formal treaty.

(b) However, if in cases falling under the preceding provisions of this paragraph the representative of a particular State has expressly signed the treaty "subject to ratification", or if the credentials, full-powers or other instrument issued to him and duly exhibited by him to the representative or representatives of the other contracting State or States expressly limit the authority conferred upon him to signing "subject to ratification", then ratification shall be necessary in the case of that particular State.

3. (a) In all other cases where the treaty contains no provisions in regard to its ratification, the treaty shall require ratification by the signatory States in order to render definitive the consent of each State to be bound by the treaty.

(b) However, if the credentials, full-powers or other instrument issued to the representative of a particular State authorize him by his signature alone, without ratification, to express finally the consent of his State to be bound by the treaty, ratification shall not be necessary in the case of that particular State.

4. (a) Whenever a State's signature of a treaty is subject to ratification in accordance with the provisions of the preceding paragraphs of this article, the ratification of the treaty shall be at the discretion of the State concerned, unless it has expressly undertaken to ratify the treaty.

(b) The fact that the full-powers of the representative signing or acceding to a treaty are in a form apparently implying a promise or an intention to proceed to ratification shall not constitute an undertaking to ratify a treaty which is subject to ratification.

Commentary

(1) This article attempts to set out the rules determining the cases in which ratification is necessary in order to complete a signature and to render it a final expression of the State's consent to be bound by the treaty. The word "ratification", as the definition of it in article 1 indicates, is used here and throughout these draft articles exclusively in its international sense of the formal act whereby a State confirms its previous signature of a treaty and by that act finally consents to be bound by the treaty. Parliamentary "ratification" or "approval" of a treaty under *municipal* law is not, of course, unconnected with "ratification" in international law, since without it the executives of some countries may not be clothed in certain cases with the necessary constitutional authority to perform the international act of ratification. A question may in this way arise as to whether a treaty, ratified by the executive on the international plane but without the necessary authority of a prior parliamentary ratification, should or should not be regarded as valid in international law—a controversial question which will have to be considered in due course by the Commission. But it remains true that the international and parliamentary ratifications of a treaty are entirely separate procedural acts carried out on two different planes.

(2) The modern institution of ratification in international law developed in the course of the nineteenth century under the influence of France and the United States. Earlier, ratification had been an essentially formal and limited act by which, after a treaty had been drawn up, a Sovereign confirmed, or finally verified, the full-powers previously issued to his representative to negotiate the treaty. It was then not an approval of the treaty itself but a confirmation that the representative had been invested with authority to negotiate it and, that being so, there was an obligation upon the Sovereign to ratify his representative's full-powers, if these had been in order. France and the United States, however, used ratification as the means of submitting the treaty-making power of the executive to parliamentary control, and ultimately the doctrine of ratification underwent a fundamental change. It became established that (a) the act of ratification confirms the representative's signature of the treaty, (b) the treaty itself is subject to subsequent ratification by the State before it becomes binding, and (c) the act of ratification is at the discretion of the State, which is not obliged to ratify its representative's signature, even although he had full-powers to negotiate it. Furthermore, this development in the institution of ratification took place at a time when the great majority of international agreements were formal treaties. Not unnaturally, therefore, it came to be the opinion that the general rule is that ratification is necessary to render a treaty binding, unless it is a treaty concluded between Heads of State, or unless it has been agreed that the treaty shall be binding without ratification (see, for example, Hall, *International Law*, § 110; Crandall, *Treaties, Their Making and Enforcement*, § 3; Fauchille, *Traité de droit international public*, vol. 1, part III, p. 317; Oppenheim, *International Law*, vol. I, § 512; *Harvard Research Draft*, A.J.I.L., vol. 29, Special Supplement, p. 756).

(3) Meanwhile, however, the expansion of intercourse between States, especially in economic and technical fields, led to the ever-increasing use of less formal types of international agreements, amongst which were exchanges of notes and inter-governmental

agreements; and these agreements were usually intended by the parties to become binding by signature alone. Indeed, sometimes recourse has been had to these less formal types of agreement for the very purpose of avoiding the delay involved in complying with a constitutional requirement for obtaining parliamentary approval for the international ratification of a "treaty". On the other hand, an exchange of notes or other informal agreement, though employed for its ease and convenience, has sometimes expressly been made subject to ratification because of political considerations in one or the other of the contracting States. The general result of this development has been to obscure in international law both the scope of the term "treaty" and the law in regard to ratification. Yet another complicating factor has been the emergence of new methods of authenticating multilateral treaties without the signature of individual States, and of becoming a party to such treaties by the process only of accession or acceptance.

(4) Faced with these developments in State practice, Professor Brierly in his first report went so far as deliberately to omit all reference to ratification in his draft articles (A/CN.4/23, articles 6, 7 and 8 and commentary). The Commission, however, considered—and rightly so—that this solution did not do justice to the role still played by ratification in the conclusion of treaties, and was unacceptable. Professor Brierly's second report (A/CN.4/43) accordingly introduced a draft article on ratification based on article 7 of the Harvard Research Draft, and ultimately the Commission itself tentatively adopted his article 4 in the following terms:

"A State is not deemed to have undertaken a final obligation under a treaty until it has ratified that treaty, provided, however, that it is deemed to have undertaken a final obligation by its signature of the treaty:

"(a) If the treaty so provides; or

"(b) If the treaty provides that it shall be ratified but that it shall come into force before ratification; or

"(c) If the form of the treaty or the attendant circumstances indicate an intention to dispense with ratification."

(5) Sir H. Lauterpacht in his first report (A/CN.4/63) put forward a revised and amplified version of the article tentatively adopted by the Commission in 1951, the theory of which, of course, was that, in the absence of some contrary indication, a treaty is not binding without ratification. This version, which he repeated in his second report (A/CN.4/87, article 6), read as follows:

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

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

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

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

"(d) The attendant circumstances or the practice of the contracting parties concerned indicate the in-

attention to assume a binding obligation without the necessity of ratification."

At the same time, however, Sir H. Lauterpacht put forward for consideration an alternative draft, the theory of which was the exact opposite (A/CN.4/63, article 6, alternative paragraph 2):

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

In his second report (A/CN.4/87) the following year he qualified this alternative draft to the extent of adding:

"However, in the absence of express provisions to the contrary, ratification is in any case necessary with regard to treaties which, having regard to their subject matter, require parliamentary approval or authorisation of ratification in accordance with the constitutional law or practice of the countries concerned."

In his commentaries Sir H. Lauterpacht, explaining why he had submitted two apparently contradictory versions of the rule for determining when treaties require ratification, said the controversy as to which of the two versions is right is to a large extent theoretical. The more formal types of instrument include, almost without exception, express provisions on the subject of ratification, and occasionally this is so even in the case of exchanges of notes and inter-departmental agreements. Moreover, whether they are of a formal or of an informal type, treaties normally either provide that the instrument shall be ratified or, by laying down that it shall enter into force upon signature or upon a specified date or event, dispense with ratification. Total silence on the subject is exceptional, and the number of cases that remain to be covered by a general rule is very small. Accordingly, the controversy on the subject is to a large extent theoretical. This does not mean that the Commission is absolved from the task of formulating a rule for the small residuum of cases in which the parties have left the question open. For it is one of the purposes of codification to provide for such cases where the question is not regulated by the parties, and only if a clear presumptive rule is laid down will the parties themselves know in future whether or not an express provision is necessary to give effect to their intentions. But, if the first version of the rule, which makes ratification necessary unless it is expressly or impliedly excluded, is adopted, the qualifying exceptions which have to be inserted in order to bring it into accord with modern practice are so numerous as almost to bridge the gap between that version and the other one under which ratification is unnecessary, unless expressly stipulated for by the contracting States. Consequently, the difference in the practical effect of choosing one version of the rule rather than the other would not be substantial.

Sir H. Lauterpacht himself considered that there is a "slight preponderance of considerations in favour of the requirement of ratification unless dispensed with expressly or by implication". At the same time he felt it necessary to emphasize that "the most recent practice shows an increasing number of treaties which come into force without ratification". Referring to statistical information contained in a then recent article,⁴¹ he made the following comparisons between the treaties registered with the League of Nations and those registered with the United Nations (1946-51):

⁴¹ Hans Blix, "The Requirement of Ratification", *British Year Book of International Law*, 30 (1953), p. 352.

“(a) While 50 per cent of those registered with the League entered into force by ratification, the figure for the United Nations is only 25 per cent;

“(b) While 40 per cent of those registered with the League were described as ‘treaties’ or ‘conventions’ (instruments normally brought into force by ratification), the figure for the United Nations is only 15 per cent;⁴²

“(c) While only about 30 per cent of those registered under the League were in the form of agreements (instruments *not* normally brought into force by ratification), the figure for the United Nations is as much as 45 per cent;⁴³

“(d) While a large number of instruments are now being brought into force, not by ratification, but by exchange of ‘notes of approval’, this was not formerly the case.”

He considered it to be a legitimate deduction from these statistics that Governments now attach importance to treaties—however designated—entering into force without ratification in an increasing number of cases. This deduction did not, however, lead him to alter his view as to the rule to be adopted by the Commission. The increased tendency towards dispensing with ratification did not necessarily, he thought, indicate a change in the views of Governments as to the presumptive rule in regard to the need for ratification. Moreover, the general importance of the State interests regulated by treaty requires that the presumptive—residuary—rule should be based on ratification being the normal requirement. For the same reason he urged that, even if the other rule—with a presumption against the need for ratification—were to be adopted, it should be qualified in the way proposed in his new alternative draft by adding an exception making ratification necessary in the case of “treaties which, having regard to their subject matter, require parliamentary approval or authorization of ratification in accordance with the constitutional law or practice of the countries concerned”.

(6) Sir G. Fitzmaurice, in his first report (A/CN.4/101, article 32 and commentary), also dealt with this matter, accepting much of Sir H. Lauterpacht’s exposition of the problem but differing as to the rule to be adopted as the residuary rule. He recalled that as early as 1934 he had expressed the view that the older doctrine, which presumes ratification to be necessary unless dispensed with, did not correspond with modern practice and said that the statistical information furnished by Sir H. Lauterpacht showed that that doctrine was even less in accordance with the practice of today. The basic rule which he proposed, therefore, was:

“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 assumed to be subject to ratification, whether this is provided for or not.”

His draft then went on to emphasize that, if by reason of the particular subject matter of the treaty or the constitutional requirements of the State concerned

⁴² Thus of the “treaties” in the League of Nations Treaty Series only one was not ratified. All “treaties” in the United Nations Treaty Series were ratified.

⁴³ In the League of Nations Treaty Series 40 per cent of “agreements” were ratified. In the United Nations Treaty Series 15 per cent of “agreements” were ratified.

it was desired that the treaty should be conditional upon subsequent ratification, the onus would be on the signatory States to insert the necessary provision for that purpose. On the other hand, it recognized that an express provision would not be necessary *in the treaty itself*, if instead the authority of a particular State’s representative negotiating the treaty had been expressly limited to a signature subject to ratification and this fact had been formally communicated to the other prospective signatories, without encountering any objection; and similarly, if the signature itself had been expressly given “subject to ratification” and not met with objection from the other signatories. In either of these cases the particular State concerned was to have the right subsequently to deposit an instrument of ratification and, on so doing, become a party to the treaty.

Sir G. Fitzmaurice considered the traditional doctrine to have been “decisively refuted by the fact that States have never been content to rely upon it” in that they always provide expressly for ratification when they want it but are quite content to rely on silence precisely in those cases where they do not want it. If there were a basic rule requiring ratification, one would expect to find treaties expressly dispensing with the need for ratification, but these are extremely rare. On the other hand, there are innumerable cases of treaties providing expressly for ratification. Admittedly, there are mechanical reasons for making special mention of ratification in order to indicate how, where and when it is to be effected. But the very fact that such provisions are necessary for effecting ratification makes it all the more difficult to presume that, in cases of silence upon the point, the ratification of the treaty was intended. Moreover, since in such cases there will *ex hypothesi* be no provisions concerning deposit and exchange of ratifications, practical difficulties will arise both as to how ratification is to be effected and as to the date for the treaty to enter into force.

These considerations, coupled with the increasing use in modern practice of instruments coming into force upon signature and the decreasing proportion of treaties made subject to ratification, plus the fact that the necessity for ratification is largely a domestic matter, were thought by Sir G. Fitzmaurice to lead to the conclusion that the residuary rule must be that, in the absence of express provision for ratification, it is to be presumed not to have been intended and to be unnecessary. This inference is, in his view, entirely legitimate because the parties are at perfect liberty to require it, or to insist on a form of treaty in which it would be natural to insert a provision for ratification. It must be assumed that Chancelleries and Foreign Ministries are all well versed in treaty law and practice and that, if they allow their representatives to sign a treaty without provision for ratification, it must be because they do not intend it to be necessary. Today, with modern communications, Governments are able to be in constant touch with their representatives negotiating a treaty.

(7) There is considerable force in the points made by Sir G. Fitzmaurice and, if it were possible to adopt as the residuary rule the principle that ratification is not necessary unless expressly or impliedly contemplated in the treaty, it would have the advantage of simplicity. The Special Rapporteur felt bound, however, to take account also of the opinion

of Sir H. Lauterpacht, expressed after an exhaustive study of the problem, that (i) there is still a slight preponderance of considerations in favour of the opposite rule and (ii) that if a rule excluding the need for ratification were to be adopted, it would still be necessary to qualify it by laying down that that rule does not apply to "treaties which, having regard to their subject matter, require parliamentary approval or authorization of ratification in accordance with the constitutional law or practice of the countries concerned". The introduction of any such qualification into the rule appears to the Special Rapporteur to be open to serious objection. Not only would the rule lose its simplicity but the qualification, by reason of its imprecise character, would render the scope of the rule uncertain and perhaps even dependent upon the subjective determination of the interested State as to the requirements of its constitution. Consequently, if the rule favoured by Sir G. Fitzmaurice has to be qualified in the way advocated by Sir H. Lauterpacht in order to protect the position of States with strict constitutional requirements concerning the ratification of treaties, it is doubtful whether the rule is acceptable at all. It is true that Sir G. Fitzmaurice did not think it necessary to qualify the rule in this way. But against this must be set the fact that Lord McNair⁴⁴ takes the same position as Sir H. Lauterpacht that the preferable residuary rule is that ratification is required unless the need for it is excluded either by the terms of the treaty or by the nature or form of the treaty or the circumstance of its negotiation. It may also be suspected that States with strict constitutional requirements in regard to ratification may not readily be brought to accept the residuary rule favoured by Sir G. Fitzmaurice.

(8) The truth may be that the residuary rule is different for "formal" and "informal" types of treaty, and that there are really two rules. Exchange of notes and other less formal types of treaty having been introduced in order to avoid the formalities of the classical types of treaty, it is not surprising that the presumption is that they are not subject to ratification unless the treaty provides otherwise. On the other hand, the classical forms of "treaty" having previously been considered to be subject to ratification and still being more commonly used when important matters falling under domestic constitutional requirements are in issue, it would not be surprising that States should still presume them to be subject to ratification, unless the treaty itself dispenses with ratification. This is the position reflected in the drafts of the Commission in 1951 and of Sir H. Lauterpacht in 1953-4 and it seems to be the view acted upon by the majority of States in their treaty-practice. The present article has therefore been prepared on the basis that the presumption is against the need for ratification in the case of less formal types of treaty (paragraph 2 (a) (iv)) and in favour of it in other cases (paragraph 3). The main difficulty, owing to the diversity of treaty forms and nomenclature, is to draft a satisfactory formulation of the types of treaty where the presumption is against ratification. If this can be achieved, the Commission may feel that the solution adopted in the present article is preferable to the one suggested by Sir G. Fitzmaurice. Under this solution it is comparatively easy to safeguard the position of a State, like the United Kingdom, which regards its signature

as binding unless expressly made subject to ratification. Under Sir G. Fitzmaurice's rule, however attractive its simplicity may be, it is not so easy to safeguard satisfactorily the position of States with strict constitutional requirements in regard to the ratification of "treaties".

(9) Paragraph 1 of the draft does not appear to require comment. Apart from the possible case of a so-called "accession" made subject to ratification, which is dealt with in article 14, ratification always presupposes a previous signature of the treaty and is therefore a process normally confined to signatory States.

(10) Paragraph 2 (a) sets out the cases in which, when the treaty is silent upon the question of ratification, ratification is not necessary to render the signature a definitive expression of consent to be bound. Sub-paragraphs (i)-(iii) comprise cases where ratification is not required, whether the treaty is of a formal or informal type. The first category of case, Heads of State treaties, is an old, established, exception to the requirement of ratification,⁴⁵ and although signature by Heads of States is now comparatively rare, it may be desirable to mention it.

The second category is that of cases where the treaty, by specifying that the treaty shall come into force upon signature or upon a given date or event, without saying a word about ratification, impliedly dispenses with ratification. As Sir H. Lauterpacht pointed out in his first report (A/CN.4/63, footnote 39), a very large proportion of modern bilateral treaties fall within this category; in consequence it is only in a comparatively few cases that a bilateral treaty does not specify the way in which it is to come into force and thereby fails to dispense with the need for ratification.

The third category comprises cases where it is to be inferred from the circumstances of the treaty that ratification is not required, and a typical case is the treaty which is an instrument ancillary to another treaty which was not itself subject to ratification. It is not possible to define exhaustively the circumstances which would suffice to bring a treaty within this category, but another example may be the case where the subject matter of the treaty is such as to require it to come into force immediately, if the treaty is to serve any purpose.

The fourth category is limited to less solemn forms of treaty and lays down as the basic residuary rule the presumption that, if the treaty makes no mention of ratification, the treaty is not subject to ratification. That this is the general practice with regard to exchange of notes seems to be entirely clear from the results of a study of the League of Nations and United Nations Treaty Series made by a Swedish writer,⁴⁶ published in 1953, in which he said:

"Exchanges of notes frequently lack provisions concerning the mode of entry into force; in such cases they are not as a rule ratified. Of the League treaties, some seventy-five such exchanges of notes were found, and none of them was ratified. Of the United Nations treaties, some 125 such exchanges

⁴⁵ Fitzmaurice, "Do Treaties Need Ratification?", *British Year Book of International Law*, 1934, p. 119.

⁴⁶ Hans Blix, "The Requirement of Ratification", *British Year Book of International Law*, 1953, p. 366.

⁴⁴ *Law of Treaties*, 1961, pp. 133-4.

of notes were found, and only one of them was ratified."

And the general practice appears to be much the same in regard to other treaties of such less formal kinds; if ratification is required, the treaty is expressed to be subject to ratification.⁴⁷

Paragraph 2 (b) provides for the possibility that in cases where, under the provisions of paragraph 2 (a), the treaty is not in principle subject to ratification the representative of a particular State may nevertheless be required by his own Government, or may himself decide, to make his signature subject to ratification.

(11) Paragraph 3 (a), for reasons which have already been explained in paragraphs 4-9 above, lays down as the residuary rule for treaties not of a less formal type—treaties *stricto sensu*—that ratification is presumed to be required where the treaty is silent upon the question of ratification.

Paragraph 3 (b) seeks to take account of the position of States like the United Kingdom, whose constitutional practice it is to authorize their representative to bind the State by signature alone unless instructed to make the signature subject to ratification.

(12) Paragraph 4 (a) states what is today an undisputed rule that, where a treaty is subject to ratification, it is at the discretion of the State concerned whether to ratify the treaty or not. Sir H. Lauterpacht, in his first report (A/CN.4/63, commentary on article 5) gave reasons for thinking that in many cases States may be under a strong moral obligation to ratify a treaty that they have signed. But under the modern law that obligation can never be a legal one unless the treaty itself imposes an obligation on the signatory State to ratify the treaty, as has sometimes happened in the case of peace treaties; and then, as Sir G. Fitzmaurice pointed out, the truth is that the treaty is really binding upon signature and the subsequent ratification is a political rather than legal act (A/CN.4/101, commentary on articles 32 and 42).

Paragraph 4 (b) is intended to cover a point to which Sir G. Fitzmaurice drew attention (*ibid.*, commentary on article 32). For historical and traditional reasons many common forms of full-powers imply, or seem to imply, a promise that ratification will be forthcoming in due course, but these forms are empty relics from the past when ratification performed a quite different function, and today no legal obligation to ratify can be spelt out from them.

ARTICLE 11. THE PROCEDURE OF RATIFICATION

1. (a) Ratification shall be carried out by means of a written instrument, executed by an authority competent under the laws of the ratifying State to execute instruments of ratification, and declaring that the State confirms and ratifies its consent to be bound by the treaty to which its signature is already affixed.

(b) The form of instruments of ratification shall be governed by the internal laws and usages of the ratifying State.

2. (a) Unless the treaty itself provides that contracting States may elect to become bound by part or parts only of the treaty, the instrument of ratification must extend to the whole treaty.

⁴⁷ See generally the article by Hans Blix mentioned in the preceding footnote.

(b) An instrument of ratification, if it is to qualify as an effective act of ratification, must contain a definitive expression of the State's consent to be bound by the treaty; it may not be made conditional upon the occurrence of a future event, such as the receipt or deposit of the ratifications or accessions of other States. Any conditions embodied in an instrument of ratification shall be treated as equivalent to reservations and their validity and effect shall be determined by the principles governing the validity and effect of reservations.

3. Instruments of ratification become operative by being communicated to the other signatory States or to the depositary of the instruments relating to the treaty. If the treaty itself lays down the procedure by which they are to be communicated, instruments of ratification become operative on compliance with that procedure. If no procedure has been specified in the treaty or otherwise laid down by the signatory States, instruments of ratification shall become operative:

(a) In the case of a bilateral treaty, upon the formal communication of the instrument of ratification to the other Contracting Party, and normally by means of an exchange of the instruments duly certified by the representatives of the States carrying out the exchange;

(b) In the case of a plurilateral or multilateral treaty adopted at an international conference convened by the States concerned, upon deposit of the instrument of ratification with the Government of the State in which the treaty was signed;

(c) In the case of a multilateral treaty adopted in an international organization, upon deposit of the instrument of ratification with the secretariat of the organization in question.

4. When an instrument of ratification is deposited with a Government or with the secretariat of an international organization under sub-paragraph (b) or (c) of the preceding paragraph, the ratifying State shall have the right to an acknowledgement of the deposit of its instrument of ratification; and the other signatory States shall at the same time have the right to be notified promptly both of the fact of such deposit and the terms of the instrument of ratification.

Commentary

(1) The tentative draft articles adopted by the Commission in 1951 did not deal with the modalities of ratification, and it was not until Sir G. Fitzmaurice's first report that the subject was examined in any detail (A/CN.4/101, article 31 and commentary). The present article, which takes account of his draft article 31 and commentary in that report, is more elaborate and attempts, in the light of State practice and of the practice of depositaries of treaties, to formulate rules concerning the modalities of ratification to cover the various situations in which, owing to the silence of the treaty, the need for such rules may arise.

(2) Paragraphs 1 and 2 concern the preparation of the *international* instrument by the communication of which the State is to effect the *international* act of ratifying the treaty. Paragraph 1 (a) expresses the principle that ratification is a solemn act which must be carried out by means of a formal written instrument unambiguously declaring the will of the State to ratify the treaty and executed by an authority competent under its laws to do so. Although it is necessary,

as Sir G. Fitzmaurice emphasizes, to distinguish clearly between ratification as an internal procedure and as an act operating in the relations between States, it remains true that the actual form in which an international act of ratification is drawn up is determined by the internal laws and usages of each State. It is this principle which paragraph 1 (b) declares.

(3) Paragraph 2 (a) follows necessarily from the fact that what a State is entitled to ratify is its previous signature of the text of the treaty as a whole. Accordingly, although it may be admissible to attach *reservations* to the ratification of a treaty, it is not admissible to select parts only of the treaty for ratification. Occasionally, however, treaties are found which expressly authorize States to ratify a part or parts only of the treaty or to exclude certain parts, and then, of course, partial ratification is admissible. The rule here stated seems to be generally accepted, and is endorsed in the *Summary of the Practice of the Secretary-General as Depositary of Multilateral Agreements*, p. 24. But it is possible to imagine cases where the line between partial ratification and ratification subject to a reservation might appear to be more one of form than of substance. Paragraph 2 (b) carries further and makes more specific the principle expressed in paragraph 1 (a), that the instrument of ratification must unambiguously declare the State's consent to be bound by the treaty. The expression of consent must be definitive and may not be made subject to a condition *precedent*, although it may be made subject to reservations.

(4) Paragraph 3 concerns the execution of the act of ratification by its delivery—its communication—to the other signatory States. Normally, the procedure for accomplishing this is laid down in the treaty itself and paragraph 3 recognizes that fact. It goes on, however, to make provision for any cases where the treaty is silent as to the procedure and specifies for such cases the procedures most commonly found in the relevant treaty-clauses in modern practice.

(5) Paragraph 4 declares the right of the ratifying State to an acknowledgement of the deposit of the instrument of ratification and the right of other signatories to be notified promptly of the ratification.

ARTICLE 12. LEGAL EFFECTS OF RATIFICATION

1. Ratification constitutes the ratifying State an actual Party to the treaty immediately:

(a) If the treaty is already in force when the ratification takes place, or

(b) If the ratification itself operates to bring the treaty into force.

2. In other cases ratification constitutes the ratifying State:

(a) A presumptive Party to the treaty, pending its entry into force; and

(b) An actual Party to the treaty, if and when it comes into force.

3. Pending the entry into force of a treaty and provided always that its entry into force is not unreasonably delayed, a ratifying State, although not bound by the treaty itself, is subject under general international law:

(a) To an obligation not to withdraw the ratification;

(b) To refrain from any action calculated to frustrate the objects of the treaty or to impede its eventual performance.

4. Unless the treaty provides otherwise, ratification shall not have any retroactive effects. In particular, the ratifying State's consent to be bound by the treaty shall operate only from the date of ratification and shall not be held to operate from the date of the signature which the ratification confirms.

Commentary

(1) This article embodies the substance of the principles stated in article 33 of Sir G. Fitzmaurice's draft. Paragraphs 1 and 2 deal with the effects of ratification in making the ratifying State a party to the treaty and to a large extent speak for themselves. Paragraphs 1 (b) and 2 (b) have in mind the particular but frequent case where the treaty provides that it shall come into force after the deposit of a specified number of ratifications.

(2) Paragraph 3 sets out the position of a State which has ratified but is not yet a party to the treaty because the treaty will not enter into force until further States have either ratified, acceded to, or accepted the treaty. Paragraph 3 (a) deals with a further aspect of the definitive character of ratification which, once duly effected, may not be withdrawn. Paragraph 3 (b) repeats, for a State which has ratified, the obligation of good faith which also attaches in certain measure to a signatory under article 9, paragraph 2 (c), above. Just as a signature conditional upon ratification, being an inchoate act of participation in the treaty, involves a certain obligation to refrain from action calculated to frustrate its objects and execution, so also—and *a fortiori*—does this obligation attach to ratification by which the State becomes a *presumptive* party to the treaty.

(3) Paragraph 4 declares what is believed now to be the undisputed principle that, on ratification, the rights and obligations of the treaty become applicable to the ratifying State only as from the date of ratification, not as from that of signature. The ratification does not operate retrospectively to make the signature a binding act of consent on the date when it was affixed to the treaty. Formerly, when ratification was regarded as obligatory and a mere formality confirmatory of the authority to sign, it was generally held to operate retrospectively and to make the treaty effective as from signature. This view continued to be echoed by writers and by some municipal courts, even after the institution of ratification had undergone the fundamental change which has already been described in the commentary to article 10 above (see *Harvard Research Draft*, pp. 799-812). But the theory of the retroactivity of ratification has long since been rejected in State practice; the European Commission of Human Rights, for example, has consistently held that the rights and obligations of the European Convention of Human Rights become applicable with respect to each individual signatory State only as from the date of the deposit of its instrument of ratification (see *Year Book of the European Commission and Court*, vol. 1, pp. 137-49 and vol. 2, pp. 215, 376, 382, etc.).

ARTICLE 13. PARTICIPATION IN A TREATY BY ACCESSION

1. (a) A State has the right to become a party to a treaty by accession, as defined in article 1, where the

treaty itself or an instrument related to the treaty expressly provides that the treaty shall be open to accession either generally or by particular States or categories of States of which the acceding State is one.

(b) A multilateral treaty, unless it expressly provides otherwise, shall be deemed to extend the right of accession to any State that was invited to participate in the negotiations or to attend the conference at which the treaty was drawn up, but failed to qualify itself to become a party to the treaty by any of the procedures specifically established in the treaty.

2. Unless the treaty itself otherwise provides, a State not possessing the right to accede to the treaty under the provisions of the preceding paragraph may nevertheless acquire the right to accede to a treaty:

(a) In the case of a bilateral treaty, by the subsequent agreement of the two States concerned;

(b) In the case of a plurilateral treaty,

(i) Where the treaty is not yet in force, or where the treaty is already in force but four years have not yet elapsed since the adoption of its text, with the subsequent consent of all the negotiating States, or

(ii) Where the treaty is already in force and four years have elapsed since the adoption of its text, with the subsequent consent of all the parties to the treaty;

(c) In the case of a multilateral treaty drawn up at an international conference convened by the States concerned,

(i) Where the treaty is not yet in force or where the treaty is already in force but four years have not yet elapsed since the adoption of its text, with the subsequent consent of two-thirds of the negotiating States, or

(ii) Where the treaty is already in force and four years have elapsed since the adoption of its text, with the subsequent consent of two-thirds of the parties to the treaty;

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

3. A State desiring to accede to a multilateral treaty under sub-paragraphs (c) and (d) of the preceding paragraph shall transmit a written request to that effect to the depositary of the treaty in question, whose duty it shall be:

(a) In the case of a treaty drawn up at an international conference convened by the States concerned, to communicate the request to the States designated in paragraph 2 (c) of this article as States whose consent or objection is material for determining the admission of additional States to participation in the treaty;

(b) In the case of a treaty drawn up in an international organization or at an international conference conveyed by an international organization,

(i) To communicate the request to all members of the organization and to any State not a member of the organization which is a party, or entitled to become a party, to the treaty; and

(ii) To bring the matter, as soon as possible, before the competent organ of the organization concerned.

4. (a) The consent of a State to which a request has been communicated under sub-paragraph (a) of the preceding paragraph shall be presumed after the expiry of twelve calendar months, if no objection to the request has been notified by it to the depositary during that period.

(b) If a State to which a request has been communicated under either sub-paragraph (a) or sub-paragraph (b) of the preceding paragraph shall have notified the depositary of its objection to the request before the expiry of twelve calendar months from the date of the communication, and the requesting State shall nevertheless have been admitted to accede to the treaty under paragraph 2 (c) or (d) of this article, the treaty shall not apply in the relations between the objecting and the requesting States.

5. A purported accession to a treaty shall only be effective to constitute the acceding State a party to the treaty, if it is in conformity with the terms of the treaty, instrument or decision creating the right to accede and regulating its exercise.

Commentary

(1) Accession is the traditional method by which a State may, in certain circumstances, become a party to a treaty of which it is not a signatory. The subject of accession was not reached by the Commission when it discussed Sir G. Fitzmaurice's draft articles in 1959 and the last time that it was considered by the Commission was in 1951 on the basis of Professor Brierly's second report (A/CN.4/43). The Commission then drew up a tentative draft article of three short paragraphs which, in addition to defining accession, laid down the principles that: (i) a State may only accede when the treaty contains provisions allowing it to do so or with the consent of *all the parties* to the treaty, and (ii) unless otherwise provided in the treaty, accession is only possible *after the treaty has come into force*. Sir G. Fitzmaurice included both these principles in his draft articles (A/CN.4/101, article 34 and commentary) whereas Sir H. Lauterpacht in his reports (A/CN.4/63, article 6 and commentary, and A/CN.4/87, article 7 and commentary) questioned their correctness in the light of modern practice. It is therefore necessary for the present Special Rapporteur to state his position in regard to them.

(2) It will be convenient to begin with the second point, that "unless otherwise provided in the treaty, accession is only possible after the treaty has come into force". It is true that the law was so stated in the Harvard Research Draft (p. 822), where it was said that the power to accede to a treaty is usually contained in one of its clauses and cannot, therefore, be effective until the treaty is in force, and where a certain amount of State practice was cited in support of the claimed principle. The force of the logical argument, as Sir H. Lauterpacht said, is open to doubt; pushed to its *reductio ad absurdum*, it would equally mean that signature and ratification of a treaty are impossible until the treaty is in force. Clearly, however, the consent to accession expressed in the text of a treaty is by itself a sufficient basis for the accession of a non-signatory State, just as it is for the signature and ratification of signatories. As to the State practice,

Sir H. Lauterpacht showed (A/CN.4/63, commentary to article 6) that in a series of treaties between 1929 and 1939 this practice appeared to have changed and that the preponderant practice of Governments is now in the opposite direction from that indicated in the Harvard Research Draft. Sir G. Fitzmaurice (A/CN.4/101, commentary to article 34), while recognizing that there are now some exceptions, more especially where the text of the treaty is "adopted" and not signed at all, considered that the practice mentioned by Sir H. Lauterpacht "represented a lax, mainly pre-war, practice that ought not to be encouraged", and he accordingly reaffirmed the rule, subject to certain admitted exceptions.

(3) The present Special Rapporteur is entirely of the opinion of Sir H. Lauterpacht. An examination of the most recent treaty practice shows that in practically all modern treaties which contain accession clauses the right to accede is made independent of the entry into force of the treaty, either expressly by allowing accession to take place before the date fixed for the entry into force of the treaty, or impliedly by making the entry into force of the treaty conditional on the deposit, *inter alia*, of instruments of accession. The modern practice has gone so far in this direction that the Special Rapporteur believes that it is no longer appropriate to lay down, even as a residuary rule, the principle that accession is inoperative prior to the entry into force of the treaty. On this point, he recalls and adopts as his own the following statement of Sir H. Lauterpacht:

"Important considerations connected with the effectiveness of the procedure of conclusion of treaties seem to call for a contrary rule. Many treaties might never enter into force but for accession. Where the entire tendency in the field of conclusion of treaties is in the direction of elasticity and elimination of restrictive rules it seems undesirable to burden the subject of accession with a presumption which practice has shown to be in the nature of an exception rather than the rule."

Accordingly, the principle laid down in paragraph 3 (b) of the present article is in the opposite sense from that tentatively adopted by the Commission in 1951.

(4) Turning now to the first point, the conditions under which a State may be entitled to accede to a treaty, no great problem exists in the case of bilateral or plurilateral treaties. The right to accede is determined by the provisions of the treaty and, if the treaty contains no provisions concerning accession, then a State may only accede with the consent of all the States entitled to a voice in the matter. A question may, it is true, be raised as to the States which should have a voice in the matter—all the negotiating States or only States which become parties to the treaty? The problem is analogous to that which arises under paragraph 2 (c) of article 7 in regard to the right to sign, and it is suggested *de lege ferenda* that here too, if the treaty is already in force and four years have elapsed since the adoption of the text, then only actual parties should have a voice in the matter.

(5) The question, under what conditions a State may be entitled to accede to a multilateral treaty, on the other hand, raises the fundamental problem of whether States have an automatic right to participate in treaties of this kind. This problem has already been referred to in the commentary upon article 7, where mention was made of the Commission's discussion of the problem during its 1959 session, at which it had concluded

that the problem primarily concerned the right to participate in a treaty by accession.

(6) In 1959 (502nd, 503rd and 504th meetings, discussion on article 24) many members of the Commission expressed strong approval of the general idea that treaties of a universal character should be open to participation by all States and particular emphasis was placed on the desirability of new States having the right to become parties to such treaties. Attention was also drawn to the practice concerning general multilateral treaties concluded under the auspices of the United Nations, participation in which is now invariably made open to any State which is a Member of the United Nations or of a specialized agency or is a Party to the Statute of the International Court of Justice, and to any other State which is invited by the General Assembly to participate in the treaty. However, although it was recognized that the practice of international organizations is not uniform in the matter, it was generally agreed that there is a strong modern trend towards the widest possible participation in treaties of a universal character. Some members, however, pointed out that political considerations—whether springing from non-recognition or from other causes—may come into play when it is a question of establishing treaty relations between States, and that international law has not hitherto compelled States to accept treaty relations with another State in regard to any type of treaty, if they did not wish to do so. One suggestion that met with considerable support was that at any rate those States which had been invited to attend the conference at which the treaty was drawn up should be regarded as having a right to participate, because the invitation to the conference could properly be considered as implying a consent to participation in the treaty. Other suggestions that received support were: (a) that a distinction should be drawn between bilateral, plurilateral and multilateral treaties; (b) that in the case of multilateral treaties drawn up at an international conference the rule should be laid down *de lege ferenda* that the admission of further States to participation in the treaty would require the consent of a majority (either a simple majority or two-thirds) of the interested States; and (c) that in the case of multilateral treaties concluded under the auspices of an international organization the admission of additional States should be by decision of the organization concerned. It was also stressed by some members of the Commission that modern multilateral treaties normally contain satisfactory accession clauses so that the problem of the accession of the new States is one which primarily relates to the older multilateral treaties.

(7) The Special Rapporteur finds himself in general accord with the various points and suggestions made during the 1959 discussion, which are set out in the preceding paragraph; and they will be found expressed in the present draft. It is true that in the *Polish Upper Silesia case*⁴⁸ the Permanent Court said, with reference to an armistice convention, that when a treaty does not provide for any right of accession it is not possible to presume the existence of such a right. But to make that presumption, as the Commission proposes, where the treaty is a multilateral treaty and where the presumption is only to be made in favour of States which were invited to attend the international conference that drew up the treaty, does not appear to be unreasonable or in conflict with the general principle acted on by the

⁴⁸ Series A/7, pp. 28-9.

Permanent Court. The rest of the Commission's proposals relate to the *extension* of the right to participate to additional States by decisions *subsequent* to the treaty and that is, of course, an entirely different thing. There the main problem is to find suitable procedures for reconciling the sovereign rights of the States parties to the treaty with the principle of the widest possible participation in multilateral treaties, in other words, suitable procedures for obtaining the necessary consent to the extension of the right to participate to additional States.

(8) At the same time, however, it seems doubtful whether, even in the sphere of multilateral treaties, States will be ready to agree to a rule under which a State could be forced to enter into treaty relations with another State to whose participation in the treaty it actively objected. The question then is whether, in laying down the rules that an outside State may be entitled to accede to a treaty with the consent of a two-thirds majority or, as the case may be, at the invitation of an international organization, it is necessary to provide that, if an individual State notifies its objection to the participation of the State concerned, the treaty shall not be applicable as between the objecting and the acceding State, even although the latter has been admitted to accede to the treaty under one or other of these rules. No doubt, it may fairly be urged that the norms contained in multilateral treaties are, *ex hypothesi*, of a general character which should in principle be applicable between all the parties to the treaty. But the matter is not so simple as that. Quite apart from the fact that multilateral treaties frequently contain at least some new provisions agreed to *de lege ferenda*, there may be jurisdictional clauses, either within the treaty or in other instruments, which are brought into play by the linking together of the two States in mutual treaty relations. An analogous, though not identical, problem exists in regard to reservations where it seems to be established law that a State may prevent treaty relations from coming into being between itself and the reserving State by objecting to the latter's reservation. Having regard to the fundamental role played by the consent of the individual State in the formation of treaty relations, a provision to the same effect has been included in paragraph 4 (b) of the present article for the Commission's consideration.

(9) Paragraph 1 of the draft covers rights of accession conferred by the treaty itself either expressly or by implication. Sub-paragraph (a) requires no comment. Sub-paragraph (b) seeks to give effect to the suggestion made in 1959, and referred to in paragraphs 6 and 8 above, that States invited to participate in a conference can reasonably be considered to have a right of accession by reason of the consent implied in that invitation.

(10) Paragraph 2 covers rights of accession conferred by consents given subsequently to the adoption of the text of the treaty. Sub-paragraphs (a) and (b) deal with the cases of bilateral and plurilateral treaties, where the principle of unanimous consent operates in any decision to admit an additional party to accession. The only point that seems to require comment is the introduction into sub-paragraph (b) of a distinction between the position before and the position after the expiry of a period of four years. The problem here is the extent to which the right of a signatory State to veto accession by an additional State, when the signatory itself has not yet taken the necessary steps to become a party and shows no signs of ever doing so. In principle,

every signatory has a voice in decisions to widen the participation in the treaty but, when the treaty has come into force, it is arguable that at some moment in history the time should come when the parties and the parties only should have the power of decision. Sir G. Fitzmaurice suggested that the point might be covered by a rule stating that, when the treaty is in force, the decision should rest with the parties "after consultation with any States entitled to become parties by ratification". That rule seems, however, to be open to objection. In the first place, the treaty may be expressed to come into force after only two or three States have become parties, in which case the treaty might come into force very quickly and the signatory States be deprived of their right to an actual voice in the decision at an unjustifiably early date. In the second place, an obligation to "consult" the other signatories laid down as an express obligation might leave the parties in some doubt as to how much weight to attach to an objection by a mere signatory. It seems preferable, in the interests of clarity and certainty to put a time limit—a reasonably generous time limit—on the exercise of the rights of a mere signatory after the treaty has once been brought into force by the ratifications, or other final acts of consent, of other signatories. This will both preserve the signatory's legitimate voice in the matter in the early period after the adoption of the treaty and bring it to an end when its exercise ceases to be legitimate.

(11) Sub-paragraph (c) deals with the case of a multilateral treaty drawn up at an international conference convened by the States concerned, and adopts the suggestion made in 1959 that the admission of a right of accession for additional States should be by consent of a two-thirds majority of the States entitled to a voice in the matter. Here again the problem arises of the extent of the right of a signatory State which does not proceed to ratify, or otherwise become a party to, the treaty within a reasonable time and the same solution is suggested as in the case of plurilateral treaties. The process of obtaining the necessary consents after a conference attended by a large number of States has broken up is somewhat laborious and it has been thought desirable, in paragraph 3 of the present article, to make specific provision for the procedure to be followed when a State applies to be allowed to accede to a multilateral treaty drawn up in this way.

(12) Sub-paragraph (d) deals with the cases where the treaty has been drawn up either in an international organization or at a conference convened by an international organization; and it adopts in both cases the principle that the admission of additional States to participation in the treaty is to be effected by decision of the competent organ of the organization. Accession clauses which confer upon an international organization the power to extend participation in a multilateral treaty to additional States are now common, and the practice is both logical and convenient. For it affords a regular and easily operated procedure for dealing with proposals to enlarge the circle of participants in such a treaty. When the treaty has been drawn up in the organization itself and the text adopted by a decision or resolution of its competent organ, no possible doubt can exist as to the legitimacy of the rule proposed. When, however, the treaty has been drawn up merely at a conference convened by an organization, the question may fairly be raised whether the power of decision should not lie rather with the States responsible for

drawing up the treaty and framing its "final clauses". A conference convened by an organization, it may be said, does not differ in any essential way from a conference convened by the States themselves, and to place the power of decision in regard to widening the circle of the parties to the treaty in the hands of the organization is an interference with the sovereign rights of the States participating in the conference. Under the existing law that may, strictly speaking, be the position. On the other side, it can be urged that, when an international organization decides to invite specified States or categories of States to an international conference for the purpose of drawing up a multilateral treaty, it already asserts a certain authority with respect to the determination of the participants in the treaty. It is true that the States responding to the invitation have it in their power at the conference to lay down in the treaty provisions regulating the right of accession to it. It is also true that some of the States attending the conference may not be members of the organization, as was the case, for example, at the Geneva Conference on the Law of the Sea and the Vienna Conference on Diplomatic Intercourse and Immunities.⁴⁹ Nevertheless, it does not seem a big step to propose, *de lege ferenda*, that, *unless the treaty itself otherwise provides*, the power to invite additional States to accede to the treaty should vest in the organization which was responsible for convening the treaty-making conference. If such a rule were to be laid down in the present articles, it would be understood by non-member States attending any future conference that, unless another rule were to be laid down in the treaty, the question of inviting additional States to accede would be decided by the competent organ of the organization. Moreover, it would be open to the organization to obtain the views of any non-member State that participated in the drawing up of the treaty and, if its procedure permitted, to allow the non-member State to participate in the decision. The very fact that a number of multilateral treaties in the drafting of which non-member States participated already contain a rule of this kind⁵⁰ suggests that its adoption in the present article would not be inappropriate.

If the Commission does not accept this way of looking at the matter, the logical course will presumably be to place multilateral treaties drawn up at a conference convened by an international organization under the same rule as those drawn up at other conferences, in other words, under the two-thirds rule of subparagraph (c).

(13) Paragraphs 3 and 4 contain the procedure which is suggested for dealing with requests to be allowed to accede to a multilateral treaty. It is based on the procedure already followed in many cases by depositaries with regard to reservations and objections to reservations. Multilateral treaties today may be adopted by anything up to one hundred States and if the rule of admission to a right of accession by consent of a two-thirds majority is to be workable, it seems essential to have some such procedure as that set out in paragraph 3 of the draft.

⁴⁹ Equally, of course, some members of the organization voting afterwards upon the proposal to extend the circle of parties to the treaty might have failed to attend the conference.

⁵⁰ For example, the four Conventions resulting from the Geneva Conference of 1958 on the Law of the Sea and the Vienna Convention of 1961 on Diplomatic Relations.

(14) It also seems essential for the effectiveness of that rule that after a certain period of time the silence of a State confronted with a request for a right to accede should be presumed to constitute consent, and paragraph 4 (a) proposes that this should be the case after the expiry of twelve months. Whether twelve months is too long a period may be a question, for shorter periods have been accepted in some treaties for the purpose of presuming consent to reservations; but twelve months is the period recommended in a recent resolution of the Inter-American Council of Jurists dealing with reservations to multilateral treaties. A shorter period may well be appropriate in treaty provisions when the parties have expressed their readiness to accept it. But in a general provision it may be necessary to allow a longer period, in order that the provision may meet with the assent of the great majority of States. It is for this reason that a twelve months period is the period inserted in the draft.

(15) Paragraph 4 (b), for the reason already explained in paragraph 8 of this commentary, provides that, if a State gives timely notice of its objection to a request, the treaty shall not in any event be applicable in the relations between the objecting and requesting States.

(16) Finally, it is necessary to consider the special problem of opening to the accession of new States those older multilateral treaties whose circle of eligible parties is now closed owing to the terms of their participation clauses. The difficulty here is that, even if the present articles were to contain a provision specifically creating a right to accede to such treaties and were to be adopted at an international conference as a convention on the conclusion of treaties, they might not be sufficient to achieve the object. A convention only binds the parties to it, and unless all the surviving parties to the older multilateral treaties in question became actual parties to the new convention on the conclusion of treaties, there might be doubt about the effectiveness of the convention to create the right of accession. Only recently, in the *Aerial Incident* case,⁵¹ the International Court of Justice affirmed that the Charter itself—or more precisely the Statute of the Court annexed to the Charter—was "without legal force so far as non-signatory States were concerned". It is normally a long time before any considerable proportion of the States, which participated in the adoption of a multilateral treaty, take the further steps necessary to make them actual parties to it. In consequence, a convention codifying the law governing the conclusion of treaties would be unlikely to be a very expeditious or a very effective instrument for extending the participation of the older multilateral treaties to new States.

This leads the Special Rapporteur to suggest that it may be better to seek for the solution of this problem in procedures outside those envisaged in the present articles. It seems to be established that the opening of a treaty to accession by additional States, while it requires the consent of the States entitled to a voice in the matter, does not necessitate the negotiation of a fresh treaty amending or supplementing the earlier one. One possibility would be for administrative action to be taken through the depositaries of the individual treaties to obtain the necessary consents of the States concerned in each treaty; indeed, it is believed that action of this kind has been taken in some cases.

⁵¹ *I.C.J. Reports*, 1959, at page 138.

Another expedient that might be considered is whether action to obtain the necessary consents might be taken in the form of a resolution of the General Assembly by which each Member State agreed that a specified list of multilateral treaties of a universal character should be opened to accession by any State Member of the United Nations or of a specialized agency or Party to the Statute of the International Court of Justice and to any other State invited by decision of the General Assembly. There would, of course, be a few non-member States whose consent would also be necessary, but it would not be impossible to devise a means of associating these States with the resolution. Apart from possible political difficulties arising out of problems of State succession, such a resolution might be expected to command almost unanimous support and, if so, to provide a basis for the accession of additional States, and more especially new States, to a number of multilateral treaties of a universal character. Alternatively, the General Assembly might draw up a list of the treaties accession to which by additional States is desirable and invite the States parties to them to open these treaties to accession by the above-mentioned categories of States, pointing out that a number of recent multilateral treaties contain accession clauses of this kind.

ARTICLE 14. THE INSTRUMENT OF ACCESSION

1. (a) Accession shall be carried out by means of a written instrument, executed by an authority competent under the laws of the acceding State to execute instruments of accession and notifying the State's accession to the treaty.

(b) The form of instruments of accession shall be governed by the internal laws and usages of the acceding State.

2. (a) Unless the treaty itself provides that contracting States may elect to become bound by part or parts only of the treaty, the instrument of accession must extend to the whole treaty.

(b) An instrument of accession may not be made conditional upon the occurrence of a future event such as the ratifications or accessions of other States. Any other conditions embodied in an instrument of accession shall be treated as equivalent to reservations and their validity and effect shall be determined by the principles governing the validity and effect of reservations.

3. Unless an instrument of accession expressly provides that it shall be subject to subsequent ratification or acceptance by the acceding State, it shall be taken as constituting a definitive expression of the acceding State's consent to be bound by the treaty.

4. *Mutatis mutandis*, the provisions of paragraphs 3 and 4 of article 11 of the present articles concerning the coming into operation of instruments of ratification shall also apply to the coming into operation of instruments of accession.

Commentary

(1) The modalities of accession are similar to those of ratification, and the comments on article 11 are to a large extent applicable also to the provisions of this article.

(2) The only provisions appearing to require additional comments are those in sub-paragraphs 2 (b) and 2 (c), which mention the possibility of an accession being made subject to ratification. Accession, like ratifi-

cation, is generally regarded as an act which by its very nature is a definitive expression of consent to be bound by the treaty and therefore an act which is not, in principle, capable of being made subject to ratification. Nevertheless, during the League of Nations period there were a number of examples of accessions being made subject to ratification, and their admissibility was considered by the Assembly in 1927, which passed the following resolution:

"The procedure of accession to international agreements given subject to ratification is an admissible one which the League should neither discourage nor encourage. Nevertheless, if a State gives its accession, it should know that, if it does not expressly mention that this accession is subject to ratification, it shall be deemed to have undertaken a final obligation. If it desires to prevent this consequence, it must expressly declare at the time of accession that the accession is given subject to ratification."⁵²

Sir G. Fitzmaurice, pointing out that an accession subject to ratification is not an accession at all (A/CN.4/101, commentary to article 35), criticized the practice of doing so as really amounting to an attempt to secure the status of signatory after the date of signature has passed. He also considered it to be "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". On scientific grounds there is much to be said for this point of view, and the Commission will certainly wish to give it full consideration.

(3) However, after studying the relevant passages in the Summary of the Secretary-General's Practice (ST/LEG/7, paragraphs 47-49), the Special Rapporteur feels that the Commission may wish to see the article formulated in accordance with the League of Nations resolution. Sir Gerald Fitzmaurice had not known of any examples of this practice having occurred since 1945, whereas it appears from the Secretary-General's Summary that the United Nations Secretariat has encountered some instances of this practice. The Secretary-General states that the position he takes, when he receives an instrument of accession subject to ratification, is similar to that taken by the League of Nations Secretariat. He considers it "simply as a notification of the Government's intention to become a party", and he does not notify the other States of its receipt. Furthermore, he draws the attention of the Government to the fact that the instrument does not entitle it to become a party and underlines that "it is only when an instrument containing no reference to subsequent ratification is deposited that the State will be included among the parties to the agreement and the other Governments concerned notified to that effect". The Secretary-General's treatment of the matter seems to go some way towards meeting Sir G. Fitzmaurice's point that the various acts and concepts involved in treaty-making should preserve their respective special uses and distinctive juridical characteristics; for the Secretary-General makes it clear that an accession subject to ratification is not an accession, and he gives no encouragement to the idea that it can be regarded as in any sense a "signature".

⁵² Texts of the debates, plenary meetings, records of the eighth ordinary session of the Assembly, *Official Journal of the League of Nations*.

(4) Accession subject to ratification, it is clear, is more a political gesture of support for the treaty than a legal act of participation in the treaty. Nevertheless, as it is apparently found in practice and is considered by some States to be useful, it seems desirable to cover it in the draft articles, if only for the purpose of leaving no doubt about its ineffectiveness as an act of participation in a treaty. Accordingly, while paragraph 3 of this article, in line with the League of Nations resolution, does not go to the length of prohibiting the deposit of an instrument of accession subject to ratification, the next article expressly states that it only constitutes a notice of intention to accede and that accession will not take place unless and until a new unconditional instrument of accession is deposited. Paragraph 3 of the present article also states that, unless accession is expressly made subject to ratification, it shall be considered to be intended as a final act of consent to the treaty; this follows from the very nature of accession as an act of final consent, and accords with the practice of the Secretariats both of the League of Nations and of the United Nations.

ARTICLE 15. LEGAL EFFECTS OF ACCESSION

1. An instrument of accession which is expressed to be subject to ratification or approval operates only as a conditional notification of the acceding State's intention to become bound by the treaty. A State depositing such an instrument shall not therefore become a party to the treaty, whether actual or presumptive, unless and until it shall have deposited a further instrument notifying its definitive accession to the treaty.

2. Accession, when definitive, shall have the same legal effects as those stated in article 12 to be consequent upon ratification.

Commentary

(1) Accession, like ratification, is intrinsically an act by which a State commits itself definitively to participation in the treaty. Accordingly, when a State deposits an instrument of accession which is expressed to be subject to subsequent ratification or approval, it executes an act which falls short of, and does not constitute, accession to the treaty. Nor can its effect be said to be equivalent to that of signature; for signature has its own special function and status. Nor can there be any question of the deposit of the instrument making the State a *provisional* party to the treaty; for the subsequent ratification or approval of the State is a condition *precedent* to its becoming bound by the treaty.

Accession "subject to ratification or approval" is therefore believed to have, strictly speaking, no positive legal effects, and this appears to be the view taken by the Secretary-General in his capacity as depositary of multilateral treaties. As already mentioned in paragraph 3 of the commentary upon the previous article, when the Secretary-General receives an instrument of accession given subject to ratification, he considers it simply as a notification of the Government's intention to become a party and he does not notify the other States of its receipt. He draws the attention of the Government to the fact "that the instrument does not entitle it to become a party and that it is only when an instrument containing no reference to subsequent ratification is deposited that the State will be included among the States parties to the agreement and the other Governments notified to that effect" (ST/LEG/7, p. 26). Paragraph 1 of the present article endorses this

practice and emphasizes the absence of any positive legal effects consequent upon an accession "subject to ratification or approval".

(2) Accession, when definitive, has precisely the same legal effects as those already stated in article 12 for ratification. Sir G. Fitzmaurice, it is true, mentions the possibility of a treaty reserving certain rights to signatories and ratifying States, to the exclusion of acceding States. Any such special rights would, however, be additional to the normal legal effects mentioned in article 12, and it is not thought necessary to refer to this point in the present article. Paragraph 2, therefore, simply provides that the legal effects of a definitive accession shall be the same as those of ratification as set out in article 12.

ARTICLE 16. PARTICIPATION IN A TREATY BY ACCEPTANCE

1. States may become parties to a treaty by acceptance, as defined in article 1 of the present articles, in the following cases:

(a) Where the treaty expressly provides that it may be signed subject to subsequent acceptance by the signatory State; and

(b) Where the treaty expressly provides that States may become parties to it directly by acceptance without prior signature.

2. In cases falling under paragraph 1 (a) of this article, the procedure and legal effects of acceptance shall be determined by reference, *mutatis mutandis*, to the provisions of articles 11 and 12 governing the procedure and legal effects of ratification.

3. In cases falling under paragraph 1 (b) of this article, the procedure and legal effects of acceptance shall be determined by reference, *mutatis mutandis*, to the provisions of articles 14 and 15 governing the procedure and legal effects of accession.

4. Unless the context otherwise requires, the signature of a treaty subject to "approval" and a treaty opened to "approval" without prior signature shall be regarded as equivalent respectively to the signature of a treaty subject to "acceptance" and a treaty opened to "acceptance" without prior signature, and the foregoing provisions of the present article shall accordingly apply.

Commentary

(1) The draft articles tentatively adopted by the Commission in 1951 did not contain any provisions in regard to "acceptance" as a method of becoming a party to a treaty. The explanation is that, although "acceptance" has been deliberately introduced into treaty-practice in the past twenty years as a new procedure for becoming a party to treaties, it does not really represent a new method of entering into treaty obligations. The innovation is one of terminology rather than of substance; for, if the treaty is open to "acceptance" without prior signature, the method is indistinguishable from that of accession, while, if acceptance is to follow upon a prior signature, the method is indistinguishable from that of ratification. Sir H. Lauterpacht also was doubtful about recognizing "acceptance" as a procedure distinct from ratification, and compromised by inserting a draft article in brackets, at the same time commenting that he was not certain that it ought to be retained (A/CN.4/63, article 8 and commentary).

(2) Sir G. Fitzmaurice, however, although he too emphasized that "acceptance" does not involve any new principle, recognized it in a special article as a distinct procedure for becoming a party to a treaty, sometimes taking the place of accession, sometimes of ratification (A/CN.4/101, article 36 and commentary). This appears to the present Special Rapporteur to be the correct course to adopt. Acceptance was originally devised to provide a new procedure outside the traditional procedures of accession and ratification in order to facilitate entry into treaty obligations without the delays involved in complying with internal constitutional requirements; and it is now found with sufficient frequency in treaty practice to justify and even call for specific mention.⁵³

(3) As emerges from what has been said above, "acceptance" is not a single uniform procedure but is a term which covers two different procedures analogous to accession and ratification; and this fact is reflected in the provisions of the present article.

(4) In recent years the terminology of treaty-making has become more various, not to say less scientific, and one of the commonest of the new terms is "approval", either in the form of a signature made subject to "approval" or of a treaty made open to "approval". Sir G. Fitzmaurice did not cover this new form, and the present Special Rapporteur has hesitated to give it specific mention in the draft articles. Other non-classical terms are to be found in State practice and it is not easy to see where the line should be drawn. However, "approval" now appears to have established itself and to be sufficiently common, more especially in treaties to which international organizations are parties, to require mention. One writer,^{53a} for example, has said that in the United Nations *Treaty Series* for the years 1946-51 he found no less than ninety instruments that had been brought into force by "approval". In general, "approval" seems to be used as a synonym for one or other of the two uses of "acceptance" referred to in the present article. But it appears from the example given on page 18 of the *Handbook of Final Clauses* (ST/LEG/6) that it may sometimes be found used with a special sense. Accordingly, paragraph 4 of the present article states that "unless the context otherwise requires" the term "approval" should be treated as equivalent to "acceptance".

ARTICLE 17. POWER TO FORMULATE AND WITHDRAW RESERVATIONS

1. (a) A State is free, when signing, ratifying, acceding to or accepting a treaty, to formulate a reservation, as defined in article 1, unless:

- (i) The making of reservations is prohibited by the terms of the treaty, or excluded by the nature of the treaty or by the established usage of an international organization; or
- (ii) The treaty expressly restricts the making of reservations to a specified category, or specified categories, of reservation and the reservation in question does not fall within the category or categories mentioned in the treaty; or
- (iii) The treaty expressly authorizes the making of a specified category, or specified categories, of reservation, in which case the formulation

of reservations falling outside the authorized category or categories is by implication excluded.

(b) The formulation of a reservation, the making of which is expressly prohibited or impliedly excluded under any of the provisions of sub-paragraph (a), is inadmissible unless the prior consent of all the other interested States has been first obtained.

2. (a) When formulating a reservation under the provisions of paragraph 1 (a) of this article, a State shall have regard to the compatibility of the reservation with the object and purpose of the treaty.

(b) The effect of the formulation of a reservation upon the legal relations between the reserving State and the other State or States signing, ratifying, acceding to or accepting the treaty shall be determined by reference to the provisions of articles 18 and 19 below.

3. (a) Reservations shall be formulated in writing either:

- (i) On the face of the treaty itself, and normally in the form of an adjunct to the signature of the representative of the reserving State;
- (ii) In a Final Act of a conference, protocol, *procès-verbal* or other instrument related to the treaty and executed by a duly authorized representative of the reserving State;
- (iii) In the instrument by which the reserving State ratifies, accedes to or accepts the treaty, or in a *procès-verbal* or other instrument accompanying the instrument of ratification, accession or acceptance and drawn up by the competent authority of the reserving State.

(b) A reservation formulated at the time of a signature which is subject to ratification or acceptance shall continue to have effect only if the instrument of ratification or acceptance either repeats the reservation or incorporates it by reference, or the reserving State at the time of ratification clearly expresses in some other manner its intention to maintain the reservation.

4. (a) The formulation of a reservation when signing a treaty at a meeting or conference of the negotiating States shall be communicated to the representatives of the other signatory State or States at or before the time of signature of the treaty. Such communication shall be presumed in the case of a reservation formulated in the manner mentioned in sub-paragraph (a) (i) and (ii) of the preceding paragraph.

(b) The formulation of a reservation by a State signing, ratifying, acceding to, or accepting a treaty subsequently to the meeting or conference at which it was adopted shall be communicated to all other States which are, or are entitled to become, parties in accordance with the procedure, if any, prescribed in the treaty for such communications.

(c) If no procedure has been prescribed in the treaty in regard to the communication of reservations but the treaty designates a depositary of the instruments relating to the treaty, then the formulation of the reservation shall be communicated to the depositary, whose duty it shall be:

- (i) To transmit the text of the reservation to all other States who are, or are entitled to become, parties to the treaty; and
- (ii) To draw the attention of such States to the time limit within which an objection to the reservation should be filed under the provisions of the treaty or, failing any such provisions,

⁵³ See Lord McNair, *Law of Treaties*, pp. 155-7.

^{53a} Hans Blix, "The Requirement of Ratification", *British Year Book of International Law*, 1953, pp. 363-4.

under paragraph 3 (b) of the next succeeding article.

5. However, in any case where a reservation is formulated to an instrument which is the constituent instrument of an international organization and the reservation is not one specifically authorized by such instrument, it shall be communicated to the Head of the secretariat of the organization concerned in order that the question of its admissibility may be brought before the competent organ of such organization.

6. A State which has formulated a reservation is free to withdraw it unilaterally, either in whole or in part, at any time, whether the reservation has been accepted or rejected by the other States concerned. Withdrawal of the reservation shall be effected by written notification to the depositary of instruments relating to the treaty and, failing any such depositary, to every State which is or is entitled to become a party to the treaty.

ARTICLE 18. CONSENT TO RESERVATIONS AND ITS EFFECTS

1. A reservation, since it purports to modify the terms of the treaty as adopted, shall only be effective against a State which has given, or is presumed to have given, its consent thereto in accordance with the provisions of the following paragraphs of this article.

2. (a) Consent to a reservation shall be held to have been given expressly if such consent is stated:

- (i) In the treaty itself;
- (ii) In the Final Act of the conference at which the treaty was drawn up, in a protocol of signature or of exchange of ratifications, in a *procès-verbal* or other instrument related to the treaty and executed by a duly authorized representative of the consenting State;
- (iii) In the instrument by which the consenting State ratifies, accedes to or accepts the treaty, or in a *procès-verbal* or other instrument accompanying the instrument of ratification, accession or acceptance and drawn up by the competent authority of the consenting State;
- (iv) In a formal notification of such consent issued by the competent authority of the consenting State and addressed either to the State or States concerned or to the depositary of instruments relating to the treaty.

(b) Consent to a reservation shall also be held to have been given expressly where the treaty itself authorized the making of a particular reservation or category of reservations and the reservation falls within the terms of the authorization.

3. (a) Any State which is or is entitled to become a party to a treaty shall be deemed to have consented to a reservation in any case where the reservation was formulated on the face of the treaty or in the Final Act of the conference or in a *procès-verbal* or other instrument related to the treaty and it then made no objection to the reservation.

(b) Any such State shall also be deemed to have consented to a reservation to a plurilateral or multilateral treaty in any case where the reservation was communicated to the State in question and twelve calendar months have since elapsed without any notice of objection to the reservation having been lodged by that State; provided that, in the case of a multilateral treaty, a State which at the time of such communication was

not a party to the treaty shall not be deemed to have consented to the reservation if it shall subsequently lodge an objection to the reservation, when executing the act or acts necessary to qualify it to become a party to the treaty.

(c) A State which acquires the right to become a party to a treaty after a reservation has already been formulated shall be presumed to consent to the reservation:

- (i) In the case of a plurilateral treaty, if it executes the act or acts necessary to enable it to become a party to the treaty;
- (ii) In the case of a multilateral treaty, if it executes the act or acts necessary to qualify it to become a party to the treaty without signifying its objection to the reservation.

4. (a) In the case of a bilateral treaty, the consent of the other negotiating State to the reservation shall automatically establish the reservation as a term of the treaty between the two States.

(b) Unless the treaty shall otherwise provide or another rule be applicable under the constitution or usages of an international organization or under a decision of its competent organ:

- (i) The consent, express or implied, of all the States participating in the adoption of the text of a plurilateral treaty is necessary to establish the admissibility of a reservation not specifically authorized by the treaty, and to constitute the reserving State a party to the treaty; provided that the consent of a State which after the expiry of twelve months from the date of lodging an objection has not yet executed a definitive act qualifying it to become a party to the treaty shall be dispensed with, and provided that, if the treaty is in force and not less than four years have elapsed since the adoption of its text, the consent only of the parties to the treaty shall be required;
- (ii) The consent, express or implied, of any other State which is a party or a presumptive party to a multilateral treaty shall suffice, as between that State and the reserving State, to establish the admissibility of a reservation not specifically authorized by the treaty, and shall at once constitute the reserving State a party to the treaty with respect to that State.

(c) In the case of a plurilateral or multilateral treaty which is the constituent instrument of an international organization, the consent of the organization, expressed through a decision of its competent organ, shall be necessary to establish the admissibility of a reservation not specifically authorized by such instrument, and to constitute the reserving State a party to the instrument.

5. (a) When the treaty has entered into force, a reservation which has been established as admissible in accordance with the provisions of the present article shall operate:

- (i) To exempt the reserving State from the provisions of the treaty to which the reservation relates to the extent of the matters covered by the reservation; and
- (ii) Reciprocally to entitle any other party to the treaty to claim the same exemptions from the provisions of the treaty in its relations with the reserving State.

(b) The reservation of one party to a plurilateral or multilateral treaty shall operate only as between the reserving State and the other parties to the treaty; it shall not affect in any way the rights and obligations of the other parties to the treaty *inter se*.

ARTICLE 19. OBJECTION TO RESERVATIONS AND ITS EFFECTS

1. (a) With the exception of the cases mentioned in sub-paragraph (b), any State which is or is entitled to become a party to a treaty shall have the right to object to any reservation not specifically authorized by the terms of the treaty.

(b) In the case of a plurilateral treaty, however, a State shall not have the right to object to a reservation:

- (i) If it acquired the right to become a party to the treaty after the reservation had already been formulated; or
- (ii) If more than four years have elapsed since the adoption of the text or the treaty and it has not yet executed the act or acts necessary to enable it to become a party to the treaty.

2. (a) An objection to a reservation shall be formulated in writing by the competent authority of the objecting State or by a representative of the State duly authorized for that purpose.

(b) The objection shall be communicated to the reserving State and to all other States, which are or are entitled to become parties to the treaty, in accordance with the procedure, if any, prescribed in the treaty for such communications.

(c) If no procedure has been prescribed in the treaty but the treaty designates a depositary of the instruments relating to the treaty, then the lodging of the objection shall be communicated to the depositary whose duty it shall be:

- (i) To transmit the text of the objection to the reserving State and to all other States which are or are entitled to become parties to the treaty; and
- (ii) To draw the attention of the reserving State and the other States concerned to any provisions in the treaty relating to objections to reservations.

3. (a) In the case of a plurilateral or multilateral treaty, an objection to a reservation shall not be effective unless it has been lodged before the expiry of twelve calendar months from the date when the reservation was formally communicated to the objecting State; provided that, in the case of a multilateral treaty, an objection by a State which at the time of such communication was not a party to the treaty shall nevertheless be effective if subsequently lodged when the State executes the act or acts necessary to enable it to become a party to the treaty.

(b) In the case of a plurilateral treaty, an objection by a State which has not yet become a party to the treaty, either actual or presumptive, shall:

- (i) Cease to have effect, if the objecting State shall not itself have executed a definitive act of participation in the treaty within a period of twelve months from the date when the objection was lodged;
- (ii) Be of no effect, if the treaty is in force and four years have already elapsed since the adoption of its text.

4. When an objection has been made to a reservation in conformity with the provisions of the present article and the reserving State does not withdraw its reservation:

(a) In the case of a bilateral treaty, the treaty falls to the ground;

(b) In the case of a plurilateral treaty, unless the treaty shall otherwise provide or another rule be applicable under the constitution or usages of an international organization or under a decision of its competent organ, the reserving State shall be excluded from participation in the treaty;

(c) In the case of a multilateral treaty, the objections shall preclude the entry into force of the treaty as between the objecting and the reserving States, but shall not preclude its entry into force as between the reserving State and any other State which does not object to the reservation;

(d) In the case of a treaty which is the constituent instrument of an international organization, the decision of the competent organ of the organization rejecting the reservation shall exclude the reserving State from participation in the treaty.

5. A State which has lodged an objection to a reservation shall be free to withdraw it unilaterally, either in whole or in part, at any time. Withdrawal of the objection shall be effected by written notification to the depositary of the instruments relating to the treaty, and failing any such depositary, to every State which is or is entitled to become a party to the treaty.

Commentary on articles 17, 18 and 19

(1) These three articles have to be read together because the power of a State to formulate reservations to a treaty cannot be considered separately from the corresponding power of other States to accept or reject the reservation. Indeed, there is an inherent ambiguity in saying, as is usually said, that a State may "make" a reservation; for the very question at issue is whether a reservation *formulated* by one State can be held to have been effectively "made" unless and until it has been assented to by the other interested States. Accordingly, the present draft seeks to cover the "making" of reservations in three connected articles dealing with (i) the "formulation" of reservation, (ii) consent to reservations and its effects and (iii) objection to reservations and its effects. Reservations to bilateral treaties present no problem. Reservations to plurilateral treaties pose certain problems with regard to the conditions under which States are entitled to express their consent or objection to a reservation; but the basic principle appears to be generally accepted that reservations to plurilateral treaties require the consent of *all* the parties to the treaty, unless in a particular case the treaty or the constitution of an international organization provides that the consent of a majority will suffice. The real difficulty arises in the case of reservations to multilateral treaties, where the basic principle with regard to the acceptance of reservations is controversial and where the reconciliation of the respective interests of the reserving State and the other States participating in the treaty presents problems of considerable complexity.

(2) The subject of reservations to multilateral treaties has been much discussed during the past twelve years and opinion has been sharply divided both in the International Court of Justice and in the General Assembly on the fundamental question of the extent to which the consent of other interested States is necessary to the effectiveness of a reservation to this type of

treaty. In 1951,⁵⁴ the traditional doctrine under which a reservation, in order to be valid, must have the assent of all the other interested States was not accepted by the majority of the Court as applicable in the particular circumstances of the Genocide Convention; moreover, while they considered the traditional doctrine to be of "undisputed value", they did not consider it to have been "transformed into a rule of law". Four judges, on the other hand, dissented from this view and set out their reasons for holding that the traditional doctrine must be regarded as a generally accepted rule of customary law. Later that same year, the Commission in a report to the General Assembly on the general question of reservations to multilateral conventions (A/1858, chapter II) recommended the adoption of the traditional doctrine as the general rule, notwithstanding that the Court had not accepted it as applicable in the particular instance of the Genocide Convention. This recommendation was not, however, accepted at the ensuing session of the General Assembly; on the contrary, a substantial group of States showed themselves entirely unwilling to endorse the traditional doctrine as the general rule for multilateral treaties, and even those States that were in favour of maintaining the traditional doctrine showed some disposition to modify it by substituting a two-thirds majority principle for the principle of unanimous consent. The resolution ultimately adopted by the Assembly (resolution 598 (VI) of 12 January 1952) did not attempt to express any definite conclusion on the question, but simply requested the Secretary-General, as depositary of numerous multilateral treaties, to accept the deposit of instruments containing or relating to reservations and to communicate their texts to all States concerned without passing upon their legal effect. The question was subsequently taken up again in the Commission, first, by Sir H. Lauterpacht in his reports of 1953 and 1954, and then by Sir G. Fitzmaurice in his report of 1956. The former, while thinking the unanimity rule to be the existing rule, did not consider it to be satisfactory and made four alternative proposals, two of which envisaged acceptance by a two-thirds majority and the other two submission of the admissibility of reservations either to a committee of the negotiating States or to a chamber of the Court. Sir G. Fitzmaurice, on the other hand, recommended the Commission to revert to the unanimity rule which it favoured in 1951, subject to two modifications: (i) a presumption that failure to object to a reservation during a period of three months amounts to tacit consent and (ii) after a treaty has been in force for five years only the objection of an actual party to the treaty should be effective to bar a reserving State from participation in the treaty.

The draft articles now placed before the Commission have been prepared after careful consideration of the Opinion of the Court and the dissenting judges concerning reservations to the Genocide Convention, the proceedings in the Sixth Committee and the General Assembly, and the reports and proceedings of the Commission itself. No doubt the Commission will wish to consult the original records of the various proceedings and the full reports of the Commission's previous Special Rapporteurs. But, having regard to the complexity of the question and the extent of the records, it has been thought useful to append to the present commentary a substantial Note summarizing the previous discussions

⁵⁴ *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, I.C.J. Reports, 1951, p. 15.*

of the problem of reservations to multilateral treaties since it first came before the Commission in 1950 (see appendix below).

(3) The very fact that in the General Assembly different groups of States have already voiced somewhat contrary opinions on the fundamental question of the extent to which the effectiveness of a reservation depends on the consent of other interested States, renders the Commission's task of formulating general rules to govern reservations to multilateral treaties a delicate one. The draft provisions relating to multilateral treaties now submitted to the Commission discard the principle of unanimous consent which the Commission made the basis of its previous recommendations in 1951, and which Sir G. Fitzmaurice made the basis of his proposals in 1956; and they do not embrace any of the alternative proposals put forward by Sir H. Lauterpacht in 1953-4. Accordingly, the present Special Rapporteur feels it incumbent upon him to explain at the outset the reasons which have led him to suggest a different solution to this problem from any previously proposed either by the Commission or by the eminent Special Rapporteurs who have preceded him.

(4) The situation of the Commission today with regard to this question differs in several important respects from its situation when it drew up its report in 1951. First, it cannot fail to recall that its carefully considered proposals based upon the principle of unanimous consent did not commend themselves to a majority of States in the Assembly, many of which favoured a more flexible system under which a reserving State would be considered a party to a multilateral treaty vis-à-vis any State that did not give notice of its objection to the reservation. Secondly, the international community itself has undergone rapid expansion since 1951, so that the very number of potential participants in multilateral treaties now seems to make the unanimity principle less appropriate and less practicable. Thirdly, ever since 12 January 1952, i.e., during the past ten years, the system which has been in operation *de facto* for all new multilateral treaties of which the Secretary-General is the depositary has approximated to the "flexible" system advocated by the larger of the two main groups of States in the General Assembly in 1951. For the Secretariat's practice with regard to all treaties concluded after the General Assembly's resolution of 12 January 1952 has been officially stated to be as follows:⁵⁵

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

⁵⁵ *Summary of the Practice of the Secretary-General as Depositary of Multilateral Agreements (ST/LEG/7), paragraph 80.*

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

(5) Another consideration is that under a so-called flexible system, as under the unanimity system, the essential interests of each individual State are to a very great extent safeguarded by the two fundamental rules:

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

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

It is true that in the case of multilateral law-making treaties, as Sir G. Fitzmaurice has emphasized, the equality between a reserving and non-reserving State, which is the aim of the above-mentioned rules, may in practice be less than complete. For a non-reserving State, by reason of its obligations towards other non-reserving States, will feel bound to comply with the whole of the treaty, including the provisions from which the reserving State has exempted itself by its reservation. Accordingly, the reserving State will be in the privileged position of being exempt itself from certain of the provisions of the treaty, while having the assurance that the non-reserving States will observe those provisions. Too much weight ought not, however, to be given to this point. For normally the State wishing to make a reservation would equally have the assurance that the non-reserving State would be obliged to comply with the provisions of the treaty by reason of its obligations to other States, even if the reserving State remained completely outside the treaty. By entering into the treaty subject to its reservation, the reserving State at least submits itself in some measure to the régime of the treaty. The position of the non-reserving State is not made in any respect more onerous if the reserving State becomes a party to the treaty on a limited basis by reason of its reservation. Even in those cases where there is such a close connexion between the provisions to which the reservation relates and other parts of the treaty that the non-reserving State is not prepared to become a party to the treaty at all vis-à-vis the reserving State on the limited basis which the latter proposes, the non-reserving State can prevent the treaty coming into force between itself and the reserving State by the simple expedient of objecting to the reservation. Thus, the point to which Sir G. Fitzmaurice drew attention only appears to have real significance in cases where the non-reserving State would never itself have consented to become a party to the treaty, if it had known that the other State would do so subject to the reservation in question. And it may not be unreasonable

to suggest that if a State attaches so much importance to maintaining the absolute integrity of particular provisions its appropriate course is to protect itself during the drafting of the treaty by obtaining the agreement of the negotiating States to the insertion of an express clause prohibiting the making of the reservations which it considers to be so objectionable.

(6) There remain the important questions whether a more flexible system might possibly have detrimental effects on (i) the drafting of multilateral treaties or (ii) the integrity of the text of the treaty adopted by the negotiating States. As to the first question, it may be doubted whether the drafting of multilateral treaties would be sensibly affected. The treaty-text will normally require the approval of at least a two-thirds majority of the negotiating States, and it must continue to be the prime object of that majority to agree upon the best text that expert drafting can provide. The second question, the threat to the integrity of the treaty, was emphasized by the Commission itself in 1951 with reference to the Pan-American system (A/1858, chapter II, paragraph 22):

"The Pan-American practice is likely to stimulate the offering of reservations; the diversity of these reservations and the divergent attitude of States with regard to them tend to split up a multilateral convention into a series of bilateral conventions and thus to reduce the effectiveness of the former."

That a more flexible system may tend in some measure to stimulate the formulation of reservations and in that way to reduce the full effectiveness of the text as adopted can scarcely be denied. But it seems important to consider in exactly what measure the effectiveness of a multilateral treaty is reduced and to what extent the reduction in effectiveness may be compensated for by an increase in the number of States participating in the treaty.

(7) The detrimental effect of reservations upon the integrity of the treaty may, in the opinion of the present Rapporteur, easily be exaggerated. The treaty itself remains the sole authentic statement of the common agreement between the participating States. The majority of reservations relate to a particular point which a particular State for one reason or another finds difficult to accept, and the effect of the reservation on the *general* integrity of the treaty is minimal; and the same is true even if the reservation in question relates to a comparatively important provision of the treaty, so long as the reservation is not made by more than one or two States. In short, the integrity of the treaty would only be materially affected if a reservation of a somewhat substantial kind were to be formulated by a number of States. This might, no doubt, happen; but even then the treaty itself would remain the master agreement between the other participating States. What is essential to ensure both the effectiveness and the integrity of the treaty is that a sufficient number of States should become parties to it, accepting the great bulk of its provisions. The Commission in 1951 said (*ibid.*, *loc. cit.*) that the history of the conventions adopted by the Conference of American States "had failed to convince it that an approach to universality is necessarily assured or promoted by permitting a State which offers a reservation to which objection is taken to become a party vis-à-vis non-objecting States". Nevertheless, a power to formulate reservations must in the nature of things tend to make it easier for some States to execute the act necessary to

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

(8) The system proposed in the draft articles for multilateral treaties which do not contain provisions regulating the making of reservations is founded upon the present practice in regard to multilateral treaties of which the United Nations is the depositary; and it is comparable to the flexible system applied in the Organization of American States. The Inter-American system contemplates that the reserving State should give prior notice of its intention to formulate the reservation and that this notice of intention should be circulated to the other members of the Organization of American States before any instrument of ratification, accession or acceptance is deposited. The idea is that the other member States should, as it were, be consulted before the reserving State executes the act which will make it a party to the treaty. Under this system the reserving State can take into account the reactions of the other member States before finally executing its act of participation in the treaty. Under the United Nations system, on the other hand, there is not normally any prior consultation and the reservation is communicated to the other interested States *after* the reserving State has attached its signature to the treaty or deposited its instruments of ratification, accession or acceptance. The substantial difference between the two systems seems to be that under the Inter-American system the reserving State has a period of grace during which it may modify or withdraw its reservation or even withhold its participation in the treaty altogether, whereas under the United Nations system the reserving State becomes a party to the treaty immediately and, although it may certainly withdraw its reservation altogether in the face of the objection of other States, its power to modify the reservation, except by obtaining the fresh consent of all the interested States, may be doubtful, since the

original reservation may have already been accepted by some States. Nevertheless, attractive although the idea of prior consultation may be in principle, the United Nations system appears to be more practical for multilateral treaties open to participation by upwards of one hundred States, and seems to involve less risk of serious delay in the coming into force of such treaties.

Commentary on article 17

(9) Paragraph 1 of this article deals with the power to formulate, that is, to *propose*, a reservation when signing, ratifying, acceding to or accepting a treaty. It accepts the view that, *unless the treaty itself, either expressly or by clear implication, forbids or restricts the making of reservations*, a State is free, in virtue of its sovereignty, to formulate such reservations as it thinks fit. But the formulation of a reservation that is not one expressly authorized by the treaty takes the reserving State's signature, ratification or other act of consent to the treaty outside anything that has yet been consented to by the other States concerned. Accordingly they, in virtue also of their sovereignty, are not bound to treat the reserving State's signature, ratification or other act of consent as valid against themselves, so that the effect of the formulation of the reservation depends on the subsequent reactions of each of the other interested States. The general principles are contained in paragraphs 1 (a) and 2 (b) of the article. Paragraph 1 (b) deals with the exceptional case of an attempt to formulate a reservation of a kind which is actually prohibited or excluded by the terms of the treaty. Here the formulation of the reservation is inadmissible unless the prior consent of the other interested State is obtained. The distinction is that, when a reservation is formulated which is not prohibited by the treaty, the other States are called upon to indicate whether they accept or reject it but, when the reservation is one prohibited by the treaty, they have no need to do so, for they have already expressed their objection to it in the treaty itself.

(10) Paragraph 2 (a), which lays down as a *principle* that States, in formulating a reservation not expressly authorized, should have regard to the compatibility of the reservation with the object and purpose of the convention, has been included in the article with a certain amount of hesitation. This was, of course, the principle applied by the International Court in the *Reservations to the Genocide Convention* case as the criterion for determining whether a reserving State can be still regarded as a party to the Convention notwithstanding the fact that its reservation has been objected to by one or more States. Applied in this way as the test of a State's right to be considered a party to the treaty, the principle met with strong criticism in some quarters, and not least in the Commission itself in 1951. For it was said—and rightly—that in any given case the question of the compatibility or incompatibility of a particular reservation with the object and purpose of the treaty depends to a considerable extent on the conclusions reached as to exactly how much of the subject-matter of the treaty is to be regarded as representing the "object and purpose of the treaty" and as to exactly which provisions are to be regarded as material for the achievement of that "object and purpose". But these are questions on which opinions, and especially the opinions of the parties themselves, may well differ, so that the principle applied by the Court is essentially subjective and unsuitable

for use as a general test for determining whether a reserving State is or is not entitled to be considered a party to a multilateral treaty. The test is one which might be workable if the question of "compatibility with the object and purpose of the treaty" could always be brought to independent adjudication; but that is not the case, and the general view seems to be that the principle of "compatibility with the object and purpose" cannot be adopted as the general criterion for determining the status of a reserving State as a party to the treaty. The Special Rapporteur believes these criticisms of the Court's criterion to be well founded, and in articles 18 and 19 proposes that the Commission should adopt instead the flexible Inter-American system, which operates on the basis of the purely objective criterion of each State's consent or objection to the particular reservation in question.

Nevertheless, the Court's criterion of "compatibility with the object and purpose of the convention" does express a valuable concept to be taken into account both by States formulating a reservation and by States deciding whether or not to consent to a reservation that has been formulated by another State. Moreover, some representatives in the Sixth Committee and General Assembly thought that the Court's criterion could be given a more general application. The Special Rapporteur, although also of the opinion that there is value in the Court's principle as a general concept, feels that there is a certain difficulty in using it as a *criterion* of a reserving State's status as a party to a treaty in combination with the objective criterion of the acceptance or rejection of the reservation by other States. First, the principle of consent would lose much of its value as a simple and objective test, if it could be overridden or qualified by reference to another subjective and indeterminate criterion. Secondly, in some cases the two criteria might even give inconsistent results. Accordingly, the Special Rapporteur has tentatively inserted in paragraph 2 (a) for the Commission's consideration a provision stating the Court's concept as a general principle to be taken into account, without however attaching any sanction to it or giving it any express place in articles 18 and 19, where the objective criteria of "consent" and "objection" are adopted as the tests for determining the legal relations between a reserving State and other parties to the treaty. Paragraph 2 (b) needs no comment.

(11) Paragraph 3 (a) deals with the modalities of formulating reservations and does not appear to require comment. Paragraph 3 (b), which covers the special case of a reservation attached to the signature of a treaty which is subject to ratification (or acceptance), is perhaps more controversial. The present draft takes the line that the reservation will be presumed to have lapsed unless some indication is given in the instrument of ratification that it is maintained. The Harvard Research Draft (article 15 (d)) put the rule in the opposite way, laying down that ratification would automatically be considered to be ratification of the treaty *subject to the reservation*. The authors of the Harvard Research Draft admitted that some writers (e.g. Fauchille) considered that the reservation must be repeated, but argued that such a rule would be inconsistent with the theory that a reservation made at the time of signature forms part of the text as adopted. On the other hand, in 1959 the Inter-American Council of Jurists recommended a rule which would require the reservation to be "reiterated" before the deposit of the instrument of ratification, although

the United States delegation found that rule to be "unacceptable in the form in which it has been drafted". Clearly, different opinions may be held as to what exactly is the existing rule on the point, if indeed any rule exists at all. But the Special Rapporteur suggests that a rule requiring some form of confirmation of the reservation in the instrument of ratification is desirable in the interests of certainty, and is more in harmony with the modern concept of the ratification process as a confirmation not of the signature but of the *treaty* than the rule proposed in the Harvard Research Draft.

(12) Paragraph 4 prescribes that reservations must be communicated to all the other interested States and contains provisions in regard to the procedure to be followed in making such communications.

Paragraph 5 has been inserted to cover a point to which attention is drawn in paragraph 81 of the Summary of the Practice of the Secretary-General (ST/LEG/7), where it is said:

"If the agreement should be a constitution establishing an international organization, the practice followed by the Secretary-General and the discussions in the Sixth Committee show that the reservation would be submitted to the competent organ of the organization before the State concerned was counted among the parties. The organization alone would be competent to interpret its constitution and to determine the compatibility of any reservation with its provisions."

Paragraph 6 declares the absolute right of a State to withdraw a reservation unilaterally, even when the reservation has been accepted by other States.

Commentary on article 18

(13) Paragraph 1 of this article lays down the fundamental principle that, by attaching a reservation to its signature, ratification, accession or acceptance, a State is in effect making a new proposal which must be assented to by the other State before any contractual nexus can arise between them. Paragraph 2 (a) recites the ways in which express consent to a reservation may be given in advance by the insertion in the treaty of an express authority to make the particular reservation in question.

(14) Paragraph 3 deals with what may be a more controversial question, namely, the question of implied consent to a reservation. That the principle of presuming consent to a reservation from absence of objection has been admitted into State practice cannot really be doubted; for the Court itself in the *Reservations to the Genocide Convention* case spoke of "very great allowance" being made in international practice for "tacit assent to reservations". If the Commission in its 1951 report did not specifically refer to consent being presumed from absence of objection, its proposals involved the application in some measure of the principle of tacit consent. And the drafts of both Sir H. Lauterpacht and Sir G. Fitzmaurice provided that the consent of a State should be presumed conclusively after a period of three months, if no objection has been raised to the reservation. Furthermore, a rule specifically stating that consent will be presumed after a period of three, or in some cases six, months is to be found in some modern conventions;⁵⁶ while other conventions

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

achieve the same result by limiting the right of objection to a period of three months.⁵⁷ Again, in 1959, the Inter-American Council of Jurists⁵⁸ recommended that, if no reply had been received from a State to which a reservation had been communicated, it should be presumed after one year that the State concerned had no objection to the reservation. On the other hand, it is stated in the Final Act of that Council that the United States delegation made a reservation on this point, saying that it considered the recommended rule to be "undesirable".⁵⁹

(15) It has, of course, to be admitted that there may be a certain degree of rigidity in a rule under which tacit consent will be presumed after the lapse of a fixed period. It is also true that, under the "flexible" system now proposed, the acceptance or rejection by a particular State of a reservation made by another primarily concerns their relations with each other, so that there may not be the same urgency to determine the status of a reservation as under the system of unanimous consent. Nevertheless, it seems very undesirable that a State, by refraining from making any comment upon a reservation, should be enabled more or less indefinitely to maintain an equivocal attitude as to the relations between itself and the reserving State under a treaty of universal concern. A State participating in the adoption of the text of a plurilateral or multilateral treaty must be deemed to be aware that under generally accepted treaty-making practice States are free to put forward reservations of their own when finally binding themselves to the treaty, provided that the reservation in question is not one prohibited by the treaty. This being so, good faith in the application of the procedural provisions of the treaty, and especially those dealing with participation in the treaty, would seem to require that States adopting a plurilateral or multilateral treaty should take note of the formulation of reservations and voice any objection that they may have to the reservation with reasonable expedition in order that the position of the reserving State under the treaty may be clarified. And, on the same basis, if a State voices no objection or hesitations in regard to a reservation, it seems reasonable to hold that after an appropriate interval the State shall be presumed to have acquiesced in the participation of the reserving State in the treaty subject to the reservation. Nor does it seem possible to make this presumption dependent on some positive act of recognition of the reserving State as a party to the treaty. Under modern practice it is the depositary alone who deals with each State in regard to the procedural clauses of the treaty, and the risk would be that a State which had kept silent in regard to another State's reservation would only take a clear position in the matter *after* a dispute had arisen between it and the reserving State. It is for reasons such as these that it has been thought advisable to lay down in paragraph 3 (b) of article 18 that if a State has voiced no objection to a reservation during a period of twelve months, it shall be presumed to have consented to the reservation.

(16) Seeing that in a number of treaties States have found it possible to accept periods as short as three or six months, the question may be asked why it has

been thought necessary to propose a period of twelve months in the present draft. But there are, it is thought, good reasons for proposing the adoption of the longer period. First, it is one thing to agree upon a short period for the purposes of a particular treaty whose contents are known, and a somewhat different thing to agree upon it as a general rule applicable to every treaty which does not lay down a rule on the point. States may, therefore, find it easier to accept a general time limit for voicing objections, if a longer period is proposed. Secondly, as already noted, the Inter-American Council of Jurists in 1959 appears to have favoured the longer period here proposed. Again, there may even be cases where a Government desires to bring another State's reservation before the competent organ of the State in connexion, perhaps, with the State's own decision to ratify the treaty. It seems prudent, therefore, to have a long rather than a short period for the general rule. Furthermore, the arguments in favour of a time limit do not appear to be so strong under the flexible system for reservations to *multilateral* treaties in the case of a State which is not already a party to the treaty; for by delaying a decision it is not prejudicing the position of the reserving State vis-à-vis any State. Accordingly, it seems possible in such a case to lessen the rigidity of the rule by allowing an objection made on ratifying, or acceding to, the treaty to be effective, notwithstanding the expiry of the twelve months' period. This qualification of the rule is not possible in the case of plurilateral treaties because there the delay in taking a decision does place in suspense the status of the reserving State vis-à-vis all the States participating in the treaty.

(17) Paragraph 3 (c) covers the case of a State invited to become a party to a treaty by accession or otherwise at a date when certain States have already become parties or presumptive parties to it subject to reservations. One alternative is to hold that a State responding to such an invitation must take the treaty and the reservations previously attached to the treaty by some States as it finds them; in other words, to hold that the newly invited State shall in any event be bound by reservations formulated prior to its participation in the treaty. In the case of plurilateral treaties, this appears to be the rule applied. For a reservation to a plurilateral treaty requires the unanimous consent of the participating States and, once this has been obtained, it becomes established as an admitted reservation attached to the treaty. It is, therefore, perfectly logical that a newly invited State should only be able to participate in the treaty on the basis of accepting it as already modified with respect to the reserving State by the admission of the reservation; and this is the principle suggested for plurilateral treaties in paragraph 3 (c). Quite different considerations, on the other hand, apply to multilateral treaties, if the "flexible system" of determining the admissibility of reservations is adopted. Under this system corporate acceptance of reservations by the whole body of participating States is not necessary and the admissibility of a reservation is a matter which concerns each State individually; moreover, the consent of any one State to a particular reservation is limited in its effects to the relations between that State and the reserving State. Accordingly, there does not seem to be any good reason under this system for a newly invited State to be deprived of all right to object to reservations formulated prior to its participation in the treaty. On the contrary, the principle of equality seems to require that the newly

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

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

⁵⁹ *Ibid.*, p. 86.

invited State should have that right and the appropriate time for it to exercise that right would appear to be when it executes the act by which it becomes a party to the treaty. It follows that, if the newly invited State does not then notify its objection to previously formulated reservations, it should be presumed to have assented to them.

(18) Paragraph 4 sets out the basic rules concerning the States whose consents are required for the admission of a reservation, and, in considering these rules, it is necessary to bear in mind the principle in paragraph 3 (b) that consent will be implied from the absence of any objection during a period of twelve months. It is also to be noted that the rules set out in this paragraph concerning plurilateral and multilateral treaties are subject to the proviso that another rule is not applicable either under the treaty itself or under the constitution or usages of an international organization. One object of this proviso is to safeguard any such special usages as those applicable in the Organization of American States.

In the case of bilateral and plurilateral treaties the basic rule laid down is that a reservation not authorized by the treaty must have the consent of all the other States which are or are entitled to become parties to the treaties. There is, however, an exception to this rule in the case of plurilateral treaties where it is suggested *de lege ferenda* that, if four years have elapsed since the date of the adoption of the treaty and a State has not entered into any definitive commitment to be bound by the treaty, the consent of that State should be dispensed with. The Commission recognized in 1951 (A/1858, chapter II) that it would be an abuse if a signatory State were to object to another State's reservation and then refrain from entering into any commitment itself to be bound by the treaty. The rule that the Commission suggested was that an objection should be disregarded if after the expiry of twelve months the objecting State had not itself ratified or otherwise accepted the treaty. Sir G. Fitzmaurice, on the other hand, proposed the following rule in article 39, paragraph 1 (ii) of his draft articles (A/CN.4/101): "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 20 per cent of the States originally entitled to become parties." This rule, which would only operate five years after the treaty had already been in force, seems to be somewhat too remote in its application to provide a satisfactory answer to the problem. On the other hand, the general idea in it that, after the treaty comes into force, the right to pronounce upon the validity of reservations should sooner or later pass exclusively to the States which have committed themselves to participation in the treaty, seems to be valid. The Special Rapporteur suggests that both the principle proposed by the Commission in 1951 and the idea in Sir G. Fitzmaurice's draft should be retained and both elements will be found in paragraph 4 (b) (i) of the present article. The rule suggested by Sir G. Fitzmaurice has been considerably modified, however, by reducing the period to four years⁶⁰ and by making it operate from the date of the adoption of the text, not that of the entry into force of the treaty. The resulting position under

⁶⁰ This is the same period as that suggested in the analogous case of the right of States to a voice in deciding whether to invite new States to accede to the treaty (see article 13 above).

the present draft would be that (i) before the end of the four-year period any State could lodge an objection, which would be effective to exclude the reserving State from participation in the treaty; provided that the objecting State either had already committed itself to participation or proceeded to do so within twelve months; and (ii) this would still be the position after the end of the four-year period until the treaty came into force; but (iii) if and when the treaty came into force the right to object—after the expiry of the four years—would be confined to the actual parties.

(19) Paragraph 4 (b) (ii) lays down the basic principles of the "flexible" system of admitting reservations to multilateral treaties, namely, that (a) it is a matter for each State individually to consent or object to a reservation, and (b) the consent of any individual State to a reservation makes the reserving State a party to the treaty *at least with respect to the consenting State*.

(20) Paragraph 4 (c) corresponds to paragraph 5 of article 17, and restates, in the context of the consents necessary for the admission of a reservation, the rule that the admission of a reservation to a constituent instrument of an international organization is a matter for the decision of the organization concerned.

(21) Paragraph 5 sets out the rules concerning the legal effects of a reservation, which has been established as admissible under the provisions of the present article once the treaty is in force. These rules, which appear not to be disputed, follow directly from the consensual basis of treaty regulations. A reservation operates reciprocally between the reserving State and any other party to the treaty, so that both are exempted from the reserved provisions in their mutual relations. But it has no application as between the other parties, since they have not made it a term of the agreement between them.

Commentary on article 19

(22) The provisions of this article are for the most part a reflex of provisions contained in article 18, and do not therefore need further explanation. Thus:

Paragraph 1 (a) corresponds to paragraph 1 of article 18

Paragraph 1 (b) corresponds to paragraph 3 (c) of article 18

Paragraph 2 corresponds to paragraphs 3 and 4 of article 17

Paragraph 3 (a) reflects paragraph 3 (b) of article 18

Paragraph 3 (b) (i) reflects the first proviso in paragraph 4 (b) (i) of article 18

Paragraph 3 (b) (ii) reflects the second proviso in paragraph 4 (b) (ii) of article 18

Paragraph 4 reflects paragraph 4 of article 18

Paragraph 5 corresponds to paragraph 6 of article 17.

Chapter III. The entry into force and registration of treaties

ARTICLE 20. MODE AND DATE OF ENTRY INTO FORCE

1. (a) A treaty enters into force in such manner and on such date or event as the treaty itself may prescribe, provided always that not less than two States have become mutually bound by the treaty in accordance with the rules laid down in the foregoing articles.

(b) Where the treaty itself does not lay down any rules for its coming into force and where no other rule is applicable under the constitution or usages of an international organization, the entry into force of the treaty shall be determined by reference to the provisions in the following paragraphs of the present article.

2. (a) Where a bilateral or plurilateral treaty is one which under the provisions of chapter II is to become binding upon signature alone, it shall be deemed to come into force:

- (i) Upon the date of signature, if it shall have been signed upon that date by all the States which adopted it; and
- (ii) If not, then upon the date when the last of the signatures of the States which adopted the treaty shall have been affixed to the treaty.

(b) Where a bilateral or plurilateral treaty is one which under the provisions of chapter II is subject to subsequent ratification or acceptance and lays down that ratification or acceptance is to be effected by a specified date, it shall be deemed to come into force upon that date provided that:

- (i) If the treaty indicates the number of States whose ratifications or acceptances shall be necessary to bring the treaty into force, the required number of instruments of ratification or acceptance shall have been deposited by that date;
- (ii) If the treaty contains no indications as to the number of ratifications or acceptances required, all the States which adopted the treaty shall have deposited their instruments of ratification or acceptance by that date.

(c) In a case similar to that in sub-paragraph (b) but where the treaty does not lay down that the ratifications or acceptances are to be effected by a specified date, it shall be deemed to come into force:

- (i) If ratifications are to be exchanged, then upon the date of the exchange of ratifications;
- (ii) If the ratifications or acceptances are to be deposited, then upon the date of the deposit of the last of the required instruments of ratification or acceptance; and
- (iii) If no provision has been made either for the exchange or for the deposit of ratifications or acceptances, then upon ratification or acceptance by all the States which adopted the treaty and the notification by each State to the other of such ratification or acceptance.

3. (a) Where a multilateral treaty is one which under the provisions of chapter II is to become binding upon signature alone, the treaty shall be deemed to come into force:

- (i) Upon the date of signature, if it shall have been signed upon that date by all the States which adopted it;
- (ii) If not, then upon the date when the signatures of not less than one-fourth of the States which adopted the treaty shall have been affixed to the treaty.

(b) Where a multilateral treaty is one which under the provisions of chapter 2 is subject to subsequent signature, ratification, accession or acceptance and provides for any of these acts to take place by a specified date, it shall be deemed to come into force:

- (i) Upon the date specified, if not less than one-fourth of the States which adopted the treaty

shall have affixed their signatures or, as the case may be, deposited their instruments of ratification, accession or acceptance by that date; and

- (ii) If not, then upon the first date thereafter when not less than one-fourth of those States shall have executed the act or acts necessary to qualify them to be parties to the treaty.

(c) In a case similar to that in sub-paragraph (b) but where the treaty does not lay down that the signatures, ratifications, accessions or acceptances are to be effected by a specified date, it shall be deemed to come into force upon the first date when not less than one-fourth of the States which adopted the treaty shall have executed the act or acts necessary to qualify them to be parties to the treaty.

4. If a treaty provides that it shall be subject to ratification or acceptance and at the same time specifies a fixed date for its entry into force, it shall enter into force:

- (i) Upon the specified date, if the ratifications or acceptances required under the treaty have been completed; and
- (ii) If not, so soon after that date as such ratifications or acceptances have been completed.

5. A treaty shall enter into force for any particular State when it shall have executed an act definitively qualifying it to be a party to the treaty and either

- (i) The treaty is already in force; or
- (ii) The treaty is brought into force by the execution of the act which definitively qualifies the State in question to be a party to the treaty.

6. Notwithstanding anything contained in the preceding paragraphs of this article, a treaty may prescribe that it shall come into force provisionally on signature or on a specified date or event, pending its full entry into force in accordance with the rules laid down in this article.

7. Nothing in the present article is to be understood as precluding the possibility of the provisions of a treaty being brought into force by the subsequent agreement or subsequent acts of the States concerned.

Commentary

(1) This article deals with the conditions which the treaty itself must satisfy before it can be considered as having come into force, and the conditions under which each individual State qualifies to be considered an actual party to the treaty. The basic rule, set out in paragraph 1 (a), is that it is in the hands of the negotiating States themselves to determine the mode and date of the entry into force of the treaty. The only point that need be discussed is the proviso that, if the parties themselves have not fixed the number of the States whose definitive commitment to be bound by the treaty is necessary to bring it into force, there must as a minimum be two States *mutually* bound to each other under the treaty. Clearly, unless this is so the treaty, as such, can have no application; but the proviso, as it has been formulated in the text, does raise the problem of reservations. If one or other of the first two States has subscribed to the treaty subject to a reservation, can the treaty be said to come into force until it is clear that no objection is being raised to the reservation? The Secretary-General's practice for multilateral treaties is to treat a signature, ratification, accession or acceptance subject to a reservation as

equivalent to a full signature, ratification, etc., for the purpose of clauses which specify a given number of signatures, ratifications, etc., as a condition for the entry into force of the treaty. It may not therefore be fully consistent with this practice to provide that there must at least be two States *mutually* bound under the treaty before it can come into force. But it seems necessary to state the *minimum* rule in this way in order to avoid the meaningless situation of having the treaty in force but no two States able to invoke its provisions against each other. No doubt, it might be possible to regard each State as having entered into a unilateral engagement under the treaty, even although they were not mutually bound; but that would hardly seem to be a case of a *treaty* having come into force; see Hudson, *International Legislation*, vol. 1, p. liv.

As to paragraph 1 (b), the only point that need be mentioned is the reference to the constitutional provisions or usages of an international organization. This is intended to safeguard and underline the character of a regional or other group system such as the Inter-American usages in regard to treaties concluded within the Organization of American States.

(2) Paragraph 2 covers where a *bilateral* or *plurilateral* treaty makes no provision for its entry into force. Sub-paragraph (a) concerns treaties not subject to ratification. Here, it seems to be generally accepted that the treaty is to be presumed to come into force upon the date of signature and, if the signatures are not all affixed upon the same date, then upon the date of the last signature; see Harvard Research Draft, pp. 795-6.

Sub-paragraph (b) concerns cases where the treaty is subject to ratification and specifies a date by which ratification is to take place. The rules stated in the text are based on those proposed *de lege ferenda* by Sir G. Fitzmaurice in article 41 (3) of his draft (A/CN.4/101). It appears to be a reasonable presumption in these cases that the entry into force of the treaty was intended to turn upon the date specified for ratification. The present text, however, differs from that of Sir G. Fitzmaurice in two respects. His text was designed to cover multilateral as well as plurilateral treaties, and no doubt it was for this reason that he sought to mitigate the rule of unanimity by proposing that, in the absence of indications in the treaty that unanimity is required, it should be enough to obtain the ratifications or acceptances of two-thirds of the participating States. The present draft deals quite differently with multilateral treaties in the next paragraph, and it seems correct in the case of plurilateral treaties to lay down the classical rule of unanimity except where the treaty itself provides otherwise. As already mentioned, special usages, such as those of the Inter-American system, are excepted in paragraph 1 (b).

(3) Paragraph 2 (c) deals with the case of a treaty which is subject to ratification or acceptance but is silent as to the date on which ratification or acceptance is to take place. Here the general view seems to be that the Contracting States must be presumed to have intended the treaty to come into force upon the exchange of ratifications or acceptances, if this takes place, and, if not, upon the deposit of the last of the required instruments; see Harvard Research Draft, p. 796, and article 41 (2) of Sir G. Fitzmaurice's draft.

(4) Paragraph 3 covers cases where a *multilateral* treaty makes no provision for its entry into force

and sets out rules analogous to those given in paragraph 2 for *plurilateral* treaties. The chief difference is as to the quorum—the minimum number of States that must be bound—necessary before the treaty can come into force, when the treaty itself is silent upon the point. In the case of multilateral treaties the rule of unanimity must surely be regarded as out of the question. To presume that the Contracting States contemplated that all must be bound before the treaty could enter into force would almost be to presume that they intended it never to come into force. One possibility would be to presume that the Contracting States intended the treaty to come into force as soon as not less than two States had become mutually bound under the treaty. It could be urged that a large number of multilateral treaties fix a definite number, such as twenty, and that, if nothing is said in the treaty as to the number, the Contracting States must have been content that the treaty should come into force for each State as it subscribed to the treaty. But cases also exist, e.g. the Geneva "Red Cross" Conventions of 1949,⁶¹ where the Contracting States have specifically provided that the treaty shall come into force after not less than two States have committed themselves to the treaty. In truth, the varied treaty practice hardly justifies the making of any clear presumptions as to the intentions of Contracting States, and all that seems possible is for the Commission to propose what it thinks to be a reasonable residuary rule. A glance at the treaty clauses collected on pages 21-38 of the *Handbook of Final Clauses* (ST/LEG/6) will reveal the extent of the variations in the "entry into force" clauses of modern treaties, and that the different types of clause cannot easily be attributed to definite categories of treaties. Clauses requiring between twenty and twenty-six States to have committed themselves are quite common, but clauses fixing a smaller number are found, and even clauses bringing the treaty into force as each State singly commits itself to the treaty. The Commission, in formulating a single broad rule, may think it necessary to take a conservative view of the probable intentions of States on this point. The figure twenty represents today between a fourth and a fifth of the number of States likely to adopt a treaty at a large multilateral conference, and the Special Rapporteur suggests that the Commission could adopt as a reasonable general rule a quorum of either one-fourth or one-fifth, and in paragraph 3 of the present article has tentatively adopted one-fourth as the minimum number for multilateral treaties.

(5) Paragraph 4 deals with a case which may sometimes arise through inadvertence in drafting and to which attention is drawn in the Harvard Research Draft (pp. 791-2). The authors of that draft would seem to be clearly right in saying that the requirement of ratification (or acceptance) must prevail over the fixing of the date, if that requirement turns out not to have been satisfied before the date fixed by the treaty for its entry into force.

(6) Paragraph 5 merely declares the obvious rule that for any particular State to be subject to the rights and obligations of a treaty, two conditions must be satisfied: (a) the treaty itself must be in force as a treaty and (b) it must be in force with respect to that particular State.

⁶¹ These Conventions were to come into force "six months after not less than two instruments of ratification have been deposited".

(7) Paragraph 6 seeks to cover what in modern practice is a not infrequent phenomenon—a treaty brought into force provisionally, pending its full entry into force when the required ratifications or acceptances have taken place. Sir G. Fitzmaurice covered this point exclusively in article 42 of his draft as part of the “legal effects” of entry into force, but it seems equally to have a place in the present article. For a treaty clause having this effect is, from one aspect, a clause relating to a *mode* of bringing a treaty into force. Accordingly, this aspect is mentioned here and the “legal effects” of provisional entry into force is dealt with in the next article.

(8) Sir G. Fitzmaurice included in his draft a further provision (paragraph 5) worded as follows: “A treaty may come into force whatever its terms, if the signatories proceed to execute its terms, if the signatories proceed to execute it, *pro tanto*, if it is put into application between a limited number of them”. The present Special Rapporteur hesitates to include this provision in the draft as a positive rule. So much may depend upon the provisions and circumstances of the treaty and the nature of the acts which are relied upon as establishing that it has been brought into force by the parties outside the procedures contemplated in the treaty. Furthermore, there may be juridical problems as to whether a particular case is really one of the entry into force of the original treaty or of some fresh form of agreement. The Special Rapporteur has therefore inserted tentatively for consideration a negative clause simply reserving the point.

ARTICLE 21. LEGAL EFFECTS OF ENTRY INTO FORCE

1. (a) On entering into force a treaty shall automatically become binding upon all the States parties to the treaty.

(b) The rights and obligations contained in the treaty shall accordingly come into operation for each State at once upon its becoming a party to it, unless the treaty itself shall provide that all or any of those rights or obligations shall only come into operation upon a future date.

(c) Unless the treaty itself shall expressly provide for the retrospective operation of all or any of its clauses, the rights and obligations laid down in the treaty shall come into operation for each party only from the date of the entry into force of the treaty with respect to that particular party.

2. (a) When a treaty lays down that it shall come into full force provisionally upon a certain date or event, the rights and obligations contained in the treaty shall come into operation for the parties to it upon that date or event and shall continue in operation upon a provisional basis until the treaty enters into full force in accordance with its terms.

(b) If, however, the entry into full force of the treaty is unreasonably delayed and, unless the parties have concluded a further agreement to continue the treaty in force on a provisional basis, any of the parties may give notice of the termination of the provisional application of the treaty; and when a period of six months shall have elapsed, the rights and obligations contained in the treaty shall cease to apply with respect to that party.

Commentary

(1) Paragraph 1 (a) simply declares the basic rule that the entry into force of the treaty automatically

makes it binding upon the parties. There is a certain importance in stating this obvious principle, because, even although the treaty itself may postpone the operation of the rights or obligations in the treaty, the position of a State after the entry into force of the treaty is radically different from what it was before that event. Prior to the entry into force of the treaty, as has already been noticed in article 9, a State may be under certain obligations of good faith to refrain from acting in such a way as to frustrate the objects of the treaty. But after entry into force it is no longer merely a question of good faith but of an obligation under the treaty itself.

(2) Paragraph 1 (b) also deals with an obvious point, namely that there may be a difference between the entry into force of the treaty and the operation of the rights and obligations laid down in it.

(3) Paragraph 1 (c) deals with what is generally considered today to be an unquestionable principle, though even as late as 1935 it was regarded in the Harvard Research Draft as requiring extended discussion. This principle is that a treaty has no retroactive effects unless the treaty expressly so provides; and that this principle obtains equally in cases where the treaty was signed subject to ratification. It is now beyond doubt that ratification is ratification of the treaty itself and not merely a confirmation of a previous acceptance of the treaty.

(4) Paragraph 2 seeks to formulate the legal effects of the provisional entry into force of a treaty. Clearly the rule in 2 (a) follows simply from the provisional nature of the entry into force. Sub-paragraph (b) is put forward *de lege ferenda* for the Commission's consideration. It seems evident that if the necessary ratifications or acceptances etc. are unreasonably delayed so that the provisional period is unduly prolonged, there must come a time when States are entitled to say that the provisional application of the treaty must come to an end. Sir G. Fitzmaurice states this as a rule (commentary on his article 42, paragraph 1). It seems desirable, however, for the Commission to try and give a little more definition to the rule, and perhaps to make withdrawal from the provisional application of the treaty and orderly process. The suggestion in the draft is that at least six months' notice ought to be given before withdrawal becomes effective. The draft also suggests that withdrawal would only affect the particular party concerned. But this may be a matter for further examination.

ARTICLE 22. THE REGISTRATION AND PUBLICATION OF TREATIES

1. Every treaty entered into after 24 October 1945, the date of the coming into force of the Charter of the United Nations, by any Member of the United Nations or by any State party to the present articles, shall as soon as possible be registered (or filed and recorded if appropriate) with the Secretariat of the United Nations and published by it, if such registration and publication have not already been effected.

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

3. (a) Registration of a treaty shall be effected *ex officio* by the United Nations where:

(i) The United Nations is itself a party to the treaty; or

- (ii) The United Nations has been specifically authorized by the treaty to effect registration; or
 - (iii) The United Nations is the depositary of a multilateral treaty.
- (b) A treaty may be registered by a specialized agency where:
- (i) The constituent instrument of the specialized agency provides for such registration;
 - (ii) The treaty has been registered with the specialized agency pursuant to the terms of its constituent instrument; or
 - (iii) The specialized agency has been authorized by the treaty to effect registration.
- (c) A treaty may also be registered by any party thereto.

4. (a) The registration of a treaty either by the United Nations or by a specialized agency in accordance with sub-paragraphs (a) and (b) of the preceding paragraph relieves all the parties to the treaty of the obligation to register.

(b) The registration of a treaty by a party to the treaty in accordance with sub-paragraph (c) of the preceding paragraph relieves all other parties to the treaty of the obligation to register.

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

6. No party to any treaty entered into after 24 October 1945, which has not been registered in accordance with the provisions of the present article, may invoke that treaty before any organ of the United Nations.

Commentary

(1) Articles 22 and 23 recall the obligations contained in Article 102 of the Charter concerning the registration and publication of treaties and the regulations adopted by the General Assembly in its resolution of 14 December 1946⁶² for implementing those obligations. Neither Professor Brierly nor Sir G. Fitzmaurice included any provisions concerning the registration and publication of treaties in their draft articles covering the framing and conclusion of treaties. Sir H. Lauterpacht, on the other hand, included in the final section of his code (A/CN.4/63)—after sections covering “reality of consent” and “legality of object”—a brief article (article 18) stating that “Treaties entered into by Members of the United Nations subsequent to their acceptance of the Charter of the United Nations cannot be invoked by the parties before any organ of the United Nations unless registered, as soon as possible, with the Secretariat of the United Nations”. Moreover, although his actual article merely restated in a combined form the provisions found in paragraphs 1 and 2 of Article 102 of the Charter, Sir H. Lauterpacht suggested in his commentary that the Commission should consider whether “it ought not, in the exercise of its function to develop international law, to formulate a rule both more comprehensive and more explicit than that formulated in the present article on the basis

of Article 102 of the Charter”. And the rule he suggested would have run as follows: “A treaty concluded by a Member of the United Nations shall be *void* if not registered with the United Nations *within six months* of its entry into force.”

(2) The present Special Rapporteur considers that the registration and publication of treaties should find a place in the draft articles on the law of treaties and that the appropriate part of the draft in which to include them is the present chapter. It is true that, if regard is had primarily to the sanction in paragraph 2 of Article 102 of the Charter, registration may seem to be concerned with the question of the enforceability of treaties. But the *substantive* obligation of registration is one which, in point of time, is closely associated with the conclusion and entry into force of treaties. Thus, Article 102 requires registration to be effected “as soon as possible”, while the regulations adopted by the General Assembly state that registration is to be effected “when the treaty has come into force between two or more parties thereto”. It seems to the Special Rapporteur that the substantive obligation rather than the sanction ought to determine the placing of registration of treaties in the draft articles, and that the above-mentioned provisions of the Charter and the Assembly’s regulations would justify the Commission in placing it immediately after “entry into force”, either in the same or in a separate chapter.

(3) The Special Rapporteur doubts whether it is either desirable or necessary for the Commission to propose that the sanction for non-registration of treaties contained in Article 102 of the Charter should be made more stringent. But in any event the rule suggested by Sir H. Lauterpacht involves a direct amendment of an express provision of the Charter, and its inclusion in the present articles seems for that reason alone to be altogether out of the question. The two articles now proposed for the Commission’s consideration incorporate the substance of the provisions of the two paragraphs of Article 102 of the Charter and articles 1-7 of the General Assembly’s regulations with only such minor drafting adjustments as are necessary to fit them into the different context of the present articles. The idea of the Special Rapporteur has been to include those provisions of Article 102 and the regulations which touch the rights and obligations of States and organizations in regard to the registration and publication of treaties and to omit those which concern primarily the Secretary-General’s administrative functions with respect to the register itself.

(4) Paragraph 1 restates and makes applicable to all future treaties the basic provision in Article 102, paragraph 1, of the Charter. Members of the United Nations are, of course, already under this obligation, which dates from 24 October 1945, the date of the coming into force of the Charter. Although the Charter obligation is limited to States and to States Members of the United Nations, many non-member States (and virtually all international organizations) have been in the practice of registering treaties with the Secretariat of the United Nations in voluntary compliance with Article 102, paragraph 1. It therefore seems reasonable to lay down in sub-paragraph (b) of the present article that every registrable treaty entered into by a non-member State between the coming into force of the Charter and the coming into force of the present articles shall as soon as possible be registered, if registration has not already been effected in voluntary compliance with the Charter provision. This would

⁶² The regulations were adopted by General Assembly resolution 97 (I) of 14 December 1946 and amended by General Assembly resolutions 364 B (IV) of 1 December 1949 and 482 (V) of 12 December 1950.

have the effect of extending, through the present articles, the operation of Article 102 of the Charter to any non-member States which may subscribe to the present articles.

(5) Paragraph 2 restates the provision in article 1 (2) of the General Assembly's regulations, which is really an interpretation of Article 102 of the Charter by the Assembly; for the Assembly has in effect said that "as soon as possible" does not mean as soon as possible after the drawing up of the treaty but as soon as possible after *its entry into force* with respect to at least some parties.

(6) Paragraph 3 sets out the contents of article 1, paragraph 3, and article 4 of the General Assembly's regulations.

(7) Paragraph 4 restates the provisions of article 3 of the General Assembly's regulations. The order of the two paragraphs of article 3 has been reversed, because the obligation of an individual party to register a treaty appears to be an obligation which is residuary in the sense that, if the treaty is one capable of being registered by the United Nations or by a specialized agency, registration by those bodies is a virtual certainty unless an administrative lapse occurs; and on registration being effected by the United Nations or a specialized agency, the individual party is relieved of his obligation.

(8) Paragraph 5 restates the provision contained in article 2, paragraph 1, of the General Assembly's regulations. This provision, which calls for the registration of subsequent, related, instruments affecting the operation of the treaty, represents a not unimportant supplement to the obligation stated in Article 102 of the Charter.

(9) Paragraph 6 restates the sanction laid down in Article 102, paragraph 2, of the Charter, and in a form to make it applicable to all treaties entered into after the coming into force of the Charter. The United Nations is entitled to lay down the conditions under which treaties may be invoked by any State, whether Member or non-member, in the proceedings of organs of the United Nations, and it would seem to be logical to make this provision of universal application, in order to encourage a world-wide system of registration of treaties.

ARTICLE 23. PROCEDURE OF REGISTRATION AND PUBLICATION

1. (a) A party to a treaty or a specialized agency, registering a treaty in accordance with the provisions of the preceding article, shall certify that the text is a true and complete copy thereof and that it includes all reservations made by parties thereto.

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

- (i) The date on which the treaty has come into force; and
- (ii) The method whereby it has come into force (signature, ratification, acceptance, accession, *et cetera*).

2. (a) The date of the receipt by the Secretariat of the United Nations of a treaty for registration shall be deemed to be the date of registration.

(b) However, the date of registration of a treaty registered *ex officio* by the United Nations shall be the date on which the treaty first came into force between two or more of the parties thereto.

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

4. The foregoing provisions of the present article, which incorporate the provisions, as amended, of articles 5, 6 and 7 of the regulations adopted by the General Assembly of the United Nations on 14 December 1946, to give effect to Article 102 of the Charter, shall be subject to alteration by any amendments that may from time to time be made to those regulations by the General Assembly.

Commentary

(1) The principle upon which the draft articles concerning registration of treaties have been drawn up has already been explained in paragraph (3) of the commentary to the previous article. The present article reproduces the substance of articles 5 to 7 of the General Assembly's regulations.

(2) Paragraph 1 reproduces almost verbatim the provisions of article 5 of the regulations.

(3) Paragraph 2 reproduces article 6 of the regulations almost verbatim but divides it into two rules. The reason for this drafting change is that the "provided that" clause in the second part of article 6 is not really a proviso at all but a distinct and completely different rule for a particular class of treaty.

(4) Paragraph 3 reproduces textually the terms of article 7 of the regulations, as amended by General Assembly resolution 482 (V) of 12 December 1950.

APPENDIX

Historical summary of the question of reservations to multilateral conventions^a

(1) Certain reservations made to the Second Opium Convention of 1925 brought the question of reservations to multilateral treaties to the attention of the League of Nations, and in 1927 the Council of the League adopted a report on the question drawn up by the Committee for the Progressive Codification of International Law.^b The relevant passage in the report ran as follows:

"In order that any reservation whatever may be validly made in regard to a clause of the treaty, it is essential that this reservation should be accepted by all the contracting parties, as would have been the case if it had been put forward in the course of the negotiations. If not, the reservation, like the signature to which it is attached, is null and void."

Thus, under the League of Nations practice a State could only become a party to a multilateral treaty subject to a reservation if the reservation received the unanimous assent of all the Contracting States. When the United Nations was established and took over the depositary functions of the League, the Secretariat applied the same principles in regard to reservations as those previously followed by the League of Nations Secretariat. Difficulties having arisen in 1950 in determining the date of the entry into force of the Convention on the Prevention and Punishment of the Crime of Genocide by reason of the fact that some of the ratifications were accompanied

^a See generally Lord McNair, *Law of Treaties*, chapter 9, and the bibliography at the beginning of the chapter.

^b The report is set out in full in Lord McNair's *Law of Treaties*, pp. 173-176.

by reservations, the Secretary-General brought the matter before the General Assembly. In doing so, he submitted a full report (A/1372) on the existing practice of the Secretariat, the substance of which, for present purposes, was contained in the following passages of the report:

"While it is universally recognized that the consent of the other governments concerned must be sought before they can be bound by the terms of a reservation, there has not been unanimity either as to the procedure to be followed by a depositary in obtaining the necessary consent or as to the legal effect of a State objecting to a reservation." (Paragraph 2.)

"In the absence of stipulations in a particular convention regarding the procedure to be followed in the making and accepting of reservations, the Secretary-General, in his capacity as depositary, has held to the broad principle that a reservation may be definitively accepted only after it has been ascertained that there is no objection on the part of any of the other States directly concerned. If the convention is already in force, the consent, express or implied, is thus required of all States which have become parties up to the date on which the reservation is offered. Should the convention not yet have entered into force, an instrument of ratification or accession offered with a reservation can be accepted in definitive deposit only with the consent of all States which have ratified or acceded by the date of entry into force.

"Thus, the Secretary-General, on receipt of a signature or instrument of ratification or accession, subject to a reservation, to a convention not yet in force, has formally notified the reservation to all States which may become parties to the convention. In so doing, he has also asked those States which have ratified or acceded to the convention to inform him of their attitude towards the reservation, at the same time advising them that, unless they notify him of objections thereto prior to a certain date—normally the date of entry into force of the convention—it would be his understanding that they had accepted the reservation. States ratifying or acceding without express objection, subsequent to notice of a reservation, are advised of the Secretary-General's assumption that they have agreed to the reservation. If the convention were already in force when the reservation was received, the procedure would not differ substantially, except that a reasonable time for the receipt of objections would be allowed before tacit consent could properly be assumed." (Paragraphs 5 and 6.)

"The rule adhered to by the Secretary-General as depositary may accordingly be stated in the following manner:

"A State may have a reservation when signing, ratifying or acceding to a convention, prior to its entry into force, only with the consent of all States which have ratified or acceded thereto up to the date of entry into force; and may do so after the date of entry into force only with the consent of all States which have theretofore ratified or acceded." (Paragraph 46.)

(2) Meanwhile, the subject had already come before the Commission during the discussion of Professor Brierly's first report on the law of treaties (A/CN.4/23) at its second session in 1950, at which time the Court had not yet been asked for its advisory opinion on reservations to the Convention on the Prevention and Punishment of the Crime of Genocide. Later that year, the General Assembly by resolution 478 (V) requested the Court to give an advisory opinion on the particular question of reservations to the Genocide Convention, and at the same time invited the Commission "in the course of its work on the codification of the law of treaties to study the question of reservations to multilateral conventions, both from the point of view of codification and from that of the progressive development of international law". The Commission was requested to give priority to this study and to report thereon to the General Assembly in time for the next session. In due course, Professor Brierly submitted for discussion at the Commission's 1951 session a special report on reservations to multilateral conventions (A/CN.4/41) to which were attached annexes containing (a) a summary of the debates in the Sixth

Committee and General Assembly, (b) a summary of the opinions of writers, (c) examples of treaty clauses on the making of reservations and (d) a review of State practice. A further annex (e) contained an elaborate series of possible treaty clauses drafted in consultation with the Secretariat and covering the question of (i) the admissibility of reservations, (ii) the States entitled to be consulted as to the admissibility of reservations, (iii) the functions of the depositary and (iv) the procedure for objections to reservations. In addition, the Commission received valuable memoranda from Mr. Gilberto Amado (A/CN.4/L.9) and Mr. Georges Scelle (A/CN.4/L.14).

(3) Before the Commission met to consider this report the Court had rendered its Advisory Opinion on Reservations to the Genocide Convention (*I.C.J. Reports, 1951*, p. 15). By a majority of seven votes to five the Court advised:

"Question I:

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

"Question II:

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

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

"Question III:

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

"(b) That an objection to a reservation made by a State which is entitled to sign or accede but which has not yet done so, is without legal effect."

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

Although its opinion was thus strictly limited to a particular convention with special characteristics, the Court did give some indications of its general attitude on certain points, and these indications may be summarized as follows:

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

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

(c) Nevertheless, extensive participation in conventions of the type of the Genocide Convention has already given rise to greater flexibility in the international practice concerning multilateral conventions, as manifested by the more general resort to reservations, the very great allowance made for tacit

assent to reservations and the existence of practices which, despite the fact that a reservation has been rejected by certain States, go so far as to admit the reserving State as a party to the Convention vis à vis those States which have accepted it.

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

(e) The principle of the integrity of the convention, which subjects the admissibility of a reservation to the express or tacit assent of all the contracting parties, does not appear to have been transformed into a rule of law. The considerable part which tacit assent has always played in estimating the effect which is to be given to reservations scarcely permits it to be stated that such a rule exists; indeed, the examples of objections made to reservations appear to be too rare in international practice to have given rise to such a rule.

(f) The report adopted by the Council of the League of Nations in 1927—endorsing the rule of the integrity of the Convention for application by the Secretary-General as Depositary—constituted at best the point of departure for an administrative practice, which was also taken over later by the United Nations; and it did not have the effect of establishing a rule of law. Indeed, the Secretary-General of the United Nations himself had said in 1950 that there has not been unanimity either as to the procedure to be followed by a depositary in obtaining the necessary consent or as to the legal effect of a State's objecting to a reservation.

(g) Mere participation in the adoption of the text or a mere invitation to become a party do not confer a right to object to a reservation made by another State. A signature which is subject to ratification is, however, a different matter; it establishes a provisional status in favour of the signatory State which entitles it to formulate—on a provisional basis—objections to reservations made by another State. On ratification these objections become effective but, if the signature is not followed by ratification, the objections disappear.

Of the five dissenting Judges one, Judge Alvarez, considered that owing to its particular nature the Genocide Convention did not admit of any reservations at all. The remaining four, Judges Guerrero, McNair, Read and Hsu Mo, in a joint opinion, considered the principle of the integrity of the convention to be a rule of positive international law. Citing the opinions of Fauchille, Sir William Malkin, Accioly and Podesta Costa, and referring to the practice of the League and United Nations Secretariats as well as to the report of the League Committee for the Progressive Development of International Law adopted by the Council in 1927 and to the Harvard Research Draft, these judges came to the conclusion that the principle of the need for unanimous assent to reservations—the principle hitherto applied by the Secretariats of the League and the United Nations—had been accepted as a rule of law as well as an administrative practice. They pointed out that the contrary practice of the Pan American Union, permitting a reserving State to become a party, despite the objections of other States to the reservation, was based on the prior agreement of the Contracting States given at the Lima Conference of 1938. They further said that they were unable to accept the criterion of "compatibility with the object and purpose of the Convention", favoured by the Court, (a) because it was a new rule for which they could find no legal basis and (b) because the subjective character of the criterion, whose application would be dependent on the individual appreciation of each State, would mean that there would be no finality or certainty as to the status of the reserving State as a party to the Convention.

(4) The Commission resumed its discussion of the subject shortly after the delivery of the Court's Advisory Opinion, and it naturally took that opinion into account, as well as the special report of Professor Brierly and the memoranda of

Mr. Amado and Mr. Scelle. In its own report for 1951 (A/1858, chapter II) the Commission noted, first, that the Court's opinion had been strictly limited to the particular case of the Genocide Convention and, secondly, that while the Court had given its opinion on the basis of existing law, the Commission had been expressly asked to study the question "both from the point of view of codification and from that of the progressive development of international law". It therefore felt itself free to suggest the practice which it considered the most convenient for States to adopt for the future (para. 17). It drew attention to the practical difficulties to which, by reason of its subjective character, the criterion of "compatibility with the object and purpose of the convention" gives rise—the uncertainty as to the status of the reserving State in relation to the convention, the doubt whether the reserving State is to be considered a party to the convention for the purpose of the right of intervention under Article 63 of the Court's Statute, and in some cases the doubt even whether sufficient ratifications, accessions, etc., have taken place to bring the convention into force. And, owing to these difficulties, it advised that the criterion adopted by the Court in the case of the Genocide Convention is not suitable for application to multilateral conventions in general (para. 24).

The Commission also examined the system of the Organization of American States. Under this system a State proposing to make a reservation communicates it to the Pan American Union, which in turn inquires of the other signatory States whether they accept it, and the reserving State then decides, in the light of any observations from the other signatories, whether or not to become a party to the convention and, if so, whether or not to maintain its reservation. If the reserving State maintains a reservation to which objection has been taken, the legal position, according to a resolution of the Governing Board of the Pan-American Union of 4 May 1932 (quoted in the Commission's report A/1858, para. 21) is held to be as follows:

"1. The treaty shall be in force, in the form in which it was signed, as between those countries which ratify it without reservations, in the terms in which it was originally drafted and signed.

"2. It shall be in force as between the governments which ratify it with reservations and the signatory States which accept the reservations in the form in which the treaty may be notified by said reservations.

"3. It shall not be in force between a government which may have ratified with reservations and another which may have already ratified, and which does not accept such reservations."

The Commission, while recognizing that a system of this kind, designed to ensure the greatest number of ratifications, might be regarded by a continental or regional organization as suitable to its needs, found the Pan-American system not to be suitable for application to multilateral conventions in general.^c The reasons which it gave for this finding were:

"...an examination of the history of the conventions adopted by the Conferences of American States over the past twenty-five years has failed to convince the Commission that an approach to universality is necessarily assured or promoted by permitting a State which offers a reservation to which objection is taken to become a party vis-à-vis non-objecting States. In some multilateral conventions, the securing of universality may be the more important consideration; and when this is the case, it is always possible for States to adopt the procedure followed by the Pan American Union by inserting a suitable provision to this effect in the convention. But there are other multilateral conventions where the integrity and the uniform application of the convention are more important considerations than its universality, and the Commission believes that this is especially likely to be the case with conventions drawn up under the auspices of the United Nations. These conventions are of a law-making type in which each State accepts limitations on its own freedom

^c Mr. Yepes dissented from this part of the Commission's report.

of action on the understanding that the other participating States will accept the same limitations on a basis of equality. The Pan American Union practice is likely to stimulate the offering of reservations; the diversity of these reservations and the divergent attitude of States with regard to them tend to split up a multilateral convention into a series of bilateral conventions and thus to reduce the effectiveness of the former."

The Commission did not, therefore, recommend the application of the Pan-American system, except when the parties to the Convention had indicated their intention to adopt it (*ibid.*, para. 22).

(5) The Commission's own approach to the problem was governed by the following general considerations (*ibid.*, para. 26):

"When a multilateral convention is open for States generally to become parties, it is certainly desirable that it should have the widest possible acceptance. The very fact of its being open in this way indicates that it deals with some subject of wide international concern regarding which it is desirable to reform or amend existing laws. On the other hand, it is also desirable to maintain uniformity in the obligations of all the parties to a multilateral convention, and it may often be more important to maintain the integrity of a convention than to aim, at any price, at the widest possible acceptance of it. A reserving State proposes, in effect, to insert into a convention a provision which will exempt that State from certain of the consequences which would otherwise devolve upon it from the convention, while leaving the other States which are or may become parties to it fully subject to those consequences in their relations *inter se*. If a State is permitted to become a party to a multilateral convention while maintaining a reservation over the objection of any party to the convention, the latter may well feel that the consideration which prompted it to participate in the convention has been so far impaired by the reservation that it no longer wishes to remain bound by it."

It also emphasized that it is always within the power of negotiating States to deal with the question of reservations in the text of the convention itself, and highly desirable that they should do so. For then provisions may be inserted depending, in some measure at least, on the relative emphasis to be placed on maintaining the integrity of the text, or on facilitating the widest possible acceptance of it, even in varying terms. It suggested that, if the treaty places no limit on the admissibility of reservations, and if there is no established organizational⁴ procedure concerning reservations, the negotiating States should themselves establish in the text of the treaty a procedure covering in particular the following points (*ibid.*, para. 27):

- "(a) How and when reservations may be tendered;
- "(b) Notifications to be made by the depositary as regards reservations and objections thereto;
- "(c) Categories of States entitled to object to reservations, and the manner in which their consent thereto may be given;
- "(d) Time limits within which objections are to be made;
- "(e) Effect of the maintenance of an objection on the participation in the convention of the reserving State."

The Commission, while recognizing that no single rule uniformly applied could be wholly satisfactory to cover all the cases where the negotiating States have omitted to deal with the question of reservations, considered that its task was to recommend the rule which would be the most suitable for application in the majority of cases; and it suggested that, subject to certain modifications, the previous practice of the Secretary-General would furnish such a rule. The modifications which the Commission had in mind related to the question how far a signatory State, whose signature is still subject to ratification or acceptance, should have the right to advance objections to reservations. On this question, it said (*ibid.*, para. 29):

"The concern of a mere signatory State should also be taken into account; for, at the time the reservation is tendered, a signatory State may be actively engaged in the study of the convention, or it may be in the process of completing the procedure necessary for its ratification, or for some reason, such as the assembling of its parliament, it may have been compelled to delay its ratification. In this connexion, it has been suggested that a mere signatory to a convention should have the right of objecting only to reservations tendered before the convention has entered into force. Such a differentiation between reservations tendered before and those tendered after the entry into force of a convention would, however, be invidious where the entry into force of the convention is brought about as the result of the deposit of the ratifications of a very limited number of States, as in the case of the four Geneva Red Cross Conventions of 12 August 1949, to which more than sixty States are signatories, but which, it is provided, 'shall come into force six months after not less than two instruments of ratification have been deposited'. In such a case, a very few States might, by the tender and acceptance of reservations amongst themselves, so modify the terms of the convention that signatories, representing possibly the preponderant number of negotiating States, would find themselves confronted with a virtually new convention."^e

At the same time, the Commission acknowledged that, in order to prevent a reserving State from being indefinitely excluded from participation in the convention by the objection of a State which itself refrains from ratifying it, some time-limit must be imposed on the effectiveness of the objection of a mere signatory. It therefore added (*ibid.*, para. 30):

"Taking into consideration the normal administrative and constitutional procedures of most governments in respect of the ratification of treaties and conventions, the Commission believes that a period of twelve months would be a reasonable time within which an objecting State could effect its ratification or acceptance of a convention. Accordingly, the Commission is of the opinion that if, upon the lapse of twelve months from the date a signatory State makes an objection to a reservation to a multilateral convention, it has not effected its ratification or acceptance of the convention, its objection should cease to have the effect of preventing the reserving State from becoming a party to the convention."

In conclusion, after reiterating the desirability of inserting express provisions in multilateral conventions regarding reservations, it suggested that, in cases where this has not been done, and especially where the Secretary-General of the United Nations is the depositary, the following practice should be adopted (*ibid.*, para. 34):

"(1) The depositary of a multilateral convention should, upon receipt of each reservation, communicate it to all States which are or which are entitled to become parties to the convention.

"(2) The depositary of a multilateral convention, in communicating a reservation to a State which is entitled to object, should at the same time request that State to express its attitude towards the reservation within a specified period, and such period may be extended if this is deemed to be necessary. If, within the period so specified or extended, a State fails to make its attitude towards the reservation known to the depositary, or if, without expressing an objection to the reservation, it signs, ratifies, or otherwise accepts the convention within the period, it should be deemed to have consented to the reservation.

"(3) The depositary of a multilateral convention should communicate all replies to its communications, in respect of any reservation to the convention, to all States which are or which are entitled to become parties to the convention.

"(4) If a multilateral convention is intended to enter into force as a consequence of signature only, no further action being requisite, a State which offers a reservation at the

⁴ E.g., the Pan-American system.

^e This sentence perhaps put the matter a little strongly, since, in principle, a reservation only operates in the relations of States with the reserving State.

time of signature may become a party to the convention only in the absence of objection by any State which has previously signed the convention; when the convention is open to signature during a limited fixed period, only in the absence of objection by any State which becomes a signatory during that period.

"(5) If ratification or acceptance in some other form, after signature, is requisite to bring a multilateral convention into force:

"(a) A reservation made by a State at the time of signature should have no effect unless it is repeated or incorporated by reference in the later ratification or acceptance by that State;

"(b) A State which tenders a ratification or acceptance with a reservation may become a party to the convention only in the absence of objection by any other State which, at the time the tender is made, has signed or ratified or otherwise accepted the convention; when the convention is open to signature during a limited fixed period, also in the absence of objection by any State which signs, ratifies or otherwise accepts the convention after the tender is made but not before the expiration of this period; provided, however, that an objection by a State which has merely signed the convention should cease to have the effect of excluding the reserving State from becoming a party, if within a period of twelve months from the time of the making of its objection the objecting State has not ratified or otherwise accepted the convention."

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

- (i) To continue to act as depositary in connexion with the deposit of documents containing reservations or objections, without passing upon the legal effect of such documents; and
- (ii) To communicate the text of such documents relating to reservations or objections to all States concerned, leaving it to each State to draw legal consequences from such communications.

The resolution, being confined to *future* conventions, is limited to conventions concluded after 12 January 1952, the date of the adoption of the resolution, so that the former practice still applies to conventions concluded before that date.² As to future conventions, the General Assembly did not endorse the Commission's proposal to retain the former practice subject to minor modifications. Instead, it directed the Secretary-General, in effect, to act simply as a registry and circulating agent for instruments containing reservations or objections to reservations, without drawing any legal consequences from them. The resolution is, therefore, entirely "neutral" as to the answers to be given to the questions which States should have the right to lodge objections to reservations and what should be the legal effect of such objections.

(7) The General Assembly was unable to adopt a more positive rule because it was sharply divided on the merits of the Commission's proposals embodying the traditional concept of the integrity of the convention. A substantial group of States favoured the traditional system advocated by the Commission. At the same time, in the Sixth Committee a number of these States expressed support for a modification of it suggested by the United Kingdom to meet the criticism that under the traditional system it is possible for a single State, by its objection,

to exclude a reserving State altogether and thereby frustrate the will of the majority who might be ready to accept the reservation. The suggestion was that the requirement of *unanimous* consent to a reservation might be replaced by one of acceptance by a qualified majority, such as three-quarters or two-thirds, of the States concerned.

On the other hand, a no less substantial—and perhaps larger—group of States favoured a less strict practice, arguing that a more flexible system is necessary with regard to reservations in order to safeguard the sovereign equality of States and, as most conventions are now adopted by a majority vote, to safeguard the position of the out-voted minority. They also urged that a more flexible system would make possible a wider acceptance of conventions and thus contribute to the development of international law; and they emphasized that one State should not be able to veto reasonable reservations to which other States might agree. This group was itself somewhat divided as to the effect of objections to reservations. Some States considered that States, by virtue of their sovereignty, have an inalienable right to make reservations and that an objection to a reservation, being an interference with that sovereign right, is without any legal effect. Several others in this group, however, considered that a more general application could be given to the Court's criterion according to which a State, to whose reservation objection has been taken, may nevertheless become a party if its reservation is compatible with the object and purpose of the convention.

In addition, a number of States belonging to the second group which were members of the Organization of American States argued in favour of the Pan-American system. They said that the circulation of reservations enabled States to judge whether to maintain them in face of the objections of other States and that the system as a whole facilitated acceptance of conventions. Several States in the first group, however, including two members of the Organization of American States, maintained that, although the system might be suitable for a relatively homogeneous community like the Latin American States, it would not be suitable for the more diverse and less closely knit community of the United Nations.

A few States considered that it was impossible to apply a single rule to all multilateral conventions and that an attempt should be made to define categories of conventions and establish rules applicable to each category. There was also considerable support for the view that the Assembly should not try to take a final decision on the matter at its sixth session, but should refer it back to the Commission in the hope that it would be possible to formulate a rule combining the best features of the systems so far advocated and meeting with a wide measure of agreement.

(8) Confronted with the General Assembly's neutral resolution and with the divergent views expressed by States in the Sixth Committee and Assembly, Sir H. Lauterpacht in his two reports (A/CN.4/63 and A/CN.4/87) put forward a number of alternative draft articles for consideration. His primary draft read as follows (A/CN.4/87, article 9):

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

This draft restated in brief form the principle of the integrity of the convention—the need for unanimous consent to reservations—embodied in the Commission's report to the General Assembly which Sir H. Lauterpacht regarded "as probably still representing the existing law". He considered it to be the function of the Commission to state that principle as the rule *de lege lata* "even if only as a preliminary to a formulation of a more satisfactory solution *de lege ferenda*". He underlined, however, that the Commission had been requested to examine the subject from the point of view of the progressive development, as well as the codification, of the law and suggested that the Commission ought now to recognize that the unanimity rule had been found to be unsatisfactory and unacceptable to a large number of States.

On this basis he put forward four alternative draft articles, all of which were founded upon the following considerations

² If the previous practice had been disturbed, States parties to the same convention might have found themselves differently treated according as their reservation had been formulated before or after 12 January 1952.

(A/CN.4/63, paragraph 3 of comment on article 9, alternative draft A):

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

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

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

In short, all the drafts were designed to offer a solution intermediate between the unanimity rule, which is unacceptable to a large number of States, and the sovereignty principle of an unlimited right to make reservations, which is no less unacceptable to a great many States. Moreover, while they adopted in some measure the flexibility of the Pan-American system, they were designed to provide stronger safeguards against misuse of the power to formulate reservations.

The four drafts had a common element in that they all provided that a State should be deemed to have agreed to a reservation of which it has been notified, if within three months of the date of notification it has not communicated its rejection of the reservation to the depositary. They differed primarily in the criteria adopted for determining whether the reserving State is to be considered a party to the convention:

Alternative A envisaged that a State formulating a reservation should nevertheless be considered a provisional party for a period of up to three years. If at any time within this period it should become apparent that less than two-thirds of the States accepting the treaty have declined to agree to the reservation, the reserving State would cease to be a party. If, on the other hand, either during or after this period two-thirds or more of the accepting States should have agreed to the reservation, the reserving State would become a party to the convention vis-à-vis all the other parties, subject of course to their right to rely reciprocally on the reservation in their relations with the reserving State. This alternative draft, it may be added, provided that the right to object to a reservation should attach to every other State accepting the treaty, regardless of whether it had itself formulated a reservation; and it actually contemplated that a treaty provisionally in force might cease to be so if the number of parties were afterwards reduced below the necessary figure by the exclusion of a State through subsequent objections to its reservation.

Alternative B was a much simplified version of alternative A, in that it abandoned the concept of provisional participation. In effect, it merely provided that a State would or would not become a party according as, after a period to be prescribed in the convention, the reservation had or had not met with the agreement of two-thirds of the States "qualified to offer objections to the reservation". Nor did it define or limit in any way the States which are to be regarded as thus qualified. On the other hand, Sir H. Lauterpacht recognized in his commentary that the draft would be much clarified if the treaty itself were to provide expressly that the qualified States are only those which themselves finally accept the treaty within the period prescribed, or that an objection ceases to be valid if the objecting State does not itself finally accept the treaty within a prescribed period.

Alternative C envisaged that the parties, or the international organization responsible for establishing the text of the treaty, should designate a committee with competence to decide upon the admissibility of reservations to which objection has been made.

Alternative D envisaged that the parties or the international organization concerned should request the International Court

to designate a Chamber of Summary Procedure to decide on the admissibility of reservations to which objection has been made.

Sir H. Lauterpacht explained in the commentary to his second report that alternatives A, B, C and D could be conceived of either as possible rules to replace the unanimous consent principle advocated by the Commission in 1951 or as solutions recommended by the Commission which the parties could choose according to the circumstances of each treaty. And he added that it would be necessary for the Commission to decide whether to formulate one of these alternatives as the new basic rule or whether to "reaffirm" the unanimous consent principle and to offer these alternatives merely as recommended procedures to replace that rule if the parties to a particular treaty so wished. Since the Commission is today definitely embarked upon the task of preparing the draft articles of a convention, Sir H. Lauterpacht's alternatives A, B, C and D, whatever value they may have as providing model precedents for the draftsmen of particular treaties, are now only of interest to the Commission in so far as they may offer a possible basis for formulating a rule for general application in cases where the question of reservations has not been dealt with in the treaty itself. Viewed from this angle, *alternative A*, under which the status of reserving States may be only provisional for as long a period as three years, appears to the present Special Rapporteur to suffer from such evident disadvantages as to be unacceptable as a general rule. Again, *alternatives C and D*, ideal solutions although they may be when States are agreeable to submit their disputes to decision by an independent body, appear to be so unlikely to meet with general acceptance at the present time that the adoption of either of them in the Commission's draft articles does not seem to be advisable. International practice does show some recourse to an analogous solution in particular cases, namely to the use of the competent organ of an international organization for determining the admissibility of reservations to multilateral conventions drawn up within the organization; and that more special question may merit further consideration. There remains *alternative B*, which incorporates the two-thirds principle suggested by the United Kingdom and favourably commented upon by some other States in the Sixth Committee in 1951. As Sir H. Lauterpacht himself recognized that alternative B required further amplification, it suffices to note that one of the solutions put forward by him was the maintenance of the consent principle with a two-thirds majority substituted for unanimity.

(9) Sir G. Fitzmaurice in articles 37-40 of his report (A/CN.4/101) submitted a more elaborate and more precise set of rules concerning reservations, the detailed provisions of which have served as a valuable guide to the present Special Rapporteur. That report has not, however, been before the Commission, and there are certain basic points in Sir G. Fitzmaurice's approach to the subject on which the Special Rapporteur would have liked to have had the Commission's opinion before drafting the present report. Sir G. Fitzmaurice, while making every provision for tacit consent to reservations through omission to object, nevertheless made the principle of unanimous consent the basis of his draft articles, as appears from the following provisions of his draft:

Article 37 (2)

"Reservations... 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."

Article 38

"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 (3)

"In the case of general multilateral treaties... if a reservation meets with objection, and if the objection is maintained notwithstanding 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."

Article 39 (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 parties to the treaty..."

In his commentary upon article 37 Sir G. Fitzmaurice referred to a study of the whole subject which he had written in a United Kingdom law review,⁸ and recommended that in any code on the law of treaties the Commission should adhere to the same basic view as that which had inspired its report to the General Assembly on reservations to multilateral conventions, 1951.

Sir G. Fitzmaurice, it will be seen, did not propose that the Commission should modify the principle that reservations require the consent of the other interested States, even to the extent of substituting a two-thirds majority for unanimity. He urged that the consent principle is mitigated in practice *inter alia* by the considerations that (i) any negotiating State may seek to have inserted in the treaty an express provision permitting certain reservations or classes of reservations, (ii) if the treaty does not contain such a provision, it may still seek specific acquiescence for any particular reservation it desires to make, (iii) tacit acquiescence may be inferred from silence, (iv) States do not in practice normally refuse their consent unless the reservation is clearly unreasonable and such as ought not to be admitted. And he suggested that all legitimate requirements would be met if the Commission's draft further provided:

(i) That in the case of reservations formulated after the treaty has been drawn up, the acquiescence of a State would be presumed if no objection had been received within a period of three months; and

(ii) That after the treaty has been in force for a certain period of time—and the period he suggested was five years—only the objections of actual parties to the treaty should be taken into account, provided that they represented a reasonable proportion of those *entitled* to become a party to the treaty. Thus, he thought that, unless the treaty itself otherwise provides, the rule of unanimity should continue to apply, qualified only by provisions (a) making absence of objection for three months equivalent to a definitive expression of consent and (b) nullifying, when the treaty has been in force for five years, the objection of any State which has not itself proceeded to become a party to the treaty.

(10) Finally, in 1959, the question of reservations to multilateral treaties was considered by the Inter-American Council of Jurists, with a view to drawing up principles to be followed by the Pan American Union in discharge of its functions as a depositary of inter-American treaties. The Council ultimately resolved to recommend the adoption of the following rules (reproduced in document A/CN.4/124, para. 94):

"I. In the case of ratification or adherence with reservations, the ratifying or adhering State shall send to the Pan American Union, before depositing the instrument of ratification or adherence, the text of the reservations it proposes to make so that the Pan American Union may transmit them to the other signatory States for the purpose of ascertaining whether they accept them or not.

"The Secretary-General shall inform the State that made the reservations of the observations made by the other States. The State in question may or may not proceed to deposit the instrument of ratification or adherence with the reservations, taking into account the nature of the observations made thereon by the other signatory States.

"If a period of one year has elapsed from the date of consultation made to a signatory State without receiving a reply, it shall be understood that that State has no objection to make to the reservations.

⁸ Fitzmaurice, "Reservations to Multilateral Conventions", *International and Comparative Law Quarterly* (1953), vol. 2, pp. 1-26.

"If, notwithstanding the observations that have been made, the State maintains its reservations, the juridical consequences of such ratification or adherence shall be the following:

"(a) As between States that have ratified without reservations, the treaty shall be in force in the form in which the original text was drafted and signed.

"(b) As between the States that have ratified with reservations and those that have ratified and accepted such reservations, the treaty shall be in force in the form in which it was modified by the said reservations.

"(c) As between the States that have ratified with reservations and those that have ratified but have not accepted the reservations, the treaty shall not be in force. In any event the State that rejects the reservations and the one that has made them may expressly agree that the treaty shall be in force between them with the exception of the provisions affected by the reservations.

"(d) In no case shall reservations accepted by the majority of the States have any effect with respect to a State that has rejected them.

"II. Reservations made to a treaty at the time of signature shall have no effect if they are not reiterated before depositing the instrument of ratification.

"In the event the reservations are affirmed, consultations will be made in accordance with rule I.

"III. Any State may withdraw its reservations at any time, either before or after they have been accepted by the other States. A State that has rejected a reservation may later accept it."

The Council then added that both the making of reservations and the acceptance or rejection of them or the abstention from any comment upon them are acts inherent in national sovereignty. The Council further recommended that reservations should be precise and indicate exactly the clause or rule to which they relate.

The resolution of the Inter-American Council of Jurists concerning reservations to multilateral treaties was, however, made subject to certain reservations by four States, and these reservations were as follows (*ibid.*, para. 95):

Reservation of Brazil:

The delegation of Brazil abstains from voting on rule I, paragraphs (b) (c) and (d) with respect to reservations to multilateral treaties, in view of the opinion maintained by the Government of Brazil regarding the principle of the compatibility of reservations with the objective or purpose of the treaties to which they refer.

Statement of the United States of America:

The United States delegation makes the following statement with respect to two of the provisions in the draft resolution on the Juridical Effects of Reservations to Multilateral Treaties:

(a) The provision in paragraph I of the resolution, that the failure of a party to the convention to reply within a year to a notice of a reservation filed by a ratifying or adhering party shall be construed as acceptance of the reservation, is undesirable.

(b) The requirement of paragraph II of the resolution, under which reservations filed at the time of signature must also be reiterated prior to the deposit of the ratification, is unacceptable to the United States delegation in the form in which it has been drafted.

The United States delegation therefore reserves its position on both these provisions.

Reservation of Bolivia:

The delegation of Bolivia abstains from voting on the draft resolution dealing with reservations to multilateral treaties, because it regards as inappropriate any statement "in the abstract" on the acceptance or rejection of reservations on multilateral treaties, without a prior definition of the subject matter of these reservations and the significance thereof.

Statement of Chile:

The delegation of Chile makes a reservation with respect to the third paragraph of rule I of the draft resolution on Reservations to Multilateral Treaties, the justification of which, within the machinery of consultation on reservations, it recognizes only to the extent that it could be in disagree-

ment, in certain cases, with provisions of Chilean constitutional law.

These reservations raise the somewhat awe-inspiring spectre of the possibility of reservations being made by States actually to the articles of a codifying convention seeking to lay down the general rules of international law in regard to reservations.

DOCUMENT A/CN.4/144/ADD.1

Addendum to the first report on the law of treaties, by Sir Humphrey Waldoock, Special Rapporteur

[Original text: English]
[2 May 1962]

Chapter IV. The correction of errors and functions of depositaries

ARTICLE 24. THE CORRECTION OF ERRORS IN THE TEXTS OF TREATIES FOR WHICH THERE IS NO DEPOSITARY

1. Where a typographical error or omission is discovered in the text of a treaty for which there is no depositary after the text has been signed, the signatory States shall by mutual agreement correct the error either:

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

(b) By drawing up and executing a separate protocol or *procès-verbal* setting out the errors in the text and the corrections which the parties have agreed to make to the text; or

(c) By preparing a corrected text of the whole treaty and executing it afresh in the same manner as the erroneous text that is being replaced.

2. The provisions of paragraph 1 shall also apply *mutatis mutandis* to any case where there are two or more authentic texts of such a treaty which are discovered not to be concordant and the parties are agreed in considering that the wording of one of the texts is inexact and requires to be amended in order to bring it into harmony with the other text or texts.

3. Whenever the text of a treaty has been corrected or amended under the preceding paragraphs of the present article, the corrected or amended text shall be deemed to have come into force on the date of the original text, unless the States concerned shall otherwise decide.

Commentary

(1) Errors and inconsistencies are not uncommonly found in the texts of treaties and it seems desirable to include provisions in the draft articles concerning methods of rectifying them. The present article deals with the situation where an error is discovered in a bilateral treaty or in a plurilateral treaty for which there is no depositary; and also with the situation where there are two or more authentic texts of such a treaty and they are discovered not to be concordant. In these cases the correction of the error or inconsistencies would seem to be essentially a matter for agreement between the signatories to the treaty. Neither the Harvard Research Draft, nor Satow's *Diplomatic Practice*, nor the reports of previous Rapporteurs contain any information on this question; and in formulating the provisions of the present article the Special Rapporteur has had regard primarily to the precedents given on

pages 93 to 101 of volume V of Hackworth's *Digest of International Law*.

(2) The normal techniques used for correcting errors appear to be those in (a) and (b) of paragraph 1. Only in the extreme case of a whole series of errors would there be any occasion for starting afresh with a new text as contemplated in paragraph (c); since, however, one such instance is given in Hackworth, *op. cit.*, that of the United States-Liberia Extradition Treaty of 1937, the Special Rapporteur has included a provision allowing for the substitution of a completely new text.

(3) The same techniques appear to be appropriate for the rectification of discordant texts where there are two or more authentic texts in different languages. Thus, a number of the precedents given in Hackworth concern the rectification of discordant passages in one of two authentic texts; for example, the Commercial Treaty of 1938 between the United States and Norway (page 93) and the Naturalisation Convention of 1907 between the United States and Peru (page 96).

(4) Since what is involved is merely the correction or rectification of an already accepted text, it seems clear that, unless the parties otherwise agree, the corrected or rectified text should be deemed to operate from the date when the original text came into force. On the other hand, it would not be right to say that it should be deemed to date back to the adoption of the original text, since that might complicate the position where a faulty text has been submitted by one or other party to its legislature for approval or ratification.

ARTICLE 25. THE CORRECTION OF ERRORS IN THE TEXTS OF TREATIES FOR WHICH THERE IS A DEPOSITARY

1 (a). Where a typographical error or omission is discovered in the original text of a treaty for which there is a depositary, after the text has been authenticated, the depositary:

- (i) Shall notify the error to all the States which participated in the adoption of the text and to any other States that may subsequently have signed or accepted the treaty and inform them that it is proposed to correct the error if within a specified time limit no objection shall have been raised to the making of the correction; and
- (ii) Shall in particular invite any States that may have already signed or accepted the treaty to give their consent to the said correction.

(b) If on the expiry of the specified time limit no objection has been raised to the correction of the text, the depositary:

- (i) Shall make the correction in the text of the treaty, initialling the correction in the margin; and
- (ii) Shall draw up and execute a *procès-verbal* of the rectification of the text and transmit a copy of the *procès-verbal* to each of the States mentioned in sub-paragraph (a) (i) of the present paragraph.

2. Where a typographical error or omission is discovered in a certified copy of such a treaty, the depositary shall draw up and execute a *procès-verbal* specifying both the error and the correct version of the text, and shall transmit a copy of the *procès-verbal* to all the States mentioned in paragraph 1 (a) (i) of the present article.

3 (a). Where there are two or more authentic texts of such a treaty which are discovered not to be concordant, and a proposal is made that the wording of one of the texts should be amended in order to bring it into harmony with the other text or texts, the depositary:

- (i) Shall notify the lack of concordance in the texts to all the States mentioned in paragraph 1 (a) (i) of the present article and inform them of the proposal to amend the text in question; and
- (ii) Shall at the same time communicate to each State a certified copy of the text as amended, or of such parts only as it is proposed to amend, and request it within a specified time limit to notify the depositary whether it has any objection to the text being amended as proposed.

(b) If on the expiry of the specified time limit no objection has been raised to the amendment of the text the depositary:

- (i) Shall either replace the offending text with the new text appropriately endorsed and duly initialled, or as the case may be, make the correction of the offending passages in the text and initial the corrections in the margin; and
- (ii) Shall draw up and execute a *procès-verbal* of the substitution or, as the case may be, rectification of the text and transmit a copy of the *procès-verbal* to each of the States mentioned in paragraph 1 (a) (i) of the present article.

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

5. Whenever the text of a treaty has been corrected, amended or replaced under the preceding paragraphs of the present article, the corrected or amended text shall be deemed to come into force on the same date as the original text, unless the States concerned shall otherwise decide.

Commentary

(1) This article covers the same problems as article 24, but in cases where the treaty is a multilateral or plurilateral treaty for which there is a depositary.

Here the process of obtaining the agreement of the interested States to the correction or rectification of the texts is complicated by the number of the States and it is only natural that the techniques used should hinge upon the depositary. In formulating the provisions set out in the article the Special Rapporteur has based himself upon the information contained in the *Summary of the Practice of the Secretary-General as Depositary of Multilateral Agreements*. This information, together with a number of precedents, will be found on pages 8-10, 12, 19-20 and 39 (footnote), and in annexes 1 and 2 of that *Summary*.

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

(3) The only further point that may call for comment is, perhaps, the mention in paragraph 4 of the reference of a dispute concerning the amendment of a text to the competent organ of the international organization concerned, in cases where the treaty was either drawn up in the organization or at a conference convened by it. This provision is inspired by the precedent of the rectification of the Chinese text of the Genocide Convention mentioned on page 10 of the *Summary of Practice*.

ARTICLE 26. THE DEPOSITARY OF PLURILATERAL OR MULTILATERAL TREATIES

1. The depositary of a plurilateral or multilateral treaty shall normally be the State or international organization in whose archives the original texts of the treaty are required to be deposited under an express provision in the treaty.

2. If such a treaty should fail to designate a depositary of the treaty, and unless the negotiating States shall have otherwise determined, the depositary shall be:

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

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

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

Commentary

(1) Paragraph 1 deals with the normal case where a plurilateral or multilateral treaty designates a particular State or organization as depositary, in which event nothing further is needed to complete the appointment of the depositary.

(2) A depositary is really a necessity for the smooth-working administration of a multilateral treaty and is a great convenience even for a plurilateral treaty. Accordingly, if the negotiating States should fail to nominate a depositary in the treaty itself, paragraph 2 provides either for an international organization or for the "host" State of the conference at which the treaty was drawn up to act as depositary. The actual provisions of paragraph 2 are believed to reflect existing practice in the designation of depositaries in plurilateral and multilateral treaties.

(3) The Special Rapporteur is not aware of any case in which a depositary has declined or failed to act; but this might presumably happen in the case of a depositary called upon to act under the provisions of paragraph 2 of the present article. Accordingly, it has been thought desirable, *ex abundanti cautela*, to cover the point in paragraph 3.

ARTICLE 27. THE FUNCTIONS OF A DEPOSITARY

1. The depositary shall carry out any functions expressly provided for by the terms of the treaty itself. Subject to the provisions of the treaty, the depositary shall also carry out the functions set out in the subsequent paragraphs of the present article.

2. The depositary shall be responsible:

(a) For keeping the original text or texts of the treaty in safe custody;

(b) For preparing and keeping in safe custody any such further authentic texts in additional languages as may have been specified in the treaty;

(c) For preparing certified copies of the original text or texts and transmitting such copies to all States entitled to become parties to the treaty.

3. The depositary shall have the duty:

(a) To receive in deposit and keep in safe custody all instruments of ratification, accession or acceptance, all notifications accepting or objecting to a reservation, and any other instruments relating to the treaty;

(b) To draw up and execute a *procès-verbal* of any signature of the treaty or of the deposit of any instrument of ratification, accession, or acceptance, or of the receipt of any notice denouncing the treaty;

(c) To furnish to the State concerned, either in the form of a written receipt or in some other written form, an acknowledgement of the receipt by the depositary of any instruments or notification relating to the treaty;

(d) To inform all the other interested States of the fact and date of the receipt of any such instrument and to transmit to them a copy of the instrument in question.

4. In accepting a signature of the treaty or the deposit of an instrument of ratification, accession or acceptance, the depositary shall have the duty:

(a) To verify that provisions of article 4, paragraphs 2 and 3, of the present article relating to the authority of a representative to sign, ratify, accede to or accept a treaty are observed;

(b) To verify that the State concerned is one entitled under the terms of the treaty to sign or, as the case may be, ratify, accede to, or accept the treaty.

5. The depositary of a multilateral treaty, on receiving a request from a State desiring to accede to the treaty, shall as soon as possible take steps to communicate the request to the States indicated in article 13, paragraph 3, of the present articles, and in appropriate cases to bring the matter before the competent organ of the international organization concerned in accordance with the provisions of the same paragraph.

6. In regard to any reservation, the depositary shall have the duty:

(a) To verify that the reservation is not one expressly prohibited or impliedly excluded by the terms of the treaty and for that reason inadmissible under article 17, paragraph 1, of the present articles;

(b) To verify that the manner in which the reservation has been formulated complies with the provisions of article 17, paragraph 3, of the present articles;

(c) To comply with any provisions of the treaty concerning the communication of reservations to other States; and subject to any such provisions, to transmit the text of the reservation to all other States which are, or are entitled to become, parties to the treaty;

(d) To draw the attention of all such States to any time limit specified in the treaty within which objections to the reservation are required to be filed; and failing any such time limit, to draw their attention to the provisions of article 18, paragraph 3 (b) of the present articles;

(e) To verify that any notifications of consent or objection to a reservation have been duly formulated in accordance with the provisions of article 18, paragraph 2, and article 19, paragraph 2, of the present articles;

(f) To communicate to all other States which are, or are entitled to become, parties to the treaty, any notifications received of consent or objection to a reservation and also any notifications of the withdrawal either of a reservation or of an objection to a reservation.

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

(a) To inform promptly all the States which are, or are entitled to become, parties to the treaty, of the coming into force of the treaty when, in the opinion of the depositary, the conditions laid down in the treaty for its entry into force have been fulfilled;

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

Commentary

(1) The depositary of a plurilateral or multilateral treaty plays a significant procedural role in what is really the internal administration of the treaty; and a number of the functions of a depositary have already been mentioned in connexion with preceding provisions of the present articles. It seems convenient, however, to collect together in a single article the main functions of a depositary relating to the conclusion and entry into force of treaties and that is the purpose of article 26. In drafting its provisions the Special Rapporteur has

naturally paid particular attention to the *Summary of the Practice of the Secretary-General as Depositary of Multilateral Agreements*.

(2) Paragraph 1 of the draft requires no comment.

(3) Paragraphs 2 and 3 deal with the functions of the depositary in relation to the original text or texts of the treaty, and as the agent of the interested States for receiving, keeping and communicating all instruments and notice relating to the treaty. Paragraph 3 makes it clear that the depositary is not a mere postbox, but has a certain duty to verify that any signatures or instruments are in due form.

(4) Paragraph 4 recalls the duties laid upon a depositary in article 13, paragraph 3, of the present articles for the purpose of facilitating the accession of States, and especially of new States, to multilateral treaties.

(5) Paragraph 5 sets out the implications for a depositary of the provisions of articles 17-19 relating to reservations.

(6) Paragraph 6 deals with the depositary's duty to notify the interested States of the coming into force of the treaty, when this is dependent on a specified number of States signing, ratifying, acceding to or accepting the treaty. The *Summary of the Practice of the Secretary-General* speaks of this duty as the depositary's function to "determine" the date of entry into force. It is not clear to the Special Rapporteur whether the word "determine" is meant to convey that the

depositary is authorized to determine *with binding effect* the date of entry into force. The point is one of substance and could give rise to controversy if, for example, a depositary were to take into account a ratification that was subject to a reservation to which strong objections were taken. However normal it may be for States to accept the depositary's *appreciation* of the date of the entry into force of a treaty, it seems doubtful whether the negotiating States intend to confer upon a depositary an absolute right unilaterally to determine the date of entry into force. Accordingly paragraph 6 does not go beyond requiring the depositary to inform the interested States of the date when, in its opinion, the conditions for the entry into force of the treaty have been fulfilled.

(7) Chapter VIII of the *Summary of the Practice of the Secretary-General* contains a quite extensive account of the Secretary-General's practice as depositary when confronted with (a) territorial application clauses and (b) the emergence of new States. This practice appears to the Special Rapporteur to relate closely to branches of the law of treaties which fail to be dealt with either in a later group of draft articles or in connexion with State succession. Accordingly, it did not seem to him appropriate to include in the present article the functions of a depositary set out in chapter VIII of that *Summary*. Indeed, some of the practice relating to so-called State succession may be controversial, so that the definition of the depositary's functions with regard to it must await the Commission's discussion of that subject.