Document:-
A/CN.4/23

Report on the Law of Treaties by J.L. Brierly, Special Rapporteur

Topic:
Law of Treaties

Extract from the Yearbook of the International Law Commission:-
1950 , vol. II

Downloaded from the web site of the International Law Commission
(http://www.un.org/law/ilc/index.htm)

Copyright © United Nations
# DOCUMENT A/CN.4/23

Report by J. L. Brierly, Special Rapporteur

[Original Text: English]  
[14 April 1950]

## CONTENTS

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>I. <strong>Draft Convention on the Law of Treaties</strong></td>
<td>223</td>
</tr>
<tr>
<td>II. <strong>Explanatory note by the Special Rapporteur</strong></td>
<td>224</td>
</tr>
<tr>
<td>A. Nature of the Draft</td>
<td>224</td>
</tr>
<tr>
<td>B. Scope of the Draft</td>
<td>225</td>
</tr>
<tr>
<td>C. Sources of the Draft</td>
<td>225</td>
</tr>
<tr>
<td>III. <strong>Text of Draft Convention with comment</strong></td>
<td>226</td>
</tr>
<tr>
<td>Introductory Comment</td>
<td>226</td>
</tr>
<tr>
<td>Chapter I. Introductory</td>
<td>226</td>
</tr>
<tr>
<td>Article 1. Use of the term “treaty”</td>
<td>226</td>
</tr>
<tr>
<td>Article 2. Use of certain other terms</td>
<td>229</td>
</tr>
<tr>
<td>Chapter II. Capacity to Make Treaties</td>
<td>230</td>
</tr>
<tr>
<td>Article 3. Capacity in general</td>
<td>230</td>
</tr>
<tr>
<td>Article 4. Constitutional provisions as to the exercise of capacity to make treaties</td>
<td>230</td>
</tr>
<tr>
<td>Article 5. Exercise of capacity to make treaties</td>
<td>232</td>
</tr>
<tr>
<td>Chapter III. The Making of Treaties</td>
<td>233</td>
</tr>
<tr>
<td>Article 6. Authentication of texts of treaties</td>
<td>233</td>
</tr>
<tr>
<td>Article 7. Acceptance of treaties in general</td>
<td>235</td>
</tr>
<tr>
<td>Article 8. Acceptance by signature</td>
<td>237</td>
</tr>
<tr>
<td>Article 9. Acceptance by means of an instrument</td>
<td>237</td>
</tr>
<tr>
<td>Article 10. Reservations to treaties</td>
<td>238</td>
</tr>
<tr>
<td>Article 11. Entry into force and entry into operation of treaties</td>
<td>242</td>
</tr>
</tbody>
</table>

## APPENDICES

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>A. Harvard Draft Convention on the Law of Treaties (Relevant articles)</td>
<td>243</td>
</tr>
<tr>
<td>B. Convention on Treaties adopted by the Sixth International Conference of American States, Havana, 20 February 1928 (Relevant articles)</td>
<td>244</td>
</tr>
<tr>
<td>C. David Dudley Field's Draft Code (Relevant articles)</td>
<td>245</td>
</tr>
<tr>
<td>D. Bluntschli's Draft Code (Relevant articles)</td>
<td>245</td>
</tr>
<tr>
<td>E. Fiore's Draft Code (Relevant articles)</td>
<td>247</td>
</tr>
<tr>
<td>F. Draft of the International Commission of American Jurists, Rio de Janeiro, 1927 (Relevant articles)</td>
<td>248</td>
</tr>
</tbody>
</table>
I. DRAFT CONVENTION ON THE LAW OF TREATIES

Chapter I. Introductory

Use of the term "treaty"

Article 1. As the term is used in this Convention
(a) A "treaty" is an agreement recorded in writing between two or more States or international organizations which establishes a relation under international law between the parties thereto.
(b) A "treaty" includes an agreement effected by exchange of notes.
(c) The term "treaty" does not include an agreement to which any entity other than a State or international organization is or may be a party.

Use of certain other terms

Article 2. As the terms are used in this Convention
(a) A "State" is a member of the community of nations.
(b) An "international organization" is an association of States with common organs which is established by treaty.

Chapter II. Capacity to make treaties

Capacity in general

Article 3. All States and international organizations have capacity to make treaties, but the capacity of some States or organizations to enter into certain treaties may be limited.

Constitutional provisions as to the exercise of capacity to make treaties

Article 4. (1) The capacity of a State or international organization to make treaties may be exercised whatever organ or organs of that State or organization its constitution may provide.
(2) In the absence of provision in its constitution to the contrary, the capacity of a State to make treaties is deemed to reside in the Head of that State.
(3) In the absence of provision in its constitution to the contrary, the capacity of an international organization to make treaties is deemed to reside in its plenary organ.

Exercise of capacity to make treaties

Article 5. (1) In the absence of provision in its constitution to the contrary, the exercise of the capacity of a State or international organization either to negotiate or to conclude treaties may be delegated.
(2) Delegation of the exercise of the treaty-making capacity of a State or international organization may be effected either
(a) Expressly, by the issue to representatives of full powers to negotiate, to negotiate and conclude, or to conclude a treaty or treaties; or
(b) Implicitly, as a result of the investment of an individual or individuals with ministerial functions.

Chapter III. The making of treaties

Authentication of texts of treaties

Article 6. The authentication of the text or texts of a treaty may be effected by
(a) The signature of the duly authorized representatives of the States or international organizations which have taken part in the negotiation of that treaty; or
(b) Incorporation in the Final Act or other record of a conference of such representatives, similarly authenticated; or
(c) Incorporation in the resolution of an organ of an international organization authenticated in whatever manner the constitution thereof may provide; or
(d) Other formal means.

Acceptance of treaties in general

Article 7. (1) Within the meaning of this Convention a State or international organization has accepted a treaty when it has given its consent to be bound by that treaty.
(2) A State or international organization may accept a treaty in any manner indicated in that treaty.
(3) Unless the contrary is indicated in a treaty, a State or international organization which has not taken part in its negotiation may accept that treaty only with the consent of all the parties thereto or, in the case of a treaty which has not yet entered into force, generally, with the consent of all the States, or international organizations, taking part in its negotiation.

Acceptance by signature

Article 8. Unless the contrary is indicated in a treaty or otherwise expressly declared, the signature of the text or texts of a treaty by a representative of a State or international organization having authority to conclude that treaty constitutes an acceptance thereof by that State or organization.

Acceptance by means of an instrument

Article 9. (1) Unless the contrary is therein indicated, a State or international organization which has not otherwise accepted a treaty may do so by the making of a formal instrument of acceptance.
(2) An instrument of acceptance must be communicated to such depository as a treaty may designate.
(3) If no depository is designated an instrument of acceptance or a copy thereof must be communicated, in the case of a treaty already in force generally, to every party to that treaty, and in the case of a treaty not yet in force generally, to every, or as the case may be to every other, State or international organization which may have taken part in the negotiation of that treaty.

Reservations to treaties

Article 10. (1) Unless the contrary is therein indicated or otherwise follows from the nature of that treaty, a State or international organization may accept a treaty subject to a reservation, that is to say a special term limiting or varying the effect of that treaty in so far as
concerns the relations of that State or organization with one or more of the existing or future parties to the treaty.

(2) Unless the contrary is indicated in a treaty, the text of a proposed reservation thereto must be authenticated together with the text or texts of that treaty or otherwise formally communicated in the same manner as an instrument or copy of an instrument of acceptance of that treaty.

(3) The acceptance of a treaty subject to a reservation is ineffective unless or until every State or international organization whose consent is requisite to the effectiveness of that reservation has consented thereto.

(4) Unless the contrary is indicated in the text of a treaty, a reservation proposed before the entry into force generally of a treaty is effective only if consented to expressly or impliedly by every State or international organization which may have taken part in the negotiation of that treaty, and a reservation proposed thereafter only if consented to by every one of the then parties to that treaty.

(5) A State or international organization accepting a treaty impliedly consents to every reservation thereto of which that State or organization then has notice.

**Entry into force and entry into operation of treaties**

**Article 11.**

(1) A treaty enters into force at such time as may be indicated in that treaty.

(2) If there is therein no indication as to when it enters into force, a treaty enters into force generally, that is to say with respect to every State or international organization which may have accepted that treaty, as soon as every State or international organization which may have taken part in the negotiation thereof has accepted it.

(3) Unless the contrary is therein indicated, a treaty enters into force, with respect to a State or international organization accepting that treaty after its entry into force generally, as soon as that State or organization has accepted it.

(4) Unless the contrary is therein indicated, every stipulation of a treaty enters into operation with respect to a party to that treaty as soon as the treaty enters into force with respect to that party.

**II. EXPLANATORY NOTE BY THE SPECIAL RAPPORTEUR**

1. The portion of the draft submitted herewith consists in articles relating exclusively to the definition of certain terms (Chapter I), to treaty-making capacity (Chapter II) and to the making of treaties (Chapter III). It is intended that further chapters should be added. These must deal, it is clear, with the interpretation of treaties and with their termination. And it will be a matter for further consideration whether or not there ought to be also a chapter, which would follow Chapter III, on what may be termed the obligation or effect of treaties. As the work progresses it may also be necessary to add to the definitions contained in Chapter I. Some expansion or revision of the existing Comment may likewise be dictated by the progress of the work, quite apart from such revision as will certainly follow discussion in the Commission.

**A. NATURE OF THE DRAFT**

2. The draftsman of a code of the law of treaties is confronted immediately upon taking up his task with the problem inherent in all work of codification: whether to confine his attention strictly to the law as it may be generally acknowledged to be, or whether to suggest what are in his view improvements in the existing law. The problem appears the more acute in connexion with the special topic of treaties for a reason connected with the nature of that topic. For the principal problems which arise in practice in connexion with treaties are due not so much to any degree of doubt or dispute as to what the general rules of law applicable may be, but rather to the infinitely various application of those rules in fact.

3. It is possible, on the one hand, to confine the process of codification to the expression of such broad propositions of existing law as that

"In the absence of an agreement upon procedure which dispenses with the necessity for signature, a treaty must be signed on behalf of each of the States concluding it"

or that

"The ratification of a treaty by a State is a condition precedent to its coming into force so as to bind that State... when the treaty so stipulates... or... when the form or nature of the treaty or the attendant circumstances do not indicate an intention to dispense with the necessity for ratification" (Harvard Draft Convention, articles 5 (b), 7.)

but these rules are so broad that if they were stated in reverse they would command scarcely less agreement. And their statement leaves unlimited room for the variations of form which in practice make treaties often difficult to understand and apply.

4. It is equally possible, on the other hand, to abandon any effort "to reach, by way of international agreement, a body of rules which would be binding obligatorily upon the various States" and merely to "put at the disposal of States rules in the form of a jus dispositivum, which they could apply or modify as they chose in each concrete case and the acceptance of which might save them much discussion, doubt and delay". Such an approach involves the production of a book of precedents or series of model clauses rather than of rules of general application which are or may be binding rules of law.

5. Upon a consideration of the relevant provisions of the Commission's Statute, and of the general directives to rapporteurs given by the Commission, and after investigating the practical merits and demerits of undertakings of each sort described, the Rapporteur has come to the conclusion that both his terms of reference and the existing state of the law and practice of States require

\[\text{\textsuperscript{1}}\text{See appendix A.}\]

that he should follow the first pattern outlined above, rather than the second. It has been sought, however, notwithstanding the confinement of the accompanying draft to a statement of what is conceived to be the existing law, to express that law as precisely as possible, and to frame its rules in such a way that they can, with little difficulty, be employed as a guide in the drafting of an actual treaty.

6. The Rapporteur desires also to point out that, though the preparation of standard clauses for treaties cannot either legitimately or usefully be brought within the rubric of codification of the law of treaties, the intrinsic merits of an undertaking of that sort are not to be underestimated. It is indeed a matter for consideration whether a table of standard clauses should not be annexed to the present draft.

7. Quite apart from the question of standard clauses, it is to be observed further that the adoption of standard practices — in relation, for instance, to the designation of depositories of treaties, to the procedures adopted by depositories in relation to reservations proposed to treaties, and to the registration of treaties — could contribute materially to the unification of the practice of States, and thus ultimately to the growth of the law of treaties in both certainty and detail. It is desired to point out in this connexion that the growing practice of conferring depository and other secretarial functions in connexion with treaties upon the Secretary-General of the United Nations renders some degree of standardization in these matters comparatively easy of achievement. For it could in some measure be effected by the adoption by the General Assembly of regulations respecting the Secretary-General’s depository functions comparable to those which now govern his activities as registrar of treaties under Article 102 of the Charter, and, to whatever extent may be desirable, by the modification of the latter regulations. It will be a matter for further consideration also whether the Commission should not make recommendations to this end in the context of, if not in actual connexion with, the present draft.

8. Finally, upon the nature of the present draft, the Rapporteur deems it proper to explain that, though restricted to lex lata, this draft differs in expression to a not inconsiderable extent from such projets as have been elaborated before now. Thus the reader may be surprised to find that it does not employ the familiar terms “ratification” and “accession” at all. The reason here is that particular attention has been paid to the treaty practice which has grown up since the establishment of the United Nations and which, though revealing few substantial innovations, in a sense constitutes the consummation of a process of gradual change. Details of this modern practice, which is perfectly well-established and in no way inconsistent which accepted law, are indicated where necessary in the Comments to the various articles.

B. Scope of the Draft

9. Another problem which the Rapporteur had provisionally to solve before proceeding to the work of drafting was that of the scope of “the law of treaties”. It is conceived that, whatever definition is given to the term “treaty”, it cannot exhaust the sphere of international legal obligations ex contractu. No attempt has, therefore, been made to prepare a statement of the whole “law of international contractual obligations”, as the wide sphere has recently been designated. On the other hand, it is thought that no useful purpose is served by the exclusion from the purview of the present draft of agreements of a treaty character embodied in exchanges of notes. It is true that the “exchange of notes” is a device of the law which is not confined in its use to treaty-making agreements. But at the same time it is the case that a very large number of agreements is achieved or recorded in exchanges of notes. A consideration of the contents of the United Nations Treaty Series makes this strikingly clear.

10. In connexion with the definition of the scope of the present draft, the wording of Article 102 of the Charter of the United Nations, the history of that wording, and the somewhat liberal interpretation placed upon it in practice, have not been ignored. The distinction then drawn between a “treaty” and an “international agreement” is not rejected. On the contrary the term “law of treaties”, however infelicitous the extreme variety of modern nomenclature may have rendered it, is expressly retained because, in the phase of Committee IV/2 of the San Francisco Conference, the broader term “agreement” can be understood “as including unilateral engagements of an international character which have been accepted by the State in whose favour such an engagement has been entered into”. For wholly unilateral engagements, engagements to the creation of which only one international legal person is a party, are not within the scope of the present draft. This is not to say that a bi- or multilateral character is thought to be inherent in an international legal obligation ex contractu. It is not thought that the doctrine of consideration plays any part in international law. But it is considered that the line between the analogues of the contract and the gift of municipal law, the latter of which is but notionally bilateral, must be drawn somewhere, and that at that line the law of treaties must be taken to stop.

C. Sources of the Draft

11. In the preparation of the present draft the Rapporteur has, in conformity with the Commission’s Statute, taken into consideration existing drafts. The principal existing drafts, relevant to the articles so far prepared, are: Field’s Outlines of an International Code (1876), Bluntschi’s Le droit international codifié (3rd ed. 1881), Fiore’s International Law Codified (Borchard’s trans., 1918), the Draft of the International Commission of American Jurists (Rio de Janeiro, 1927), the Convention on Treaties adopted by the Sixth International Conference of American States, Havana, 20 February 1928, a draft considered by the Seventh International Conference of American States, 1933, and the Draft Convention on the Law of Treaties prepared in 1935 by Messrs. Garner and Jobst which is part of the Research in International Law undertaken under the auspices of the Faculty of the Harvard Law School. The articles of these drafts which are relevant to the matters so far dealt with in the present draft are annexed to the latter (see appendices).
12. Of the drafts mentioned, the last-mentioned, the Harvard Draft, is accompanied by a commentary and bibliography of the highest value. The Secretariat of the United Nations has furnished the Special Rapporteur with a bibliography covering the years since 1935, which in effect brings the bibliography of the Harvard Draft up to date. It has also collected for him the formal clauses of the principal multipartite treaties concluded and drafted during the last ten years. And it has furnished materials relating to the developments of treaty practice which have come to the attention of the Legal Department. The Secretariat has also undertaken on behalf of the Rapporteur special inquiries into certain aspects of the treaty practice of the United States of America and of the Organization of American States. The United States Department of State and the Secretariat of the Organization of American States have courteously assisted in these inquiries.

III. TEXT OF DRAFT CONVENTION WITH COMMENT

INTRODUCTORY COMMENT

13. When the present draft is completed it will be preceded by an Introductory Comment replacing the Explanatory Note by the Rapporteur and incorporating and amplifying the discussion of the matters referred to in the latter.

Chapter I. Introductory

Use of the term "treaty"

Article 1. As the term is used in this Convention

(a) A "treaty is an agreement recorded in writing between two or more States or international organizations which establishes a relation under international law between the parties thereto.

Comment

14. Article 1 is not intended to supply an independent definition of a "treaty" but merely to indicate what is the general scope of this Draft Convention.

15. The term "treaty" is used, especially in the jurisprudence of States with written constitutions, in a restricted sense to denote an agreement arrived at by particularly solemn means which is usually expressly designated a "treaty". But it is also used in a wider sense—especially in the well-known expressions "treaty-making power" and "law of treaties". In this wider sense "treaties" do not perhaps exhaust the whole category of obligations ex contractu, or even of agreements, between international persons. Thus the duty of registration undertaken by Members of the United Nations in Article 102 of the Charter extends not only to "treaties" but also to "every international agreement". A similar antithesis between a "treaty" and an "international engagement" appeared in Article 18 of the Covenant of the League of Nations. According to an interpretation of Article 18 which the League Council accepted in 1920 the obligation of registration thereby imposed extended to "every formal Treaty of whatsoever character and every International Convention" as well as "any other International Engagement or Act by which nations or their Governments intend to establish legal obligations between themselves and another State, Nation or Government". In practice the separate registration of agreements for the revision or prolongation of treaties was regarded as called for. But the view of the United Kingdom Government that the registration of certain financial arrangements between States as not called for was not opposed. And in 1921 an Advisory Committee of Jurists appointed to consider the matter regarded "technical regulations defining, without in any way modifying [another] instrument ... or ... only designed to enable such an instrument to be carried into effect" as outside the scope of Article 18.

16. In Article 102 of the Charter the term "agreement" was expressly adopted "in preference to the term "engagement" which may fall outside the strict meaning of the word 'agreement". Nevertheless, the meaning of the term "agreement" as used in that Article is a wider one than is invariably conceded to the term "treaty", being expressly declared by Committee IV/2 of the San Francisco Conference to include "unilateral engagements of an international character which have been accepted by the State in whose favour such an engagement has been entered into". Resolution 97 (1) on the Regulations to give effect to Article 102 of the Charter of the United Nations, adopted by the General Assembly on 14 December 1946 reflect this interpretation, and declarations of acceptance of the Optional Clause of the Statute of the International Court of Justice, as well as declarations by new Members of the United Nations of acceptance of the obligations of the Charter are regarded as registrable thereunder. Indeed such instruments are registered ex officio by the United Nations as treaties or agreements to which the United Nations is a party in accordance with Article 4 (1) (a) of the Regulations. The same is the case with Trusteeship Agreements, notwithstanding the obscurity of the question as to who are the parties thereto.

17. Existing draft conventions on the law of treaties employ the term "treaty" in a more or less extended sense. Thus art 1 of the Harvard Draft Convention extends to any "formal instrument of agreement by which two or more States establish a relation under international law between themselves". Likewise the Havana Convention on Treaties seems to employ the term as embracing all agreements between States which are recorded in writing and subject to ratification.

18. The present draft follows both the practice of

---

6 Ibid.
national Justice on several occasions. But it is not to be denied that a customary general form in which treaties are drafted and their provisions arranged has developed. The implication behind the registration provisions of Article 18 of the Covenant of the League of Nations and Article 102 of the Charter of the United Nations is that the "treaties" and "engagements" and the "treaties" and "agreements" to which these provisions respectively refer must be in writing. Modern writers, whilst not denying the validity of oral agreements, have tended to insist that "treaties" be in writing. Existing drafts on the law of treaties have prescribed the same rule.

22. No other rule appearing practicable, the present draft is confined in its scope to agreements in writing and the term "treaty" is defined accordingly in the present draft as "an agreement recorded in writing".

23. The term "writing" is to be understood to include typewriting and printing and, indeed, any other permanent method of recording. But though, within the meaning of the present draft, it is required that an agreement should be recorded in writing to come within its scope, this must not be taken to imply that only a written instrument is a "treaty" for its purposes.

24. There appears to be no reason of either principle or convenience for excluding agreements evidenced either by exchange of notes or memoranda of agreement from the scope of a convention on the law of treaties. The present draft does not, therefore, follow the Harvard Draft Convention in confining the use of the term

---

8 See further para. 21, infra.
9 See para. 25-32, infra.
10 See the cases and literature cited in the Harvard Draft Convention, Comment, pp. 926-937.
11 See the cases and literature cited in the Harvard Draft Convention, Comment, pp. 926-937.
12 A "treaty" is an agreement...
14 A/266, p. 2.
“treaty” to a “formal instrument of agreement”: Article 1 (a). Nor does it follow other existing drafts by requiring that a “treaty” must itself be in writing.

(iii) ... between two or more States or international organizations ...

25. Both a State and an international organization are defined in Article 2 of the present draft.

26. This draft differs from any existing draft in recognizing the capacity of international organizations to be parties to treaties. That capacity was not indeed denied by the Harvard Draft Convention which, however, arbitrarily excluded from its scope any agreement to which any entity other than a State was a party. In so far as concerned the agreements of international organizations, this attitude was adopted “because of their abnormal character and the difficulty of formulating general rules which would be applicable to a class of instruments which are distinctly sui generis.”

It is now, however, impossible to ignore this class of agreements or to regard the existence as an abnormal feature of international relations. For the International Court of Justice has observed, of the United Nations, that “The Charter has not been content to make the Organization created by it merely ‘a centre for harmonizing the actions of nations in the attainment of these common ends’ (Article 1, para. 4). It has equipped that centre with organs, and has given it special tasks. It has defined the position of the Members in relation to the organization by ... providing for the conclusion of agreements between the Organization and its Members. Practice — in particular the conclusion of conventions to which the Organization is a party — has confirmed this character of the Organization ...”

The difficulty of finding rules common to the treaties of States and to those of international organizations is, moreover, not insuperable.

27. But the present draft follows others in so far as it is confined in its scope to agreements concluded between international persons.

(iv) ... which establishes a relation ...

28. The present draft differs from the Harvard Convention in that it does not regard as treaties instruments which merely “seek to establish relations” under international law between the parties. The words quoted were employed in the latter draft in order to comprehend, firstly, “a treaty [which] might define or establish relationships as between the parties without necessarily creating rights or obligations for the parties” and, secondly “[Treaties] which have been negotiated and perhaps signed and even ratified by some States, yet which have not come definitively into force because they have not been ratified by a sufficient number of States, or if so, because the ratifications have not been exchanged or deposited.”

29. As to the first category of “instruments” referred to, it is no doubt the case that States do on occasion conclude “agreements” which create neither rights nor obligations for the parties. But such “agreements”, however named, are not acts in the law and are therefore of no significance from the point of view of the law of treaties.

30. A draft of terms which are intended to be accepted as binding but which are not in fact accepted by the negotiating parties or which for some other reason never come into force, on the other hand, is of significance in the law of treaties. For that law is the system of rules governing both the negotiation and conclusion as well as the operation of treaties. And it is of course the case that a draft for an agreement is frequently termed a “treaty”; for its text will ordinarily be drawn up on the assumption that it will ultimately enter into force and will therefore employ the language appropriate to a binding agreement. A certain linguistic difficulty must, therefore, inevitably pervade the framing of rules for the conclusion of treaties. This is especially the case when the term “treaty” is used primarily to connote the instrument or document embodying a binding agreement rather than the agreement itself. In existing drafts, as well as in the literature of international law, this usage is very prevalent. It is innocuous provided that it does not obscure the real nature of a treaty, which is a legal act or transaction, rather than a document. And the linguistic difficulty it creates can be avoided by the use, in reference to the text of a projected agreement, of some such expression as “draft treaty” or “projet”. The confinement in the present draft of the term “treaty” to its strict meaning — an act in the law comparable to the contract of domestic law — renders any such device unnecessary.

(v) ... under international law ...

31. The purpose of this qualification is to exclude from the category of “treaties” in the sense of the present draft transactions between States or International organizations referable to the context of some other system of law, such as a domestic system. It is not, it is apprehended, possible to deny the international legal quality of transactions between international persons merely because the same transactions might be effected by other categories of persons, e.g. contracts of sale or carriage. But at the same time it is possible for international persons to contract, in the same manner as other categories of persons, under domestic law. And transactions of a private law nature do not acquire the character of treaties merely because the parties thereto are international persons.

(vi) ... between the parties thereto

32. It is indisputable that a treaty between States may expressly create rights for other persons, whether

---

18 [Harvard Draft Convention, op. cit., Comment, p. 692.]
20 [See further para. 34, infra.]
21 [Harvard Draft Convention, op. cit., Comment, pp. 692-693.]
22 [See appendices, infra. Harvard Draft Convention, article 1 (a); Field's Code § 138; Bluntschli's Draft § 418; Fiore's Draft Code § 744. Contrast, however, the Havana Convention, article 2.]
international persons or lesser entities. It is equally indisputable that an international person may have relations *ex contractu* with an entity other than another such person. If transactions of this type are not referable to any system of domestic law, it appears that they must be considered to be contracts of international law. They are not, however, treaties. And, notwithstanding that a treaty may create rights for others than the parties; it is of the essence of such an agreement that it shall create either rights or obligations between the parties. The present draft therefore incorporates this condition in the definition of a treaty which it employs.

**Article 1.** As the term is used in this Convention 

(b) A "treaty" includes an agreement effected by exchange of notes.

**Comment**

33. Despite the great multiplication in recent years, to which the contents of the *United Nations Treaty Series* bear witness, of agreements arrived at by exchange of notes, existing drafts do not include such agreements within the meaning of the term "treaty" or within the scope of the "law of treaties". Their exclusion is indeed inevitable where the term "treaty" is used to connote, not an agreement, but an instrument or document the execution or drawing up of which effects an agreement. No doubt a subsidiary reason for their exclusion is the susceptibility of the recognized form of an exchange of notes for purposes other than the conclusion of treaties, e.g., the interpretation of treaties. But it would appear to be generally admitted that "agreements concluded in [the form of exchanges of notes] have the juridical force and effect of treaties" and "they are considered by many writers as falling within the category of treaties equally with protocols, arrangements, declarations and other international agreements designated by other names. They are often published in official treaty collections . . .". They have, it is true, a peculiar form and because of this it is the case that in the past it was "difficult . . . to formulate a body of general rules which would apply equally to them and other instruments having a different form". Having regard, however, to the circumstance that exchanges of notes require registration in accordance with Article 102 of the Charter, it is thought unrealistic to exclude them from the purview of the present draft. The manner in which the institution of ratification is here dealt with (as to which see especially article 9) and the definition of a "treaty" as an "agreement" rather than an instrument (see article 1 (a)), enables them to be included notwithstanding the differences in form between exchanges of notes and other types of treaties.

**Article 1.**

(c) The term "treaty" does not include an agreement to which any entity other than a State or international organization is or may be a party.

**Comment**

34. The expressions "State" and "international organization", as used in the present draft, are defined in article 2. Examples of entities other than States or international organizations in this sense would be associations, companies, churches, commissions, provinces, cities, and members of federal unions not possessing the attributes of States. But it is not implied that agreements to which such entities, in addition to States or international organizations, are parties, lack binding force, or that their obligatory force is not derived from international law. Nor, of course, is it intended to exclude from the category of treaties dealt with in the present draft, agreements to which the nominal parties are heads of States or governments, or organs or officials of international organizations. Agreements between the component members of federal States and either foreign States or international organizations are, however, excluded.

35. The clause is based principally on article 1 (c) of the *Harvard Draft Convention*.

**Use of certain other terms**

**Article 2.** As the terms are used in this Convention 

(a) A "State" is a member of the community of nations.

**Comment**

36. This clause of the present draft does not attempt a definition of a "State" but merely an explanation of the scope of the draft. No authoritative definition of a State appears to exist, but the International Law Commission did not consider that it was necessary to include one in the Draft Declaration on Rights and Duties of States.

37. As it is used in this Convention, the term "State" would clearly apply to all Members of the United Nations or of specialized agencies and all parties to the Statute of the International Court of Justice. It would also apply to the Vatican City State. But it would not apply to such entities as cantons or provinces of a federal State, completely lacking in international personality.

38. The clause is based principally on article 2 (a) of the *Harvard Draft Convention*.

**Article 2.** As the terms are used in this Convention 

(b) An "international organization" is an association of States with common organs which is established by treaty.

**Comment**

39. The term "international organization" is an
ambiguous one. But as defined for the purposes of the present draft it would include the United Nations, all specialized agencies, and such regional organizations as the Organization of American States. It would not include such an institution as the Australia-New Zealand Affairs Secretariat which, though established by treaty, has parallel rather than common organs.30

40. The requirement which the clause imposes that an international organization shall be established by treaty is derived from Article 57 of the Charter of the United Nations. The further requirement that an international organization shall have common organs rests upon no such authority but is derived from the inherent nature of treaties as joint expressions of the several wills of the parties, and from the circumstance that an entity without sovereign organs can have no will.

Chapter II. Capacity to make treaties

Capacity in general

Article 3. All States and international organizations have capacity to make treaties, but the capacity of some States or organizations to enter into certain treaties may be limited.

Comment

41. This Article deals exclusively with the rules of international law respecting capacity to make treaties. By that law capacity to make treaties is commonly said to be an attribute of the sovereignty of States. And it has been treated by the International Court of Justice as the principal evidence of the international personality of international organizations.30

42. As respects States, whilst in general international law imposes no limitations upon their treaty-making capacity, the capacity of a particular State to enter into any category or all categories of treaties may be limited by reason of its qualified status or its existing treaty obligations. Thus the Free City of Danzig, though held to be a State by the Permanent Court of International Justice, was subjected to certain limitations affecting both the extent and the manner of exercise of its treaty-making power.31 Likewise, a neutralized State is presumably incapable of concluding a treaty of offensive alliance. And, similarly, Article 20 (1) of the Covenant of the League of Nations, at least according to one construction, limited the capacity of the Members of the League to enter into engagements inconsistent with the terms of the Covenant.

43. As respects States also, their treaty-making capacity may appear to be limited by their constitutions. But it is an open question still whether such self-limitation results in any diminution of capacity under international law. The important question of the effect of constitutional provisions upon the exercise of a State's capacity to make treaties is therefore dealt with in the present draft in a separate article, article 4.

44. In so far as concerns international organizations, their constitutions are of even greater influence upon their capacity to make treaties than is the case with States. For the primary source of such capacity in an organization is express provision in the constituent instrument. But it is not to be presumed that an international organization cannot make treaties simply because its constitution does not so provide in terms. Thus a treaty-making capacity was claimed for, and exercised by, the League of Nations notwithstanding that there was no mention of it in the Covenants.32 Both the Permanent Court of International Justice and the International Court of Justice regulated the question of their privileges and immunities by treaty notwithstanding that there was no express power so to do conferred by their respective Statutes. And Article 63 of the Charter, which provides for the bringing of specialized agencies into relationship with the United Nations by means of the conclusion of agreements, though it expressly empowers the Economic and Social Council to conclude agreements to this end, clearly contemplates a parallel capacity in the specialized agencies without regard to terms of their respective constituent instruments. But it is clear that the inherent treaty-making capacity of international organizations, which thus exists, is confined to capacity to make treaties compatible with the letter and spirit of their several constitutions.

45. To the extent that it relates to States, Article 3 is based principally upon article 3 of the Harvard Draft Convention.

Constitutional provisions as to the exercise of capacity to make treaties

Article 4. (1) The capacity of a State or international organization to make treaties may be exercised by whatever organ or organs of that State or organization its constitution may provide.

Comment

46. Whilst there is no absolute agreement as to the international legal effect of constitutional limitations on the treaty-making capacity of States or constitutional restrictions or rules as to its exercise, it is clear that the constitutions of many States contain provisions purporting to restrict or regulate the making of treaties. Article 2 (2) of the Constitution of the United States of America is the classic example of such a provision.

47. Equally, though a certain inherent treaty-making capacity may be claimed for international organizations, the constitutions of some organizations make express provision for the conclusion of certain types of treaties, and for the manner of their making. Thus article 43 (paragraph 1) of the Charter contemplates the making of agreements as to the contributions of Members to the forces and facilities to be placed at the disposal of the Security Council. By paragraph 3 of the same

30 See British Year Book of International Law, vol. XXIII, (1946), pp. 476-482.
article the power to enter into such agreements on behalf of the United Nations is vested in the Security Council. By Article 63 (paragraph 1), on the other hand, the conclusion of agreements bringing specialized agencies into relationship with the United Nations is vested in the Economic and Social Council, subject to the approval of the General Assembly. The agreements in fact made in pursuance of the latter paragraph are expressed to be made between the United Nations itself, on the one hand, and the specialized agencies concerned, on the other. In respect of each there has also been concluded a "Protocol concerning . . . Entry into Force . . ." signed on the part of the United Nations, by the Secretary-General, and, on the part of the specialized agency concerned, by its chief executive officer, and reciting the approval of the principal agreement by the General Assembly and its negotiation by the Committee on Negotiations with Specialized Agencies of the Economic and Social Council and an appropriate delegation of the specialized agency concerned. Each principal agreement likewise provides for the conclusion of supplementary arrangements for its implementation between the Secretary-General and the chief executive officer of the specialized agency concerned.\(^33\)

48. In view of the division of opinion as to the international legal effect of restriction of capacity to make treaties or of regulation of its exercise in the constitutions of States, it is open to the draftsman of a code of the law of treaties to take up any one of three attitudes on the matter. He may either side with those who hold that "the State can speak with only one voice in international law" and adopt either expressly or impliedly the rule that the treaty-making capacity of a State resides in its Head and that any constitutional provision to the contrary is of no effect. No existing draft which has been considered in fact takes this attitude. Indeed most adopt the very opposite rule that the treaty-making capacity of a State is vested solely in the domestically competent organ.\(^34\) But a third alternative is to adopt either of the views already outlined obliquely by providing simply that a treaty concluded by a constitutionally incompetent organ either does or does not bind a State.\(^35\) A drawback to this third alternative is that not all constitutional provisions regulating the making of treaties expressly declare the State concerned not bound by a treaty made otherwise than in accordance with them.\(^36\) Further, amongst the many writers who maintain that such a treaty has no international legal effect, a considerable number maintains that the State concerned may be responsible \textit{quasi ex delicto} for an injury to another State resulting from reasonable reliance upon a representation of constitutional competence.\(^37\)

49. The manner in which the capacity of both States and international organizations to make treaties is sought to be dealt with as a single whole in the present draft renders it impossible to adopt the third alternative method outlined above. For no doctrine of implied warranty of authority which may be applicable to States can be applied to international organizations without serious modifications.\(^38\) It has been necessary, therefore, to oblige between the recognition and the denial of the international legal significance of constitutional self-limitation upon treaty-making capacity. And, having regard to the prevalence and notoriety of provisions in the constitutions of States regulating the making of treaties, and to the existence of similar provisions in the constitutions of international organizations, notably the Charter of the United Nations, the former has been decided upon.

\textbf{Article 4} \\

\(\ldots\)

\(2\) In the absence of provision in its constitution to the contrary, the capacity of a State to make treaties is deemed to reside in the Head of that State.

\textbf{Comment}

50. Notwithstanding that, as is apprehended, both the practice and theory of modern times justify the conclusion that international legal effect is to be attributed to constitutional limitations on the treaty-making capacity of States or on its exercise, it is clear that, where the constitution of a State is silent as to the organ competent to make treaties, capacity is to be presumed to reside in the Head. The present draft therefore makes express mention of this. And the term "Head", as here employed, must obviously be taken to include a supreme organ as well as a personal Head.

\textbf{Article 4.}

\(\ldots\)

\(3\) In the absence of provision in its constitution to the contrary, the capacity of an international organization to make treaties is deemed to reside in its plenary organ.

\textbf{Comment}

51. If it is, at least, unrealistic to deny effect to constitutional provisions respecting capacity to make treaties in the case of States, it is impossible to do so in the case of international organizations, which are in a sense but \textit{traités organisés}, or living constitutions. At the same time, as has been pointed out above, the terms of the constitution of an international organization do not necessarily indicate where within that organization its inherent, or even its express, treaty-making capacity resides. But an international organization has no personal Head in the same sense that a State may have a personal Head. And it is clearly impossible to attribute its residuary or implied treaty-making capacity to the organization's chief executive officer. Nor does an international organization necessarily have a single supreme organ. Thus within the League of Nations the Council and the Assembly were co-ordinate. As respects the United Nations, though all three Councils are, along

\(^{32}\) See E/1317.

\(^{33}\) See appendices, \textit{infra: Field's Code, § 190; Flories Draft Code, § 751; Havana Convention, article 1.}

\(^{34}\) \textit{Ibid.: Bluntschli's Draft Code, § 404; Harvard Draft Convention, article 21.}

\(^{35}\) \textit{Harvard Draft Convention, op. cit., Comment, pp. 993-995.}

\(^{36}\) \textit{Ibid., article 21 and Comment, pp. 1008-1009.}


with the General Assembly, designated as "principal organs" in Article 7, paragraph 1 of the Charter, it is to be noted that the treaty-making capacity of the Economic and Social Council provided for in Article 63 is exercisable only subject to the approval of the General Assembly. It is indeed clear that the General Assembly is supreme over the Economic and Social and the Trusteeship Councils in all respects. But the case is quite otherwise with the Security Council and, within its sphere, the latter, as appears from Article 12, paragraph 1, is supreme. Thus it would seem that in the United Nations there are two distinct "sovereign" organs, though of course both of them are merely supreme under the constitution which, as in every international organization, is the source of every capacity the organization possesses.

52. In view of the difficulty outlined it would appear reasonable to lay down as a general rule that, if its constitution neither expressly nor impliedly provides for the case, the capacity of an organization to make treaties resides in its plenary organ, wherein are represented the totality of States whose several sovereignty is the original source of all power of the organization. Such a rule has been applied in at least one case with respect to the United Nations. Thus, when it was provided in the Final Protocol to the International High Frequency Broadcasting Agreement of April 1949 that "The United Nations, should the Secretary-General of the United Nations accept this Agreement on behalf of the United Nations' telecommunications services, shall be regarded as a Party to the Agreement for the purposes of this Agreement", advice was taken by the department of the Secretariat concerned as to the capacity of the Secretary-General to accede to the agreement on behalf of the United Nations and, notwithstanding the conclusion that such capacity existed in view of the exclusively administrative character of the agreement itself and of the terms of the agreement whereby the International Telecommunication Union was brought into relationship with the United Nations, a report of the action of the Secretary-General on the matter was made to the General Assembly (information supplied by the Secretariat).

53. It is thought that the opening words of the clause — "In the absence of provision in its constitution to the contrary" — are sufficiently wide to cover a case where the constitution of an international organization implicitly rather than explicitly contemplates the exercise of treaty-making capacity by an organ other than the plenary organ. In this connexion it may be noted that whereas the text of Articles 57 and 63 of the Charter of the United Nations speak only of the conclusion by the Economic and Social Council of agreements with "specialized agencies", Committee II/3 of the San Francisco Conference stated that it was not intended to preclude that organ from entering into agreements, at its discretion, in order to bring "other types of inter-governmental agencies" into relationship with the United Nations. The view is tenable that the wider treaty-making capacity implied by this statement is deducible from the general mandate of the Economic and Social Council which, in any event, is subordinate to the General Assembly in a substantial measure: see especially Articles 62, paragraphs 1, 3; 63, paragraph 1 and 66, paragraph 3 of the Charter. But it may be noted that it was denied on behalf of the United Nations, in the course of the negotiations with the Universal Postal Union, that an international organization could be "brought into relationship" with the former otherwise than as a "specialized agency".

Exercise of capacity to make treaties

Article 5.

... (1) In the absence of provision in its constitution to the contrary, the exercise of the capacity of a State or international organization either to negotiate or to conclude treaties may be delegated.

Comment

54. The more modern of existing drafts on the law of treaties do not deal with the topic of Full Powers although earlier drafts did so. The League of Nations Committee of Experts for the Progressive Codification of International Law considered that the topic should be included in any draft to be undertaken. In view of the practical importance of the matter it is considered that it should be dealt with in the present draft. The first clause of article 5, however, is confined simply to a statement of the principle that the exercise of treaty-making capacity may be delegated. The words "either to negotiate or to conclude" are used advisedly in order to indicate the distinction between "full powers to negotiate" and "full powers to negotiate and/or sign", familiar in diplomatic practice. This distinction is emphasized and amplified in the second clause of the article.

Article 5.

...(2) Delegation of the exercise of the treaty-making capacity of a State or international organization may be effected either

(a) Expressly, by the issue to representatives of full powers to negotiate, to negotiate and conclude, or to conclude a treaty or treaties; or...

Comment

55. The term "full powers" is a highly misleading one. The "powers" of a delegate to a diplomatic conference are frequently found not to be "full" in the sense that although they may authorize participation in the drafting of a projected treaty, they do not authorize such delegate to bind his State thereto, or even to attach his signature to the agreed text. Equally often "full powers" are so loosely drafted it may be a serious question whether they relate to the particular treaty it

---


91 League of Nations, Document C.47.M.24.1926.V.
is intended that a delegate shall negotiate, sign or accept on behalf of his State. The result is that the question of credentials often occupies an undue amount of time and that depositaries are required to undertake correspondence of a burdensome and avoidable character. It would appear, however, that this result could largely be excluded by the stricter observance of forms, upon which the effect of which there is no disagreement. The purpose of this clause in the present draft is to re-state the well-recognized distinction between the different types of full powers in general use and to draw attention to the desirability of precise reference in them to the particular negotiations or treaties to which they are intended to relate.

Article 5.

... (2) ...

(b) Implicitly, as a result of the investment of an individual or individuals with ministerial functions.

Comment

56. It would appear that a personal Head of State requires no full powers in order to negotiate or conclude a treaty. In so far as negotiation is concerned, such a Head of State is recognized by international law to possess the *jus representationis omnimodae*. Thus President Wilson is described in the Preamble to the Treaty of Versailles as "acting in his own name and by his own proper authority." As to acceptance of a treaty so as to bind the State, when a Head of State is not the repository, or not the sole repository, of the treaty-making capacity, it is a serious question whether or not his independent and unconstitutional acceptance is effective in international law. Upon that question, the present draft takes the position that constitutional limitations on the powers of Heads of State are operative in the international sphere. This position perhaps involves acceptance of the thesis that a Head of State whose powers are constitutionally limited is a delegate of the treaty-making capacity of a State. But that thesis is also inherent in the traditional attribution to him of a *jus representationis*. However, he needs no full powers in the ordinary sense of the term, so that the case is one of implied rather than express delegation.

57. Heads of State are not the only functionaries to whom international law appears to concede by implication from their offices power to make treaties on behalf of States. Thus it is said of a Foreign Minister that "His position at home is regulated by Municipal Law. But International Law defines his position regarding international intercourse with other States." And the capacity of a Foreign Minister to bind the State by means of a declaration in the nature of a treaty made within the sphere of his proper functions was recognized by the Permanent Court of International Justice in the *Legal Status of Eastern Greenland Case*.  

58. It is apprehended that international law has now gone further in the attribution of implied authority to make treaties. Thus it has been not uncommon for other Ministers of States besides Foreign Ministers to negotiate treaties and to accept them as binding on behalf of States. This is especially the case with Secretaries or other Heads of Treasury Departments. Agreements concluded by such officials do not appear in general to be made in virtue of express full powers.

59. Similarly, in the case of international organizations, the conclusion of treaties of secondary importance appears to be within the general authority of their Secretaries-General or other chief executive officers. This circumstance appears to be recognized in so far as concerns the Secretary-General of the United Nations by the attribution to him in the agreements with the specialized agencies, to which the General Assembly has given approval, of capacity to enter into arrangements supplementary to such agreements.

60. The purpose of this clause in the present draft is to indicate the limits of implied authority to exercise the treaty-making capacity of States and international organizations. The terms "ministerial functions" which it employs must be understood to connote such functions as are commonly exercised by Ministers of States, by the Foreign Ministers or others, having concern with the foreign relations of States, or with any aspect of such relations.

Chapter III. The making of treaties

Authentication of texts of treaties

Article 6. The authentication of the text or texts of a treaty may be effected by

(a) The signature of the duly authorized representatives of the States or international organizations which have taken part in the negotiation of that treaty; or

(b) Incorporation in the Final Act or other record of a conference of such representatives, similarly authenticated; or

(c) Incorporation in the resolution of an organ of an international organization authenticated in whatever manner the constitution thereof may provide; or

(d) Other formal means.

Comment

61. If existing drafts do not provide in terms for the authentication of the records of treaties, this is because the process of authentication is commonly part of that of negotiation or conclusion, the same act serving more than one purpose. Thus when a treaty is signed by the negotiators subject to ratification the signatures affixed to its text serve both for the purpose of authenticating the latter as a correct record of the terms the several parties are willing to consider accepting as binding, and also as part of the process whereby the parties do in fact become bound by those terms. Likewise, in the case of a treaty binding on signature, its signature

---

43 See paras. 46-49, supra.
45 *Publications of the P.C.I.J.*, Series A/B No. 53, pp. 73, 91.
46 See paras. 47 and 52, supra.
on the part of any party constitutes both an act of authentication of its terms and an act of final acceptance of these terms.

62. In such cases as those treated in the foregoing paragraph it is not wholly correct to say that the signature of the text of a treaty on the part of one party alone constitutes an authentication of that text. Such signature is rather an act contributing to the authentication of the text in question, and the process of authentication is completed only when the text has been signed on behalf of the other negotiating parties also, or at least on behalf of a substantial number of them. The practice of authenticating treaties by multilateral signature may seem to be an unduly cumbersome process. Convenience might be held to render desirable its abandonment in favour of some simpler device in the same manner that the practice of exchanging ratifications between each and every party to a multipartite treaty has been abandoned in favour of deposit of instruments of ratification with a single depository. No doubt some very considerable simplification of the steps which lead finally to the conclusion of a binding treaty could be achieved. In some cases the number and complication of these steps is in truth wholly unnecessary. Thus the Convention on the Prevention and Punishment of Genocide, as a result of an ill-considered incorporation of formal clauses developed under the auspices of the League of Nations not for the simplification of the mechanics of treaty-making but, what is a different thing, for the encouragement of their rapid acceptance by States, provides for the adoption of its text by the General Assembly, its signature, ratification of signature, and the drawing up of a procès-verbal of entry into force. The Secretary-General of the United Nations is, moreover, required by its terms to communicate to parties or potential parties no less than seven different kinds of notifications. That official has also certain functions to perform in connexion with the calculation of the date of entry into force of the Convention. And he is charged with the furnishing to interested States of certified copies of its text and must of course, if it enters into force, register and publish it also.46 It is difficult to believe that all these processes are necessary.

63. In recent years methods of authentication of the texts of treaties, other than that of signature on behalf of all or most of the negotiating parties have been devised. Thus the incorporation of unsigned texts of projected treaties in signed Final Acts of diplomatic conferences which may have negotiated more than one such text has been resorted to.47 And a special procedure, namely, signature by the President of the International Labour Conference and Director or Director-General of the International Labour Office, alone, has been applied for the authentication of (draft) international labour conventions since the first establishment of the International Labour Organization.48 Treaties which have not been signed at all, parties resorting instead to a process of accession, have not been unknown.49 The authentication of the texts of these agreements was effected by their incorporation in a resolution of the League Assembly or, as the case may be, of the General Assembly of the United Nations.

64. No doubt these innovations are largely attributable to the development of a quasi-legislative technique of elaboration of treaty texts, involving drafting by an expert body or organ of an international organization rather than by a diplomatic or negotiating conference of representatives of States. An early example of the employment of this technique was the drafting of the Statute of the Permanent Court of Justice by an Advisory Committee of Jurists appointed by the Council in pursuance of its duty, under Article 14 of the Covenant of the League of Nations, to "formulate and submit to Members of the League for adoption" plans for the Court. The achievement of the text of the Statute in this way led to an innovation in treaty-making practice of great importance. For, instead of being submitted to the Members of the League individually, the draft Statute was laid before the League Assembly and, after it had been amended to some extent in that body, there was then opened in connexion with it, by the Secretary-General of the League, a protocol of signature. This was, apparently, the first occasion on which the device of "opening" a treaty "for signature" was employed. The practice subsequently became common and was not confined to treaties drafted under the auspices of the League of Nations.40

65. In the light of the developments referred to, it is thought useful to emphasize in the present 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 accepts a treaty as obligatory; considered as a means of authentication, signature of negotiators is but one such means, though of course still that which is most common. It may therefore, as article 6 indicates, be dispensed with in favour of some other method of authentication of a treaty text. And it would appear in principle clear that, where some such other method is therein prescribed, it is superfluous to require the authentication of the text of a treaty by signatures. It has, however, to be borne in mind that signature by a party to a treaty may constitute, either alone or when followed by some act in the nature of ratification, the means whereby that party becomes bound by the treaty.51 As is there explained, there is no evidence whatever that signature as a method of conclusion, as distinct from authentication, of treaties is likely to decline in importance. On the contrary, it appears

46 See A/760.
48 See Treaty of Versailles, article 405.
51 See further the Comment to article 8, infra.
to be increasing in importance. It might therefore appear that it would be more reasonable to discourage the unnecessary duplication of processes of authentication by a restriction of the use for this purpose of alternatives to signature rather than by restricting the employment of the latter. But it has to be borne in mind that, just as the requirement of signature in a treaty or treaty text may serve a dual purpose, so also may some alternative method of authentication. Thus, whilst the incorporation of the text of a treaty, which has been signed by negotiators, in a resolution of the General Assembly, is superfluous for purposes of authentication, the moral and political force of such a resolution is not to be ignored. Perhaps a more profitable field for economy in this regard might be that of depository functions or that of the registration of treaties. For there can be no doubt that stipulations for the preparation by depositories of certified texts of treaties and, as well, the processes of registration and publication in accordance with Article 102 of the Charter, lead to some duplication of effort. A prerequisite to any simplification, however, is the drawing of a clear distinction between the authenticatory value of any particular act and whatever other significance it may possess.

Acceptance of treaties in general

Article 7. (1) Within the meaning of this Convention a State or international organization has accepted a treaty when it has given its consent to be bound by that treaty.

Comment

66. Clause (1) of article 7 of the present draft is a purely mechanical provision. It relates to the term "acceptance" as used in the draft. That term is used to connote any and every means whereby a State or international organization agrees to be bound by a treaty. As to why the term "acceptance" has been employed in preference to any other, see paragraph 71 infra.

Article 7.

... (2) A State or international organization may accept a treaty in any manner indicated in that treaty.

Comment

67. The methods whereby a State or international organization may accept a treaty, that is, participate in the making of a binding agreement have been largely confined in practice over a very long period of time to the three modes of signature, signature followed by ratification, and accession. Nevertheless, these are merely traditional methods of signification of the will of an international person and possess no greater validity than any other effective expression of will. Moreover, the three methods mentioned have not at all times possessed a constant connotation. Thus ratification has changed its meaning more than once. Originally ratification appears to have been a process of confirmation by a prince of his envoy's act, essential to the validity of the latter. During the eighteenth century, owing partly to the practice of insertion of promises of ratification in full powers, it became a purely formal, but still essential, process of adoption of the act of an envoy. But in the nineteenth century, largely because of the growth of the constitutional State, ratification again became a material requisite to the binding force of treaties. The promise of ratification was replaced in full powers by the reservation of the requirement thereof, and ratification itself came to be a process of confirmation, not of the mere signature of an envoy, but of the entire text of a projected treaty agreed upon by negotiators. And in the early twentieth century express or implied waiver of ratification became so common that, though there was no denial that, where it was expressly stipulated for, it alone was the real act whereby consent to be bound by a treaty was given, the view was tenable that ratification was not required unless expressly stipulated for.52

68. Similarly, whilst in former times accession was universally understood to be a single process whereby States which had not participated in the negotiation of the terms of a treaty became bound thereby, after their entry into force as between negotiating parties, various innovations of practice of the epoch of the League of Nations tended to impair the value of any such definition of the term. Thus, accession subject to ratification occurred and the League Assembly, by formal resolution, adjudged the practice to be admissible and to be one which should be neither encouraged nor discouraged.53 Accession of States, strangers to their negotiation, to treaties not in force between the negotiating parties was likewise permitted.54 And, conversely, there occurred signature and ratification of treaties by States not parties to their negotiation—a proceeding characterized by the League of Nations Committee for the Progressive Codification of International Law as "nothing more than an 'accession'."55 And the practice of dispensing with signatures altogether, as to which see paragraphs 63 and 64 supra, tended to blur still further the outlines of the traditional conception of accession.

69. Changes in the significance of both ratification and accession reacted, too, upon the institution of signature, considered as a means of conclusion of treaties. Thus it was admitted by the Special Committee of the League Council set up in 1930 to consider means of expediting the signature and ratification of multipartite treaties "that the signature of an international convention on behalf of a country" indicated no more than "an intention on the part of the Government of that country to make a fresh examination of the question with a view to putting the convention in force so far as it [was] concerned."56

70. Nor did the development of practice cease with the end of the League of Nations period. Since that time the process of destruction of the traditional distinctions between signatory and acceding parties to treaties has indeed continued. It has been materially accelerated by the employment, in a number of multipartite treaties of first importance, of the expressions "acceptance" and

52 See J. Mervyn Jones, Full Powers and Ratification (Cambridge University Press, 1946); Harvard Draft Convention, op. cit., Comment to articles 6, 7, 8.
53 League of Nations, Records of the Eighth Assembly, Plenary, p. 141.
54 League of Nations, Document 8 A, 34262.
55 Ibid. C.357.M.130.1927.V.
part in its negotiation may accept that treaty only with the consent of all the parties thereto or, in the case of a treaty which has not yet entered into force, generally, with the consent of all the States, or international organizations, taking part in its negotiation.

Comment

72. Though recent innovatory practices have tended to destroy the traditional distinctions between signatory and acceding parties to treaties, and between ratification and accession, the reality behind these distinctions remains. That is to say, no State or international organization is bound to enter into treaty relations with any other State or organization and, therefore, when two or more States or organizations have either concluded a treaty between themselves or have negotiated the terms of a projected treaty, a stranger to the negotiations is not entitled to become a party thereto unless all who participated in its negotiation consent. However, in the case of a treaty which has already entered into force in accordance with its provisions as between some of the parties to its negotiation, the consent of a negotiating party which has not become a contracting party is not requisite in order that a stranger to the negotiations may accede. And the requisite consents to accession may be given in advance in the negotiated terms of a projected treaty. Where they are not so given it would appear that they may still be given tacitly at some stage subsequent to the negotiation of the projected treaty.

73. Clause (3) of article 7 reflects the rules stated in the foregoing paragraph. The term "accession" is not, however, used for reasons already indicated. And the clause does not seek to restrict the liberty of acceptance of treaties by States or international organizations which have not taken part in their negotiation to stages subsequent to entry into force. For contemporary practice does not reveal that any rule of this sort can be laid down. In the first place, as has been indicated already, instances of treaties the terms of which dispense with signature altogether and so render every party in a sense an acceding party are not lacking. And, secondly, the use of the standard clause providing that States or organizations may become bound by treaties by any of the methods of signature without reservation as to acceptance, signature with reservation as to acceptance, or bare acceptance perpetuates a practice of permitting the reckoning of acceding parties for the purpose of calculating a quorum requisite in the entry into force of a treaty which was inaugurated under the auspices of the League of Nations.

74. The term "negotiation" as used in this clause must be understood to include the elaboration or approval of the terms of a projected treaty by an organ of an international organization.

75. As to what is meant by the "entry into force generally" of a treaty, see article 11 of the present draft.
Acceptance by signature

Article 8.

... Unless the contrary is indicated in a treaty or otherwise expressly declared, the signature of the text or texts of a treaty by a representative of a State or international organization having authority to conclude that treaty constitutes an acceptance thereof by that State or organization.

Comment

76. Changes in the significance of the institution of ratification which have from time to time taken place have naturally resulted in changes in the significance of the signature of treaties. Since the end of the period of the League of Nations, signature has manifestly increased in importance as a method of acceptance of treaties. In recent years some instruments of first importance have become binding by signature alone. An example is the UNRRA Agreement. That was indeed a treaty concluded under abnormal conditions with respect to a matter of some urgency. But it would appear to be clear that the use of bare signature as a method of acceptance is not confined to cases of urgency nor restricted to any category of treaties of secondary importance. The United Kingdom and other countries of the British Commonwealth have for many years pursued a practice of dispensing with anything in the nature of ratification, where other parties to a projected treaty are agreeable to its becoming binding on signature alone. This tendency is not universal. Some States, and notably the Union of Soviet Socialist Republics, China and the Latin-American States, continue largely to stipulate that their treaties shall be ratified. But the adoption under the auspices of the United Nations of the common form clause providing that a State or international organization may become a party to a projected treaty by either bare signature, signature subject to acceptance, or bare acceptance has tended to enhance the importance of the first of these alternatives as a method of conclusion of treaties. The United Kingdom, and certain other States, habitually avoid themselves of the first of these alternatives.

77. Notwithstanding that, considered as a means of authentication of the texts of projected treaties, signature has declined in importance, it is not possible to fail to accord to it in a draft convention on the law of treaties a place of first importance as a method of conclusion of treaties. In consequence the present draft treats of the matter in a separate article. This is framed on the basis that a treaty becomes binding on signature unless the contrary is stipulated. This formulation of the rule is the exact antithesis of that adopted in various other existing drafts. But the difference between a rule that some process of confirmation of signature is required unless the contrary is indicated or that no such process is required unless expressly stipulated for is slight. The latter formulation is believed to be the more convenient.

78. A signatory party to a projected treaty may clearly stipulate, however, that its signature shall not be taken to constitute a definitive acceptance of the negotiated terms. The common form clause which is used in multipartite instruments concluded under the auspices of the United Nations expressly provides to this end. And even where the formal clauses employed in the text of a treaty do not contemplate the case, any express declaration to that effect will exclude the attribution to mere signature of binding effect. Thus it is common for representatives of States to attach to their signatures such phrases as "ad referendum" or "subject to ratification (confirmation, approval)". These cases are provided for in Article 8 of the present draft by the words "unless the contrary is... otherwise expressly declared...".

79. Though both convenience and the trends of contemporary practice may render it desirable to lay down as a general rule that a treaty becomes binding on signature unless the contrary is indicated rather than the reverse, it is manifest that signature can commit a State or international organization only where it is effected in pursuance of authority in the individual signatory to produce this result. For this reason the words "...signature... by a representative... having authority to conclude [the treaty in question]..." are included in Article 8. This phrase has to be interpreted in the light of the rules contained in Article 5 as to the delegation of treaty-making capacity and, notably, in the light of the distinction there drawn between the various forms of so-called "full powers" and of the rule adopted with respect to the implied delegation of treaty-making capacity.

Acceptance by means of an instrument

Article 9. (1) Unless the contrary is therein indicated, a State or international organization which has not otherwise accepted a treaty may do so by the making of a formal instrument of acceptance.

Comment

80. The traditional alternatives to acceptance of treaties by bare signature are of course ratification, following prior signature, and accession. But the distinct character of these two alternative processes has in recent years been much obscured. Even their names have often been abandoned. As respects the majority of bipartite treaties this is not indeed the case. Such instruments, just as they are still very often expressly designated "treaties" rather than given any alternative name, where they provide for ratification, tend to do so in express terms and, where they contemplate the participation of third parties, commonly stipulate for "accession" ex nomine. Even here there are exceptions. Thus it would appear that in contemporary Polish practice the exchange of "instruments of approval" is sometimes stipulated for in bipartite instruments drawn up in the
French or English language. The term "confirmation" instead of "ratification" is also sometimes found.

81. In so far as concerns the major multipartite treaties, which are so infrequently designated "treaties" in modern times, little remains of the traditional usages of practice in relation to ratification and accession except that a distinction continues to be drawn between mediate conclusion or acceptance by means of the signature of a representative with full or implied powers and immediate conclusion by means of some formal act, corresponding either to ratification or accession, performed otherwise than by such a representative. The terms "acceptance" and "approval" have thus come to connote both an immediate act following signature and an act in the nature of accession as traditionally understood. There is nothing inherently objectionable in developments of this sort, nor in the opening of treaties to signature by parties strangers to their negotiation, nor yet in the permitting of accession before entry into force, or in the dispensing with signatures altogether.67 On the contrary, these variants of classical practice, as adopted in the common form clause used in multipartite instruments drafted under the auspices of the United Nations, appear to be highly convenient.68 They would seem to permit, in conformity with the principle that sovereign States neither are nor must be allowed to become fettered by mere forms, a very desirable liberty to individual States to adopt whatever methods of accepting treaty obligations their constitutions or circumstances may indicate as necessary or desirable. In consequence there has been adopted in the present draft the somewhat bold expedient of dispensing with all mention of the words "ratification" and "acquiescence" and of concentrating rather upon the distinction between the "mediate" conclusion or treaties by the signature or other act of representatives with full powers or like authority and "immediate" conclusion, by direct governmental acts. The term "acceptance" is employed in the present draft. That word makes no distinction between an act of "immediate" acceptance (i.e. acceptance otherwise than through the act of a person to whom treaty-making capacity is delegated) following signature, and such an act not preceded by signature. The justification for this is that, unless signature constitutes acceptance, it is the act of "immediate" acceptance which alone binds the party concerned. A prior signature may well have significance for a different purpose, that is to say the authentication of the text of the treaty in question. Or it may, notwithstanding its ineffectiveness to bind the party concerned, be an essential prerequisite to an act of "immediate" acceptance by that party. But these possibilities are provided for, firstly, by the terms of article 6 of the present draft and, secondly, by the inclusion in article 9 (1) of the words "Unless the contrary is . . . indicated [i.e. in a treaty]", which govern and qualify the rule that a State or international organization may accept a treaty by the making of a formal instrument of acceptance.

Article 9.

. . .

(2) An instrument of acceptance must be communicated to such depository as a treaty may designate.

(3) If no depository is designated an instrument of acceptance or a copy thereof must be communicated, in the case of a treaty already in force generally, to every party to that treaty, and in the case of a treaty not yet in force generally, to every, or as the case may be to every other, State or international organization which may have taken part in the negotiation of that treaty.

Comment

83. Clauses (2) and (3) of article 9 merely indicate the admitted rule as to what is requisite to the effectiveness of an instrument of acceptance. Such an instrument is not ordinarily effective as from its making, but only from its communication to the other parties concerned.71 It requires to be communicated, in the case of a bipartite treaty, to the opposite party; in the case of a multipartite treaty, either to each and every other party to the treaty or to the negotiation thereof or, as it is usual to provide, to a depository State or organ of an international organization. The practice of designating a depository for a multipartite treaty is now so invariable that it is thought correct to regard communication to such a depository State instead of to the individual parties as the rule rather than the exception. Provision to this end in the present draft has the further advantage of facilitating the influencing of treaty practice by the regulation of the discharge of depository functions. Thus it would be possible, in the case of the Secretary-General of the United Nations, for the General Assembly to lay down regulations for the conduct of that official of any duties laid upon him as depository within the meaning of article 9 (2) of the draft.72

Reservations to treaties

Article 10. (1) Unless the contrary is therein indicated or otherwise follows from the nature of that treaty, a State or international organization may accept a treaty subject to a reservation, that is to say a special term limiting or varying the effect of that treaty in so far as concerns the relations of that State or organization with one or more of the existing or future parties to the treaty.

Comment

84. The purpose of clause (1) of article 10 is, principally, to indicate the sense in which the word "reservation" is employed in the present draft. That word is used as meaning a special stipulation which has been agreed upon, between the parties to a treaty, limiting

---

67 See paras. 63 and 68, supra.
68 See para. 70, supra.
69 See para. 71, supra.
70 See article 8, supra.
71 See Harvard Draft Convention, op. cit., Comment, pp. 742-743.
72 See further para. 7, supra.
or varying the effect to the treaty as it applies between a particular party and all or some of the remaining parties. It is not used to connote the mere proposal, by the State or International organization interested, of such a stipulation. For it is clear that no such proposal is of any effect unless it is consented to, expressly or impliedly, by other States or organizations concerned. As to the use of the term “reservation” in the sense of a mere proposal see the Harvard Draft Convention, article 13.

85. A reservation is commonly regarded as a term limiting the effects of a treaty as it applies between one party and the remaining parties; cf. ibid. Certainly it is rare to find an example of a special term proposed by a party the effect of which is to increase rather than diminish that party’s obligations under the treaty. Where, however, an article of a treaty which is reserved against is expressed negatively, this is the effect of a “reservation”. Thus where a stipulation relating to the territorial application of a treaty is so framed as to permit States to “contract in” in respect of their colonies rather than to “contract out”, cases of “negative reservations” may arise. For a remarkable example of a different sort, see the reservation of the Union of South Africa to Article XXXV of the General Agreement on Tariffs and Trade made on becoming a party to the Protocol of 24 March 1948.


As the article reserved against stipulates that the agreement “shall not apply” as between parties which have not concluded tariff negotiations with each other and which do not consent to its application, the effect of the reservation is to enlarge rather than restrict the obligations of South Africa.

86. But if what may be termed “negative reservations” are comparatively rare, proposals of so-called reservations of obscure import or of a completely empty character are common enough. In relation to these a well-known rule of practice applies: they are to be treated as proposals of reservations proper. That is to say, they have no validity unless they are accepted by the then parties concerned.

87. What is as all events abundantly clear is that a reservation, though it may be proposed subsequently to the negotiation of the principal terms of a treaty, is part of the bargain between the parties and therefore requires their mutual consent to its effectiveness. If this be recognized, as it must be, there is no point in restricting the definition of a reservation to a special term of a limiting character. Its essence is that it is a term of a special or abnormal character: whether it limits, increases, or merely varies the obligations of the party proposing it, is wholly immaterial. For this reason the present draft defines a reservation as “a special term limiting or varying the effects of a treaty”.

88. The same clause indicates incidentally the obvious consequence which results from the nature of a reservation as a part of the bargain between the parties to a treaty, that, just as the parties may in general agree upon any terms in the treaty, so they may admit any special term by way of reservation. But, in relation to particular treaties, it may have been made clear in advance that the intending parties will not accept any reservation whatsoever. Clauses to this effect in texts of treaties are not uncommon. For this reason article 10 (1) opens with the words “Unless the contrary is indicated . . .”.

89. In the case of one class of treaties also—that of international labour conventions—it would appear that reservations are inadmissible although nothing to this effect is said in the texts thereof. This, it has been contended by the International Labour Office, results from the “peculiar legal character” which their mode of drafting, conclusion and application gives to labour conventions. It is not to be denied that in practice reservations to labour conventions have not been admitted. But it is to be noted that the League of Nations Committee of Experts for the Progressive Codification of International Law declined to commit itself to the theoretical explanation offered, which is indeed difficult of acceptance. A more cautious but wholly sufficient explanation would be that the parties to the Constitution of the International Labour Organisation have, by becoming parties, in effect renounced the right to make what bargains they please within the sphere of operation of the organization, and have agreed only to make such equilateral bargains as its Constitution impliedly admits. And it is believed that this, and possibly similar, cases are sufficiently covered by the use of the words “. . . or otherwise follows from the nature of that treaty . . .” in the clause of the present draft now commented upon.

Article 10.

. . .

(2) Unless the contrary is indicated in a treaty, the text of a proposed reservation thereto must be authenticated together with the text or texts of that treaty or otherwise formally communicated in the same manner as an instrument or copy of an instrument of acceptance of that treaty.

Comment

90. It is commonly agreed that a proposal of a reservation must take the shape of a formal declaration and such a declaration is frequently “endorsed upon the original [text of the] treaty itself, usually above . . . the signature of the representative or representatives of the State on behalf of which the reservation is [proposed] . . .” or “. . . included in the instrument of ratification or of accession of a State . . .”, or “. . . recorded in a separate formal instrument collateral to the treaty, such as a protocol or a procès-verbal of signature, a procès-verbal of the exchange or deposit of ratifications, a protocol of accession etc.”. Article 10 (2) provides for the following of parallel procedures with respect to the modes of acceptance of treaties prescribed by the present draft. The liberty of parties to agree . . .

———


90. League of Nations Document C.212.1927.V.

91. Ibid., C.266(2)1927.V.

upon some alternative method of proposing a reservation is preserved by the opening words “Unless the contrary is indicated in a treaty....”

91. It likewise appears to be the better view that, when a reservation is proposed in any of the traditional modes referred to, the State or international organization proposing it is not bound to repeat it at any subsequent stage in the making of the treaty concerned. Article 10 (2) has been drafted on this assumption and is therefore to be understood to mean that a proposed reservation requires to be authenticated in but one of the fashions indicated.

92. Having regard to the contemporary practice of elaborating the texts of projected treaties within organs of international organizations, it is thought particularly important to lay down a clear rule that the text of a proposed reservation must be authenticated in formal fashion. For it would not appear that a statement made, for instance, in the General Assembly of the United Nations in the course of debate upon a projected treaty can constitute an effective proposal of a reservation which States subsequently accepting the treaty in question must be deemed also to accept.

Article 10.

(3) The acceptance of a treaty subject to a reservation is ineffective unless or until every State or international organization whose consent is requisite to the effectiveness of that reservation has consented thereto.

Comment

93. It being clear that a proposal of a reservation is ineffective to bind the States or organizations to whom it is proposed until they have consented to it, and it being frequently the case that such a proposal is made simultaneously with what purports to be an act of acceptance of the treaty concerned, it is necessary to emphasize in the present draft that such a purported acceptance is of no effect unless or until the necessary consents are forthcoming. What consents are necessary is indicated in clauses (4) and (5) of article 10. The purpose of clause (3) is merely to lay down the principle outlined. Its words “every State or international organization whose consent is requisite to the effectiveness of that reservation” have thus to be read subject to the clauses following. The clause has likewise to be read in the light of the circumstance that the necessary consents may be implied as well as express, and that they may have already been given before or simultaneously with the performance of the purported act of acceptance to which a proposed reservation is attached.

94. The principal cases in which consent to a proposed reservation may be implied are dealt with in the comments on the succeeding clauses of article 10. But it is proper here to emphasize that what is in every case requisite is the consent, express or implied, of each individual State or international organization concerned. The circumstance that the parties to a treaty or to the negotiation of a proposed treaty are all members of an international organization or are otherwise combined in a quasi-collectivity does not, by itself, involve that a collective consent to a proposed reservation is sufficient to render the latter effective. Instances of such projected collective consent have not been lacking. Thus when the United States included in what purported to be an instrument of acceptance of the Constitution of the World Health Organization a reservation of its right of withdrawal from the organization upon the giving of a year’s notice, the plenary organ of the Organization purported to accept the reservation by resolution. The depository of the Constitution, the Secretary-General of the United Nations, found himself in this case able to regard the United States as having become a member of the Organization upon the date of the resolution referred to because, the Constitution making no mention of withdrawal from the Organization, it was possible to regard the so-called “reservation” and its “acceptance” as an inquiry and decision as to the interpretation of the Constitution, for which the Health Assembly is fully competent. When, however, the Union of South Africa proposed a “Reservation” on purporting to become party to the “Protocol of 24 March 1948, Modifying Certain Provisions of the General Agreement on Tariffs and Trade”, the Secretary-General, as depository of both instruments, felt bound to notify the other States concerned of the proposed reservation and to request their views thereon.

A procès-verbal of signature was also drawn up reciting the understanding of the Government of South Africa that its signature would not have any legal effect until each such State has notified its acceptance of the proposed reservation. This action was taken notwithstanding that at their second session in September, 1948, the “Contracting Parties” between whom the General Agreement is provisionally in force and who possess a quasi-collective personality in accordance with the Protocol of Provisional Application, had invited South Africa to become party to the Protocol subject to a reservation to the same effect as that proposed by the latter State. For the view was held that such a collective consent, given by representatives of States not assembled for that particular purpose, did not bind each individual State concerned. It may be added that subsequently the Secretary-General agreed to regard the South African signature as effective after a “Declaration accepting the reservation... attached to the signature of the Union of South Africa...” had been adopted by the “Contracting Parties” at a later session. This declaration, like the invitation which preceded it, was indeed also a collective act. But, having been made after the question had been specifically raised with each individual State concerned, it could be taken as implying individual as well as collective consent in the reservation to which it related.

95. In the light of the considerations discussed in connexion with the above incidents, article 10 (3) is to be understood as requiring that the consent of a State or organization whose acceptance of a proposed reservation is requisite to its effectiveness, shall be the individual consent of that State or organization. Such


See para. 85, supra.
individual consent may, however, be indicated by a process of participation in a collective act.

**Article 10.**

... (4) Unless the contrary is indicated in the text of a treaty, a reservation proposed before the entry into force generally of a treaty is effective only if consented to expressly or impliedly by every State or international organization which may have taken part in the negotiation of that treaty, and a reservation proposed thereafter only if consented to by every one of the then parties to that treaty.

**Comment**

96. It follows from the nature of a reservation as part of the bargain between the parties, that it must in general be consented to by all the parties to the treaty in respect of which it is proposed. If, however, a proposed reservation relates to a projected treaty not yet in force there are naturally no "parties" to consent to it. In that case, as a term of the proposed bargain, the suggested special stipulation must be consented to by all States and international organizations which have taken part in the negotiation of the projected treaty. This last rule follows from the fact that the process of negotiation of multipartite treaties is in effect one of offer and acceptance: "In all conventions of this nature there are probably provisions which do not appeal much to certain signatories but which they are prepared to accept as a return for securing the acceptance of other provisions, to which they attach importance, by other parties of the convention. If, however, any party is entitled, without the consent of the other signatories, to pick out of the convention any provisions to which it objects and exclude them by means of a reservation from the obligations which it accepts, it is obvious, not only that the object of the convention might be defeated, but that the ... other signatories are not in fact getting what they bargained for." 81

97. The conception of the provisions of a projected treaty as an "entire offer" might be taken, in strict logic, to require that any reservation proposed thereto should be consented to by all the parties to their negotiation and all States or international organizations entitled in accordance with these provisions to accept the projected treaty. The same thesis could even be held to require that a reservation proposed to a treaty in force should be consented to by a State which participated in the negotiation of the terms of that treaty but which failed thereafter to accept these terms as binding upon it. But any such rule would clearly go further than either practice or convenience can be said to demand and would ignore the circumstance that very often consent to a proposed reservation is implied rather than express.

98. It is believed that the rule stated in clause (4) of article 10 reflects adequately the practice of States at the present time. A more detailed and comprehensive rule is indeed laid down in the Harvard Draft Convention, which calls, in the case of a projected treaty left open for signature until a certain date, for the consent to any proposed reservation of "all other States which sign before the date fixed." 82 In the cases of a projected treaty such as the Convention on the Prevention and Punishment of the Crime of Genocide, article XI of which, as implemented by the General Assembly's resolution 368 (IV) of 3 December 1949, contemplates its signature by States which are not Members of the United Nations (and which are therefore, on any construction, strangers to its negotiation), and article XIII of which provides that it shall not come into force until ratified or acceded to by twenty States, the rule quoted would require the consent of the non-member States concerned to a reservation proposed by a Member of the United Nations. If any such requirement were insisted upon, a position might be reached in which the Convention could never come into force because non-member States not themselves intending to proceed to ratification objected to reservations proposed by Member States and thereby prevented effective ratification by the latter. It is thus of interest to note that such reservations as have been proposed by Member States purporting to sign the Convention have merely been notified by the Secretary-General to the interested non-member States, whilst such (Member) States as have proceeded to ratification already have been further informed that it is the understanding of the Secretary-General that all States ratifying or acceding to the Convention will have accepted such reservations unless notification of objection is received before the date of entry into force (information supplied by the Secretariat).

99. It may be pointed out that the steps taken by the Secretary-General with respect to States which have already ratified the Convention on the Prevention and Punishment of the Crime of Genocide conform to the rule laid down in article 10 of the present draft inasmuch as the latter recognizes the well-known rule of practice that consent to a proposed reservation may be tacit as well as express. The principal cases in which such consent is to be presumed are dealt with in the succeeding clause. (As to the presumption of individual consent for participation in a collective act, see paras. 93-95 supra.) However, it is always competent to the parties to prescribe in a treaty a special procedure for the acceptance of reservations. Thus, for instance, the Protocol of the Convention on the Simplification of Customs Formalities substituted the consent of the Council of the League of Nations for that of the parties or intending parties. 83 Such a case is provided for by the opening words of article 10 (4): "Unless the contrary is indicated in the text of a treaty".

100. As to the meaning of the term "entry into force generally", which is employed in article 10 (4), see article 11 of the present draft.

**Article 10.**

... (5) A State or international organization accepting a treaty impliedly consents to every reservation thereto of which that State or organization then has notice.

81 H. W. Malkin, "Reservations to multilateral conventions", British Year Book of International Law, vol. 7 (1926), p. 142.

82 See appendices, Harvard Draft Convention, article 14 (b).

Comment

101. It is generally admitted that if, for instance, a State is permitted to propose a reservation on signature of a treaty subject to ratification, such proposal need not be repeated on ratification and that any other signatory proceeding to ratification is to be presumed to consent to that proposal. It is likewise universally admitted that a State acceding to a treaty consents to such reservations as may already be in operation as between the then parties. Clause (5) of article 10 is designed to embrace these, and other, cases in which a party coming to a reservation already in operation, or at least already proposed, is to be presumed to consent thereto.

102. The clause has to be read in the light of the requirement of the present draft, stated in article 10 (2), that reservations must be proposed in formal fashion. It is thus not to be taken that a State or international organization has notice within the meaning of the clause, for instance, of a reservation to a projected treaty elaborated within the General Assembly when it has been merely declared in the course of debate that a particular State intends to propose a reservation to that treaty.84

Entry into force and entry into operation of treaties

Article 11. (1) A treaty enters into force at such time as may be indicated in that treaty.

Comment

103. The principal purpose of article 11 (1), which states a very wide rule, is to emphasize the convenience of the practice, which has grown very much in recent years, of providing in a treaty as to when it shall come into force. In relation to that rule it seems desirable to point out the distinction between the date of entry into force of a treaty, the date, that is, when the negotiated terms become binding and when a projected treaty becomes a definitive treaty, and the date of entry into operation of its stipulations, or some of them. The latter date may well be posterior to the former. But, notwithstanding that the performance of the terms of a treaty may not be immediately required, the obligation to perform at whatever date may be indicated arises from the moment of the treaty's entry into force. See, further, article 11 (4).

Article 11.

... (2) If there is therein no indication as to when it enters into force, a treaty enters into force generally, that is to say with respect to every State or international organization which may have accepted that treaty, as soon as every State or international organization which may have taken part in the negotiation thereof has accepted it.

Comment

104. The rule stated in article 11 (2) results from the nature of a treaty as an act of the common will of the parties which have taken part in its making. It leaves untouched the position that a projected treaty may be so drafted that a single State or international organization accepting its terms may, by its acceptance, become bound to observe these terms notwithstanding that no other State or organization accepts them. In such a case an international legal obligation quasi-ex contractu arises, but there is not a true treaty.85

105. Together with the clause next following, article 11 (2) establishes for the purposes of the present draft a distinction, well-known in practice, between the entry into force generally of a treaty and its entry into force as respects a State or international organization becoming a party at a later date. This distinction is relied on elsewhere in the draft.86

106. The opening words of the clause, "If there is [in a treaty] no indication as to when it enters into force..." serve to permit the parties to provide in any particular case that a projected treaty shall enter into force generally, that is to say with respect to the States or organizations which may then have accepted it, when it shall have been accepted by a less number of parties than the totality of those taking part in its negotiation. In the case of multipartite treaties such provision is of course common.87 Where provision to this effect is made, the distinction established in the present draft between entry into force generally and entry into force otherwise than generally must be understood as referring to entry into force in accordance with such provision and entry into force otherwise.

Article 11.

... (3) Unless the contrary is therein indicated, a treaty enters into force, with respect to a State or international organization accepting that treaty after its entry into force generally, as soon as that State or organization has accepted it.

Comment

107. Article 11 (3) lays down a sufficiently well-known principle to need no comment. It may be observed, however, that a particular treaty may provide that, for some or all of its purposes, an acceptance effected after the date of its entry into force generally shall be deemed to operate retroactively to that date.88

Article 11.

... (4) Unless the contrary is therein indicated, every stipulation of a treaty enters into operation with respect to a party to that treaty as soon as the treaty enters into force with respect to that party.

Comment

108. Despite the distinction between the date of entry into force of a treaty and the date of its entry...
into operation, these are identical unless the contrary is agreed. It may be an express or implied term of the bargain between the parties that the stipulations of the treaty, or some of them, shall only operate as from a date subsequent to the conclusion of the treaty, that is, to the date of its entry into force. Likewise it may be a part of the bargain that such stipulations shall operate even before the date on which that bargain becomes binding. This is in effect the case with formal clauses, respecting acceptance, depository functions, and entry into force itself which "are applicable before a treaty comes into force, in the sense that such provisions are operative and must be complied with before the treaty can come into force". It seems therefore desirable to emphasize in the present draft the general rule applicable, whilst providing, by means of the opening words of article 11 (4), "Unless the contrary is . . . indicated . . .", that express agreement or the nature of particular stipulations, e.g.: formal clauses, may exclude its operation.

APPENDIX A
Harvard Draft Convention on the Law of Treaties
(Relevant articles)
Article 1. Use of the term "Treaty"
As the term is used in this Convention:
(a) A "treaty" is a formal instrument of agreement by which two or more States establish or seek to establish a relation under international law between themselves.
(b) The term "treaty" does not include an agreement effected by exchange of notes.
(c) The term "treaty" does not include an instrument to which a person other than a State is or may be a party.

Article 2. Use of certain other terms
As the terms are used in this Convention:
(a) A "State" is a member of the community of nations.
(b) A "signatory" of a treaty is a State on behalf of which the treaty has been signed.
(c) A "party" to a treaty is a State which is bound by the treaty.

Article 3. Capacity to make treaties
Capacity to enter into treaties is possessed by all States, but the capacity of a State to enter into certain treaties may be limited.

Article 4. Name given to a treaty
The international juridical effect of a treaty is not dependent upon the name given to the instrument.

Article 5. Form of a treaty
(a) Although a treaty, as the term is used in this Convention, must be a formal instrument, no particular form is required.
(b) In the absence of agreement upon a procedure which dispenses with the necessity for signature, a treaty must be signed on behalf of each of the States concluding it.

Article 6. Ratification
(a) As the term is used in this Convention, a ratification of a treaty is an act by which the provisions of the treaty are formally confirmed and approved by a State.
(b) A treaty may designate the organ of a State by which a ratification shall be executed by that State; in the absence of such a designation, a ratification may be executed by any authorized organ of the State.

APPENDICES

Article 7. When ratification is necessary
The ratification of a treaty by a State is a condition precedent to its coming into force so as to bind that State:
(a) When the treaty so stipulates; or
(b) When the treaty provides for ratification by that State and does not provide for its coming into force prior to such ratification; or
(c) When ratification was made a condition in the full powers of the State's representatives who negotiated or signed the treaty; or
(d) When the form or nature of the treaty or the attendant circumstances do not indicate an intention to dispense with the necessity for ratification.

Article 8. No obligation to ratify
The signature of a treaty on behalf of a State does not create for that State an obligation to ratify the treaty.

Article 9. Obligation of a signatory prior to the coming into force of a treaty
Unless otherwise provided in the treaty itself, a State on behalf of which a treaty has been signed is under no duty to perform the obligations stipulated, prior to the coming into force of the treaty with respect to that State; under some circumstances, however, good faith may require that pending the coming into force of the treaty the State shall, for a reasonable time after signature, refrain from taking action which would render performance by any party of the obligations stipulated impossible or more difficult.

Article 10. Date of coming into force
Unless otherwise provided in the treaty itself,
(a) A treaty which is not subject to ratification shall come into force upon signature.
(b) A treaty which contains provision for exchange or deposit of ratifications shall come into force upon such exchange or deposit of ratification by all the signatories.
(c) A treaty which is subject to ratification but which contains no provision for exchange or deposit of ratifications, shall come into force when it is ratified by all the signatories and when each signatory has notified its ratification to all other signatories.

The provisions of this article are limited by the provision of Article 17 of this Convention.

Article 11. Non-retroactive effect
Unless otherwise provided in the treaty itself, a treaty which comes into force subsequently to the time of signature shall not be deemed to have effect as from the time of signature.
Article 13. Use of the term “reservation”

As the term is used in this Convention, a “reservation” is a formal declaration by which a State, when signing, ratifying or acceding to a treaty, specifies as a condition of its willingness to become a party to the treaty certain terms which will limit the effect of the treaty in so far as it may apply in the relations of that State with the other State or States which may be parties to the treaty.

Article 14. Reservations at time of signature

Unless otherwise provided in the treaty itself,

(a) If a treaty is signed by all the signatories on the same date, a State may make a reservation when signing only with the consent of all other signatories.

(b) If a treaty is open for signature until a certain date, a State may make a reservation when signing only with the consent of all other States which sign before the date fixed.

(c) If a treaty is open for signature at any time in the future, a State may make a reservation when signing, if it signs before the treaty has been brought into force, only with the consent of all the States which become signatories before the treaty is brought into force; if it signs after the treaty has been brought into force, only with the consent of all the States which have become signatories or parties prior to the time of signature by that State.

(d) If a State has made a reservation when signing a treaty, its later ratification will give effect to the reservation in the relations of that State with other States which have become or may become parties to the treaty.

Article 15. Reservations at time of ratification

Unless otherwise provided in the treaty itself,

(a) If a treaty is signed by all the signatories on the same date, a State may make a reservation when ratifying only with the consent of all other States which are signatories and of all the States which have acceded to the treaty prior to the ratification by that State.

(b) If a treaty is open for signature until a certain date, a State may make a reservation when ratifying only with the consent of all other States which become signatories before the date fixed and of all the States which have acceded to the treaty prior to the ratification by that State.

(c) If a treaty is open for signature at any time in the future, a State may make a reservation when ratifying, if it ratifies before the treaty has been brought into force, only with the consent of all other States which become signatories before the treaty is brought into force; if it ratifies after the treaty has been brought into force, only with the consent of all other States which have become signatories or have acceded to the treaty prior to the ratification by that State.

(d) If a State has made a reservation when ratifying a treaty, the reservation has effect only in the relations of that State with other States which have become or may become parties to the treaty.

Article 16. Reservations at time of accession

Unless otherwise provided in the treaty itself,

(a) A State may make a reservation when acceding to a treaty only with the consent of all the signatories to the treaty and of all States which have previously acceded to the treaty.

(b) If a State has made a reservation when acceding to a treaty, the reservation has effect only in the relations of that State with other States which have become or may become parties to the treaty.

Article 17. Registration and publication

(a) A treaty, the registration of which is required by Article 18 of the Covenant of the League of Nations, is not binding until so registered.

(b) A treaty, the registration of which is not required by Article 18 of the Covenant of the League of Nations, is not binding until it has been registered with or communicated to the Secretariat of the League of Nations, or until it has been officially published by one of the States which become parties in such manner that its contents may be known by States not parties or signatories.

(c) If such registration, communication or publication is effected within a reasonable time after the date on which the treaty would otherwise have come into force in accordance with Article 10 of this Convention, the treaty may be regarded as having been binding from that date.

Article 20. Pacta sunt servanda

A State is bound to carry out in good faith the obligations which it has assumed by a treaty (pacta sunt servanda).

Article 21. Treaties concluded by incompetent organs

A State is not bound by a treaty made on its behalf by an organ or authority not competent under its law to conclude the treaty; however, a State may be responsible for an injury resulting to another State from reasonable reliance by the latter upon a representation that such organ or authority was competent to conclude the treaty.

Article 23. Excuses for failure to perform

Unless otherwise provided in the treaty itself, a State cannot justify its failure to perform its obligations under a treaty because of any provisions or omissions in its municipal law, or because of any special features of its governmental organization or its constitutional system.

APPENDIX B

Convention on Treaties adopted by the Sixth International Conference of American States, Havana, 20 February 1928

Relevant articles

Article 1

Treaties will be concluded by the competent authorities of the States or by their representatives, according to their respective internal law.
Article 2
The written form is an essential condition of treaties.
The confirmation, prorogation, renewal or continuance, shall also
be made in writing unless other stipulations have been made.

Article 3
The authentic interpretation of treaties, when considered necessary
by the contracting parties, shall likewise be in writing.

Article 4
Treaties shall be published immediately after exchange of
ratifications. The failure to discharge this international duty shall
affect neither the force of treaties nor the fulfillment of obligations
stipulated therein.

Article 5
Treaties are obligatory only after ratification by the contracting
States, even though this condition is not stipulated in the full
powers of the negotiators or does not appear in the treaty itself.

Article 6
Ratification must be unconditional and must embrace the entire
treaty. It must be made in writing pursuant to the legislation of
the State.

In case the ratifying State makes reservations to the treaty it
shall become effective when the other contracting party informed
of the reservations expressly accepts them, or having failed to
reject them formally, should perform action implying its acceptance.

In international treaties celebrated between different States, a
reservation made by one of them in the act of ratification affects
only the application of the clause in question in the relation of the
other contracting States with the State making the reservation.

Article 7
Refusal to ratify or the formulation of a reservation are acts
inherent in national sovereignty and as such constitute the exercise
of a right which violates no international stipulation or good form.
In case of refusal it shall be communicated to the other contracting
parties.

Article 8
Treaties shall become effective from the date of exchange or
deposit of ratification, unless some other date has been agreed upon
through an express provision.

Article 19
A State not participating in the making of a treaty may adhere
to the same if none other of the contracting parties be opposed, its
adherence to be communicated to all. The adherence shall be
deemed final unless made with express reservation of ratification.

APPENDIX C
David Dudley Field's Draft Code*
(Relevant articles)

(Appendix continues with relevant treaties and articles,
including references to the Law of Treaties and Bluntschli's
works.)
Every independent Power is presumed to have capacity to conclude international treaties. Nevertheless, in cases where the right of a State to bind itself by treaty is subjected to restrictions, this circumstance should be taken into account in the relationships of the States inter se.

A treaty is not binding on a State unless the persons who conclude it are authorized to represent the State.

In cases where the head of a State is required under the constitution to obtain the concurrence and assent of the representative bodies (Senate, Parliament, Federal Council, Chamber of Deputies), he is not under international law deemed to have capacity to bind the State by a treaty concluded without such concurrence and assent.

In cases where a person who has not received the necessary powers prepares and signs a treaty in the name of a State, that State is not bound by such treaty for so long as it has not ratified the treaty. The other party may withdraw from the treaty until such ratification, unless it has renounced that right.

When the State does not ratify the treaty concluded in its name by a person who has not received the necessary powers, the treaty should be deemed never to have existed.

A State which has derived some advantage from a treaty concluded in its name by a person who was not authorized to represent it should, if the treaty fails to be ratified, and to the extent to which circumstances permit, make restitution of such advantage as it has received without consideration.

A State is deemed to retain its free will even if it is compelled by weakness or necessity, to consent to a treaty dictated to it by a stronger State.

Nevertheless, if the persons who represent the State on the occasion of the signature of a treaty are not in possession of their free will, either owing to mental derangement or their inability to appreciate the significance of their acts, or because they are subjected to violence or to grave and immediate threats, then, in such circumstances they are not capable of entering into binding commitments in the name of their government.

The obligation to respect treaties rests upon conscience and the sentiment of justice. The respect for treaties is one of the necessary bases of the political and international organization of the world.

Consequently, treaties which infringe general human rights or the necessary principles of international law shall be null and void.

Treaties which:
(a) Introduce, extend or protect slavery (Articles 360 et seq.);
(b) Deny all rights to aliens (Articles 381 et seq.);
(c) Are inconsistent with the principle of the freedom of the seas (Articles 370 et seq.);
(d) Provide for persecution by reason of religious opinion; are repugnant to recognized human rights and therefore void.

Treaties the object of which is to:
(a) Establish the domination of one Power over the whole world;
(b) Eliminate by violence a viable State which does not threaten the maintenance of peace;
are repugnant to international law and therefore void.

Treaties the intention of which is to abrogate or alter the constitution or laws of a State do not necessarily constitute a violation of international law, if they have been concluded by the representatives of the State concerned; but in certain cases they shall be unenforceable and inoperative.

Treaties the content of which is incompatible with treaties previously concluded with other States are void to the extent that their application is opposed by the State whose prior rights are threatened.

Every State should respect even onerous conditions as well as undertakings which, if enforced, would be damaging to its prestige. A state may, however, consider as void any treaties incompatible with its existence or development.

The validity of treaties is independent of the form of government of the contracting States, or of their religion or that of their representatives.

2. Form of treaties

Declarations made by a State, even if made to another State, do not constitute treaties unless:
(a) They clearly evince the intention to enter into an obligation;
(b) The other State accepts the promise embodied in the declaration.

Agreement on certain points by a number of States in the course of negotiations merely constitutes a draft treaty, which is not binding on any of the parties.

Signature of the final protocol or the special instrument containing the treaty by the accredited envoys or agents of the contracting States is binding on the States represented, when given unconditionally and without reservations. Nevertheless, in certain circumstances the treaty may be regarded as subject to ratification, even if this has not been explicitly stated.

An unjustified refusal to ratify a treaty may, according to the circumstances, be considered as improper or highly damaging to a State's credit, and may jeopardize the friendly relations previously existing between the contracting parties, but such refusal may never be treated as a violation of the law, even if the person responsible for the negotiations acted within the terms of his powers and signed the treaty in conformity with his instructions.

When a treaty is ratified, its effect, failing agreement to the contrary, is retroactive to the date of signature of the final protocol by the envoys or agents of the contracting States.

Treaties may be concluded in any form that may be used to express the intentions of the contracting States.
When the treaty is to be drawn up in writing, the parties may either jointly sign a protocol, or draw up an instrument in several copies, each bearing the signatures of the accredited agents or of the sovereigns of the different contracting States, or transmit to the State upon which the treaty confers certain rights a declaration signed by the representatives of the States which contract certain obligations towards that State.

It is not necessary to bring treaties to the knowledge of the public in order to render them valid and enforceable, although the publicity of a treaty is a guarantee of its execution.

APPENDIX E

Fiore's Draft Code
(Relevant articles)

TITLE 2
TREATIES AND THE CONDITIONS FOR THEIR VALIDITY

Treaties in general

744. Any convention between two or more States, drawn up in writing and concluded with a view thereby to create an obligation or to annul or modify one already subsisting, is called a treaty.

745. Treaties may be divided into named and unnamed.

The former are those which by international law are designated by a particular name, derived from the subject-matter of the agreement. Such are treaties of commerce, territorial cession, extradition and the like.

Unnamed treaties are those concluded for different objects, not subsumed under a specific name, but which, nevertheless, affect certain political or social interests of States. They are more commonly called conventions.

746. Whatever the denomination of a written act concluded by the sovereignty of the State to declare its will to bind itself, the resulting international obligation with all its effects should be considered as subsisting whenever the act complies with the substantial conditions necessary to its validity.

Requirements for the validity of a treaty

747. The conditions necessary to the validity of a treaty are:
(a) The capacity of the parties;
(b) Reciprocal consent, legally expressed;
(c) A lawful and attainable object, according to the principles of international law.

Capacity to conclude a treaty

748. Any State which enjoys rights of sovereignty must be deemed capable, in principle, of concluding a treaty and thus contracting legal obligations and acquiring rights with respect to the other contracting party, subject, however, to the limitation set forth in rule 739. (Invalidity of obligations contrary to a rule of international "common" law.)

This capacity, furthermore, may be possessed by associations to which international personality has been attributed (see rule 81) within the limits, nevertheless, of the purposes for which personality was recognized and is considered as subsisting.

749. The power to conclude treaties may be attributed to States not fully possessed of international personality, when, by the constitutional law governing their union, this power is reserved to them for certain specific objects.

750. In a State, constituted under the form of a federated State or of a confederation, the power of the individual States to conclude treaties must be determined by their international personality, as fixed in the constitutional compact.

Persons competent to conclude treaties

751. Only persons having the power to negotiate and conclude a treaty under the constitutional law of the State should be deemed competent to negotiate a treaty in the name of the State.

752. When, by the constitutional law of a State, the Executive is given the power to negotiate treaties, reserving to another governmental body a final assent to their definitive conclusion, the rules of the constitution govern the competency of the various parties in the conclusion of treaties.

753. Plenipotentiaries may be considered as properly delegated to represent the State to negotiate and conclude a treaty, when they are provided with official full powers, conferred upon them for that purpose. They should be exhibited to the other party, who should take cognizance of them. Conventions concluded within the limits of the full powers officially exhibited should be regarded as legally concluded.

754. Secret instructions given to the plenipotentiary delegated to conclude a treaty cannot have any legal force to modify in its international effects the full powers officially communicated to the other contracting party.

In case the plenipotentiary has concluded a treaty within the limits of the full powers exhibited, but contrary to the secret instructions of his government, he would incur personal responsibility to his government, which might justifiably punish the delinquency in conformity with its municipal law, but could not affect, in any way, the legal value of the international obligation contracted by virtue of the instructions contained in the full powers of his agent.

Ratification of treaties

755. Ratification must be considered essential to making a treaty final and perfect:
(a) When required by the constitutional law of the State to make the treaty binding upon it;
(b) When the plenipotentiaries who negotiated and concluded the treaty have made its validity dependent upon its ratification by the sovereign they represent or by the proper authorities.

Outside of these cases, a treaty concluded by a plenipotentiary and signed by him without reserving ratification, by virtue of the full powers conferred upon him and duly exhibited to the other party, and within the strict limits of his powers, must be considered as final and perfect from the day of its signature.

Consent required for the validity of a treaty

756. Treaties concluded between States must be freely assented to. Assent is not valid if given by mistake, extorted by violence or obtained by fraud.

757. The consent cannot be considered as lacking freedom when the treaty is assented to under pressure of a hostile power which has occupied part of the State territory, threatening the invaded State with greater disaster if the proposed conditions should not be accepted.

758. Duress resorted to by one party to a treaty against another is a ground for nullity only when it constitutes true physical violence, or when the person who signed the treaty was compelled to do so through external constraint which deprived him of all deliberation and freedom of judgement.

759. Fraud may be deemed a ground for the nullity of treaties only when the fraudulent methods resorted to by one of the parties were such as to mislead the other party as to the object of the convention.

*From Fiore's International Law Codified.
Lawful subject-matter of treaties

760. No State may by a treaty engage to do anything contrary to positive international law or to the precepts of morals or universal justice. No State may by treaty absolutely renounce its fundamental rights, enumerated in rule 62.

761. A lawful subject-matter of contracts between States should be considered to be only such as concerns the public interests of the State and may be regarded as within the conventional power of the contracting parties, according to the principles of "common" law.

762. An engagement which violates, to the injury of another State, an obligation previously contracted by treaty with one of the parties, cannot constitute the object of a convention.

763. Anything implying a violation of the constitutional law of either contracting party cannot constitute a lawful subject-matter of a treaty. But a subject-matter not in harmony with the municipal law of one of the contracting parties may be covered by a treaty, provided the contracting party has not conditioned the legal force of the treaty upon a change in its municipal law.

Extrinsic requirements, including form

764. International treaties should be drawn up in writing, and do not acquire perfect form until they have been subscribed by all the parties to them.

765. An agreement upon certain articles of a treaty, even when drawn up in writing and signed by the contracting parties, cannot be considered a perfect reciprocal obligation with respect to the clauses adopted, independently of the final conclusion and signature of the treaty.

When, however, the clauses agreed to and subscribed are considered as a preliminary convention, concluded in order to establish the reciprocal obligations of a status quo, they should be regarded as perfect and valid until the conclusion of the final treaty or of a formal declaration that the parties consider themselves freed from any previous engagement.

766. When, in the negotiation of a treaty, a reciprocal agreement is reached on various distinct points, principal or accessory but related, and this agreement has been drawn up in writing and signed by the contracting parties, the engagements assumed do not acquire binding legal force until the treaty is finally concluded and agreement established on all the separate parts which constitute the treaty as a whole.

767. The form of the reciprocal agreement concluded between the contracting parties may vary according to the degree of importance of the object of the convention. We may, therefore, consider as sufficient a diplomatic exchange of two declarations written and subscribed by persons duly authorized, or of two cartels, notes, or manifestoes, properly subscribed.

768. An agreement relating to particular matters concluded by persons competent to contract international obligations will be valid, even though not drawn up in writing, but concluded verbally, on condition, however, that the agreement may be proved without difficulty, and that evidence thereof may be readily adduced.

APPENDIX F

Draft of the International Commission of American Jurists,
Rio de Janeiro, 1927
(Relevant articles)

Article 1

Treaties will be concluded by the competent authorities of the contracting States according to their internal law, or by their duly authorized representatives.

Article 2

Treaties must be in writing. The confirmation, prorogation, renewal, reestablishment, or continuance must observe the same form, unless other stipulations have been made.

Article 3

The interpretation of treaties, when the contracting parties consider it necessary, must likewise be in writing.

Article 4

Treaties shall be published immediately after the exchange of ratifications.

Article 5

Treaties are obligatory and in force only after ratification by the contracting States, even though this condition be not stipulated in the full powers of the negotiators nor appear in the treaty itself.

Article 6

Ratification must be unconditional and must embrace the entire treaty. It must be dispatched in writing in conformity with the constitution of the State.

In case the ratifying State makes reservations in the treaty, it shall become effective when the other contracting party, informed of the reservations, expressly accepts them.

In international conventions celebrated between different States, a reservation made by one of them in the act of ratification affects only the clause in question and the State to which it refers.

Article 7

A refusal to ratify is a right of States and can not be considered an unfriendly act. The refusal shall be communicated to the other contracting parties.

Article 8

The terms of a treaty are in effect from the date of exchange of ratifications, unless some other date has been agreed upon. Even in the latter event private rights remain safeguarded.