

Document:-  
**A/CN.4/43**

**Second Report on the Law of Treaties: Revised articles of the draft convention by  
Mr. J.L. Brierly, Special Rapporteur**

Topic:  
**Law of Treaties**

Extract from the Yearbook of the International Law Commission:-  
**1951 , vol. II**

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

# LAW OF TREATIES

## DOCUMENT A/CN.4/43

Second report : Revised articles of the draft convention, by Mr. J. L. Brierly, Special Rapporteur

[Original text: English]

[10 April 1951]

### TABLE OF CONTENTS

#### *Text of revised articles on treaties*

	<i>Page</i>
Article 1. Conclusion of treaties .....	70
Article 2. Entry into force of treaties .....	71
Article 3. Application of treaties .....	71
Article 4. Ratification of treaties .....	72
Article 5. When ratification is necessary .....	72
Article 6. Date of entry into force of treaties .....	72
Article 7. Obligation of a signatory prior to the entry into force of a treaty .....	73
Article 8. No obligation to ratify .....	73
Article 9. Accession to treaties .....	73

The draft articles which follow are submitted as a basis of discussion alternative to articles 6, 7, 8, 9 and 10 of my report of last year. The Commission will see that they follow the traditional terminology as to ratification and accession.

#### CONCLUSION OF TREATIES

##### *Article 1*

A treaty is concluded when the text agreed upon has been established in final written form, and

(a) In the case of a text agreed upon at an international conference especially convened for the purpose, either such text or the Final Act of the conference has been duly signed or initialed *ne varietur* on behalf of two or more States represented at the conference;

(b) In the case of a text drawn up by an organ of any international organization or of a specialized agency of the United Nations whose constitution provides for the adoption of conventions by such organization or agency, being conventions to which States may become parties, the rules prescribed by such constitution for the adoption or conclusion of such conventions have been duly complied with;

provided that a State, on whose behalf a treaty has been signed or initialed *ad referendum*, shall not be

deemed to have duly signed or initialed the treaty within the meaning of sub-paragraph (a).

#### *Comment*

A distinction is drawn between two stages in the making of treaties (a) conclusion (b) entry into force. This distinction and the language in which it is expressed correspond entirely to the actual practice of States. Thus, innumerable examples may be given both in bilateral and in multilateral treaties, the text of which state that the High Contracting Parties "have agreed and concluded as follows". The expression "agreed" is the one most commonly used but examples may also be given on the use of the expression "concluded", e.g., the Treaty of Friendship and Alliance between China and the Soviet Union of 1945 which says that the parties "have decided to conclude the present treaty" (*United Nations Treaty Series*, vol. 10, Part II, No. 68); the Treaty of Mutual Guarantee signed at Locarno on 16 October 1925, states that the parties "have determined to conclude a treaty" (Hudson, *International Legislation*, vol. III, p. 1689); the convention between Mexico and the United States of 18 June 1932 extending the duration of the General Claims Commission states that the parties have "agreed upon the following articles" (Malloy, *Treaties, Conventions, International Acts, Protocols, and Agreements between the*

United States of America and other powers, vol. IV, p. 4461). These examples are taken at random and these expressions are not invariable. Thus the "Agreement concerning the preservation or re-establishment of rights of industrial property affected by the World War", signed on 30 June 1920, states that the parties "have decided upon the following text" (Hudson, *International Legislation*, vol. I, p. 473). The Final Act of the Hague Codification Conference 1930 states that "a number of instruments, resolutions and recommendations have been drawn up" (*American Journal of International Law*, vol. 24 (Supplement) p. 181). The Final Act of the Civil Aviation Conference of 1944 states that "the following instruments were formulated".

In spite of slight variations in terminology the expression "agreed and/or concluded" is by far the commonest used in treaties, and, whatever the language used, the sense of it is that a text has been established by agreement. What the parties have agreed upon is the text, even before it has entered into force. This is the text by which they agree (if it enters into force at all) to be bound. The distinction between the conclusion and the entry into force of treaties, drawn in the articles of this draft, is considered to be both fundamental, and to conform to the practice of States. The use of the word "establish" may be illustrated, for example, by paragraph 8 of the "Final Act of the United Nations Conference on Declaration of Death of Missing Persons" of 6 April 1950, which uses the words "the Conference established and opened for accession by States the Convention on Declaration of Death of Missing Persons of which the English, French and Spanish texts are appended to this Final Act".

The expression "duly signed" is used as opposed to "signed *ad referendum*" in the proviso to article 1. In the latter case the signature is only provisional and is subject to confirmation or repudiation under further instructions. Initialling *ne varietur* is not very common; but examples exist, e.g., the Final Act of the Locarno Conference. It seems desirable that the draft should embody, as comprehensively as possible, the practice actually followed by States "on behalf of two or more States represented at the Conference".

It is possible that some States may sign the text, and others not; in which case a signed treaty (which may or may not have entered into force) exists between those States that have signed.

(b) With regard to international organizations not many constitutions exist containing a provision for the adoption of conventions by the organization. The International Labour Organisation is, however, a familiar example. In addition article IV of the Food and Agriculture Organization's constitution provides:

"The Conference may by a two-thirds majority of votes cast submit conventions concerning questions relating to food and agriculture to Member nations for consideration with a view to their acceptance by the appropriate constitutional procedure."

Article IV of the constitution of the United Nations Educational Scientific and Cultural Organization provides:

"The general conference shall, in adopting proposals for submission to the Member States, distinguish between recommendations and international conventions submitted for their approval. In the former case a majority vote shall suffice; in the latter case a two-thirds majority shall be required. Each of the Member States shall submit recommendations or conventions to its competent authorities within the period of two years from the close of the session of the general conference at which they were adopted."

On the other hand article 3 of the constitution of the Inter-Governmental Maritime Organization simply enables it to "provide for the drafting of conventions, agreements, or other suitable instruments and to recommend these to governments and to convene such conferences as may be necessary". In this case the conventions drawn up would fall under article 1 (a) above. The same applies to the World Health Organization which may "propose conventions" and to the International Civil Aviation Organization (see article 49 (j) of its constitution). The Universal Postal Union and the European Transport Organization have no provision enabling them to prepare or adopt conventions. In these and similar cases any conventions that may be drawn up under the auspices of the organization will be the result of a conference specially convened and will fall under article 1 (a), "*being conventions to which States may become parties*". This phrase has been inserted in order to differentiate the case dealt with in article 1 (b) from the possible case of treaties made by the organization itself.

#### ENTRY INTO FORCE OF TREATIES

##### Article 2

- (1) A treaty enters into force when it becomes legally binding in relation to two or more States.
- (2) The conditions under which the treaty enters into force depend, in the first instance, on the terms of the treaty itself.

##### Comment

In this article, the expression "enters into force" has been chosen in preference to any other because in treaties containing stipulations of a formal character this is the expression most commonly used.

A distinction is drawn in the draft between the entry into force of the treaty as a legal instrument and its binding force or application in relation to particular States. The latter point is dealt with in articles 3, 4 and 5.

#### APPLICATION OF TREATIES

##### Article 3

A treaty becomes legally binding in relation to each State when that State undertakes a final obligation

under the treaty whether by signature, ratification or accession.

*Comment*

This article merely states a general principle which is worked out in detail in the succeeding articles.

RATIFICATION OF TREATIES

*Article 4*

(1) Ratification is an act by which a State, finally and in a written instrument duly executed, confirms and accepts a treaty as binding.

(2) Ratification may be made subject to reservations or conditions in accordance with the provisions of Article 10.<sup>1</sup>

(3) An instrument of ratification is deemed to be duly executed within the meaning of sub-paragraph (1) if it is executed by such organ of the State as is designated in the treaty or, if none such is designated by any organ of the State competent under that State's constitutional law or practice.

*Comment*

It is believed that the constant practice of States for centuries justifies the formulation adopted here in preference to that used in article 6 of the Harvard Draft. "Confirm" and "accept" are used in nearly all instruments of ratification and in practice such instruments are in writing. Diplomatic practice constantly speaks of "acts" or "instruments" of ratification, and in spite of the discussion in text books of tacit ratification it is believed to be the better opinion that the actual ratification should be in writing—all the more so since treaties generally provide that ratifications must be exchanged or deposited and it is not possible to exchange or deposit mere inactivity.

WHEN RATIFICATION IS NECESSARY

*Article 5*

Where:

(a) A treaty provides it shall be ratified

(b) A treaty provides that it shall be ratified by a State and does not provide for its coming into force before such ratification

(c) The full powers of the State's representatives who negotiated or signed a treaty stipulated that ratification was necessary

(d) When the form of the treaty or the attendant circumstances do not indicate an intention to dispense with ratification;

in any such case a State is not deemed to have undertaken a final obligation under the treaty until it ratifies that treaty.

<sup>1</sup> This refers to article 10 of my draft last year which will require reconsideration in the light of the advisory opinion of the International Court of Justice.

*Comment*

This article adopts the provisions of article 7 of the Harvard Draft with slight verbal variations.

It has already been pointed out in comment on article 1 that signature is the normal method by which a treaty is *concluded* (unless it is of the type falling under article 1 (b) as is the case with United Nations Conventions). The treaty may, however, *enter into force* on signature in which case signature is also the act by which the State undertakes a final obligation.

It will be observed that nothing is said here about the comparatively recent development of "acceptance". Examples of this have been common in United Nations conventions but on 22 November 1949, the Sixth Committee of the Assembly (*Official Records of the Fourth Session of the General Assembly, Sixth Committee, 201st Meeting*) voted an affirmative answer to the following question put to it by its Chairman: "Does the Sixth Committee approve the procedure of signature followed by ratification and accession in preference to the procedure described in the draft proposed by the Third Committee". The latter procedure was that of "acceptance".

DATE OF ENTRY INTO FORCE OF TREATIES

*Article 6*

Unless otherwise provided in the treaty itself:

(1) Where a treaty is not subject to ratification within the scope of Article 5 it enters into force on signature.

(2) A treaty which provides for the exchange or deposit of ratifications enters into force on the exchange or deposit of ratifications by all the signatories.

(3) A treaty which is subject to ratification but which contains no provision for exchange or deposit of ratifications enters into force when it is ratified by all the signatories and when each signatory has notified its ratification to all the other signatories.

*Comment*

This article with minor drafting alterations follows article 10 of the Harvard Draft. Paragraph (1) deals with a situation which has been the subject of controversy of recent years. See article 5 of the Havana Convention on Treaties (1928); Fitzmaurice, "Do Treaties need Ratification?", *British Yearbook of International Law* (1934), vol. XV, p. 117; Dehousse, "La Conclusion des Traités d'après la pratique constitutionnelle et diplomatique belge", *Annales de l'Institut de droit comparé de l'Université de Paris*, vol. III, 1938, pp. 110-123; Dehousse, *La ratification des traités* (1935), pp. 100-101; McNair, *Law of Treaties* (1938), pp. 85-86; Rousseau, *Principes généraux du droit international public* (1944), vol. I, pp. 190-195. The view set forth in paragraph (1) is not, therefore, by any means universally accepted, but is adopted here for the purposes of discussion.

The situations dealt with in paragraph (2) are perhaps not likely to arise very often in practice at the present

time, but examples are cited in the Harvard Draft, pp. 796-799, to which it is hardly necessary to add further comment.

OBLIGATION OF A SIGNATORY PRIOR TO THE ENTRY  
INTO FORCE OF A TREATY

*Article 7*

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 entry into force of the treaty in relation to that State; under some circumstances, however, good faith may require that pending the entry 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.

*Comment*

This article adopts article 9 of the Harvard Draft. It is included here for the purposes of discussion, although in the opinion of the special Rapporteur it states a moral rather than a legal obligation.

NO OBLIGATION TO RATIFY

*Article 8*

The signature of a treaty on behalf of a State does not create for that State any obligation to ratify the treaty.

*Comment*

This article follows verbally article 8 of the Harvard Draft.

ACCESSION TO TREATIES

*Article 9*

(1) Accession to a treaty is an act by which a State, on whose behalf the treaty has not been signed or ratified, formally, and in accordance with the terms of the treaty, accepts, in a written instrument duly executed, the treaty as binding.

(2) A State may not accede to a treaty unless that treaty contains provisions enabling it to do so or unless invited to do so by all the parties to the treaty.

(3) Unless otherwise provided in the treaty itself a State may only accede to a treaty after it has entered into force.

(4) Where a State accedes to a treaty without making its accession subject to ratification it is deemed to have undertaken a final obligation or, if the treaty has not at that time entered into force, to have acceded to the treaty, subject only to its entry into force.

(5) An instrument of accession shall be deemed to have been duly executed within the meaning of subparagraph (1) if it is executed by such organ of the State as is designated in the treaty, or, if none such is designated, by any organ of the State competent under that State's constitutional law or practice, provided that an instrument of accession shall not, by reason only of the fact that it is made subject to ratification, be deemed not to have been duly executed.

*Comment*

The rules adopted here are substantially the same as those contained in article 12 of the Harvard Draft but the formulation is somewhat different. Subparagraph (4) does not appear in the Harvard Draft but deals with a point that has raised some controversy in the past which it seems desirable to settle.

DOCUMENT A/CN.4/L.28

Text of articles tentatively adopted by the Commission at its third session

I. On the basis of second report on the law of treaties  
(A/CN.4/43)

ESTABLISHMENT OF THE TEXT OF TREATIES

*Article 1*

The establishment of the text of a treaty may be effected by

(a) The signature or initialling *ne varietur* on behalf of the States which have taken part in the negotiation of that treaty by their duly authorized representatives; or

(b) Incorporation in the Final Act of the conference at which the treaty was negotiated; or

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

(d) Other formal means prescribed by the negotiating States.

ASSUMPTION OF TREATY OBLIGATIONS

*Article 2*

A treaty becomes binding in relation to a State by signature, ratification, accession or any other means of expressing the will of the State, in accordance with its constitutional law and practice through an organ competent for that purpose.