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**Second Report on the Law of Treaties by Mr. H. Lauterpacht, Special Rapporteur**

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# LAW OF TREATIES

## DOCUMENT A/CN.4/87\*

### Second report by H. Lauterpacht, Special Rapporteur

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#### I. INTRODUCTION

At its fifth session, held in Geneva in 1953, the International Law Commission decided to request the Special Rapporteur on the Law of Treaties to continue his work on the subject and to present a further report for discussion at the next session together with his first report submitted in 1953.<sup>1</sup> While the Special Rapporteur has made progress in his study of what will be Part II of the complete report on the Law of Treaties, namely operation and implementation of treaties, he now submits a further report supplementary to and, in some respect, modifying certain articles and the comment of the report submitted in 1953. This covers the following articles: article 1 (essential requirements of a treaty); article 6 (ratification); article 7 (accession); article 9 (reservations); article 16 (consistency with prior treaty obligation).

#### II. TEXT OF REVISED ARTICLES WITH COMMENTS

##### ARTICLE 1

##### *Essential requirements of a treaty*

1. This article of the Special Rapporteur's first report<sup>2</sup> runs as follows:

Treaties are agreements between States, including organizations of States, intended to create legal rights and obligations of the parties.

\* Incorporating document A/CN.4/87/Corr.1.

<sup>1</sup> A/CN.4/63, in *Yearbook of the International Law Commission 1953*, vol. II.

<sup>2</sup> *Ibid.*

2. In the light of further study the Special Rapporteur submits for consideration of the Commission the question whether it may not be desirable to add either in the article itself or in the accompanying comment some such statement of the law as follows:

*In the absence of evidence to the contrary, an instrument finally accepted by both parties in the customary form of an international undertaking and registered with the United Nations in accordance with Article 102 of the Charter shall be deemed to be an instrument creating legal rights and obligations.*

3. This aspect of the definition of a treaty is covered by paragraph 4 of the relevant comment to article 1 of the first report. At the end of this part of the comment the Special Rapporteur stated as follows: "The circumstance that it [the instrument] has been registered with the United Nations, by one or more of the parties, as an international treaty or engagement is not decisive for determining this question [i.e. whether the instrument is intended to create legal rights and obligations] — although the fact of its registration as the result of joint action by the parties raises a strong presumption in that direction." The Special Rapporteur now believes that this passage requires reconsideration in the light of the amendment as formulated above. This is so for the reason that unless some such rule is adopted, the legal nature — and the binding character — of a large number of instruments may remain uncertain.

4. In the first instance, as already stated in the first report, the fact that the extent of the application of the instrument is left in some respects to the appreciation of the parties and that, as the result, the scope of the obligation is indefinite and elastic, is not a decisive factor for denying that there is in existence a legal duty

to be fulfilled in good faith. This is so even if, in what must be regarded as the typical case in treaties of this nature, the instrument contains no provisions, or purely nominal provisions, for the settlement of disputes arising out of the application or the interpretation of the treaty. A number of instruments will illustrate this aspect of the problem :

5. Thus article 6 of the Agreement of 27 April 1951 between the United States of America and Denmark covering the defence of Greenland (*U.N.T.S.*, 94 (1951), p. 45) provides that " the Government of the United States of America agrees to cooperate to the fullest degree with the Government of the Kingdom of Denmark and its authorities in Greenland in carrying out operations under this Agreement ", and that " every effort will be made to avoid any contact between United States personnel and the local population which the Danish authorities do not consider desirable for the conduct of operations under this Agreement ". The reference to " every effort " being made by the American authorities in circumstances which the Danish authorities " consider desirable " are indefinite and elastic. It is not believed, however, that they derogate from the legal nature of the obligations thus undertaken.<sup>3</sup>

6. The same applies to instruments such as the Preliminary Agreement between the United States of America and Czechoslovakia of 11 July 1942 relating to the principles applying to mutual aid in the prosecution of the war against aggression (*U.N.T.S.*, 90 (1951), p. 258). On the face of it, the agreement is non-committal. In article I the Government of the United States of America binds itself to supply the Provisional Government of Czechoslovakia with such defence articles, defence services and defence information as the President of the United States of America shall authorize to be transferred or provided — a, *prima facie*, nominal obligation. In article 11 the Provisional Government of Czechoslovakia undertakes to continue to contribute to the defence of the United States of America and the strengthening thereof and to provide such articles, ser-

vices, facilities and information as it may be in the position to supply. While other parts of the Agreement incorporate clear legal obligations in the matter of the transfer, payment and return of the goods supplied by the United States, article 7 seems to formulate what is no more than a principle of policy. It lays down that the final determination of the benefits to be provided to the United States of America by the Provisional Government of Czechoslovakia in return for the aid furnished under the Act of Congress of 11 March 1941, shall be such as not to burden commerce between the two countries, but to promote mutually advantageous economic relations between them and the betterment of the world. Notwithstanding the vague and indefinite formulation of those provisions, they are not such as to render impossible their interpretation, by reference to the overriding principle of good faith, by an arbitral or judicial body proceeding on the basis of law. The widest possible latitude of appreciation was implied in the Advisory Opinion of the Permanent Court of International Justice given in 1931 in deciding whether the customs union between Germany and Austria endangered or alienated Austrian independence (*Series A/B*, No. 41). This fact did not deprive the relevant provisions of the Treaty of St. Germain and of the Geneva Protocol of 1922 of their character as binding treaty obligations.

7. The recent series of mutual defence assistance agreements between the United States of America and some other countries provides, to a more conspicuous degree, another example of instruments of that character. Thus article 1 of the Mutual Defense Assistance Agreement between the United States of America and France of 27 January 1950 (*U.N.T.S.*, 80 (1951), p. 172) provides " that each Government, consistently with the principle that economic recovery is essential to international peace and security and must be given clear priority, will make or continue to make available to the other, and to such other governments as the parties hereto may in each case agree upon, such equipment, materials, services or other military assistance as the Government furnishing such assistance may authorize and in accordance with such terms and conditions as may be agreed ". The Agreement also provides, in article 2, for the obligation of the French Government to facilitate the production and the transfer to the Government of the United States of raw and semi-processed materials required by the United States as a result of deficiencies or potential deficiencies of its own resources; and it provides, in article 3, for such security measures " as may be agreed in each case between the two Governments in order to prevent the disclosure or compromise of classified military articles, services or information ".<sup>4</sup>

<sup>3</sup> This is also probably the position with respect to various types of agreement of an economic nature such as the Agreement concerning the exchange of commodities between Denmark and Poland of 7 December 1949 (*U.N.T.S.*, 81 (1951), p. 22). While some provisions of that Agreement admit of elasticity of interpretation, such as the provision that the parties shall grant to each other as *favourable treatment as possible* in the issue of import and export authorization so as to facilitate the development of reciprocal exchanges, other clauses are of a definite nature, such as the obligation of the two Governments to authorize the export of goods specified in the schedule to the Agreement. Similar considerations apply to such instruments as the Exchange of notes constituting an agreement between the Netherlands and Luxembourg regarding the placement of Netherlands agricultural workers in Luxembourg of 17 and 25 August 1950 (*U.N.T.S.*, 81 (1951), p. 14). While the notes contain a number of provisions of a somewhat vague character such as that " in principle, the entire territory of the Grand Duchy shall be available for permanent or temporary settlement by Netherlands agricultural workers ", or that the Luxembourg authorities shall provide Netherlands agricultural workers with all information that might be useful to them, other provisions are couched in terms of clear legal obligations such as that the Netherlands agricultural workers and their families shall receive in Luxembourg for equal work and performance remuneration equal to that customary in Luxembourg for workers of the same category in the same district, or that Netherlands agricultural workers shall be entitled to make transfers each month of their surplus wages and savings.

<sup>4</sup> Similar provisions are contained in the Mutual Defense Assistance Agreement with Luxembourg of 27 January 1950 (*U.N.T.S.*, 80 (1951), p. 188); with the Netherlands of 27 January 1950 (*ibid.*, p. 220); with Norway of 27 January 1950 (*ibid.*, p. 242); and with the United Kingdom of 27 January 1950 (*ibid.*, p. 262). The same applies to the Exchange of notes constituting an agreement between the United States of America and Italy relating to mutual defense assistance of 27 January 1950 (*U.N.T.S.*, 80 (1951), p. 146). In that Agreement the two Governments undertook to take appropriate measures, consistent with security, to keep the public informed of operations under the Agreement. They also agreed to take security measures, to be agreed upon in the future, in order to prevent disclosure or compromise of classified military articles, services or information. An annex to the Agreement

In a sense these provisions, which leave for future agreement the determination of the extent of the substantive obligations of the parties, are no more than *pacta de contrahendo*. They are further weakened by qualifications such as that the amount of assistance shall be such as the Government in question shall authorize. Nevertheless, it would not be accurate to maintain that an instrument of that character is no more than a pious statement of intention as distinguished from an assumption of binding legal obligations.

8. Neither is the legal nature of the instrument affected by its designation as a declaration of policy, especially if it is described as an agreement and if in other respects it imposes ascertainable obligations upon the parties. This applies, for instance, to the Declaration by the French Republic constituting an agreement on commercial policy and related matters of 28 May 1946 (*U.N.T.S.*, 84 (1951), p. 152). While the Declaration opens with the statement that "the Government of the United States of America and the Provisional Government of the French Republic, having concluded comprehensive discussion on commercial policy and related matters, find themselves in full agreement on the general principles which they desire to see established to achieve the liberation and expansion of international trade, which they deem to be essential to the realization of worldwide prosperity and lasting peace", and continues that "the two Governments have agreed that important benefits would accrue to both countries from a substantial expansion of French exports to the United States", it contains definite clauses on such matters as the obligation of the French Government to accord to American nationals who have suffered damage to their properties in France, through causes originating in the war, compensation equal to that payable to French nationals having the same types and extent of losses.

9. The same considerations apply to purely administrative agreements which, having regard to their nature and subject matter, leave a considerable measure of discretion to the authorities in question. Thus article 19 of the Agreement of 12 July and 28 August 1948 between the Post Office of the United Kingdom of Great Britain and Northern Ireland and the Shereefian Post and Telegraph Administration for the exchange of money orders (*U.N.T.S.*, 90 (1951), p. 84) provides as follows (*ibid.*, p. 94): "Each of the two Administrations may, in extraordinary circumstances which would be of a nature to justify the measure, suspend temporarily or definitely the Money Order service on condition of giving immediate notice thereof (if necessary by telegraph) to the other Administration. The Administration of the United Kingdom may also in case of abuse by the transmission of large sums of money as Money Orders raise the rate of commission charged." There is no warrant for the suggestion that instruments of that nature do not, on account of either the large measure of discretion inherent in their application or of their purely administrative character, exhibit the essential characteristics of an international treaty.

10. As will be seen presently (see paragraph 14), there are types of treaties which raise the same prob-

makes provision for privileges and immunities to the missions of the two States.

lem, namely, whether an instrument cast in the usual forms of an international undertaking — i.e. an instrument signed and formally accepted by the parties or a unilateral declaration having the same effect — constitutes a treaty conferring legal rights and imposing legal obligations. The same problem arises occasionally in the sphere of the private law of contract when courts are called upon to determine whether an instrument creates legal rights and duties. It was stated in the following terms by Lord Justice Atkin in *Rose & Frank Co. v J. R. Crompton Bros. Ltd.*:<sup>5</sup> "To create a contract there must be a common intention of the parties to enter into legal obligations . . . Such an intention ordinarily will be inferred when parties enter into an agreement which in other respects conforms to the rules of law as to the formation of contracts. It may be negatived impliedly by the nature of the agreed promise or promises."

11. The difficulties inherent in the problem are shown in the statement that "the intention of the parties to enter into legal obligations . . . may be negatived impliedly by the nature of the agreed promise or promises." The Special Rapporteur does not consider that that formulation can be of assistance in determining whether what on the face of it appears to be a treaty is in fact a treaty, namely, whether it creates legal rights and obligations. While in the sphere of private law the informality and variety of private arrangements may permit an inquiry into the question whether the nature of the promise is such as to create legal rights and obligations, it is believed that with regard to formal international compacts such intention must be implied from the fact of the formality of the instrument unless there is cogent and conclusive evidence to the contrary. Undoubtedly, the legal rights and obligations do not extend further than is warranted by the terms of the treaty. The fact that the instrument is a treaty does not imply an intention of the parties to endow it with the fullest possible measure of effectiveness. They may intend its effectiveness to be drastically limited. But, subject to that consideration which must be evidenced by the terms of the treaty and any other available evidence, the guiding assumption is that the instrument creates legal rights and obligations. Any measure of discretion and freedom of appreciation, however wide, which it leaves to the parties must be exercised in accordance with the legal principle of good faith. Although the parties may have intended a treaty to mean little, no assumption is permissible that they intended it to mean nothing and that the instrument concluded in the form of a treaty — with the concomitant solemnity, formality, publicity and constitutional and other safeguards — is not a treaty.

12. In particular, there is probably no warrant for the suggestion<sup>6</sup> that an instrument is not a treaty unless it contains provisions for the compulsory judicial or arbitral settlement of disputes as to its interpretation or

<sup>5</sup> [1923] 2 K. B. 261, at p. 293. In *Balfour v. Balfour* ([1919] 2 K.B. 571) he said: "[such agreements] are not sued upon, not because the parties are reluctant to enforce their legal rights when the agreement is broken, but because the parties, in the inception of the arrangement, never intended that they should be sued upon."

<sup>6</sup> For an elaboration of which see the article by Mr. Fawcett in the *British Year Book of International Law*, 30 (1953), pp. 381 ff.

application. While most multilateral treaties of a general character and many other treaties contain clauses of this nature, this is not the case in many treaties which clearly create legal rights and obligations. The legal nature of rules of customary international law does not depend upon the existence of a compulsory machinery for their arbitral or judicial ascertainment. There is no reason for more stringent requirements in this respect in the matter of treaties.

13. While in his first report the Special Rapporteur did not regard the question of registration with the United Nations as decisive, he now considers that that view requires modification — but no more — in accordance with the text as proposed above in paragraph 1. He continues to believe that the mere fact of registration is not *decisive*. In particular, it cannot be admitted that the Secretary-General can be entrusted with the function of giving, by complying with the request for registration, the complexion of a legal instrument to something which otherwise would not possess that character. However, although the fact of registration is not decisive — what is decisive is the formality of a written instrument couched in the traditional terms of a treaty obligation — registration constitutes an addition to those essential requirements of form which make of an instrument a treaty. It may be a matter for consideration whether weight ought to be attached in this connexion to the protest of one of the parties against registration, on the ground that the instrument does not constitute a treaty or an international agreement creating legal rights and obligations.

14. The Special Rapporteur has devoted further study to — and has to some extent modified his view on — this question for the reason that, in his opinion, the codification of the law of treaties ought to provide an opportunity not for devitalising such legal element as is contained in international instruments but for salvaging from them any existing element of legal obligation. There are, in addition to the types of instrument referred to above, other categories of treaties whose legal importance and beneficence may be jeopardized unless that principle is adopted. Thus the numerous agreements between the United Nations and the specialized agencies, as well as the agreements of the specialized agencies *inter se*, have been regarded by some as purely administrative arrangements of co-ordination<sup>7</sup> devoid of legal character. It is not believed

<sup>7</sup> It will be noted that in some cases the obligations in question although described as co-operation go substantially beyond mere co-operation. This applies, for instance, to article 6 of the Agreement between the United Nations and the International Labour Organisation which provides that "the International Labour Organisation agrees to co-operate with the Economic and Social Council in furnishing such information and rendering such assistance to the Security Council as that Council may request including assistance in carrying out decisions of the Security Council for the maintenance or restoration of international peace and security." (*U.N.T.S.*, 1 (1946-1947), p. 192.) In some cases the obligation is of a declaratory nature as in the case of article 6 of the Agreement between the United Nations and the International Monetary Fund which provides as follows: "The Fund takes note of the obligation assumed, under paragraph 2 of Article 48 of the United Nations Charter, by such of its members as are also Members of the United Nations, to carry out the decisions of the Security Council through their action in the appropriate specialized agencies of which they are members, and will, in the conduct of its activities, have due

that that view is substantiated either by their content or form. The same applies to the numerous inter-State treaties for cultural co-operations;<sup>8</sup> for technical assistance;<sup>9</sup> for co-operation between Governments and public international organizations of a humanitarian character, such as the Agreement of 19 July 1950 between the United Nations International Children's Emergency Fund and the Government of the Republic of China concerning the activities of the former in China;<sup>10</sup> and agreements relating to military co-operation

regard for decisions of the Security Council under Articles 41 and 42 of the United Nations Charter." (*U.N.T.S.*, 16 (1948), p. 332.)

<sup>8</sup> Such as the Cultural Convention between the Government of the United Kingdom of Great Britain and Northern Ireland and the Netherlands Government of 7 July 1948 (*U.N.T.S.*, 82 (1951), p. 260). Of these conventions, which often provide for ratification, there is a great number. To the same category belong instruments such as the Agreement between the United States of America and France relating to the financing of certain educational exchange programmes of 22 October 1948 (*U.N.T.S.*, 84 (1951), p. 174). The legal character of the provisions of such agreements is illustrated by article 1 of the above Agreement. It provides as follows: "There shall be established a Commission to be known as the United States Educational Commission for France (hereinafter designated "The Commission"), which shall be recognized by the Government of the United States of America and the Government of the French Republic as an organization created and established to facilitate the administration of an educational program financed by funds made available in accordance with the Memorandum of Understanding dated May 28, 1946 and the supplement thereto. Except as hereinafter provided, the Commission shall be exempt from the domestic and local laws of the United States of America as they relate to the use and expenditure of currencies and credits for currencies for the purposes set forth in the present agreement. The funds shall enjoy on the part of the Government of the French Republic the exemption and immunities accorded to the property of a foreign government." The Agreement between Thailand and the United States of America of July 1950 (*U.N.T.S.*, 81 (1951), p. 62) providing for the establishment of a foundation, to be known as the United States Educational Foundation in Thailand, contains specific obligations such as that the funds of the Foundation shall be regarded in Thailand as the property of a foreign Government. The Exchange of notes constituting an agreement of 21 June 1949 between the United States of America and Mexico relating to anthropological research and investigation (*U.N.T.S.*, 89 (1951), p. 4) provides for detailed obligations concerning the supply of services of officials and scholars, payment of salaries, publication of results of research, communication of data, customs facilities and the like. The same applies to a similar agreement between the United States of America and Peru of 17 and 25 March 1949 (*ibid.*, p. 16).

<sup>9</sup> Such as the Basic Agreement between the United Nations, the Food and Agriculture Organization of the United Nations, the International Civil Aviation Organization, the International Labour Organisation, the United Nations Educational, Scientific and Cultural Organization, the World Health Organization and France for the provision of technical assistance of 20 March 1951 (*U.N.T.S.*, 82 (1951), p. 174); the Basic Agreement between the United Nations, the Food and Agriculture Organization of the United Nations, the International Civil Aviation Organization, the International Labour Organisation, the United Nations Educational, Scientific and Cultural Organization, the World Health Organization and Colombia for the provision of technical assistance of 24 November 1950 (*U.N.T.S.*, 81 (1951), p. 190); the Basic Agreement between the United Nations and the Government of Thailand for the provision of technical assistance of 11 June 1951 (*U.N.T.S.*, 90 (1951), p. 46).

<sup>10</sup> *U.N.T.S.*, 94 (1951), p. 22. The Agreement lays down obligations governing the distribution of supplies, maintenance by the Government of accounting and statistical records, access to records, immunities of various kinds, and settlement of disputes by reference "for appropriate action" to the Programme Committee of the Executive Board of the Interna-

by way of establishment of military missions and otherwise.<sup>11</sup>

## ARTICLE 6

### *Ratification*

1. Ratification is an act by which a competent organ of a State formally approves as binding the treaty or the signature thereof.

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

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

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

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

(d) The attendant circumstances or the practice of the contracting parties concerned indicate the intention to assume a binding obligation without the necessity of ratification.

#### Alternative paragraph 2 :

2. Confirmation of the treaty by way of ratification is required only when the treaty so provides. *However, in the absence of express provisions to the contrary, ratification is in any case necessary with regard to treaties which, having regard to their subject matter, require parliamentary approval or authorization of ratification in accordance with the constitutional law or practice of the countries concerned.*

tional Children's Emergency Fund. The legal nature of the Agreement is not impaired by some unorthodox provisions such as that relating to the duration of the agreement. Thus article 9 lays down that "it shall remain in force at least until any supplies furnished by the Fund are finally consumed or used, plus a reasonable period for the completion of an orderly liquidation of all Fund activities in the Republic of China."

<sup>11</sup> Thus the Agreement between the United States of America and Haiti of 14 April 1949 relating to a naval mission to Haiti (*U.N.T.S.*, 80 (1951), p. 38), in addition to the detailed provisions concerning the personnel, duties, rank, pay and allowances of the mission to be provided by Haiti, contains other obligations of Haiti such as the undertaking not to engage the services of a mission of any other foreign government for duties connected with the coastguard of Haiti except by the mutual agreement of the two Governments. To similar effect are such instruments as the Agreement between the United States of America and Ecuador relating to a military mission to Ecuador of 29 June 1944 (*ibid.*, p. 284); the Agreement of 6 March 1950 between the United States of America and Honduras for the establishment of a United States Air Force mission to Honduras (*ibid.*, p. 52); the Agreement between the United States of America and Honduras of 6 March 1950 for the establishment of a United States army mission to Honduras (*ibid.*, p. 72); the Agreement between the United States of America and Argentina of 6 October 1948 concerning a military advisory mission to Argentina (*ibid.*, p. 92); the Agreement between the United States of America and Brazil relating to a military advisory mission to Brazil of 29 July 1948 (*ibid.*, p. 112).

The passage italicized constitutes an addition to the previous Report.<sup>12</sup>

1. The Special Rapporteur attaches importance to stating that the submission of two alternative drafts on the question is intended, to some extent, to express his view that the practical difference between the adoption of the one or the other solution is not considerable. According to one solution, which has the merit of simplicity, confirmation — through ratification — of a signed treaty is not required as a condition of its validity unless there is a clause expressly providing for ratification. According to the other solution ratification is an essential condition of the assumption of a valid treaty obligation unless the treaty either expressly provides to the contrary or unless such provision is to be implied from the previous practice of the parties, from the fact that it is concluded in the form of an exchange of notes or an agreement between government departments, or from other "attendant circumstances" — a potentially wide range of exceptions. These exceptions are so wide — in particular in view of the large number of treaties concluded by way of exchanges of notes and interdepartmental agreements — that their effect is to bring about a close approximation of the two alternative solutions. Moreover, the practical importance of the question is rigidly limited by the fact that treaties either expressly provide for ratification or expressly or by implication dispense with it. Reasons have been given in the first report why a codification of the subject — one way or the other — is nevertheless of importance.

2. While the Special Rapporteur is still of the view that there is a slight preponderance of considerations in favour of the requirement of ratification unless dispensed with expressly or by implication, he feels it necessary to draw repeated attention to the fact — already emphasized in the first report — that the most recent practice shows an increasing number of treaties which come into force without ratification. My attention has been drawn to statistical data, more detailed than those given in the first report, which reveal that tendency in a conspicuous manner. Thus it appears<sup>13</sup> that while about one-half of the instruments registered in the League of Nations Treaty Series came into force by ratification, this has been the case only with regard to one-fourth of the instruments registered in the United Nations Treaty Series. With this there is connected the fact that while about 40 per cent of the instruments registered with the League of Nations were described as "treaties" or "conventions", this has been the case only with regard to 15 per cent of the instruments registered with the United Nations. This latter development may be of significance inasmuch as it is only in the case of "treaties" and "conventions" that ratification constitutes the normal method of bringing them into force.<sup>14</sup> On the other hand, while in the case of the League of Nations about 30 per cent of the registered instruments were in the form of agreements, the percentage in the case of the United Nations is about 45 per

<sup>12</sup> A/CN.4/63, in *Yearbook of the International Law Commission 1953*, vol. II.

<sup>13</sup> See article by Hans Blix in the *British Year Book of International Law*, 30 (1953), pp. 352 ff.

<sup>14</sup> Thus of the "treaties" in the League of Nations Treaty Series only one was not ratified. All "treaties" in the United Nations Treaty Series were ratified.

cent — again a significant change seeing that ratification in case of agreements is not as normal a course of bringing into force as in the case of “treaties” or “conventions”.<sup>15</sup> Moreover, it appears that a large number of instruments are now being brought into force not by ordinary ratification, but by exchanges of “notes of approval” — a method not referred to in the first report.

3. It may be asked whether, in view of this tendency as revealed by these figures, it is not desirable to formulate what may be described as the residuary rule in the matter — i.e. the rule for the small residuum of cases in which the treaty is in effect silent on the subject — by reference to the fact that ratification now takes place only in a relatively small minority of cases. It would appear legitimate to draw some such inference from what seems to be a clear trend. On the other hand, it is submitted that this is not an inescapable inference from that practice. For the only cogent deduction from that practice is that in an increasing number of cases Governments attach importance to treaties — however designated — entering into force without ratification. It does not follow that they consider the irrelevance of ratification to be the presumptive rule to which, in the absence of provisions to the contrary, they must be deemed to have submitted themselves. There is still room for the view that the general importance of the interests of States regulated by treaty requires that the presumptive — the residuary — rule must be based on the normal requirement of ratification.

4. For this reason the Commission may consider whether, even if it arrives at the conclusion that the presumption of non-ratification is the residuary rule, it should not qualify it in turn by laying down that that rule does not apply in relation to treaties which, having regard to their subject matter, require parliamentary approval or authorization of ratification in accordance with the constitutional law or practice of the countries concerned — such as instruments involving cession or exchange of territory, changes in the internal law of the parties, financial obligation of an extensive character, and obligations of assistance in case of war. In such cases the necessity of ratification may properly be regarded as part of the residuary rule. It is, of course, open to the parties to displace that residuary rule by an express provision by virtue of which the treaty enters into force upon signature and without ratification. The Special Rapporteur has considered it necessary to add this qualification to the alternative residuary rule in case that rule should recommend itself to the Commission.

5. That qualification clearly complicates the residuary rule. However, this may be a case in which simplicity of the rule cannot constitute the decisive factor. A balance must be struck between the tendency to informality and expeditiousness in the conclusion of treaties and the residuary requirement of ratification which may be regarded as dictated by imperative con-

siderations of constitutionality and democratic principles. Some countries continue to attach importance to these considerations as may be seen from the categorical language of article 5 of the Pan-American Convention on Treaties of 20 February 1928, which provides that “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”.<sup>16</sup> Although that treaty was ratified, by 1 January 1951, only by seven Governments, it must be regarded as evidence of regional practice. On the other hand, the practice of some States, as given recent expression, seems to favour the view that unless the treaty expressly provides for ratification its signature binds the parties. Thus the French Government, in a memorandum submitted on 10 January 1953 to the Secretariat of the United Nations stated as follows: “Certains traités ne prévoient pas qu’une ratification devra suivre la signature. Dans ce cas la signature, si elle est donnée sans condition (une signature *ad referendum* est une signature sous condition), engage définitivement l’Etat.”<sup>17</sup> It must be assumed that this statement is to be read subject to article 27 of the Constitution of 1946 which provides that treaties relating to international organization, commerce, financial obligations, the position of French subjects abroad, treaties providing for cession, exchange or acquisition of territory “ne sont définitifs qu’après avoir été ratifiés en vertu d’une loi”.<sup>18</sup> This provision of the Constitution is given effect by means of legislation authorizing the Executive to proceed to ratification by virtue of which the treaty becomes internationally binding. This means apparently that, notwithstanding the statement in the French memorandum referred to above, treaties which do not provide for ratification must nevertheless be ratified, in order to become binding, if they fall within one of the categories of treaties enumerated in article 27. Moreover, it would appear that it would be *ultra vires* of the French Government to conclude a treaty of that description as entering into force upon signature. Similarly, article 60 of the amended Constitution of the Netherlands provides as follows: “Agreements with other Powers and with organizations based on international law shall be concluded by or by authority of the King. *If required by such agreements* they shall be ratified by the King.”<sup>19</sup> There are authoritative statements to the effect that this is also the view of the United Kingdom. Thus the Secretary of State for Commonwealth Relations stated on 11 March 1953 in the House of Lords (*House of Lords Debates*, vol. 180, col. 1284) that “there is never any necessity for ratification unless an agreement so provides.” Here again, in so far as by virtue of constitutional convention certain treaties require the previous approval of Parliament (see paragraph 9 of the comment to article II of the Special Rapporteur’s first report on the Law of Treaties) it would appear that with regard to such treaties ratification is required if the treaty is silent on the subject. Occasionally, in this respect, the position may not be free of

<sup>15</sup> In the League of Nations Treaty Series 40 per cent of “agreements” were ratified. In the United Nations Treaty Series 15 per cent of “agreements” were ratified.

<sup>16</sup> Printed in Hudson, *International Legislation*, vol. IV, pp. 2378 ff., at p. 2380.

<sup>17</sup> Printed in “Laws and Practices Concerning the Conclusion of Treaties”, *United Nations Legislative Series* (1952), p. 48.

<sup>18</sup> See, for example, Preuss in *American Journal of International Law*, 44 (1950), pp. 641 ff.

<sup>19</sup> See van Panhuys in *American Journal of International Law*, 47 (1953), p. 537, at p. 538 (italics added).

doubt. Thus the Exchange of notes constituting an agreement of 15 and 22 February 1949 between the United Kingdom and the Union of South Africa confirms "the arrangement that His Majesty's Government in the United Kingdom should transfer to His Majesty's Government in the Union of South Africa the rights, title and interests which they formerly possessed in Marion Island and Prince Edward Island". Note is taken of the fact that the national flag of the Union of South Africa was raised on these islands on specified dates and that consequently His Majesty's Government "regard the transfer as complete as from those dates" (*U.N.T.S.*, 93 (1951, p. 76). A similar Exchange of notes, providing for the transfer to Australia of the Heard and MacDonal Islands was signed on 19 December 1950 (*ibid.*, p. 82). There is no provision for ratification in these instruments. In view of the constitutional rule requiring parliamentary consent for cession of British territory, it may be difficult to imply from the terms of these instruments a dispensation from the requirement of ratification.

6. In this connexion there must constantly be borne in mind the close relation between the question of the residuary rule in the matter of ratification and the problem of constitutional limitations upon the treaty-making power. A substantial strain is already imposed by the rule that notwithstanding the disregard of constitutional limitations a treaty which the contracting party in question expressly accepts as binding without ratification is either binding or, as suggested in the first report (article 11), may in certain circumstances impose obligations upon the State. To say that such result may follow — in disregard of constitutional limitations — as the result of mere silence, is to strain to the breaking point a rule which is controversial in itself. This is the reason why the qualifications now added to the alternative residuary rule include the exception covering constitutional limitations.

7. The additional complication now introduced by the Special Rapporteur into the alternative residuary rule B adds emphasis to his preference for rule A. At the same time he submits, once more, that the practical importance of the subject is severely limited seeing that by far the greater number of treaties contain express provisions on the subject; that the practical difference between the two rules, as qualified in this report is small; that no vital interest of States is involved in the adoption of either rule; and that the removal of doubts on the subject, through the adoption of a definite residuary rule, is feasible and desirable. The necessity for a codified rule cannot properly be judged either by the relative importance — political or other — of the rule in question or by the probable frequency of its application.

8. In connexion with the subject matter of this article it would be useful if, in its report on the subject, the Commission could draw attention to the necessity of clarifying one aspect of the practice of the Secretariat of the United Nations with regard to registration of treaties, especially of exchanges of notes. It has been customary for the Secretariat to append in a footnote on the opening page of the registered instrument a statement to the effect that it entered into force on a specified date. While in some cases such statement is clearly substantiated by a reference to the relevant article or articles of the instrument, in others it is not

clear what is the source of the information given. Thus, for instance, in the case of exchanges of notes the footnote merely states that the instruments entered into force on the date (or dates) of the signature of the notes in question. It would be useful to know what is the source of the statement in question. It may perhaps be assumed that the Secretariat, in making the statement, is relying on a source of information other than the implication that exchanges of notes belong to a type of instrument which, by its nature, does not require ratification and that it therefore enters into force as a result of signature. However, the question when the absence of the requirement of ratification may be implied from the terms or the nature of the instrument is difficult to answer and it is arguable that the burden of a decision on the subject cannot properly be put on the organs of the United Nations. Admittedly in some cases such implication is obvious. Thus it is clear that a treaty requires ratification if it contains a clause permitting denunciation "from year to year as from the date of exchange of ratifications", or, as is the case in various declarations of the acceptance of the optional clause of Article 36 of the Statute of the International Court of Justice, when it confers jurisdiction upon the Court in disputes "which may arise after the ratification of the declaration concerning any situation or fact arising after such ratification". On the other hand, it is not certain that dispensation from ratification can be implied from a clause which lays down that a treaty shall be operative as from a stated date or that its provisions shall continue for a stated period of years as from the date of the signing of the agreement. Article 10 of the Agreement between the Governments of the United Kingdom and South Africa concerning the avoidance of double taxation of 14 October 1946 provides (*U.N.T.S.*, 86 (1951), p. 64), that "the present Agreement shall come into force on the date on which the last of all such things shall have been done in the United Kingdom and the Union as are necessary to give the Agreement the form of law in the United Kingdom and the Union respectively". A footnote appended on p. 52 states that the treaty "came into force on 13 February 1947 in accordance with the provisions of article X". It is not clear to what extent the provision as quoted implies that the treaty can be regarded as having entered into force without ratification. It seems proper that the report of the Commission should draw attention to the desirability of a clarification of this aspect of the matter.

#### ARTICLE 7

##### *Accession*

1. A State or organization of States may accede to a treaty, which it has not signed or ratified, by formally declaring in a written instrument that the treaty is binding upon it.

2. Accession is admissible only subject to the provisions of the treaty. *In case a decision is required, in pursuance of this paragraph, as to the accession, or conditions thereof, of any State, such decision shall, unless otherwise expressly provided by the treaty, be effected by a majority of two-thirds of the States which are parties to the treaty at the time at which the request for accession is made.*

1. The additional, italicized, part of paragraph 2 as proposed and the observations which follow are in accordance with the original article 7 of the first report<sup>20</sup> and of the comment thereon (paragraphs 4-7 of the comment). However, the addition as formulated is intended to render the views there expressed more specific. It is also now considered appropriate, in view of the importance of the question involved, to give them the form of an express clause in article 7. While in the comment to article 7 doubts were expressed as to the application of the rule of unanimity to any decision required under that article, these doubts found no expression in the body of the article. The rule of unanimous consent of the existing parties to accession, or its conditions, by another State has the appearance of a rule of juridical logic and any derogation from it, if such derogation is considered desirable, ought probably to be given the form of a clear exception from the rule of unanimity. In some cases, unless the matter is deemed to be governed by the implied rule of unanimity, treaties normally contain no provisions on the subject. Thus, to refer to a recent instrument, article 10 of the International Convention for the permanent control of outbreak areas of the red locust of 22 February 1949 between Belgium, the United Kingdom, South Africa and Southern Rhodesia, provides as follows: "Any Government which is not a signatory to the present Convention may be invited by the Council to accede thereto, subject to such conditions as the Contracting Governments may determine" (*U.N.T.S.*, 93 (1951), p. 138). Similarly, article 31 of the Agreement between the United Kingdom, Belgium, France, Luxembourg, the Netherlands and the United States of America for the establishment of an International Authority for the Ruhr of 28 April 1949 (*U.N.T.S.*, 83 (1951), p. 106) provides that as soon as a German Government has been established it may accede to the agreement by executing an instrument containing such undertakings with respect to the assumption of the responsibilities of the German Government under the agreement and such other provisions as may be agreed by the signatory Governments. The General Agreement on Tariffs and Trade of 30 October 1947 provides, in article 33, for accession on terms to be agreed between the acceding Government and the contracting parties (*U.N.T.S.*, 55 (1950), p. 284). It is arguable that, as these conventions do not refer to unanimous consent, a decision which falls short of unanimity is sufficient. The Special Rapporteur does not regard that argument to be of a cogent character. Moreover, that interpretation fails to make provision for the kind of majority, if any, required.

2. For these reasons, assuming that the Commission shares the Special Rapporteur's view as to the essential shortcomings of the rule of unanimity in this connexion, it seems desirable to complete paragraph 2 of article 7 by the adoption of the rule as formulated. Admittedly that rule is open to the objection that it is somewhat mechanical inasmuch as it takes no account of the relevant importance of the contracting parties. However, that defect is inherent in the existing machinery of the conclusion of multilateral treaties. It can be remedied either by express provisions of the treaty or by some

such solution as is outlined below (article 16, paragraph 16 of the comment) in connexion with the revision of multilateral treaties. In any case, it is believed that, as a general rule, doubts ought to be resolved in the direction of the widest possible application of the treaty — provided that a substantial number of signatories so desire.

3. The rule as here formulated seems to be in accordance with the recent practice of multilateral conventions as to admission of new members of international organizations. Thus the Convention on International Civil Aviation of 7 December 1944 provides, in article 93, that States other than those referred to in the Convention shall be admitted to participation by means of a four-fifth vote of the Assembly and on such conditions (apparently by the same or a less exacting majority) as the Assembly may prescribe (*U.N.T.S.*, 15 (1948), p. 358). The Constitution of the Food and Agriculture Organization of 16 October 1945 lays down, in article 2, that additional members may be admitted by a vote concurred in by a two-thirds majority of all the members of the Conference (*American Journal of International Law*, 40 (1946), Supplement, p. 76). The Constitution of the United Nations Educational, Scientific and Cultural Organization of 16 November 1945 lays down, in article 2, that States not members of the United Nations may be admitted, upon the recommendation of the Executive Board, by a two-thirds majority vote of the General Conference (*U.N.T.S.*, 4 (1947), p. 280). To the same effect are the Constitution of the International Labour Organisation of 7 November 1945 (*U.N.T.S.*, 2 (1947), p. 18); of the Universal Postal Union of 5 July 1947 (*U.K. Treaty Series*, No. 57 (1949)); of the World Meteorological Organization of 11 October 1947; of the International Telecommunications Union of 2 October 1947; and of the Intergovernmental Maritime Consultative Organization (*United Nations Maritime Conference, 19 February-6 March 1948, Final Act and Related Documents*, United Nations publication, 1948. VIII. 2, p. 29). The Constitution of the World Health Organization of 26 July 1946 (*U.N.T.S.*, 14 (1948), p. 186) requires a simple majority. The same principle underlies the constitutions of international organizations which provide for admission by a decision of one of their organs whose decisions do not, according to the constitutions, require unanimity. This is the position, for instance, with regard to the Articles of Agreement of the International Bank for Reconstruction and Development of 27 December 1945 (*U.N.T.S.*, 2 (1947), p. 134).

4. It will be noted that the rule as formulated refers to the consent not of the original signatories of the treaty but of the States which are the contracting parties at the time when the request for accession is made. This means that the contracting parties which are entitled to take a decision on the subject include those — and those only — which have validly acceded to the treaty in accordance with its provisions.<sup>21</sup>

<sup>21</sup> This principle would apparently apply to such provisions as that of article 5 of the Convention between the United States of America and Costa Rica for the establishment of an Inter-American Tropical Tuna Commission of 31 May 1949 (*U.N.T.S.*, 80 (1951), p. 12). That article lays down that any Government, whose nationals participate in the fisheries covered by the Convention, desiring to adhere, shall

<sup>20</sup> A/CN.4/63, in *Yearbook of the International Law Commission 1953*, vol. II.

## ARTICLE 9

*Reservations*

## I

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

## II

*Alternative Proposals de lege ferenda* (as in the first report)<sup>22</sup>

1. The italicized passage, which has been added, is not intended as any substantial modification of the original draft. It expresses a qualification which, whether explicitly stated or not, underlies most of the other articles of the first report, namely, that the parties may, subject to any overriding principles of general international law (see article 15 of the first report), adopt conventional rules appropriate to the nature and the circumstances of any particular treaty. In fact, the main purpose of the qualifying passage is to draw attention to the alternative proposals *de lege ferenda* as formulated in the first report. This is so mainly having regard to the fact that the unanimity rule which the article as formulated adopts, with some hesitation though in conformity with the view previously expressed by the Commission as to the *lex lata*,<sup>23</sup> is unsatisfactory in many respects.

2. It is believed that, however unsatisfactory and however far short of universal acceptance a rule of international law may be, it is the function of the Commission to state that rule—even if only as a preliminary to a formulation of a more satisfactory solution *de lege ferenda*. In his first report, the Special Rapporteur has given reasons why the unanimity rule which the Commission—rightly, it is believed—found to be the existing rule, cannot be regarded as satisfactory. However, although open to objections of various kinds, that rule nevertheless represents the existing law. The fact that it is not unanimously accepted does not mean that it is not generally accepted and that, as such, it cannot be described as the rule of international law on the subject. If unanimity of acceptance, as distinguished from generality, were to be regarded as an essential

address a communication to that effect to each of the high contracting parties and that, upon receiving the unanimous consent of the parties to adherence, such Government shall deposit with the Government of the United States of America an instrument of adherence. It must be assumed that the high contracting parties referred to above include those who have adhered in the meantime.

<sup>22</sup> A/CN.4/63, in *Yearbook of the International Law Commission 1953*, vol. II.

<sup>23</sup> In his interesting memorandum on the subject, submitted in August 1953, Mr. Yepes considers that the view of the Commission as to the *lex lata* cannot be sustained (*ibid.*, A/CN.4/L.46). However, what is believed to be relevant is that the Special Rapporteur, though after some hesitation, did in fact associate himself with the view of the Commission as to the *lex lata*.

hall-mark of rules of international law, the scope of the law would be reduced to the barest minimum.

3. Nevertheless, although the Commission can, in the view of the Special Rapporteur, properly adhere to its statement of the existing law on the subject as formulated in its report on reservations in 1951,<sup>24</sup> it cannot stop there. It is a matter for reflection that while the International Court of Justice, whose function it is to *apply* existing law, in its advisory opinion on the question of Reservations to the Convention on Genocide,<sup>25</sup> devoted itself mainly to the *development* of the law in this sphere by laying down the novel principle of compatibility of reservations with the purpose of the treaty, the International Law Commission whose task is both to codify and develop international law, limited itself substantially to a statement of existing law. This was so notwithstanding the fact that the General Assembly requested the Commission to examine the subject from the point of view of both codification and development. In view of this the Special Rapporteur submits that the satisfactory fulfilment of the task of the Commission in this respect requires that it should devote attention to the elaboration of other solutions. These solutions can be conceived either as replacing the existing rule or as solutions alternative, at the option of the parties, to the existing rule which may continue to be the residuary binding principle in case the parties fail to adopt any alternative rule such as those formulated in this report.

4. Thus it will be necessary for the Commission to decide which course it will finally adopt in its codification of the law of treaties, namely, whether to formulate one of the alternative solutions as a replacement of the existing law as formulated by it in its report in 1951, or whether to re-affirm that rule as the main residuary rule and to recommend any of the alternative solutions to be adopted by the parties according to the circumstances of any particular treaty. If the Commission adopts that latter course, its task will be considerably simplified. The Special Rapporteur expresses no preference for either solution seeing that the practical difference between them is distinctly limited. For even if the traditional rule of unanimity—admittedly unsatisfactory—is maintained, it is a rule which the parties can discard at will by selecting any of the alternative solutions. They would be bound by the unanimity rule only if they were to fail to provide for other alternatives. What the codification of the subject can usefully do is, by annexing to the main residuary rule a number of model alternative solutions, to remove the danger of the parties being bound by the residuary rule as the result of mere inadvertence. There will be no excuse for such inadvertence if the alternative solutions are clearly set out in a code of the law of treaties and if, as the result, they can be presumed to be present to the minds of the parties when engaged in drafting the final clauses of the treaty.

5. From this point of view it may be useful to bring to the attention of the Commission the discussions which took place in 1954 within the Commission on

<sup>24</sup> See Chapter II of the Commission's report on its third session, *Yearbook of the International Law Commission 1951*, vol. II, p. 125.

<sup>25</sup> *I.C.J. Reports 1951*, p. 15.

Human Rights in the matter of reservations to the proposed Covenant of Human Rights. While Chile and Uruguay proposed that "no State Party to this Covenant may make reservations in respect of its provisions" (Commission on Human Rights, tenth session, document E/CN.4/L.354, 25 March 1954), the U.S.S.R. advanced a proposal in the opposite direction — a proposal giving any State the right to formulate reservations irrespective of the attitude of the other parties. The proposal (*ibid.*, document E/CN.4/L.349, 22 March 1954) ran as follows: "Any State may, either at the time of signature of the present Covenant followed by acceptance, i.e. ratification, or at the time of acceptance, make reservations with regard to any of the provisions contained therein. If reservations are made the Covenant shall, in relations between the States which have made the reservations and all other States Parties to the Covenant, be deemed to be in force in respect of all its provisions except those with regard to which the reservations have been made." The proposal put forward by China, Egypt, Lebanon and the Philippines (*ibid.*, document E/CN.4/L.351, 24 March 1954) combined, in a novel fashion, the so-called Pan-American system with the principle of compatibility as enunciated by the Court. It reads as follows:

"1. Any State, at the time of its signature subsequently confirmed by ratification, or at the time of its ratification or acceptance, may make any reservation compatible with the object and purpose of the Covenant.

"2. Any State Party may object to any reservation on the ground that it is incompatible with the object and purpose of the Covenant.

"3. Should there be a dispute as to whether or not a particular reservation is compatible with the object and purpose of the Covenant, and it cannot be settled by special agreement between the States concerned, the dispute may be referred to the International Court of Justice by the reserving State or by any State Party objecting to the reservation.

"4. Unless a settlement is reached in accordance with paragraph 3, any State Party objecting to the reservation may consider that the reserving State is not a party to the Covenant, while any State Party which accepts the reservation may consider that the reserving State is a party to the Covenant.

"5. Any State making a reservation in accordance with paragraph 1, or objecting to a reservation in accordance with paragraph 2, may at any time withdraw the reservation or objection by a communication to that effect addressed to the Secretary-General of the United Nations."

The detailed proposals put forward by the United Kingdom are of special interest inasmuch as they emanate from a Government which before the International Court of Justice, in the case of Reservations to the Convention on Genocide,<sup>26</sup> relied conspicuously on the unanimity rule. These proposals are in accordance with the alternative drafts A and B as formulated in the first report submitted by the Special Rapporteur in 1953. They follow the lines of the solution foreshadowed by the

Government of the United Kingdom at the General Assembly in 1952 and elaborated in greater detail by Sir Gerald Fitzmaurice in the *International and Comparative Law Quarterly*, vol. 2 (1952), pp. 1-26. They read as follows (*ibid.*, document E/CN.4/L.345, 18 March 1954):

"1. Any State may, on depositing its instrument of acceptance to this Covenant, make a reservation to the extent that any law in force in its territory is in conflict with, or to the extent that its law does not give effect to a particular provision of Part III of this Covenant. Any reservation made shall be accompanied by a statement of the law or laws to which it relates.

"2. As soon as the period of two years mentioned in Article 70 (3) has elapsed, the Secretary-General of the United Nations shall, subject to paragraph 5 of this Article, circulate a copy of all reservations received by him to all States which have by the date of circulation deposited an instrument of acceptance with or without reservation.

"3. Copies of reservations received after the expiry of the period mentioned in Article 70 (3) shall, subject to paragraph 5 of this Article, forthwith be circulated by the Secretary-General to all States which, by the date of circulation, have deposited an instrument of acceptance with or without reservation or, if on that date the Covenant has entered into force, to all States parties thereto.

"4. A reservation shall be deemed to be accepted if not less than two-thirds of the States to whom copies have been circulated in accordance with this Article accept or do not object to it within a period of three months following the date of circulation.

"5. If an instrument of acceptance accompanied by a reservation to any part of this Covenant not mentioned in paragraph 1 of this Article is deposited by any State, the Secretary-General shall invite such State to withdraw the reservation. Unless and until the reservation is withdrawn, the instrument of acceptance shall be without effect and the procedure provided in this Article shall not be followed with respect to such instrument or the reservation or reservations accompanying it.

"6. Any State making a reservation in accordance with this Article may withdraw that reservation either by a notice addressed to the Secretary-General; such notice shall take effect on the date of its receipt; and in whole or in part at any time after its acceptance, a copy of such notice shall be circulated by the Secretary-General to all States parties hereto."

Subsequently the following paragraph was added to the foregoing text (*ibid.*, document E/CN.4/L.345/Add. 1, 24 March 1954):

"7. It is understood that, in order to achieve the application to the fullest extent of the provisions of this Covenant, any State making a reservation in accordance with this article should take, as soon as may be practicable, such steps as will enable it to withdraw the reservation either in whole or in part."

8. The Commission on Human Rights, without declaring itself in favour of any solution, decided to sub-

<sup>26</sup> *Ibid.*

mit the various proposals to the General Assembly for a final decision. While the General Assembly may find it necessary, with regard to the particular instrument before it, to take a decision in favour of one particular system in the matter of reservations, no such determination is incumbent upon the International Law Commission. As already suggested, it may properly consider that after formulating the main residuary rule binding upon the parties in case (and only in case) they have failed to provide for a different solution, its task will be fulfilled if it formulates the various alternative solutions as outlined in this report, or, if the Commission so desires, any other methods. For the fact, which the Commission is not at liberty to disregard, is that, according to the circumstances of the various treaties, the recent practice of Governments has variously followed the different methods outlined in the report. Thus the Agreement of 25 February 1953 on German External Debts (*Cmd. 8781 (1953)*) follows closely the principle of unanimity. It lays down in article 38 as follows: "Any Government which deposits an instrument of ratification or a notification of approval or an instrument of accession to the present Agreement other than in accordance with the terms of its invitation or subject to any other reservation or qualification shall not be deemed to be a Party to the Agreement until such reservation or qualification has been withdrawn or has been accepted by all the Parties thereto." On the other hand, the Convention of 1951 on the Legal Status of Stateless Persons allows reservations, regardless of the subsequent consent of the other contracting parties, but excludes them altogether with regard to some specified subjects, such as absence of non-discrimination (article 3), freedom of religion (article 4), free access to court (article 16, para. 1), prohibition of expulsion to countries of persecution (article 33), and the final clauses of the convention. The Convention on Declaration of Death of Missing Persons, concluded about the same time (6 April 1951), follows the so-called Pan-American system. It provides, in article 19, that if a contracting party does not accept a reservation made by another State, it may within ninety days of the receipt of notification thereof, notify the Secretary-General that it considers the accession of the State making the reservation as not having entered into force between that State and itself; for in that case the convention is to be considered as not having entered into force between the two States in question. These examples, which show the continuing variety of practice on the subject, suggest that it is neither necessary nor desirable to aim at a uniform solution of the problem. What is both necessary and desirable is that the codification of the law of treaties shall contain a clear rule for the cases in which the parties have made no provision on the subject.

9. It will be noted that neither the first report nor the present additional report refers to the so-called "federal clause" or the "colonial clause" — a subject which has given rise to considerable discussion. Essentially, the federal and colonial clauses constitute reservations; to that extent they are governed by the rules and principles bearing on that matter. However, their importance is such that they warrant separate treatment. This belongs, more conveniently, to that part of the report which will cover the operation and implementation of treaties.

## ARTICLE 16

*Consistency with prior treaty obligations*

1. A bilateral or multilateral treaty, or any provision of a treaty, is void if its performance involves a breach of a treaty obligation, previously undertaken by one or more of the contracting parties.

2. A party to a treaty which has been declared void by an international tribunal on account of its inconsistency with a previous treaty may be entitled to damages for the resulting loss if it was unaware of the existence of that treaty.

3. The above provisions apply only if the departure from the terms of the prior treaty is such as to interfere seriously with the interests of the other parties to that treaty or substantially to impair an essential aspect of its original purpose.

4. The rule formulated above does not apply to subsequent multilateral treaties, partaking of a degree of generality which imparts to them the character of legislative enactments properly affecting all members of the international community or which must be deemed to have been concluded in the international interest. *Neither does it apply to treaties revising multilateral conventions in accordance with their provisions or, in the absence of some provisions, by a substantial majority of the parties to the revised convention.*

1. The following changes, which have been italicized and which are the subject of this comment, have been introduced in article 16 of the original report:

(a) The contention of the principal provision of paragraph 1 has been clarified so as to make it cover both unilateral and multilateral subsequent treaties;

(b) A further clarification has now been introduced in this paragraph in the sense that the invalidity of the subsequent treaty may extend to some of its provisions only as distinguished from the treaty as a whole — a recognition of the principle of severability which is of special importance in connexion with the subject matter of this article;

(c) The present version of paragraph 3 of article 16 now qualifies the rule of the invalidity of the inconsistent subsequent treaty, namely that the serious impairment of the original purpose of the prior treaty must extend to an essential aspect of that original purpose;

(d) In paragraph 4 the reference to the Charter of the United Nations has been omitted in order to avoid too narrow a reference to multilateral treaties which permit of an exception to the general principle enunciated in the article;

(e) In the same paragraph, in relation to subsequent multilateral treaties generally, the principle has been introduced that such multilateral treaties are valid if they constitute a revision of the prior treaty accomplished either in accordance with its original terms or by a substantial majority of the parties thereto.

2. While the changes now introduced into article 16 represent some alterations of substance, they are intended mainly to clarify and to supplement the original object of that Article. Their object is also to draw attention

to the fact the question of the co-existence and the conflict of multilateral treaties raises problems other — and in some respects more important — than that of the validity or otherwise of the subsequent treaty inconsistent with treaty obligations previously undertaken. These problems include those of interpretation of the prior and subsequent treaties and of termination<sup>27</sup> — or degree of termination — of the prior treaty in the light of the subsequent instrument. Above all, there arise in this connexion complicated problems of legislative technique as the result of the co-existence of multilateral treaties unavoidably covering the same subject matter, of regional agreements, and of constitutions of international institutions — based on treaty — with overlapping spheres of activity. With regard to these questions, the issue of invalidity of the subsequent treaty or of its individual provisions is not of primary significance. Although this aspect of the problem falls more conveniently within the part of the report concerned with the operation and implementation of treaties, it is of importance that the codification of the law of treaties should, at every stage, draw attention to the wide ramifications of this aspect. In particular, it has a direct bearing upon the question of the revision of multilateral conventions. Any revision of a multilateral convention amounts to the conclusion of a new treaty which, even if it merely adds to the obligations of the revised treaty, creates a new set of obligations potentially inconsistent with the latter. The question arises whether, in the absence of express provisions regulating the process of revision, the second treaty — however otherwise justified, reasonable and beneficent — is void on account of inconsistency with the prior treaty. This and similar questions affect the whole process of so-called international legislation — including that covered

<sup>27</sup> *As between the same parties* the question of inconsistency of the prior and subsequent treaties is not relevant to the question of the validity of the latter. Here—but only here—the maxim *lex posterior derogat priori* fully applies. To the extent of inconsistency the subsequent treaty abrogates the former treaty. The degree of the inconsistency is a question of interpretation. See, for example, Hackworth, *Digest of International Law* 5 (1943), pp. 306-507, on the controversy between the United States and Turkey concerning the implied abrogation of the Treaty of Commerce and Navigation of 1930 between the United States and the Ottoman Empire by the Treaty of 28 October 1931. It will be noted that in the case of the *Free Zones of Upper Savoy and the District of Gex* the Permanent Court of International Justice was called upon to decide whether article 435, paragraph 2, of the Treaty of Versailles “has abrogated or is intended to lead to the abrogation” of the provisions of the Treaty of Paris of 1815 regarding the regime of the Free Zones of Upper Savoy and the District of Gex (*P.C.I.J.*, Series A/B, No. 46). While in the *Mavrommatis* case the Court considered that a Protocol annexed to the Peace Treaty of Lausanne overruled the provisions of the mandate for Palestine (Series A, No. 2, p. 30), it held in the case of *Minority Schools in Upper Silesia* that the contracting parties could not validly abrogate or modify in one part of the Convention, the protection afforded by a decision of the Conference of Ambassadors and embodied in a preceding part of the same Convention (Series A, No. 15). There may be circumstances in which two parties may properly cancel a treaty to which a third State is a party. Thus Article 8 of the Treaty of Peace and Friendship of 31 July 1950 between the Governments of India and Nepal (*U.N.T.S.*, 94 (1951), p. 8) provides as follows: “So far as matters dealt with herein are concerned, this Treaty cancels all previous Treaties, agreements, and engagements entered into on behalf of India between the British Government and the Government of Nepal.”

by the codification of international law — and a further detailed examination of the problem seems to be indicated.

3. In the first instance, it has seemed desirable to clarify the first paragraph of article 16 by stating expressly that the main principle there formulated applies both to subsequent bilateral and multilateral treaties. The contrary principle is adopted in the Havana Convention on Treaties of 1928 which provides in article 18 that “two or more States may agree that their relations are to be governed by rules other than those established in general conventions celebrated by them with other States”.<sup>28</sup> The Governments participating in The Hague Codification Conference of 1930 were conscious of the implications of the question. However, the final recommendation of the Conference on the subject was inconclusive. It stated that “in the future, States should be guided as far as possible by the provisions of the Acts of the First Conference for the Codification of International Law in any special conventions which they may conclude among themselves”.<sup>29</sup> The Report of the Drafting Committee added a further element of uncertainty by contriving, in one passage, to give expression to — and, apparently, approve of — two contradictory considerations. It referred to the concern felt in the Committee on Nationality “as to how far it would be possible for two States to conclude between themselves special agreements which were not entirely in accordance with the principles contained in the instruments adopted by the Conference”.<sup>30</sup> It proceeded to express the view that “doubtless nothing prevents the conclusion of such agreements, provided they affect only the relations between the States parties thereto”.<sup>31</sup> The Committee then added to the inconclusiveness of its statement by putting on record its opinion that it would not be desirable to adopt a rule expressly permitting States to avoid the obligations of the Convention by allowing them to conclude agreements of this nature and that this was the reason for the recommendations referred to above.

4. It would thus appear that the solution adopted by The Hague Conference was essentially in the nature of a diplomatic formula, contradictory in itself, which left on one side the principal issue. No such course is open to the International Law Commission in its codification of the law of treaties. The problem is admittedly of pronounced complexity. Can it be said that any *inter se* agreement affects only the relations of the parties thereto? If a number of States are parties to a general convention whose provisions are designed to eliminate statelessness, can those States validly conclude *inter se* an agreement departing from these provisions? If a number of States are parties to a general treaty providing for full freedom of air navigation in respect of all the “freedoms of the air”, can they subsequently validly conclude *inter se* an agreement limiting the operation of that principle? If some States are parties to general

<sup>28</sup> Printed in Hudson, *International Legislation*, vol. IV, pp. 2378, ff., at p. 2383.

<sup>29</sup> *Acts of the Conference for the Codification of International Law*, vol. I, *Plenary Meetings*, Publications of the League of Nations, V. *Legal*, 1932.V.14., p. 171.

<sup>30</sup> *Ibid.*, p. 68.

<sup>31</sup> *Ibid.*

conventions which prohibit forced labour, or traffic in slaves, or white slave traffic, or the right to have recourse to force, or absolute freedom to produce and import narcotic drugs, can these States validly conclude *inter se* a convention which limits the operation of the principal convention? Can a number of States parties to the Geneva Conventions on Prisoners of War or on the Treatment of Civilians subsequently agree *inter se* that, contrary to the provisions of these Conventions, in any war in which they may be engaged, reprisals shall be admissible against prisoners of war or that all or some of the safeguards provided for the civilian population shall not apply? The same question can be asked in respect of a convention which codifies the law of treaties. In this case, however, a negative answer does not suggest itself as readily as with regard to the other questions. It might not seem improper, when a general convention on treaties provides for the requirements of ratification as a condition of the validity of a treaty, that some of the parties should in a subsequent treaty *inter se* dispense with that requirement. The same applies to the requirement of written form as a condition of the validity of a treaty. But are the parties to a general convention on treaties equally at liberty to provide *inter se* that, unlike the general treaty, treaties imposed by force or treaties inconsistent with general international law shall be valid?

5. Possible questions of this character are probably as many as there are multilateral conventions. The fundamental difficulty arises out of the consideration that it is of the essence of multilateral conventions that, as a rule, they do not, in respect of the subjects covered by them, regulate matters which affect only the relations between the States parties thereto. If five States parties to any of the conventions referred to above adopt as between themselves provisions and principles contrary to — or perhaps only differing from — those of the general conventions they may fairly be said to affect by their action all parties to the general convention. It is in the general and particular interest of all parties to these conventions that all other parties to the convention adhere *among themselves* to the provisions and principles of that convention. The latter may otherwise have no meaning or purpose — even if that general interest has no other object than that of securing uniformity for the sake of certainty and smoothness of international intercourse. For this reason it would appear that once States have become parties to a multilateral treaty of a legislative character, none of the questions covered by it affects only a limited number of the contracting parties; all contracting parties are affected. In fact, in conventions of this type the main interest of some parties, whose participation in the convention is no more than declaratory of a practice which they have followed as a matter of course, may be that *other* parties should individually or *inter se* abide by the purpose and the rules of the convention. For their purpose is not the regulation of a contractual *quid pro quo*. In such convention the object is not to give or receive a specific tangible consideration for benefits received: the decisive consideration is the general observance of the convention. This is the position with regard to most — or perhaps all — multilateral conventions.<sup>32</sup> This being so, the prohibition of *inter se* arrangements inconsistent with the previous treaty obligations applies to all multilateral

treaties unless, in accordance with paragraph 4 of article 16, the *subsequent* inconsistent treaty belongs to the exceptional category of enactments of a fundamental character or unless it is concluded in the general international interest and is of such a nature as properly to override previous undertakings. In view both of the actual increase of the practice of multilateral treaties and its possible extension as the result of the growing integration of international society, the time seems to be ripe for the authoritative affirmation of the principle that parties to a multilateral treaty cannot legitimately claim the right to avoid its obligations through the device of concluding a bilateral or multilateral arrangement *inter se*.

6. While, for these reasons, the Special Rapporteur has deemed it necessary to clarify paragraph 1 of article 16 by extending its principal provision to both bilateral and multilateral treaties, the fact must be taken into consideration that international practice shows numerous instances of subsequent *inter se* agreements and that such agreements are necessary and desirable. The Covenant of the League of Nations provided for — and encouraged — regional agreements. So does the Charter of the United Nations. The Universal Postal Convention of 1952 authorizes, in article 9 (*U.N.T.S.*, 169 (1953), p. 25), the establishment of limited unions — subject to the restriction that they do not introduce conditions less favourable to the public than those laid down by the Convention and Regulations of the Universal Postal Union. Similar latitude is provided for in article 42 of the International Telecommunication Union. The Convention of 1934 for the Protection of Industrial Property and the Convention of 1928 for the Protection of Literary and Artistic Works permit, in articles 15<sup>33</sup> and 20<sup>34</sup> respectively, *inter se* arrangements provided that they are not inconsistent with the provisions of those conventions. In some cases the authorization extends specifically to conventions already concluded. Thus the Safety of Life at Sea Convention of 1948 lays down that matters falling within the provisions of that Convention but governed by the International Telecommunications Convention shall be governed by the latter as supplemented by the Safety of Life at Sea Convention. The same principle has been made applicable in the relations between the International Telecommunications Convention and the International Civil Aviation Convention as well as between the International Sanitary Regulations and the International Civil Aviation Convention. Above all, upon analysis, those treaties which terminate an existing multilateral treaty and provide for the continuation of such prior treaty between and in relation to those States who do not become parties to the new treaty, amount to what is called an *inter se* arrangement. Such treaties, which may or may not be inconsistent with a previous

<sup>32</sup> In this respect the Special Rapporteur has felt compelled to adopt a view differing from that expressed in the Harvard Research draft on treaties which limits the multilateral conventions in question to conventions of a fundamental character such as the Covenant of the League of Nations or the Statute of the Permanent Court of International Justice. See *American Journal of International Law*, 29 (1935), Supplement, pp. 1016 ff., especially at p. 1018.

<sup>33</sup> *L.N.I.S.*, vol. 192, pp. 17 ff., at p. 43.

<sup>34</sup> Printed in Hudson, *International Legislation*, vol. IV, pp. 2463 ff., at pp. 2475-2476.

treaty in *pari materia* between the same parties, constitute a prominent and constant feature of international practice. This takes place through provisions such as that of article 27 (1) of the Convention for the Protection of Literary and Artistic Works of 2 June 1948 which reads as follows: "The present Convention shall replace in the relations between the countries of the Union the Convention of Berne of 9 September 1886, and the acts by which it has been successively revised. The acts previously in effect shall remain applicable in the relations with the countries which shall not have ratified the present Convention."<sup>35</sup> The Hague Convention for the Pacific Settlement of International Disputes provided that it shall replace as between the Contracting Parties the corresponding convention of 1897. Similar provisions were incorporated in the Sanitary Convention of 21 June 1926. The Geneva Conventions of 1948 include analogous provisions in relations to the Geneva Convention of 1929 which, in turn, made similar reference to the provisions of The Hague Convention No. IV in so far as they bore on the treatment of prisoners of war.

7. Two factors would thus seem to emerge from the preceding observations. The first is that successive treaties which are concluded between some of the parties to the previous treaty and which cover the same subject and, to that extent, are potentially mutually inconsistent, are a frequent and necessary occurrence. The second is that any such subsequent treaty, although concluded only as between some States, as a rule affects, in some way, the former treaty and all the parties thereto. The question is whether it affects them so vitally and so adversely as to bring into play the general principle of the invalidity of the subsequent inconsistent treaty. This problem, in turn, resolves itself into two questions: the first is whether the subsequent multilateral treaty is in fact inconsistent with the prior multilateral treaty. This is a question of considerable difficulty which can be decided only by reference to the character and the purpose of the two treaties. In the nature of things, although the decision must somehow be made, it cannot be made, with any assurance, in advance and by reference to any abstract standard. Very often, an inconsistency — a conflict — will, upon closer scrutiny, prove to be no more than a divergence or variation with regard to the scope of the treaty and the method of its application. Often the departure, though apparent, is not such as to affect the true purpose of the prior treaty — especially in the light of an actual assessment of the relative importance of the interests involved. Thus, from this point of view, there is no conflict — even if the resulting situation amounts to more than mere overlapping — as the result of the fact that the various Trusteeship Agreements cover such subjects, regulated in other conventions, as traffic in arms, slavery and forced labour; or that the Convention of 1951 relating to the Legal Status of Refugees or the Conventions of 1949 on Prisoners of War and the Treatment of Civilians regulate questions which form the subject matter of various international labour conventions with regard to such matters as labour legislation and social security; or that, while some conventions between the same

contracting parties aim at the relaxation of restrictions of the freedom of movement of goods or persons, others introduce specific limitations by reference to public health (as in the case, referred to above, of the International Sanitary Regulations and the International Civil Aviation Convention).

8. In all these matters the ensuing problem — and the correct method of approach — ought not to be conceived so much in terms of any invalidity of the subsequent treaty or its particular provisions as of deciding which, in all the circumstances, must prevail. For there is little substance in the suggestion that, in pure logic, if a provision is made to yield to a provision of another treaty it is, *pro tanto*, invalid. For that provision may be otherwise — i.e., in relation to other treaties and generally — fully valid and operative. This being so, unless the inconsistency is so gross, irreparable and raising the issue of good faith as to call urgently for the application of the principle and of the sanction of invalidity, the problem is one of resolving the conflict by application of principles appropriate to the case. Such principles may be found in the application of the maxim *lex specialis derogat generali* or in an inquiry into the degree of generality or hierarchical order of the treaties in question. It cannot be found in the application of a rule of thumb.<sup>36</sup> It must, more properly, be sought in the provision of some organs of international advice and assistance equipped with an up-to-date knowledge of existing treaties in the same way as parliamentary draftsmen in national legislatures among whose principal qualifications is a thorough and ready familiarity with the large mass of statutory law of their country. It must further be sought in a consistent practice of consultation between and with the various specialized agencies within whose province any particular multilateral convention may fall. The Administrative Committee on Co-ordination of the United Nations and the Specialized Agencies has made far-reaching recommendations to that effect.<sup>37</sup> In many cases the problem may be solved by the conclusion of more general — consolidatory — treaties aiming at the removal of inconsistencies between treaties as in the case of the United Nations Convention on Road Traffic of 19 September 1949<sup>38</sup> (which attempted to remove the inconsistencies between the Washington Convention of 6 October 1930 on the Regulation of Automotive Traffic<sup>39</sup> and the Paris Convention of 24 April 1926 on Motor Traffic<sup>40</sup>) or in the case of the Universal Copyright Convention of 1952<sup>40\*</sup> (which, partially, attempted to achieve the same object as between the Berne and Inter-American Conventions for the Protec-

<sup>36</sup> An illuminating survey of these possible principles is contained in an article by Dr. Jenks entitled "The Conflict of Law-Making Treaties", in *British Year Book of International Law* (1953), pp. 401 ff. See also the valuable contribution by Dr. Aufrecht in *Cornell Law Quarterly*, 37 (1952), pp. 655-700.

<sup>37</sup> See Jenks, "Co-ordination in International Organization: An Introductory Survey", in *British Year Book of International Law*, 28 (1951), pp. 75 and 84; *ibid.* 30 (1953), pp. 401 ff.; and in *Recueil des Cours* of The Hague Academy, 77 (1950), pp. 189-293.

<sup>38</sup> *U.N.T.S.*, 125 (1952), pp. 22 ff.

<sup>39</sup> Hudson, *International Legislation*, vol. V, pp. 786 ff.

<sup>40</sup> *Ibid.*, vol. III, pp. 1859 ff.

<sup>40\*</sup> *Cmd.* 8912 (1952).

<sup>35</sup> *Ibid.*, p. 2479.

tion of Literary and Artistic Works).<sup>41</sup> Last — but not least — there remains recourse to judicial settlement for determining, in relation to any particular conflict, either the priority or, in extreme cases, the voidance of any particular inconsistent obligation. It is clear that in such cases the task confronting a judicial body is of an exacting nature. Inasmuch as on occasion it may amount to assigning the same treaties and provisions a hierarchical priority of importance by reference to the character and objects of the treaties in question, it may tend to assume the complexion of legislative activity. However, the performance of such tasks may be unavoidable in some cases. It may be aided by a codification, on the lines suggested, of this aspect of the law of treaties.

9. At the same time it is of importance not to exaggerate the importance of conflict. On occasion, the apparent conflict resolves itself, upon analysis, into no more than an assumption of additional obligations. Thus, for instance, it was widely maintained for a time that there existed a conflict between the obligations of the Pact of Paris, which prohibited war as an instrument of national policy, and the provisions of the Covenant of the League of Nations which allowed war in certain contingencies (such as the failure of the Council to make a valid recommendation or a valid finding that a dispute fell within the domestic jurisdiction of a State). There was in fact no such conflict. There merely existed an additional obligation under the Pact of Paris — an obligation clearly not inconsistent with the Covenant. Neither was there a conflict when, in addition to the obligation to submit disputes to the Council of the League of Nations, the parties became bound by special treaties of conciliation and other means of pacific settlement — a contingency which in any case does not arise under Chapter VI of the Charter of the United Nations owing to the elastic nature of its provisions. The same applies to the multiplicity of obligations of judicial settlement — as when parties to the optional clause of Article 36 of the Statute of the International Court of Justice are also bound by other obligations of judicial settlement. In such cases it is probably for the body first seized with the dispute to determine which obligation enjoys precedence. The co-existence of multilateral conventions in cognate fields must unavoidably cause a great deal of overlapping and divergence. When the International Law Commission approaches in due course the question of the operation and implementation of treaties it will be necessary, in the light of recent authoritative research on the subject, to consider constructive proposals in the field of legislative technique in this matter. However, as a rule the problem is in many cases of a less drastic nature than that arising from obvious or deliberate inconsistency which renders relevant the principle of the invalidity of the subsequent treaty. This applies even to such widely acknowledged instances of inconsistency of treaties as occurred in the case of the Convention of 1919 for the Regulation of Aerial Navigation and the Havana Commercial Aviation Convention of 1928.<sup>42</sup>

<sup>41</sup> The Special Rapporteur is indebted to Dr. Jenks for these examples: *British Year Book of International Law*, 30 (1953), pp. 401 ff.

<sup>42</sup> See Warner in *Air Law Review*, 1932, p. 225.

10. In this connexion there arises the question of what weight must be given to the provisions of treaties affirming that they are not intended to conflict with other — specified or unspecified — treaties. Thus article 7 of the North Atlantic Treaty of 4 April 1949 (*U.N.T.S.*, 34 (1949), p. 248) provides as follows: "This Treaty does not affect, and shall not be interpreted as affecting, in any way the rights and obligations under the Charter of the Parties which are members of the United Nations." Article 10 of the Inter-American Treaty of Reciprocal Assistance of 2 September 1947 (*U.N.T.S.*, 21 (1948), p. 101) provides that "none of the provisions of this Treaty shall be construed as impairing the rights and obligations of the High Contracting Parties under the Charter of the United Nations."<sup>43</sup> The Agreement between the United Nations and the Universal Postal Union of 15 November 1948 provides in article 6 (*U.N.T.S.*, 19 (1948), p. 224) that "as regards the Members of the United Nations, the Union agrees that in accordance with Article 103 of the Charter no provision in the Universal Postal Convention or related Agreements shall be construed as preventing or limiting any State in complying with its obligations to the United Nations." Similar provisions were inserted in the various and numerous treaties of friendship and pacific settlement between members of the League of Nations providing for neutrality of the parties in case of any — usually defensive — war in which they may become engaged. These treaties provided, having regard to the obligations of article 16 of the Covenant, that they were not intended to conflict with the obligations of the Covenant.<sup>44</sup> These treaties included the Locarno Treaty of Mutual Guarantee of 16 October 1925 (article 7). Provisions of this nature were also found in treaties of a technical character such as the Barcelona Statute of 1921 concerning navigable waterways of international interest, the Geneva Statute of 1921 concerning railways, and the convention of the same year relating to transit of electric power. What effect is to be attributed to such declarations of compatibility? It may be said that they are no more than declaratory

<sup>43</sup> Provisions of this character are to be found in a variety of recent treaties. Thus the Mutual Defense Assistance Agreements between the United States of America and other States (see above, article 1, para. 7) provide that the financing of any assistance under these agreements shall be consistent with the obligations of the contracting Governments under the Charter of the United Nations and of the North Atlantic Treaty. The Treaty of Friendship between Thailand and the Philippines of 14 June 1949 lays down, in article 2 (*U.N.T.S.*, 81 (1951), p. 54), that the undertaking to settle disputes between the parties by various pacific means, including reference to the International Court of Justice, "shall not affect the application of the Charter of the United Nations." The Convention between the United States of America and Costa Rica for the establishment of an Inter-American Tropical Tuna Commission of 31 May 1949 (*U.N.T.S.*, 80 (1951), p. 4) provides in article 4 (*ibid.*, p. 10) that "nothing in this Convention shall be construed to modify any existing treaty or convention with regard to the fisheries of the eastern Pacific Ocean previously concluded by a High Contracting Party, nor to preclude a High Contracting Party from entering into treaties or conventions with other States regarding these fisheries, the terms of which are not incompatible with the present Convention."

<sup>44</sup> For an enumeration and discussion of some of these treaties, from this point of view, see Rousseau, *Principes généraux de droit international public*, vol. 1 (1944), pp. 774-776, 789-792.

of the general presumption — which is a principle of interpretation — that the parties to a convention do not intend to undertake obligations conflicting with their duties under previous treaties. It may be argued, on the other hand, that such declarations of compatibility are no more than a form of words which cannot do away with the fact that the subsequent treaty cannot be performed without violating the provisions of the prior treaty. An inconsistent treaty cannot, it may be said, be made consistent with the prior treaty by the simple device of the parties affirming that it is so. However, the better view is probably that such declaration of compatibility is not devoid of effect and that it serves a useful purpose. It amounts to a clear expression of intention that the subsequent treaty should not be operative in case it should in fact, in any particular instance, conflict with the prior treaty. To that extent the presumption that the parties do not intend the subsequent treaty to be inconsistent with the first receives a considerable accession of strength as the result of an express provision to the effect that no conflict is intended.<sup>45</sup>

11. Having regard to the general tendency of international practice, as expressed in article 16, to treat the subsequent inconsistent treaty as void only if no other solution can reasonably be adopted, the Special Rapporteur has deemed it desirable to clarify the first paragraph of that article by adding the words “or any provision of a treaty”. The object of that addition is to incorporate expressly in the article the principle of severability, that is to say, the principle that, as a rule, the voidance resulting from the absence of any of the conditions of the validity of a treaty need not affect the treaty as a whole; it may, and as a rule does, affect only the relevant provision. The principle of severability applies generally to the whole subject of treaties and will be examined in the appropriate parts of this report, in particular in connexion with the application and the termination of treaties. However, it has been considered convenient to give to it express formulation in the present article which is concerned largely with multilateral treaties. In relation to these the principle of severability is of special importance.

12. The reasons for the change introduced in paragraph 3 — namely, the substitution of the words “essential aspect of its original purpose” for the words “original purpose” — appear from the preceding sections of this comment. The fact that the subsequent treaty alters *some* aspect of the original purpose of the prior treaty need not be decisive. The decisive question must be whether it contravenes an essential aspect of that treaty.

13. In paragraph 14 the words “such as the Charter of the United Nations” have been omitted as suggesting too narrow a scope of multilateral treaties which, although inconsistent with previous obligations, are nevertheless valid (i.e., which in effect may override

previous treaties). There may be other multilateral treaties of such generality and importance that they may properly be attributed that effect. Thus, for instance, if a general air navigation convention effectively securing “the freedoms of the air” were to come into existence that convention might properly claim validity even if inconsistent with the previous treaty obligations of the parties; it might do so to the point of releasing the parties thereto from previous treaty obligations. This is to some extent recognized in various bilateral treaties in which the parties agree that in the event of their becoming parties to a general air convention the bilateral treaty should be amended accordingly. Thus article 14 of the Agreement of 29 October 1948 between the Netherlands and the Argentine of 29 October 1948 concerning regular air services provides as follows: “If the two Contracting Parties should ratify or accede to a multilateral air transport convention, then this Agreement and its annex shall be amended so as to conform with the provisions of the said convention as from the date on which it enters into force between them” (*U.N.T.S.*, 95 (1951), p. 57). Article 14 of the Agreement of 8 December 1949 between the Netherlands and Egypt concerning the establishment of scheduled air services is to the same effect (*ibid.*, p. 141). So is article 14 of the Agreement of 11 March 1950 between Norway and Egypt for the establishment of scheduled air services (*ibid.*, p. 184). So are many other treaties in this sphere.<sup>46</sup> The adoption of some such principle may also assist in solving the difficulties raised by treaties incorporating the most-favoured-nation clause and the subsequent desire of the parties to participate in general treaties providing for a comprehensive economic régime in the direction of liberalizing international commercial relations. It is clear that, in view of the general practice of giving an unconditional interpretation to the most-favoured-nation clause, the participation in such general treaties would become illusory or impossible if the benefits of such treaties had to be extended to States refusing to take part in the general treaty. For this reason there may be room for extending the principle now introduced in paragraph 4 to economic multilateral treaties of general character concluded in what may fairly be regarded as the overriding international interest. In fact some such solution has been suggested by writers who have devoted close study to the subject.<sup>47</sup>

14. The Special Rapporteur deems it necessary to draw attention to the wide implications of the principle as now proposed in paragraph 4 of article 16. In so far as that principle sanctions and treats as valid departure from the terms of a binding treaty as the result

<sup>45</sup> This same principle is occasionally expressed in connexion with the provisions of the same instrument. Thus the Agreement of 27 February 1953 on German External Debts (Cmd. 8781 (1953)) lays down, in article 27, that “in the event of any inconsistency between the provisions of the present Agreement and the provisions of any of the Annexes thereto, the provisions of the Agreement shall prevail” (*ibid.*, p. 19).

<sup>46</sup> Thus article 13 of the Agreement concerning air communications between Poland and Bulgaria of 16 May 1949 (*U.N.T.S.*, 84 (1951), p. 338) provides as follows: “1. The present Agreement shall be ratified by the two Contracting Parties and shall come into force on the date of the exchange of the instruments of ratification. . . . It annuls and replaces all previous Polish-Bulgarian agreements and arrangements concerning air communications. 2. Should the two Contracting Parties ratify or adhere to a multilateral aviation convention, the present Agreement and its annex shall be amended so as to conform to the provisions of that convention as soon as it has entered into force, as between the two Parties.”

<sup>47</sup> See, for example, Ito, *La clause de la nation la plus favorisée* (1930).

of the conclusion of a multilateral treaty of a sufficient degree of significance and generality, it amounts to an interference with the legal rights of States without their consent. To that extent it amounts to a pronounced measure of international legislation in the literal sense. That consequence is probably unavoidable in a progressive and developing international society. However, it is of importance to realize the implications of that aspect of the codification of the law of treaties.

15. The same considerations apply to the addition now introduced at the end of paragraph 4 of article 16. The rule as now formulated provides that the general principle of the voidance of the subsequent incompatible treaty does not apply to treaties revising multilateral conventions in accordance with the provisions of these conventions or, in the absence of such provisions, by a substantial majority of the parties to the original convention. To some extent this rule overlaps with that expressed in the first sentence of paragraph 4 which refers, in the same sense, to "subsequent multilateral treaties, partaking of a degree of generality which imparts to them the character of legislative enactments properly affecting all members of the international community or which must be deemed to have been concluded in the international interest." However, the multilateral treaties referred to in the paragraph now added cover also multilateral treaties falling short of the stringent requirements of the first sentence. As stated above, any revision of a treaty, unless extending to matters of minor importance, is more or less inconsistent with the original treaty. If the revision of the prior treaty does not impair, in the words of paragraph 3, "an essential aspect of its original purpose" then, under the principle there stated, there is no question of the subsequent treaty being void. However, this will not always be the case. It is for this reason that the provision now added seems to be necessary. There is a substantial body of practice which is based on that principle. Thus article 14 of the Postal Convention of 1930 (and, substantially, article 15 of the Universal Postal Convention of 1947) provide for the possibility of a repeal, by a majority vote, of Acts of the preceding Congress of the Union. The revised Convention was, as from the date fixed by the Congress, binding on all members except those withdrawing from the Union.

Under article 17 of the Articles of Agreement of the International Monetary Fund (*U.N.T.S.*, 2 (1947), p. 98) amendments to most<sup>48</sup> articles of the Agreement require the concurrence of three-fifths of the members having four-fifths of the total voting power and are binding for all members within the time prescribed in the Agreement. Article 8 of the Articles of Agreement of the International Bank for Reconstruction and Development (*U.N.T.S.*, 2 (1947), pp. 184-186) is to similar effect. The provisions of the Convention on the Privileges and Immunities of the Specialized Agencies of 21 November 1947 (*U.N.T.S.*, 33 (1949), pp. 262 ff.) go in the same direction.

16. The amendment as proposed refrains from specifying in detail the kind of majority required for revision. While a detailed regulation of that aspect of the matter is possible — and indicated — in particular conventions, such as the Postal Union or the Monetary Fund, an article in the codification of the law of treaties must leave room for elasticity in this respect. A purely numerical majority — even if qualified by a requirement of two-thirds — may on occasion provide no more than a nominal solution.<sup>49</sup> Possibly a definition of what constitutes a "substantial majority" might include, as one of the relevant factors, a system of weighting votes such as that expressed in the Universal Postal Convention or in similar instruments. However that may be, the revision of multilateral treaties constitutes one of the most important aspects of the international legislative process and attention must be given to it either in connexion with the present article 16 or in some other part of the codification of the law of treaties.

<sup>48</sup> This does not apply to some articles, namely, those requiring unanimous consent for amendments modifying the right to withdraw from the Fund and the provisions relating to the quota of a member and the par value of its currency.

<sup>49</sup> Thus the United States, Great Britain and France consider as invalid the Belgrade Convention of 1948 relating to the Danube and revising the Convention of 1921 although that Convention was agreed upon by seven out of the ten States participating in the Conference of 1948. However, as Italy, Belgium and Greece, who were parties to the Convention of 1921, were not — contrary to article 42 of that Convention — invited to participate in the Conference of 1948, it appears that the revision was not accomplished by a majority of the original signatories.