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**Third Report on the Law of Treaties – Articles Tentatively Adopted by the Commission
at the Third Session with Commentary Thereon, by Mr. J.L. Brierly, Special Rapporteur**

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LAW OF TREATIES

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Third Report by J. L. Brierly, Special Rapporteur

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ARTICLES TENTATIVELY ADOPTED BY THE COMMISSION AT ITS THIRD SES- SION WITH COMMENTARY THEREON

CAPACITY TO MAKE TREATIES

Article 1

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

Comment

1. In general "the right of entering international engagements is an attribute of State sovereignty", as was declared by the Permanent Court of International Justice in the *Wimbledon* case (1923).¹ However, the capacity of a particular State to enter into any category, or all categories, of treaties, may be limited by reason of its qualified status. Thus, protected States have usually (subject to anything laid down in the treaty between the protecting and the protected State) no treaty-making capacity of their own, treaties being concluded on their behalf by the protecting State.

* Incorporating document A/CN.4/54/Corr.1.

¹ See Publications of the Permanent Court of International Justice, *Collection of Judgments*, Series A, No. 1, p. 21.

Members of confederations and federal unions may or may not possess treaty-making capacity according to the circumstances, *e.g.*, member states of the Federal State of Germany as it existed before the First World War retained their competence to conclude international treaties between themselves without the consent of the Federal State, and could also conclude international treaties with foreign States as regards matters of minor interest. Even under the Weimar Constitution of 1919, Bavaria retained her right to maintain diplomatic relations with the Holy See. Under the Federal Constitution of the Swiss Confederation (1848 as revised up to date) it is provided (Article 9): "exceptionally the cantons retain the right to conclude treaties with foreign States in respect of matters of public economy, relations with neighbouring cantons, and police relations; nevertheless such treaties shall not contain anything incompatible with the Confederation or with the rights of other cantons". Under the Bonn Constitution of 1949 the German *Laender* forming part of the Federal Republic possess certain limited treaty-making capacity.

2. Apart from the above cases which are instances of the qualified status of a State (a kind of *capitis diminutio*) there are also examples of States whose capacity to make treaties is restricted in point of subject-matter by international agreement, *e.g.*, in 1982 the Permanent

Court of International Justice held that although the Free City of Danzig was a State, it was subjected to certain limitations affecting both the manner and the extent of its treaty-making capacity.

3. By Article 88 of the Treaty of St. Germain, 1919, Austria's independence was declared to be inalienable and she undertook to abstain from any act which might directly or indirectly compromise her independence, in particular, by participating in the affairs of another State. A further, and somewhat wider, undertaking by Austria was recorded in the Geneva Protocol of 4 October 1922.² These provisions were held, by the Permanent Court of International Justice in 1931, to prohibit a proposed customs union between Germany and Austria.³

COMPETENCE OF HEAD OF STATE

Article 2

In the absence of provisions in its constitutional law and practice to the contrary, the Head of the State is competent to exercise the State's capacity to enter into treaties.

Comment

4. The relevance of the constitutional laws of States to the exercise on their behalf of the treaty-making power is discussed fully in the Comment on Article 4 of this Draft. Generally, it will be seen from what is said there that the traditional rule set forth in the above Article has sustained many inroads upon its former vigor. In practice today most constitutions do limit in some form or other the competence of the Head of State in this matter. However, constitutions change and it is necessary to lay down a rule—the traditional rule of international law—to cover the situation where the constitution is not specific on this point.

ESTABLISHMENT OF THE TEXT OF TREATIES

Article 3

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

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

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

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

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

Comment

5. The object of negotiations or discussions for a treaty is the establishment of a text in writing. This

² League of Nations, *Treaty Series*, vol. XII, p. 387.

³ Customs Régime between Germany and Austria. Advisory Opinion of 5 September 1931. Publications of the P.C.I.J., Series A/B, No. 41, p. 37.

may be done by any of the methods described in Article 1. Examples of these methods are as follows: As regards Article 3(a), The Hague Conventions of 1899 and 1907 were signed on behalf of States which decided to sign. Initialling *ne varietur* is not very common in practice; but examples do exist, e.g., the Final Act of the Locarno Conference. Examples of Article 3(b) are: The Final Acts of The Hague Codification Conference of 1930, the Civil Aviation Conference of 1944 and the United Nations Conference on the Declaration of Deaths of Missing Persons, 1950. Examples of Article 3(c) are conventions adopted by resolutions of such bodies as the International Labour Organisation, the Food and Agriculture Organization of the United Nations, the United Nations Educational and Scientific Organization, or by the United Nations itself, as, for example, the Convention on Privileges and Immunities of the United Nations, 1946.⁴ A case in which "other formal means" contemplated by Article 3(d) were adopted is that of the General Act for the Pacific Settlement of International Disputes (1928).⁵ This was not signed by delegates nor does it fall under any of the sub-paragraphs (a), (b) or (c) of Article 3. It was signed by the President of the Assembly of the League of Nations and by the Secretary-General.

ASSUMPTION OF TREATY OBLIGATIONS

Article 4

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

Comment

6. This Article enumerates the methods traditionally employed whereby a State becomes bound by a treaty. In addition, in order to embrace the practice which has sometimes been used of recent years, and which is known as "acceptance", the Article specifies "other means of expressing the will of the State". Further, it specifies that the relevant "means" shall be expressed (a) through an organ competent for that purpose, and (b) in accordance with the constitutional law and practice of the State.

7. As regards this latter point there have been two schools of thought in international law. The adoption of the views put forward by either school raises difficult practical problems. On the one hand, some writers have argued that the conditions of the validity of treaties are determined by international law, and not by the national law of the parties concluding them. According to this view, a treaty which has been ratified and promulgated by the Head of State, to whom (it is said) international law attributes the right to speak in its international relations, must be regarded as a valid and binding treaty, notwithstanding the fact that it may not have been concluded in compliance with the provisions of the Constitution. On the other hand,

⁴ United Nations, *Treaty Series*, vol. I, p. 15.

⁵ League of Nations, *Treaty Series*, vol. XCIII, p. 345.

according to the majority of writers, the international validity of treaties is determined, at least in point of form, by the constitutional law of the States which conclude them. It is argued by this school of thought that a treaty concluded in violation of the constitutional provisions of a State is not binding on that State, and that it is both the right and the duty, of a State, when negotiating with another State, to verify the facts relative to the treaty-making power of the organs of the other State.

8. A measure of support was given to the former view by the judgment of the Permanent Court of International Justice, in 1933, in the dispute between Norway and Denmark concerning the sovereignty over Eastern Greenland.⁶ In 1919 the Danish Minister at Christiania (now Oslo) requested a statement as to the Norwegian attitude to the question of Denmark's claim over Eastern Greenland. He expressed the hope that Norway would raise no difficulty. Eight days later Mr. Ihlen, the Norwegian Minister for Foreign Affairs, gave an oral reply, of which he recorded a minute. It was to the effect that he had told the Danish Minister that "the Norwegian Government would not make any difficulties in the settlement of this question". The Court held that this statement, in spite of the Norwegian argument that its Foreign Minister had exceeded his constitutional powers, was binding on Norway.

9. Although this judgment of the Court would appear to support the opinion that constitutional requirements are irrelevant in determining the validity of treaties it will be observed, on closer examination, that what was involved was (a) not a treaty strictly so called, but a unilateral statement, and (b) a declaration of policy rather than a legal engagement. However, this may be, the exact interpretation to be given to the judgment is not free from doubt.

10. The majority of the Commission decided, after careful consideration, that without prejudice to the strictly legal and difficult issues involved, the view of the majority of writers was to be preferred, as more in accordance with the facts of international life, and decided also that this applied, not only to the traditional procedure of signature and ratification, but, in addition, to any novel methods of concluding treaties which may arise in the future, such as, for example, acceptance. Such novel methods are legitimate, and in accordance with international law, to the extent that, and in so far as, they conform with constitutional requirements. Consequently when, for example, a treaty dispenses with ratification expressly (as some do) the efficacy of such a provision depends upon whether it is in accordance with constitutional requirements.

11. A collection has recently been prepared by the Secretariat of the United Nations of national laws and practices regarding the negotiation and conclusion of treaties and other international agreements.⁷ Much

information was supplied by Governments by way of commentary on the constitutional texts regulating this matter. From this study the following facts emerge:

(1) As a general rule the power to ratify treaties is formally vested in the Head of State; but the overwhelming majority of constitutions qualify this rule by specifying that such ratifications shall not be given (or, if given, shall not be binding) unless the prior approval of the legislature (or of a section of it, as in the case of the United States Senate) has been obtained. In most countries this applies to all treaties, with minor exceptions. In some countries it only applies to particular classes of treaties.

(2) In very few countries does the rule still prevail that the Head of State has an unfettered power to ratify treaties. As a matter of pure form this is still legally the position in the countries of the British Commonwealth of Nations, but, in practice, it has become not unusual to seek prior Parliamentary approval before treaties are ratified, at any rate if they are of an important political nature, or impose financial burdens on the State. In any case, the Cabinet System ensures harmony of policy between executive and legislature.

Out of 86 countries, only an insignificant minority state the rule, in an unqualified form, that the Head of State ratifies treaties. Apart from one or two cases, where the actual legal situation is not quite clear, the following countries fall into this class: Ethiopia, Jordan, Monaco, Saudi Arabia, Vatican City.

(3) Occasionally the constitution, or constitutional practice, empowers State authorities other than the Head of State to make, and ratify, international agreements, e.g., in the name of the Government or of a Government department. Thus postal conventions and agreements are concluded on behalf of the United States by the Postmaster-General by and with the advice and consent of the President. Similarly, Article 66 (2) of the Austrian Federal Constitution Act, 1920 provides that the Federal President may authorize the Federal Government or the competent members thereof to conclude certain categories of international treaties for which his ratification is not required.

(4) Some constitutions stipulate that treaties shall be ratified even if there is no provision in the treaty to that effect.

"Other means of expressing the will of the State"

12. This wording is intended to take account of the practice of inserting into international treaties a provision enabling States to "accept" the treaty. This practice is of recent origin,⁸ and was adopted owing to the desire of some States to avoid the usual reference in treaties to "ratification", and so render unnecessary the precise observance of the constitutional procedure appropriate for ratification. Thus, there has appeared, in connexion with multipartite treaties drafted under

⁶ *The Eastern Greenland Case*, Publications of the P.C.I.J., Series A/B, No. 53.

⁷ *Laws and Practices concerning the Conclusion of Treaties*, United Nations publication, Sales No. 1952.V.4.

⁸ It may be noted, however, that the United States used this procedure as long ago as 1884 when joining the International Labour Organisation.

the auspices of the United Nations, a clause which, subject to minor variations, enables an intending party to become bound by either:

- (a) Signature without reservation as to acceptance; or
- (b) Signature with reservation as to acceptance followed by acceptance; or
- (c) Acceptance.

13. The purpose of this practice was to offer Governments greater freedom in regard to the methods used to become parties to treaties. This was particularly so in the case of the United States, under whose political system it is desirable sometimes to give the House of Representatives (instead of the Senate alone, as in the normal ratification procedure) an opportunity to consider the treaty.

14. An article is included below which deals specifically with the procedure of acceptance (Article 10).

RATIFICATION OF TREATIES

Article 5

Ratification is an act by which a State, in a written instrument, confirms a treaty as binding on that State.

Comment

15. As a general rule, ratification applies to treaties which have been signed, and, historically, ratification meant that the act of a diplomatic agent in signing a treaty was confirmed and approved. In modern times, however, ratification is considered to apply not so much to the signature as to the treaty itself. Nor is it necessary that a treaty be signed at all. For example, the Conventions of the International Labour Organisation are not signed, but are simply authenticated by the signature of the President of the Conference and of the Director. Also, many Conventions are simply "adopted" and submitted for acceptance by the appropriate constitutional procedure, which may include ratification. (See Article IV of the Constitution of the Food and Agriculture Organization.)

16. In practice, ratification is a formal act executed in writing. It is theoretically possible to have an oral ratification or a tacit ratification, but the writers⁹ who refer to such a possibility are unable to point convincingly to examples which have arisen in practice. It is correct, therefore, to represent existing law as requiring that ratification should take the form of a written instrument.

WHEN RATIFICATION IS NECESSARY

Article 6

A State is deemed to have undertaken a final obligation by its signature of the treaty:

- (a) If the treaty so provides; or

⁹ L. Oppenheim, *International Law: A Treatise*, 4th ed. (London, Longmans, Green and Co., 1928), vol. I, p. 723, remarked that there might be an oral ratification, but added that he was "not aware of any case where ratification was given orally". These comments do not appear in later editions of his work.

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

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

Except in these cases a State is not deemed to have undertaken a final obligation until it has ratified that treaty.

Comment

17. Here the general rule is laid down that, in the absence of special stipulation, ratification of a treaty is necessary. In its judgment, in 1929, in the *Case concerning the Territorial Jurisdiction of the International Commission of the River Oder*, the Permanent Court of International Justice said that, unless there was in the treaty an express provision to the contrary, the contracting parties must have intended to abide "by the ordinary rules of international law, amongst which is the rule that conventions, save in certain exceptional cases, are binding only by virtue of ratification".¹⁰ The contrary view has been advocated, namely that treaties do not require ratification unless the text, or the circumstances, point clearly in that direction. The rule stated in Article 4 of this draft is believed, however, to conform more closely to the practice of States, most of whose constitutions specify that treaties shall be ratified according to a particular constitutional procedure. It must also be remembered that the constitutions of some countries provide that treaties shall be ratified, even if there is no provision in the treaty to that effect (See Comment on Article 4). Further, it can hardly be denied that, according to the established custom of centuries, treaties have normally been ratified, and that it is only in exceptional cases, and generally as a development of modern times, that the cases specified under (a), (b) and (c) have arisen.

Examples:

(a) Anglo-Japanese Alliances of 1902, 1905 and 1911;¹¹ Treaty of Lausanne (1912) between Italy and Turkey;¹² Agreement of 14 June 1929 concerning a transit card for emigrants;¹³ Anglo-Polish Treaty of Alliance (1939); Four-Power Agreement of 1944 concerning the punishment of war criminals; Interim Arrangements for the United Nations, signed at San Francisco (26 June 1945);¹⁴ Agreement between United States and Burma concerning the use of certain funds (1947)¹⁵.

(b) Some treaties provide for ratification, but specify that they shall come into force from the date of signature. The Treaty of Madrid (1880), which was subject to ratification, and concerned the protection of the nationals of the High Contracting Parties in Morocco, provided that, by exceptional agreement of the parties, the provisions of the treaty should enter into force as from the date of signature. The Balkan Pact of Non-

¹⁰ Publications of the P.C.I.J., Series A, No. 23, pp. 17-21.

¹¹ *British and Foreign State Papers*, vol. 95, p. 88; vol. 98, p. 136; vol. 104, p. 173.

¹² *Ibid.*, vol. 106, p. 1100.

¹³ M. O. Hudson, *International Legislation* (Washington, Carnegie Endowment), vol. IV, p. 2848.

¹⁴ *Ibid.*, vol. IX, p. 366.

¹⁵ United Nations, *Treaty Series*, vol. 25, p. 28.

Agression (1934), although subject to ratification, took effect from the date of signature, as did the Soviet-Czech-Slovak Treaty of Friendship and Mutual Assistance (1943). Instances of particular clauses of a treaty coming into force from the date of signature are as follows :

Treaty of Peace, Amity, Commerce and Navigation (1893) between Japan and Peru (1893); Treaty of Rapallo between Germany and Russia (1922); Agreement between the Union of South Africa and Portugal (1928).

(c) A case where the form of the treaty indicates an intention to dispense with ratification is a treaty providing for conclusion by "acceptance". (See Article 10.) Other examples are often furnished by protocols, by declarations, and by agreements, concluded by subordinate officials, such as military officers or postal officials.

18. Ratification must be in accordance with the constitutional laws of the State. (See Article 4.)

NO OBLIGATION TO RATIFY

Article 7

If a treaty is subject to ratification, signature by a State does not create for that State any obligation to ratify the treaty.

Comment

19. Originally, it was the rule of customary international law that, where a treaty provided ratification, it was normally obligatory to ratify it; and a refusal to ratify a signed treaty, except for good cause, was a serious breach of faith. As a result, however, of the French and American Revolutions of the eighteenth century, it became the practice to insert a clause in Full Powers expressly *reserving* the right to ratify, instead of the traditional *promise* to ratify, which reflected the time-honored rule. In the course of the nineteenth century, as more and more countries adopted the constitutional practice that the legislature should be consulted in the matter of ratification of treaties, the conception that ratification was discretionary became established. Various theories have been advanced in modern times with a view to preventing the abuse of this discretion, and of imposing restrictions on the right to refuse ratification. None of these theories, however, have succeeded in obtaining general acceptance in the practice of States, which, it is believed, is accurately reflected in the rule stated in text. Attempts were made, during the period of the League of Nations, to lay down principles which would at least obviate undue delay on the part of the States in taking a decision whether to ratify or not, but the report produced by the committee appointed on the subject by the League of Nations Assembly failed to influence practice.¹⁶

20. There is an important conventional exception to the rule that ratification may be refused. This is created by Article 19 of the Constitution of the Inter-

national Labour Organisation. This provides that, when the consent of the competent authority has been obtained, a member of the Organisation is bound to communicate its ratification of the Convention for which consent has been given. Such instruments of ratification, however, take, in practice, a somewhat different form from the usual type of instrument of ratification employed in connexion with treaties generally.

21. A certain amount of material exists concerning an alleged obligation on the part of States not to do anything, between the signature of a treaty on their behalf, and its ratification, that would render ratification by other States superfluous or useless.¹⁷ This material is, however, of too fragmentary and inconclusive a nature to form the basis of codification. The same applies to the conception that, where one party has partially executed a treaty, which the other party has signed but not ratified, there arises a kind of estoppel against the non-ratifying party. See Harvard Draft Convention on Treaties.¹⁸

ENTRY INTO FORCE OF TREATIES

Article 8

Unless otherwise provided in the treaty itself,

(a) **A treaty not subject to ratification enters into force on signature of all States which have participated in the negotiations;**

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

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

Comment

22. Except for a slight verbal alteration (the expression "enters into force" rather than "come into force") the above Article follows the wording of Article 10 of the Harvard Draft Convention.

23. Article 8(b) states what is generally accepted, and appears to require no illustration. However, treaties which provide for ratification and deposit or exchange of ratifications, but which contain no provision as to the date when they should come into force, have not been uncommon. Among them may be mentioned the treaty of defensive alliance between Albania and Italy (1927), and between the Chinese Republic and the Persian Empire of 1 June 1920. The rule stated in

¹⁷ Publications of the P.C.I.J., Series C, No. 17, II, p. 279; Series A, No. 23, pp. 20-21; Series A, No. 5, p. 39; Series C, No. 11, II, pp. 631-632; Series A, No. 7, pp. 39-40. *American and British Claims Arbitration*, Report of Fred K. Nielsen, (Washington, Government Printing Office, 1926), p. 382.

¹⁸ Harvard Law School, *Research in International Law*, "Draft Convention on the Law of Treaties" in *American Journal of International Law*, vol. 29 (1935), Supplement, pp. 778-787.

¹⁶ League of Nations, *Official Journal* (1930), Annex 1207, p. 598.

paragraph (b), as will be seen, requires the exchange of, or deposit of, the instruments of ratification of all the signatories to bring a treaty into force, unless, of course, the treaty otherwise provides.

24. The situation dealt with in paragraph (c) is unusual, but examples have occurred in practice of treaties which have provided that they should be subject to ratification, but have nevertheless contained no provision for exchange or deposit of ratifications; e.g., Convention on the Establishment of Common Rules of Private International Law (1921),¹⁹ and the Money Order Convention of the Pan-American Postal Union (1921).²⁰

ACCESSION TO TREATIES

Article 9

(a) Accession to a treaty is an act by which a State, which has not signed or ratified the treaty, formally declares in a written instrument that the treaty is binding on that State.

(b) A State may accede to a treaty only when that treaty contains provisions allowing it to do so, or with the consent of all the parties to the treaty.

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

Comment

25. Accession originally began as an invitation to particular States to become parties to a treaty who were not signatories to that treaty. Later, towards the end of the nineteenth century, it became customary to insert clauses, in a general form, allowing any State to "accede".

26. The principle stated in paragraph (b) would appear to be self-evident, as well as in accordance with practice. A State claiming to accede to a treaty is offering a legal relationship with other States which it is for them to accept or reject.

27. As regards the rule stated in paragraph (c) the entry into force of a treaty is, in most instances, an essential pre-requisite to effective accession to the treaty by non-signatory States, inasmuch as the invitation to, or permission for, such States to accede is usually contained in a clause of the treaty, which like the other clauses thereof, is ineffective until the treaty has entered into force. It was declared, at the Second Hague Conference, to be "evident" that an "adhesion" (equivalent to accession in practice) "may have no effect except, at the earliest, from the time the Convention goes into effect".²¹ The invitations sent out by the United States, in connexion with the Pact of Paris (1928), on the day the treaty was signed, referred to "notice of adherence".²² The text of the treaty provided that the

treaty "shall, when it has come into effect... remain open as long as may be necessary for adherence by all the other Powers of the World" (Article III). Likewise, Article 38 of the International Air Transport Convention of Warsaw (1929) provides: "This Convention shall, after it has come into force, remain open for accession by any State."²³

28. In some cases, to which the rule in paragraph (c) applies, an attempt by a State to accede to a treaty not yet in force has been treated as a notice of intention to accede, if and when the treaty enters into force. In such cases, the instrument of accession can be treated as effective on the date of entry into force of the treaty.

"Unless otherwise provided in the treaty"

29. Some treaties are not signed, but simply made "open" to accession, and their entry into force is made expressly dependent on the deposit of a certain number of instruments of accession. Thus, the General Act for the Pacific Settlement of International Disputes (1928) was not opened to signature and ratification, but was merely "adopted" by the Assembly of the League of Nations, and opened to accession. It was provided that it should enter into force on the ninetieth day following the receipt by the Secretary-General of the League of Nations of the accessions of not less than two Contracting Parties. The United Nations Convention on Privileges and Immunities (1946) adopted by the General Assembly in similar fashion, contains (Article 31) provision for only one method of becoming a party — by accession. Article 32 provides that it shall come into force for each party on the deposit of its instrument of accession. In other instances, treaties, although they are signed, and subject to ratification, provide for accession also; nevertheless, they provide that they shall enter into force on the deposit of a certain number of ratifications or accessions, e.g., the International Convention for the Suppression of Counterfeiting Currency (1929); the Convention for the Prevention and Punishment of the Crime of Genocide (1949) is to the same effect.

30. In these cases it is clear that the treaty establishes an exception to the normal rule that accession is only possible when the treaty has entered into force.

31. The above Article is subject to the over-riding principle stated in Article 4 that accession must be in accordance with the constitutional requirements of the State.

ACCEPTANCE

Article 10

Acceptance of a treaty is an act by which a State, in lieu of signature or ratification or accession or all of these procedures, declares itself bound by the treaty.

Comment

32. In the Comment on Article 2 of the Draft an explanation is given of the reference to "other means of expressing the will of the State", including the

²³ Hudson, *op. cit.*, vol. V, p. 117.

¹⁹ See Hudson, *op. cit.*, vol. I, p. 678.

²⁰ *Ibid.*, p. 726.

²¹ J. B. Scott, *The Proceedings of the Hague Peace Conferences*, the Conference of 1907 (New York, University Press), vol. I, p. 211.

²² See Treaty for the Renunciation of War (Washington, U.S. Government Printing Office, 1933).

fairly novel procedure of acceptance; and a brief description of this procedure is given. In Article 10, the Commission has sought to give a general definition of acceptance as it has recently emerged in the practice of States.

33. To some extent it may be said that, in point of effect, acceptance differs very little, if at all, from the standpoint of international law, from the traditional modes — ratification, etc. — by which the State indicates its willingness to be bound.²⁴ It is for this reason that it is comprehended under the expression “other means” in Article 4. Nevertheless, in practice, acceptance does present some points of difference. Thus, under the traditional procedures, it is difficult for a single convention to be simply signed by some States, and ratified by others: a uniformity of procedure is presumed. When a convention provides for ratification, the same procedure must be followed by all; if, however, acceptance is provided for, there is a choice of method for each State. Under acceptance procedure those States whose constitutions do not make ratification subject to parliamentary approval can bind themselves at once; whereas others can bind themselves “subject to acceptance”. In short, acceptance does away with certain formalities (*e.g.*, the ceremony of signature), combines various traditional methods, and makes the entry into force a more flexible and speedy process. This is particularly true, and important, in connexion with multilateral conventions.

34. In interpreting this Article, the over-riding principle, adopted by the Commission in Article 4, that constitutional law and practice must be observed, is always to be implied and understood. It is not necessary, in the view of the Commission, to repeat

²⁴ It may also be added as a matter of history that the idea underlying acceptance, as distinct from the actual formula used, is not so novel. Thus, some earlier treaties entered into force in relation to each State, either upon signature or upon signature followed by ratification. In such cases each signatory had the option of saying whether or not his signature was subject to ratification. The intention underlying such a clause was the same as that upon which the practice of acceptance rests, though, as will be seen from the formulation of that practice, the scope of the latter, and the options it provides, are much wider.

that language in Article 8, owing to the generality of the wording of Article 4. Accordingly, although the whole idea of acceptance is to provide an informal alternative to the traditional procedures, nothing excludes the legality of acceptance being indicated in the form of those procedures, if such be the constitutional requirement of any particular State. Thus some countries, whose constitutions have no specific provision or practice for acceptance as such, have become parties to conventions prescribing such procedure by the traditional instrument of ratification. According to information supplied to the Secretariat of the United Nations by the Governments of the countries concerned, this is the position, for example, under the constitutional law and practice of Chile and the Netherlands.

35. The formula adopted in most United Nations Conventions is generally accompanied by the clause: “Acceptance shall be effected by the deposit of a formal instrument with the Secretary-General of the United Nations.” Such formal instrument may be an instrument of ratification, accession or a simple declaration of willingness to be bound. Nevertheless, it will be seen, if the rest of the standard clause is examined (See para. 12 of this draft) it also provides for signature with or without acceptance. Signature without acceptance is thus not the same thing as acceptance, but is yet another form in which the State can be bound. This illustrates the fact that the international practice in the matter is flexible enough to meet all contingencies.

36. It must be observed that discussion took place in the Sixth Committee of the General Assembly during the first part of its Third Session (1948) with respect to the meaning and implications of “acceptance”.²⁵ After a lengthy consideration of the matter, the Sixth Committee resolved that it preferred the procedure of signature followed by ratification rather than the new procedure. However, although this at present reflects the position within the United Nations, the possibility of a revival of the practice, or a reversion to it, is not to be excluded.

²⁵ *Official Records of the General Assembly, Third Session, Part I, Sixth Committee, 88th meeting, et seq.*