The Juridical Nature of Article 7 of the Vienna Convention on the Law of Treaties

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The question of who acts for the State in respect of the performance of treaty-making acts is one which has received comparatively little attention in the literature of the law of treaties. Most texts pass over the issue quite quickly, as if it were a matter of only incidental interest to the lawyer.[1] While some studies have been made of the subject, the emphasis of most of these enquiries has been largely historical,[2] or else they have focused principally on some other, larger or related, field of investigation.[3] Moreover, many of these studies are now rather dated, predating not only the 1969 Vienna Convention on the Law of Treaties,[4] but also the work of its preparation.[5]

In these circumstances, one might be forgiven for forming the impression that the matter is one which is merely of secondary importance.[6] Yet, as has

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1 McNair Lord, *The Law of Treaties* (1961), pp 120–28; Remiro Brotons A, *Derecho Internacional Público, vol II, Derecho de los Tratados* (1987), pp 146–53; Reuter P, *Introduction au Droit des Traités,* 2nd ed (1985), paras 90, 95 and 96*; Sinclair Sir I, *The Vienna Convention on the Law of Treaties,* 2nd ed (1984), pp 29–33. See also: Gore-Booth Lord (ed), *Satow's Guide to Diplomatic Practice,* 5th ed (1979), pp 58–64, 231, 247, 249 and 271; and Jennings Sir R and Watts Sir A (eds), *Oppenheim's International Law,* 9th ed (1992), vol I, pts 2–4, pp 1220–22.

2 See: Jones JM, *Full Powers and Ratification* (1949); and O'Connell DP, "A Cause Célèbre in the History of Treaty-Making: The Refusal to Ratify the Peace Treaty of Regensburg in 1630" (1967) 42 *British Year Book of International Law* 71.

3 See: Geck WK, "The Conclusion of Treaties in Violation of the Internal Law of a Party" (1967) 27 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 429; Murty BS, *The International Law of Diplomacy* (1989), esp pp 201–17; and Watts Sir A, (1994) 247 *Recueil des Cours* 9 esp at 19–34, 97–102 and 114–29.

4 1155 UNTS 331. This is not to mention the 1975 Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character (A/Conf.67/16; *United Nations Juridical Yearbook* 1975, p 87) and the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (A/Conf.129/15; *United Nations Juridical Yearbook* 1986, p 218).

5 This is unfortunately true of the one major study of the area which is neither historical in its emphasis nor principally devoted to some other subject of enquiry. See Blix H, *Treaty-Making Power* (1960), pp 1–95.

6 See the remarks made by Ago, during the course of the International Law Commission's consideration of what was subsequently to become Article 7 of the 1969 Vienna Convention: *Yearbook of the International Law Commission* 1965, vol I, p 34 at para 59. Cf also the doubts which a number of the members of the Commission felt regarding the need for the future Article 8. See n 111 below.

been rightly remarked,[7] the article of the Vienna Convention on the Law of Treaties which is devoted to this subject — Article 7 — is the only article of that convention which serves to connect treaties with the actions of actual human beings. That article provides as follows:

> 1. A person is considered as representing a State for the purpose of adopting or authenticating the text of a treaty or for the purpose of expressing the consent of the State to be bound by a treaty if:
>   (a) He produces appropriate full powers; or
>   (b) It appears from the practice of the States concerned or from other circumstances that their intention was to consider that person as representing the State for such purposes and to dispense with full powers.
> 2. In virtue of their functions and without having to produce full powers, the following are considered as representing their State:
>   (a) Heads of State, Heads of Government and Ministers for Foreign Affairs, for the purpose of performing all acts relating to the conclusion of a treaty;
>   (b) Heads of diplomatic missions, for the purpose of adopting the text of a treaty between the accrediting State and the State to which they are accredited;
>   (c) Representatives accredited by States to an international conference or to an international organization or one of its organs, for the purpose of adopting the text of a treaty in that conference, organization or organ.

Since it is only through human beings that States can act, the fundamental importance of this provision is patent. It is a reflexion of that importance that a large part of the 1986 Vienna Conference on the Law of Treaties between States and International Organizations or between International Organizations was devoted to consideration of the parallel problem of the performance of treaty-making acts by international organisations and to the provision of the future 1986 Vienna Convention which is devoted to that subject: Article 7.[8]

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7 By Rosenne, *Yearbook of the International Law Commission* 1965, vol I, p 253 at para 56.

8 The Conference's Committee of the Whole devoted its seventh and practically the entirety of its eighth meetings to consideration of the International Law Commission's Draft Article 7 and the nine proposed amendments to that provision. At its tenth meeting, the Committee established a Working Group on the draft article, composed of the sponsors of those amendments and of other specially interested delegations: A/Conf.129/C.1/SR.10, p 2. That working group succeeded in drawing up a consolidated text of a draft article (A/Conf.129/C.1/L.43), which it placed before the Committee of the Whole and which the Committee of the Whole approved and referred to the Drafting Committee at its fourteenth meeting: A/Conf.129/C.1/SR.14, pp 6–7. It would appear from the records of the Conference that only the International Law Commission's Draft Article 36 *bis*, the vexed question of dispute-settlement procedures and, perhaps, the matter of the definitions which were to be contained in the future Article 2 — which itself included the contentious issue of the definition of full powers — occupied more of the Conference's time and attention.

Article 7 of the 1986 Vienna Convention provides as follows:

It is perhaps surprising, then, that a number of very basic questions about Article 7 of both the 1969 and the 1986 Vienna Conventions remain unanswered. These include, most notoriously, the nature of the relationship between that article and the ground of invalidity which is laid down in Article 46 of those conventions;[9] but they also comprise some quite elementary points

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1. A person is considered as representing a State for the purpose of adopting or authenticating the text of a treaty or for the purpose of expressing the consent of the State to be bound by a treaty if:
   (a) that person produces appropriate full powers; or
   (b) it appears from practice or from other circumstances that it was the intention of the States and international organizations concerned to consider that person as representing the State for such purposes without having to produce full powers.
2. In virtue of their functions and without having to produce full powers, the following are considered as representing their State:
   (a) Heads of State, Heads of Government and Ministers for Foreign Affairs, for the purpose of performing all acts relating to the conclusion of a treaty between one or more States and one or more international organizations;
   (b) representatives accredited by States to an international conference, for the purpose of adopting the text of a treaty between States and international organizations;
   (c) representatives accredited by States to an international organization or one of its organs, for the purpose of adopting the text of a treaty in that organization or organ;
   (d) heads of permanent missions to an international organization, for the purpose of adopting the text of a treaty between the accrediting States and that organization.
3. A person is considered as representing an international organization for the purpose of adopting or authenticating the text of a treaty, or expressing the consent of that organization to be bound by a treaty if:
   (a) that person produces appropriate full powers; or
   (b) it appears from the circumstances that it was the intention of the States and international organizations concerned to consider that person as representing the organization for such purposes, in accordance with the rules of the organization, without having to produce full powers.

9 Influential commentators have reached quite different conclusions on this question. Cf, for example, Remiro Brotons, n 1 above, pp 158–59, and Sinclair, n 1 above, p 32. Many have advanced their conclusions tentatively and with a measure of hesitation. See, for example: Cahier P, "Violation du droit interne relatif à la compétence pour conclure des traités comme cause de nullité des traités" (1971) 54 *Rivista di Diritto Internazionale* 226 at 243; and Geck, n 3 above, p 439. It is hardly surprising, then, that the relationship between the two articles has been said to be uncertain or confused: Geck, *ibid;* and Hostert J, "Droit international et droit interne dans la Convention de Vienne sur le droit des traités du 23 Mai 1969" (1969) 15 *Annuaire Français de Droit International* 92 at 108. This perception was shared by the one State to address the issue at the 1968–1969 Vienna Conference. See the remarks of the representative of the Federal Republic of Germany: A/Conf.39/11, p 69 at para 5.

Article 46 of the Vienna Convention of 1969 provides as follows:

1. A State may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent

regarding the operation of its detailed provisions.[10] Much of the confusion which has served to cloud such treatment as has been given to these various issues in the literature has stemmed from a failure to be clear about the precise nature of the rules which are laid down in Article 7. Not only is little, if anything, specific said about what it is that those rules do, but implicit in what is said is a measure of uncertainty on the point.[11] The rather modest purpose of the present study is to facilitate analysis of Article 7, both in its detailed provisions and in respect of its relationship with other articles of the Vienna Conventions, by examining what precise juridical nature it is that its dispositions bear: that is, what juridical operation it is that they effect and what category of legal rules it is to which they belong — if, indeed, they are legal rules at all.

I. Diplomatic Practice

The question of who acts for a State in respect of the performance of treaty-making acts has sometimes been treated more as a matter of diplomatic practice than a question of law.[12] In fact, just such an approach characterised the earlier stages of the International Law Commission's work on this subject when preparing its Draft Articles on the Law of Treaties.

The original proposals for an article which were submitted to the Commission by its Special Rapporteur, Sir Humphrey Waldock, were couched largely in the form of an *aide-mémoire* for officials who might be considering either performing a particular act of treaty-making themselves or else charging some other official with that responsibility. Thus, advice was proffered to officials who might be charged with the task of performing a particular treaty-making act of what documents they would need to carry with them or what status they would need to possess if they were to discharge their assignment successfully. Paragraph 1 of the proposed draft article, for example, counselled a representative who might put himself forward as possessing authority to negotiate and draw up the terms of a treaty on behalf of a State that he "shall be required ... to furnish or exhibit credentials issued by the competent authority in the State concerned and providing evidence of such authority," while adding, for clarity's sake, that "[h]e shall not be required for these purposes to be in

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unless that violation was manifest and concerned a rule of its internal law of fundamental importance.

2. A violation is manifest if it would be objectively evident to any State conducting itself in the matter in accordance with normal practice and in good faith.

Article 46 of the 1986 Vienna Convention is framed along similar lines.

10 For example, the precise nature of the circumstances which will serve to meet the conditions laid down in paragraph 1(b).

11 For the single, notable exception, see n 127 below.

12 Partly for the sake of simplicity and partly for the reason that most of the materials in which the issue under examination has been discussed relate to the 1969, rather than to the 1986, Vienna Convention, the question under study will be described as one which concerns the performance of treaty-making acts for States only. References to the Vienna Convention should accordingly be understood as referring to the Convention on the Law of Treaties of 1969 — except, of course, where the context indicates otherwise.

possession of full-powers to sign the treaty".[13] Paragraph 2(c), to take another example, advised an official who was charged with performing some treaty-making act that, if there were a delay in the transmission to her of her full powers, then a letter or a telegram stating that full powers had been issued and would be forthcoming "may be employed provisionally as a substitute for full powers".[14]

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13 Although this and other paragraphs of Waldock's proposed draft article — and, likewise, the draft article which was subsequently provisionally adopted by the Commission on first reading (n 15 below) — employed the language of obligation, it is in all probability the case that there was no intention, either on the part of the Special Rapporteur or on the part of the Commission as a whole, that the provision be understood to give expression to duties under international law. It is more probable that deontic terminology was employed to give expression to the notion of being "obliged", rather than being "obligated". See the text at nn 53–57 below.

14 The full text of Waldock's proposed Draft Article 4 is as follows:

1. A representative of a State purporting to have authority to negotiate and draw up the terms of a treaty on behalf of his State shall be required, except in the cases mentioned in paragraph 3, to furnish or exhibit credentials issued by the competent authority in the State concerned and providing evidence of such authority. He is not, however, required for these purposes to be in possession of full-powers to sign the treaty.
2. (a) A representative of a State purporting to have authority to sign (whether in full or *ad referendum*), ratify, accede to or accept a treaty on behalf of his State shall be required, except in the cases mentioned in paragraph 3(b) below, to produce full-powers which invest him with authority to execute the act in question.
   (b) Full-powers shall be in the form prescribed by the law and practice of the State concerned and shall emanate from the competent authority in that State. They may either be in a form restricted to the execution of the particular act concerned or in the form of a general grant of full-powers which covers the execution of that particular act.
   (c) In case of delay in the transmission of the instrument of full-powers, a letter or telegram evidencing the grant of full-powers sent by the competent authority of the State concerned or by the head of its diplomatic mission in the country where the treaty is negotiated may be employed provisionally as a substitute for full-powers, subject to the production in due course of an instrument of full-powers, executed in proper form. Similarly, full-powers issued by a State's permanent representative to an international organization may also be employed provisionally as a substitute for full-powers issued by the competent authority of the State concerned, subject to the production in due course of an instrument of full-powers executed in proper form.
3. (a) Heads of a diplomatic mission have authority *ex officio* to negotiate a bilateral treaty between their State and the State to which they are accredited and to authenticate its text. They are, however, bound to comply with the provisions of paragraph 2 of this article, concerning the production of full-powers for the purpose of signing or ratifying the treaty on behalf of their State.
   (b) Heads of State, Heads of Government and Foreign Ministers have authority, *ex officio*, to negotiate and authenticate a treaty on behalf of their State, and to sign, ratify, accede to or accept a

The article which the Commission proceeded provisionally to adopt on first reading was couched even more decidedly in advisory terms. So, for example, Heads of State and certain other officials were informed in the first paragraph of the Commission's Draft Article 4 that they do not need to furnish officials acting for their putative treaty-partners with any evidence that they possess "authority" to accomplish any treaty-making act in the name of their States. Subsequent paragraphs were couched in a similar manner.[15]

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treaty on its behalf; and they are not required to furnish any evidence of specific authority to execute any of these acts.

Yearbook of the International Law Commission 1962, vol II, p 38.

15 The full text of Draft Article 4, as so adopted, is as follows:

1. Heads of State, Heads of Government and Foreign Ministers are not required to furnish any evidence of their authority to negotiate, draw up, authenticate or sign a treaty on behalf of their State.
2. (a) Heads of a diplomatic mission are not required to furnish evidence of their authority to negotiate, draw up and authenticate a treaty between their State and the State to which they are accredited.
   (b) The same rule applies in the case of the Heads of a permanent mission to an international organization in regard to treaties drawn up under the auspices of the organization in question or between their State and the organization to which they are accredited.
3. Any other representative of a State shall be required to furnish evidence, in the form of written credentials, of his authority to negotiate, draw up and authenticate a treaty on behalf of his State.
4. (a) Subject to the provisions of paragraph 1 above, a representative of a State shall be required to furnish evidence of his authority to sign (whether in full or *ad referendum*) a treaty on behalf of his State by producing an instrument of full powers.
   (b) However, in the case of treaties in simplified form, it shall not be necessary for a representative to produce an instrument of full powers, unless called for by the other negotiating State.
5. In the event of an instrument of ratification, accession, approval or acceptance being signed by a representative of the State other than the Head of State, Head of Government or Foreign Minister, that representative shall be required to furnish evidence of his authority.
6. (a) The instrument of full powers, where required, may either be one restricted to the performance of the particular act in question or a grant of full powers which covers the performance of that act.
   (b) In case of delay in the transmission of the instrument of full powers, a letter or telegram evidencing the grant of full powers sent by the competent authority of the State concerned or by the head of its diplomatic mission in the country where the treaty is negotiated shall be provisionally accepted, subject to the production in due course of an instrument of full powers, executed in proper form.
   (c) The same rule applies to a letter or telegram sent by the Head of a permanent mission to an international organization with reference to a treaty of the kind mentioned in paragraph 2(b) above.

Yearbook of the International Law Commission 1962, vol II, pp 164–65.

An approach centred upon the preferment of advice was retained in the proposals which the Special Rapporteur submitted to the Commission during the second reading of Draft Article 4.[16] In contrast with the perspective which had previously been adopted, the revised draft article which Waldock proposed to the Commission was drafted from the point of view, not of officials who might be considering performing a treaty-making act for their State, but, rather, of their counter-parts in the administration of that State's putative treaty-partner.[17] As such, the advice which was now proffered related to the circumstances in which one State might safely rely on an act which might purportedly be

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16 The Special Rapporteur proposed that Draft Article 4 be revised to read as follows:

1. A representative may be considered as possessing authority to act on behalf of his State in the conclusion of a treaty under the conditions set out in the following paragraphs, unless in any particular case his lack of authority is manifest.
2. A Head of State, Head of Government and a Foreign Minister may be considered as possessing authority to negotiate, draw up, authenticate, or sign a treaty and to sign any instrument relating to a treaty.
3. (a) A Head of a diplomatic mission may be considered as possessing authority to negotiate, draw up or adopt a treaty between his State and the State to which he is accredited.
   (b) The rule in paragraph (a) applies also to a Head of a permanent mission to an international organization in regard to treaties drawn up under the auspices of the organization to which he is accredited.
   (c) Other representatives may not be considered in virtue of their office alone as possessing authority to negotiate, draw up or adopt a treaty on behalf of their State; and any other negotiating State may, if it thinks fit, call for the production of an instrument of full powers.
4. Except as provided in paragraph 2, a representative may be considered as possessing authority to sign a treaty or an instrument relating to a treaty only if —
   (a) he produces an instrument of full powers or
   (b) it appears from the nature of the treaty, its terms or the circumstances of its conclusion that the intention of the States concerned was to dispense with full powers.
5. (a) In case of delay in the transmission of the instrument of full powers, a letter or telegram evidencing the grant of full powers sent by the competent authority of the State concerned or by the head of its diplomatic mission in the country where the treaty is negotiated may be provisionally accepted, subject to the production in due course of an instrument of full powers, executed in proper form.
   (b) The same rule applies to a letter or telegram sent by the Head of a permanent mission to an international organization with reference to a treaty of the kind mentioned in paragraph 3(b) above.

Yearbook of the International Law Commission 1965, vol II, pp 21–22.

17 Waldock stated this change of approach to have been prompted by the criticisms which Sweden had made of the draft article, as it had been provisionally adopted by the Commission on first reading: *Yearbook of the International Law Commission* 1965, vol II, p 20 at para 3, and *ibid*, vol I, p 33 at para 40. For those criticisms, see *ibid*, vol II, p 19.

performed for another State: that is, when it might safely assume that that act would be deemed in law to be an act of that other State.[18] This change of standpoint notwithstanding, the approach, nonetheless, remained one of counsel, the tone of the proposed draft article, as so revised, being set in its first paragraph, which affirmed that "[a] representative may be considered as possessing authority to act on behalf of his State in the conclusion of a treaty under the conditions set out in the following paragraphs ...".[19]

Certainly, it is possible to give practical advice to diplomats and officials on how they should conduct themselves in order successfully to accomplish acts of treaty-making for the States which they purport to represent. It is clear, however, that the circumstances in which an act of treaty-making exists, such that a State will be deemed to have performed a particular operation in the conclusion of a treaty, is not, and cannot be, simply a question of diplomatic practice or of "mere" fact, but is necessarily also a matter of law.[20] Indeed, it could hardly be otherwise. The concept of the State as an international legal person is a creation of international law. International law likewise creates the concepts of a treaty and of the various treaty-making acts — the act of adoption, the act of authentication, the act of consent to be bound and so on. If it did not also define the circumstances in which such an act of treaty-making were to be deemed performed by a State, the whole of the law of treaties would be redundant: no treaty could ever be made by a State.[21]

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18 By Waldock, *Yearbook of the International Law Commission* 1965, vol II, p 38 at para 36.

19 Although this and other paragraphs of Waldock's proposed draft article employed the language of permission, it is in all probability the case that there was no intention on the part of the Special Rapporteur that the provision be understood to give expression to freedoms or liberties under international law. See the text at nn 59–62 below. Cf also n 13 above.

20 Moreover, in so far as any advice is proffered of the type described in the text, that advice depends for its utility upon the existence of rules of law which regulate the matter in hand. If an official wishes to know how to be successful in the performance of an act of treaty-making, the advice which she is proffered will depend upon when an act of the type concerned is likely to be recognised as one which is attributable to the State for which she intends to act; and that, in turn, will depend — in very large part, at least — upon whether that act satisfies any of the sets of conditions which are stipulated by law as causing an act of the instant type to be attributable to the State for which it is purportedly performed. It would only be otherwise if the rules of law in question were ineffective or were divorced from reality — as would be the case if, for example, the law were to stipulate that a particular act were to be deemed performed by a State in certain, specified circumstances, but it were generally or often the case that States would deny to be theirs any act which was accomplished in those circumstances, only being prepared to recognise it as their own if other, different circumstances pertained. The dependence of international law upon practice tends to exclude this possibility.

21 That this is so does not depend in any way upon the fact that the State is an incorporeal legal person. Even if individual human beings were persons of international law which were possessed of the capacity to conclude treaties, there would still need to be rules of international law which would specify the circumstances in which an act of treaty-making which might purportedly be

It is hardly surprising, then, that a number of the members of the International Law Commission affirmed that the purpose of the draft article under preparation should not be to offer advice or simple descriptions of prevailing diplomatic practice, but, rather, to set forth the rules of international law on the topic in hand.[22] During its second reading, Draft Article 4 was accordingly recast in its entirety into the form which is now borne by Article 7 of the 1969 Vienna Convention.[23] That article defines the circumstances in

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performed by and for an individual were to be considered to be an act of that individual. These rules might be thought to be simple and obvious — for example, that physical acts of a physical individual are to be deemed in law to be acts of the legal person who "is" that physical individual. The existence of such rules would, nevertheless, be necessary in order to connect the natural phenomena of human activity to the abstract creations that are legal persons. The argument in the text depends, then, upon the facts that legal personality and, likewise, those legal arrangements between them which are created by legal acts of those legal persons are not natural phenomena, but artificial and abstract creations of the law.

22 See, in particular, Reuter, *Yearbook of the International Law Commission* 1965, vol II, p 37 at para 15. See also: Amado, *ibid*, p 36 at para 84; and Tsuruoka, *ibid*, p 35 at para 81.

23 In addition to the comments cited in the preceding note, a number of specific proposals were made for reformulating the draft article in a manner which converted it, either in whole or in part, into a statement of rules of law. These included, in particular, a new formulation proposed by Castrén which, for the first time, consisted in a series of statements of the circumstances in which a person "is considered as" acting for a State when purporting to perform a treaty-making act on its behalf: *Yearbook of the International Law Commission* 1965, vol II, p 38 at paras 25–28. (The Special Rapporteur had in fact at an earlier stage in the Commission's work proposed a formulation which was along these very lines, but for Article 32(1) of the Draft — the provision which was later to become Article 8 of the Vienna Convention — rather than for Draft Article 4 — the future Convention's Article 7: *ibid*, vol II, p 72 at para 6.) Similar formulations were suggested by Briggs, *ibid*, vol I, p 34 at para 52, and Lachs, *ibid*, p 35 at para 66. Note also Tabibi, *ibid*, p 38 at para 24, and, perhaps, Yasseen, *ibid*, p 34 at para 54. Moreover, Amado suggested a specific reformulation for part of the draft article which, although it was not entirely free from ambiguity in this respect, was, in view of his accompanying statements on the subject (see the preceding note), probably meant and understood to consist in an exposition of a rule of law, albeit a rule of a somewhat different type from those set forth in the proposals of Briggs, Castrén and Lachs: *ibid*, p 36 at para 85.

In view of this body of opinion, the Commission decided to refer Draft Article 4 to its Drafting Committee with an instruction that it be redrafted "on the lines suggested by Amado and others" (*ibid*, p 39 at para 41). As it emerged from the Drafting Committee, the draft article at last bore the form of an exposition of rules of international law: *ibid*, p 253 at para 52. As such, it was provisionally adopted by the Commission on second reading, without this important change being the subject of any remark: *ibid*, p 281 at para 13.

As it was finally adopted by the International Law Commission, Draft Article 6 — as the article in question was subsequently renumbered — provided as follows:

> 1. Except as provided in paragraph 2, a person is considered as representing a State for the purpose of adopting or authenticating the text of a treaty or for the purpose of expressing the consent of the State to be bound by a treaty only if:
>
> (a) He produces appropriate full powers; or

which a person "is considered" by international law "as representing a State for the purpose of" accomplishing particular, specified acts of treaty-making;[24] and, as such, it gives expression to what are clearly rules of law.

Nonetheless, there do remain in the Vienna Convention some traces of the advisory approach which had earlier been favoured by the Special Rapporteur and by the International Law Commission. In particular, the second sentence of Article 67(2) warns an official who anticipates communicating an instrument terminating a treaty that, in order successfully to perform an act of treaty-termination for the State in whose name she purports to act, she may find that she will need to be able to produce full powers designating her as representing that State for that purpose, if the instrument which she communicates is not signed by one of the high-ranking officials specified.[25]

(b) It appears from the circumstances that the intention of the States concerned was to dispense with full powers.

2. In virtue of their functions and without having to produce full powers, the following are considered as representing their State:
   (a) Heads of State, Heads of Government and Ministers for Foreign Affairs, for the purpose of performing all acts relating to the conclusion of a treaty;
   (b) Heads of diplomatic missions, for the purpose of adopting the text of a treaty between the accrediting State and the State to which they are accredited;
   (c) Representatives accredited by States to an international conference or to an organ of an international organization, for the purpose of the adoption of the text of a treaty in that conference or organ.

Yearbook of the International Law Commission 1966, vol II, p 192.

24 See the chapeau to paragraph (1). The chapeau to paragraph (2) is similarly worded.

25 Article 67(2) of the 1969 Vienna Convention provides as follows:

> Any act declaring invalid, terminating, withdrawing from or suspending the operation of a treaty pursuant to the provisions of the treaty or of paragraphs 2 or 3 of article 65 shall be carried out through an instrument communicated to the other parties. If the instrument is not signed by the Head of State, Head of Government or Minister for Foreign Affairs, the representative of the State communicating it may be called upon to produce full powers.

Article 67(2) of the 1986 Vienna Convention is framed along similar lines.

Admittedly, the second sentence of this provision can be read in such a way as to state a rule of law — a rule which confers a freedom upon a State's treaty-partner to call upon an official who communicates such an instrument to produce such a document of full powers. Cf the text at nn 43–45 and 59–62 below. However, such an interpretation would leave the provision stating little of any juridical significance. After all, a State is undoubtedly free to call for the production of full powers whether or not the circumstances which are envisaged in Article 67(2) exist — even if, that is, the instrument of termination is signed by one of the high-ranking officials specified. Cf text at nn 44–45 below. The interpretation which is outlined in the text might, therefore, be thought to be preferable.

Whichever way it is read, though, Article 67(2) does not directly address the central question in hand: namely, in what circumstances does a State perform a treaty-terminating act? This failure is best exemplified by the divergence of opinions which exists as to whether, in the context of treaty-termination, there exists a rule of the same sort as that which is set forth in Article 7(1)(b) of the

II. Evidence

Even when it is acknowledged that the matter is one which is governed by legal rules, the question of the circumstances in which a treaty-making act is to be deemed performed by a State is sometimes treated as being an issue of national, rather than of international, law. To the extent that the matter arises at the international level, the question of whether the conditions for the imputation of a purported treaty-making act are fulfilled in any given case has accordingly been said to be simply a matter of evidence.[26] All that a provision in any international convention might do — if it is not to restate or refer to relevant rules of national law — is accordingly to specify factors whose existence in any given case might serve as evidence that the conditions which are stipulated by the appropriate system of national law for the attribution of an act are fulfilled.[27]

Convention, such that an act terminating a treaty may, in at least certain circumstances, be attributed to the State for which it is purportedly performed, even though the official performing it is not called upon to produce full powers which designate her as representing the State for the purpose of performing such an act and even though the instrument which she communicates for the purpose of effecting such a step is not signed by one of the high-ranking officials designated in Article 67(2). (For this disagreement, see: Waldock, *Yearbook of the International Law Commission* 1966, vol I, pt 2, p 160 at para 59; paragraph 3 of the International Law Commission's Commentary on Article 63 of its Draft Articles on the Law of Treaties, *ibid*, vol II, p 264; and paragraph 2 of the International Law Commission's Commentary on Article 67 of its Draft Articles on the Law of Treaties between States and International Organizations or between International Organizations, *ibid*, 1982, vol II, pt 2, p 66.) The existence of this disagreement is hardly surprising, since Article 67(2) fails to state whether or not a treaty-terminating act may ever imputed to a State in such circumstances. Indeed, it is only implicitly that it affirms that such an act is to be imputed to a State in the two cases which it does envisage: namely, when the instrument is signed by one of the designated high-ranking officials and when the instrument is not so signed, but the official communicating it produces appropriate full powers.

26 See, in particular: Paredes, *Yearbook of the International Law Commission* 1965, vol I, p 35 at paras 73–74. Cf also: Ago, *ibid*, p 34 at para 60; and El-Erian, *ibid*, p 35 at para 76.

At first sight, statements which were made by a number of the members of the International Law Commission might be thought to be to similar effect. See, in particular: Briggs, *ibid*, 1962, vol I, pp 74–75 at paras 52–53 and 55, and *ibid*, 1965, vol I, p 34 at para 49; Jiménez de Aréchaga, *ibid*, 1963, vol I, p 24 at para 34; Lachs, *ibid*, 1965, vol I, p 35 at paras 63 and 66; Rosenne, *ibid*, p 36 at para 4; Tsuruoka, *ibid*, p 35 at paras 80–82; Tunkin, *ibid*, p 34 at para 55; and Waldock, *ibid*, p 33 at para 38. See, however, the text at nn 38–39 below and the accompanying notes.

27 Cf the suggestion of Austria that the future Article 7 should take the form of a set of presumptions regarding the competence of various organs of the State to perform treaty-making acts for the State, which presumptions would be rebuttable by reference to their actual competence under internal law: *Yearbook of the International Law Commission* 1965, vol II, at pp 18–19. Cf also the comment of Tunisia that the International Law Commission's Draft Article 6 might possibly have been better framed had it taken the form of a "guide", leaving the details of the competence of particular individuals to act for the State to be settled by the internal law of each State: A/C.6/SR.981, p 129 at para 4.

This approach might be thought to be best exemplified by Article 4 of the International Law Commission's Draft Articles on the Law of Treaties, as it was provisionally adopted by the Commission on first reading.[28] This provision was formulated throughout in such a way as to proffer advice to persons who might anticipate performing a treaty-making act for a State as to whether or not they might be likely to find themselves obliged to provide "evidence" of their "authority" to perform that act.[29] Despite the fact that there was support for retaining such a formulation,[30] it was discarded by the Commission's Drafting Committee during the draft article's second reading.[31] Some traces of it remain, nonetheless, in the Commission's Commentary on Draft Article 6, as it was finally adopted.[32]

It should be clear from what has already been said[33] that the circumstances in which an act of treaty-making will be imputed to a State for the purposes of the law of treaties must be defined not merely by law, but by international law in particular.[34] Otherwise, the acts which international law defines as acts of treaty-making could simply never be performed by persons of international law.[35] It might, of course, be the case that, in order to define when a particular

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28 See n 15 above.

29 See also paragraph 1 of the Commission's Commentary on that draft article. A similar formulation was employed in Article 49 of the Commission's Draft Articles, as provisionally adopted on first reading, which related to acts terminating or suspending the operation of a treaty: *Yearbook of the International Law Commission* 1963, vol II, pp 213–14.

30 See n 26 above, and Waldock, *Yearbook of the International Law Commission* 1965, vol I, p 38 at para 33.

31 *Ibid*, p 253 at para 52.

32 See paragraphs 2 and 4 of the Commentary: *Yearbook of the International Law Commission* 1966, vol II, pp 192–93. The formulation in question was, likewise, dropped from Draft Article 49 during its second reading (note Briggs, *ibid*, vol I, pt 2, p 152 at para 54, and Waldock, *ibid*, pt 1, p 109 at para 40) — though, once more, traces of its influence persist in the Commission's Commentary on that article, as it was finally adopted: see paragraph 3 of the Commentary on Draft Article 63, *ibid*, vol II, p 263.

33 See the text at nn 20–21 above.

34 By Briggs, *Yearbook of the International Law Commission* 1965, vol I, p 34 at para 49; and Yasseen, *ibid*, at para 53. See also the comments of Amado, Reuter and Tsuruoka, n 22 above.

35 The only qualification which may arguably be placed upon this statement concerns treaties which are concluded between an international organisation and one of its members, be it a State or another organisation. Such treaties are sometimes said to be governed by a special system of law constituted by the rules of the international organisation concerned. See, for example, Reuter, *ibid*, 1979, vol II, pt 1, p 135 at para 18, and *ibid*, vol I, p 94 at para 28. This system of law is, in turn, sometimes said not to form part of international law, but to constitute an entirely autonomous legal order, analogous to the legal order of a State. See, for example, Barberis JA, *Los Sujetos del Derecho Internacional Actual* (1984), pp 83–85. However, while the rules of an international organisation may modulate or vary the application of the law of treaties to the agreements which it concludes with its members, the 1986 Vienna Convention applies to such agreements, just as it does to any other treaty which an international organisation may make, there being nothing in the Convention to remove them from its scope. (This is not surprising, since the International Law Commission purposefully decided against laying down special

act of treaty-making is performed by a State, international law makes a *renvoi* to the national laws of that particular State. For example, international law might stipulate that an act of treaty-making is to be deemed to be performed by a State for the purposes of the law of treaties when that act has been performed as the result of a decision which has been taken by the individual or individuals to which national law assigns the task of deciding whether to perform that particular type of act and when that decision has been made in accordance with the other rules of national law which may regulate the taking of decisions on such matters. Certainly, some support can be found in the international legal materials for the proposition that this is the very form which the rules of international law in question do bear.[36] However, even then, it would still be rules of international law which defined when treaty-making acts were to be considered performed by States: the content of those rules would simply be determined by cross-reference to certain specified rules of national law.[37]

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rules for that category of agreements. See paragraph 9 of the Commission's Commentary on Article 46 of its Draft Articles on the Law of Treaties between States and International Organizations or between International Organizations, *Yearbook of the International Law Commission* 1982, vol II, pt 2, p 53).

Even if agreements of the type in question were to be governed by a special body of law forming an autonomous legal order, the proposition in the text would still not call for qualification; for those agreements would not then be treaties, since they would not create juridical relations or effect juridical operations under international law between international legal persons, but would be analogous in nature to contracts of national law, creating juridical relations under "organisational" law between subjects of that "organisational" legal system. Concomitantly, in so far as those agreements might be governed by rules along the lines of those set forth in the 1986 Vienna Convention, those rules would not be ones of international law, but rules of the independent legal order of the organisation concerned, their contents simply being borrowed from those of their international law exemplars.

36 Several States expressed opinions or advanced positions during the preparation of the 1969 Vienna Convention which were sympathetic to this point of view. See, in particular: Austria, n 27 above; Federal Republic of Germany, A/Conf.39/C.1/L.50, in particular sub-paragraphs (b)(i) and (iii); Iran, A/Conf.39/C.1/L.64 and A/Conf.39/11, p 70 at para 7; Italy, A/C.6/SR.793, p 61 at para 5; Mali, A/Conf.39/C.1/L.64/Add.1; and Tunisia, n 27 above. For similar opinions which were expressed in the International Law Commission, see: Ago, *Yearbook of the International Law Commission 1965*, vol I, p 34 at para 60; and Paredes, *ibid*, p 35 at paras 73–74. Cf also Article 7(3)(b) of the 1986 Vienna Convention.

Note how this way of formulating the rule no longer involves making the imputation of a treaty-making act for the purposes of the (international) law of treaties depend upon whether that act is deemed to be performed by a State under and for the purposes of its internal law. What now matters is whether that act was performed lawfully and regularly under that law. It may be that national law will treat an act as having been performed by the State, even though that act has been performed otherwise than as a result of a decision that it should be performed which has been taken in accordance with the rules which regulate the making of decisions as to whether or not the State should perform such an act. That irregularity may just make the act voidable at national law or found the liability of those responsible for its performance.

37 That it is international law, and not national law, which, therefore, regulates whether an act of treaty-making is to be attributed to a State is doubly clear from

It is hardly surprising, then, that most of the apparent support which existed during the preparation of Article 7 of the Vienna Convention for analysing the subject-matter of that provision in evidentiary terms was indeed just that: apparent, rather than real.[38] Those who favoured couching that article in the language of evidence appear to have done so partly in order to acknowledge the existence in national legal systems of rules which regulate the performance of treaty-making acts. More significantly, though, their intention also appears partly to have been to safeguard those rules. In particular, they wished to avoid the implication — which they feared might otherwise be drawn from a provision which defined the circumstances in which a treaty-making act is imputable to a State without reference to the regularity of the accomplishment of that act under that State's national laws and procedures — that international law requires of States that they ensure that their laws do in fact authorise the performance of treaty-making acts in those circumstances.[39]

III. Obligations and Freedoms

Of those who have considered the question of the circumstances in which a State is to be considered as having performed a treaty-making act, the vast majority have recognised both that those circumstances are defined by rules of law and

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the fact that the rules of national law to which international law may conceivably make such a cross-reference need not necessarily be ones which determine whether or not a treaty-making act will be imputed to the State as a matter of national law, but may equally well be ones which regulate the propriety or validity of such an act under national law: see the preceding note.

38 Certainly, most of those who spoke in favour of couching the future Article 7 in evidentiary terms acknowledged that national laws and procedures apply to determine whether a person who purports to perform an act of treaty-making for a State is possessed of the "authority" to accomplish such an act. However, they went on to distinguish the issue of the possession of such authority from the question of whether the act of such a person is attributable at international law to the State for which she purports to act. Thus, they considered that, if the circumstances set forth in what was then Draft Article 4 were present, an act of treaty-making would be imputed to the State for which it was purportedly performed, whether or not the individual accomplishing it enjoyed authority to do so under or in accordance with the law of that State. See, in particular: Briggs, *Yearbook of the International Law Commission* 1962, vol I, pp 74–75 at paras 51–55, and *ibid*, 1965, vol I, p 34 at paras 49–52; Waldock, *ibid*, vol II, p 20 at paras 1–3, and *ibid*, vol I, p 33 at para 38 and p 38 at para 34; and, at the Vienna Conference, Sweden, A/Conf.39/11, p 70 at para 17 and p 74 at para 57.

39 So, for example, there was concern that, if it were to be specified that acts of consent to be bound which may be performed for a State by its Head of Government are imputable to that State regardless of whether or not such acts are regular and proper as a matter of national law, States would be required to amend their internal laws to authorise their Heads of Government to perform such acts, if they were not already empowered so to do. See: Briggs, *Yearbook of the International Law Commission* 1962, vol I, p 75 at para 54; and Waldock, *ibid*, 1965, vol I, p 33 at para 38. Cf Luxembourg, *ibid*, vol II, p 19. Note also the first of the two declarations which Finland made upon the occasion of its ratification of the Vienna Convention (1155 UNTS 503). For the expression of somewhat similar concerns in the field of credentials, see Kearney, *Yearbook of the International Law Commission* 1971, vol I, p 26 para 46.

that the system of law to which those rules belong is the international legal system. Nevertheless, a measure of confusion has certainly existed — and continues to exist — as to the precise juridical nature of those rules.

Part of this confusion has consisted in regarding the rules in question to be ones which either impose obligations or confer freedoms. This misunderstanding was particularly prevalent during the drafting of the 1969 Vienna Convention. Thus, certain members of the International Law Commission and likewise certain States talked in terms of the existence of an obligation to issue,[40] or to carry and exhibit,[41] full powers or credentials. This confusion was only compounded by Article 4 of the International Law Commission's Draft Articles on the Law of Treaties, as it was provisionally adopted on first reading, which was framed in such a way as to appear, on the face of it, to consist entirely of an exposition of the circumstances in which there is such an obligation and of those in which there is not.[42]

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40 Bartos, *Yearbook of the International Law Commission* 1962, vol I, p 244 at para 70.

41 Tunkin, *Yearbook of the International Law Commission* 1962, vol I, p 196 at para 12; and Waldock, *ibid*, 1965, vol II, p 20 at para 3 and p 21 at para 6, and *ibid*, vol I, p 33 at para 38. See also: Japan, *ibid*, 1965, vol II, p 19; and Spain, A/Conf.39/11, p 69 at para 3. Note also, at the 1986 Vienna Conference, the remarks of the USSR: A/Conf.129/C.1/SR.7, p 6. Cf the opinion of the Legal Counsel of the United Nations, UN Juridical Yearbook 1978, pp 196–197 at p 197.

42 For the text of Draft Article 4, as so adopted, see n 15 above. See also paragraph 4 of the International Law Commission's Commentary on that draft article, *Yearbook of the International Law Commission* 1962, vol II, p 165. See, too, paragraph 8 of the International Law Commission's Commentary on Article 7 of its Draft Articles on the Law of Treaties between States and International Organizations or between International Organizations, *ibid*, 1982, vol II, pt 2, p 26. Cf also paragraph IV of the Resolution of the Institute of International Law on the Application of the Rules of the General International Law of Treaties to International Agreements concluded by International Organizations (1973) 55 *Annuaire de l'Institut de Droit International* 797.

During its work on the topic of Relations between States and International Organizations, the Special Rapporteur initially proposed to the International Law Commission a draft article on the subject of the performance of treaty-making acts by the heads of States' missions to international organisations which was framed along similar lines. El-Erian's proposed Draft Article 12 provided as follows:

1. Permanent representatives are not required to furnish evidence of their authority to negotiate, draw up and authenticate treaties drawn up within an international organization to which they are accredited or concluded between their State and the organization.
2. Permanent representatives shall be required to furnish evidence of their authority to sign (whether in full or *ad referendum*) on behalf of their State a treaty drawn up within an international organization to which they are accredited or between their State and the organization by producing an instrument of full powers.

Yearbook of the International Law Commission 1968, vol II, p 139. However, during the discussion of this proposal which took place in the Commission, Waldock suggested that the provision, at least in its first paragraph, should follow the formulation of what by then had become Article 6 of the Draft Vienna Convention on the Law of Treaties — the future Article 7 of the 1969 Vienna

Without doubt, there do exist in the present context a number of duty-imposing and, more significantly, of freedom-conferring rules. So, for example, a State is free not to rely upon the fact that there may surround the anticipated performance of a particular treaty-making act a specific constellation of circumstances which international law would treat as sufficient to cause that act to be attributed to its putative treaty-partner.[43] It is free to ask of that State that it create another, preferred, set of circumstances which international law would treat as having that same effect. Thus, a State may lawfully ask of the Minister for Foreign Affairs of its putative treaty-partner that she produce full powers designating her as representing her State in the performance of a particular treaty-making act, in spite of the fact that international law attributes to a State any act of treaty-making which might be performed for it by an individual who

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Convention: *ibid*, vol I, p 235 at para 39. The Commission followed this suggestion not just in the case of the first paragraph of the article, but in regard to the article as a whole. See Article 14 of the Draft Articles on Relations between States and International Organizations, as provisionally adopted on first reading: *ibid*, vol II, p 206. The resulting formulation of the draft article was retained by the Commission during its second reading (see Draft Article 12, as finally adopted, *ibid*, 1971, vol II, pt 1, p 294) and it now appears in Article 12 of the 1975 Vienna Convention on Relations between States and International Organizations of a Universal Character, which provides as follows:

1. The head of mission, by virtue of his functions and without having to produce full powers, is considered as representing his State for the purpose of adopting the text of a treaty between that State and the Organization.
2. The head of mission is not considered by virtue of his functions as representing his State for the purpose of signing a treaty, or signing a treaty *ad referendum*; (*sic*) between that State and the Organization unless it appears from the practice of the Organization, or from other circumstances, that the intention of the parties was to dispense with full powers.

43 The only suggestion to the contrary — that a State is not free in circumstances of this sort to refuse to consider a person as able to act for another State, but is under an obligation to treat her as able to perform acts of treaty-making which will be attributed to that State — was in the (legally) rather peripheral context of letters or telegrams evidencing a grant of full powers. At the suggestion of Tunkin (*Yearbook of the International Law Commission* 1962, vol I, p 196 at para 13), the International Law Commission initially adopted a provision on this subject which purported to require States provisionally to treat a person named in such a letter or telegram as able to perform acts of treaty-making attributable to the State issuing it. See Article 4(6)(b) of the Commission's Draft Articles on the Law of Treaties, as provisionally adopted on first reading, which is set out in n 15 above. The notion that there should be any such obligation was rejected by the USA in its written comments on the Commission's Draft Articles: *ibid*, 1965, vol II, p 20. The Special Rapporteur agreed with this view (*ibid*, p 21 at para 10) and suggested that the provision in question be revised accordingly during its second reading: see his proposed Draft Article 4(5)(a), which is set out in n 16 above. However, as things turned out, the Drafting Committee did not retain any provision on this topic in the draft article which it proposed to the Commission during the second reading of Draft Article 4 (*ibid*, vol I, p 253 at para 52 and p 281 at para 10) and none appeared in Article 6 of the Commission's Draft Articles, as finally adopted.

occupies that office.[44] Legally redundant though such a course of action might be, it may be that considerations of practical politics lead the State to fear that, otherwise, its intended treaty-partner will disown any act which might be performed for it by its Minister for Foreign Affairs. Whatever its reasons for adopting such a course of action, though, a State which takes such a step does not, in the absence of special circumstances,[45] put itself in breach of any obligation under international law.

It is also possible that States may be subject to at least one obligation of customary law in the present field. A number of statements may be found in the international legal materials to the effect that a State may not conduct any enquiry into whether or not an official who purports to act for its intended treaty-partner has authority to do so under that State's internal laws and procedures.[46] To launch such an investigation, it is said, would be to commit a breach of the principle of non-intervention in the internal affairs of other States.[47]

Important though they may be, such rules as these are peripheral, legally speaking, to the problem in hand: that is, of identifying the circumstances in which a purported act of treaty-making is deemed to be an act of the State for which it is purportedly performed. Indeed, as the examples above make clear, such rules are dependent for their very sense and operation on the existence of other rules which identify those circumstances. Those, key, rules possess a quite different juridical nature and role. Each such rule simply stipulates that, in the event that some person performs acts which purport to constitute the accomplishment for and on behalf of a State of a specific type of act of treaty-

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44 USA, A/Conf.39/11, p 70 at para 12. See also to the same effect Canada, A/Conf.39/11, p 72 at para 32. Indeed, at the Vienna Conference, the USA proposed the addition of a further, third, paragraph to the future Article 7 which would have affirmed the existence of this freedom: A/Conf.39/C.1/L.90. This proposal, which was supported by Italy (A/Conf.39/11, p 74 at para 53), was referred to the Conference's Drafting Committee by the Committee of the Whole (A/Conf.39/11, p 76 at para 72). While the Drafting Committee finally decided against adoption of this proposal, the Chairman of that body reported this to be for the reason that the Committee considered the existence of such a freedom to be "self-evident": A/Conf.39/11, p 186 at para 9. (For the sake of completeness, though, it might be added that two members of the International Law Commission made statements which might be taken to express doubt about the existence of any such freedom: Briggs, *Yearbook of the International Law Commission* 1965, vol I, p 34 at para 52; and Paredes, *ibid*, p 35 at para 71.)

45 If, however, the State should be under an obligation, by virtue of a so-called *pactum de contrahendo* or some equivalent rule of customary law, to enter into negotiations with a view to concluding a treaty with the other State concerned, it is possible that such conduct might, together with other obstructive behaviour, give rise to a breach of that obligation. Cf the Case concerning claims arising out of decisions of the Mixed Graeco-German Arbitral Tribunal set up under Article 304 in Part X of the Treaty of Versailles (1972) 19 Reports of International Arbitral Awards 25.

46 Bartos, *Yearbook of the International Law Commission* 1962, vol I, p 72 at para 27; Ushakov, *ibid*, 1979, vol I, p 89 at para 39; and perhaps Verdross, *ibid*, 1962, vol I, p 72 at para 24.

47 Cf Sierra Leone, A/Conf.39/11, p 73 at para 48.

making, then, should a specified set of facts or circumstances exist[48] — for example, the person concerned holds a particular office in the administration of that State or he produces a particular type of document attesting to his ability to act for the State in the matter concerned — it will follow that, for the purposes of those rules of international law which compose the law of treaties,[49] an act of treaty-making of the type in question is deemed to be effected by that State. There is no suggestion in the practice of States or in the international jurisprudence that the absence of any such set of facts or circumstances will have the effect of placing the State for which such a person purports to act in breach of any obligation of international law[50] — no suggestion, for example, that responsibility is incurred by a State if one of its officials is sent to a meeting with a view to performing some act of treaty-making for that State without carrying and being able to exhibit full powers designating her as representing that State for that purpose.[51] Much less is there any suggestion that such an official herself commits any breach of international law. In the event that there exists none of the various constellations of facts or circumstances which international law identifies as causing the attribution to a State of a purported treaty-making act of the type which is in question, all that occurs — it might be more felicitous to say "does not occur" — is that no act of that type is accomplished by the State concerned, as far as the law of treaties is concerned. Article 8 of the 1969 Vienna Convention accordingly provides that, absent such circumstances, should a person purport to perform an act of treaty-making for a State, her act is "without legal effect".[52]

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48 There is no necessity that these facts exist at the very time of the performance of the acts which purport to constitute an act of treaty-making. Some or all of them might come into existence, subsist and cease their existence at some time which is either prior or else subsequent to the performance of those acts. In fact, the latter eventuality is envisaged in the proviso to Article 8 of the 1969 Vienna Convention, while Article 7(1)(b) potentially embraces cases of the former type.

49 See the text following n 114 below.

50 Subject to what is said in n 45 above.

51 Though, as it was adopted on first reading, Article 67(2) of the Commission's Draft Articles on the Law of Treaties between States and International Organizations or between International Organizations was in fact so couched as to appear to impose an obligation on an international organisation to ensure that any official who was charged with communicating for the organisation an instrument terminating a treaty should be issued with and exhibit full powers — or "powers", as they were then described — designating her as representing the organisation for this purpose: *Yearbook of the International Law Commission* 1980, vol II, pt 2, p 88.

Even if there were a suggestion that there exists an obligation of the type described in the text, there would necessarily be presupposed a further rule, distinct from any such duty-imposing rule, to the effect that, if the things which the obligation required to be done were in fact done, then, not only would the State subject to such an obligation avoid committing a breach of international law, but it would also cause to be imputed to itself an act of treaty-making.

52 For further consideration of this formula, see the text at nn 111–17 below.
Article 8 of the 1969 Vienna Convention provides as follows:

> An act relating to the conclusion of a treaty performed by a person who cannot be considered under article 7 as authorized to represent a State for that purpose is without legal effect unless afterwards confirmed by that State.

Undoubtedly, there was some inclination among the members of the International Law Commission and among States to think of the matter in hand in terms of obligations and duties. Much of this confusion, though, was probably more a matter of form than of substance — a matter of inaptly describing what was in fact understood, rather than of actually mistaking the legal nature of the rules concerned. Thus, despite its use of the language of obligation, the Commission's Draft Article 4, as it was provisionally adopted on first reading,[53] was, in all probability, not thought by most of the members of the Commission to give expression to any legal duty. Indeed, that provision was drafted most unfortunately if that were the Commission's intention; for it was so framed that the obligations which it would have laid down would have been those of a State's officials, rather than of the State itself.[54] Rather, the language of obligation was probably employed — somewhat inappropriately in a document which purported to expound rules of law — to express the notion of being obliged, rather than of being obligated: that is, of being under a practical compulsion to do something, rather than a legal duty.[55] Thus, if it was desired that an official should cause a particular act of treaty-making to be imputed to a State, the draft article stated that, unless she held one of a number of offices, she would need to carry and exhibit full powers designating her as representing the State concerned for that purpose. Otherwise, she would fail in her task. As such, as has already been remarked,[56] what the draft article did was to proffer practical advice, not state rules of law; and it was precisely in this way that the draft article was understood by the members of the Commission when they came to re-examine it during its second reading.[57] In discharging such a function, though, Draft Article 4 assumed the existence of rules of law specifying the circumstances in which a treaty-making act is deemed done by a State. Otherwise, the advice which it offered would have been quite valueless.[58]

Similarly, there was, without doubt, a certain tendency among the members of the International Law Commission and among States to consider the subject under study to be a matter of freedom-conferring rules or liberties.[59] Once more, though, this confusion was, for the most part, probably more apparent than real. Typical in this respect were the revisions to the Commission's Draft Article 4 which were proposed by the Special Rapporteur during that provision's second reading. These recast the provision in terms of the circumstances in which an

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Article 8 of the 1986 Vienna Convention is framed along similar lines.

53 For the text of this draft article, see n 15 above.

54 Cf the point made by Reuter, *Yearbook of the International Law Commission* 1965, vol I, p 37 at para 16. Indeed, the draft article was so oddly drafted, were it to give expression to obligations, that it would have imposed an obligation upon a State to ask of a person who claimed to act for some other State that he exhibit full powers. The making of such a request would then have the effect of placing him under an obligation to exhibit such a document.

55 Cf Hart HLA, *The Concept of Law*, 2nd ed (1994), pp 6 and 80–81.

56 See section I above.

57 See n 22 above and the accompanying text.

58 See n 20 above.

59 Cf Reuter, *Yearbook of the International Law Commission* 1965, vol I, p 37 at paras 16–17.

official who purports to act for a State "may be considered" by that State's putative treaty-partner to act for that, first, State.[60] Notwithstanding the permissive language of these proposals, it is unlikely that Waldock intended the draft article, as so revised, to set forth rules which confer freedoms. After all, such liberties would be quite uninteresting, practically speaking. It is obvious that one State does not commit a wrong if it treats an official as acting for another State when the circumstances are such that international law deems him so to do. Indeed, without more, a State commits no wrong even if it treats him as acting for another State when, in the circumstances, he will not be deemed so to act under international law: all that that State does is to act as if something is the case which is not. Waldock's purpose in using such language was, rather, to indicate when a State would be safe to treat as acting for its putative treaty-partner an official who purported so to do — safe, for the reason that in international law he would in fact be deemed so to act.[61] Once again, then, it was not propositions of law which were being advanced so much as practical advice: this time directed to officials who might be considering the qualifications of their counter-parts in other States, rather than officials considering their own qualifications.[62] As before, such advice presupposed, for its utility, the existence of rules of law which themselves bestow no liberties, but which simply stipulate when it is that an act of treaty-making purportedly performed for a State is indeed a treaty-making act of that State.

During the second reading of Draft Article 4, the International Law Commission recognised the inappropriateness of such an approach[63] and, with it, of framing the provision in such a way as to appear to set forth freedom-conferring rules or liberties.[64] The entire provision was accordingly recast in terms of when a person "*is* considered",[65] in law, to act for a State[66] — a formulation which was not challenged at the Vienna Conference[67] and which is retained in Article 7 of the 1969 Vienna Convention.

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60 For these suggested revisions, see n 16 above.

61 Waldock, n 18 above.

62 See the text at nn 16–19 above.

63 See n 22 above.

64 See, in particular, Tabibi, *Yearbook of the International Law Commission* p 38 at para 24. See also: Castrén, *ibid*, p 38 at paras 26–28; Lachs, *ibid*, p 35 at para 66; and Yasseen, *ibid*, p 34 at para 54.

While he suggested a similar reformulation of the draft article, Briggs's reasons for doing so were somewhat different: *ibid*, p 34 at para 52 and n 44 above, in fine. See also Tunkin, *ibid*, at para 56.

65 Emphasis added. It is the history of the development of Article 7, as it is described in the text, which largely explains why this approach was adopted and the expression "is considered as representing" used, rather than the more economical "represents". That the latter formulation be substituted for the former was, however, suggested by Ruda, *Yearbook of the International Law Commission* 1965, vol I, p 254 at para 70.

66 See n 23 above, especially its second paragraph.

67 None of the amendments which were proposed to what had subsequently become Article 6 of the Commission's Draft Articles sought to make any change to this formula.

Nonetheless, something of the Commission's earlier approach does survive in the Vienna Convention. Rather oddly, after recasting the future Article 7 in the manner described, the Commission's Drafting Committee proposed,[68] and the Commission adopted,[69] changes in the text of the future Article 67 which had the effect of converting it into a statement of the very sort which the Commission had rejected in the context of the future Article 7. The resulting formulation — being one partly of counsel and partly an exposition of a legal freedom — was not challenged and was retained essentially unchanged at the Vienna Conference.[70]

IV. Validity

A much more persistent confusion has been to consider the matter in hand to be a question of validity.

It has sometimes been said that, if a person purports to perform a treaty-making act for a State and if the circumstances which surround its performance are such that international law will in fact consider the State concerned to have performed that act, then it is the case that the legal relationships which typically arise as a result of the performance of an act of the type in question will indeed arise in a valid manner or form.[71] Such an approach was taken by the International Law Commission in the series of draft articles on the law of treaties which it provisionally adopted on first reading in 1959.[72] The subject of the validity of treaties was the subject of what was then projected to form the first chapter of the Commission's draft. Having stated validity to have "three aspects" — "formal", "substantial" and "temporal" — the first article of this chapter — Draft Article 3 — proceeded, in its second paragraph, to stipulate that "[a] treaty is said to have validity in its formal aspect if it fulfils the conditions regarding negotiation, conclusion and entry into force, set out in part I of the present chapter". That part, in turn, contained a number of provisions which specified the circumstances in which a treaty-making act was to be deemed to have been performed by a State.[73]

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68 *Yearbook of the International Law Commission* 1966, vol I, pt 2, p 152 at para 51.

69 *Ibid*, p 160 at para 63.

70 See the text at n 25 above and the accompanying note.

71 Subject, of course, to those other rules of international law which regulate the validity of acts of the instant type: for example, those rules which regulate the validity of the act of consent to be bound which are contained in Articles 46 to 51 of the Vienna Convention of 1969.

72 These draft articles essentially followed the proposals which had earlier been made to the Commission by the third of its four Special Rapporteurs on the topic of the law of treaties, Sir Gerald Fitzmaurice. For the draft articles which he proposed on the matter in hand, see *Yearbook of the International Law Commission* 1956, vol II, pp 105 et seq, especially p 109 (proposed Draft Article 10).

73 In particular, Articles 6(2) and (3) and 15: *Yearbook of the International Law Commission* 1959, vol II, pp 97 *et seq*.

Following the departure of Sir Gerald Fitzmaurice and his replacement as Special Rapporteur on the Law of Treaties by Sir Humphrey Waldock, the Commission did not take any further action on these draft articles, deciding, instead, effectively to consider the topic *de novo*.

The tendency to analyse the area of law under study in terms such as these has typically been more evident when it is viewed in its negative aspect: that is, when the circumstances surrounding the performance of a purported treaty-making act are such that that act will not be deemed performed by the State for which it was purportedly done. It has often been said that, in such an event, the legal relationships which typically result from an act of the type under consideration will be invalid. This tendency was particularly evident in the International Law Commission during the preparation of Article 7 of its Draft Articles on the Law of Treaties — the future Article 8 of the 1969 Vienna Convention.

The provision which was first proposed to the Commission by Sir Humphrey Waldock envisaged that, if a purported act of treaty-making is performed in circumstances in which it is not attributable to the State for which it is purportedly performed, then that act is voidable at the option of that State.[74] The Special Rapporteur was not alone among the members of the Commission in seeing the matter in these terms.[75] Nevertheless, the Commission proceeded provisionally to adopt on first reading a provision — Draft Article 32(1) — which eschewed the notion of validity and which provided, in terms similar to those of the future Article 8,[76] that a purported treaty-making act which is performed in circumstances of the type under contemplation is "without any

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74 See Article 6(1) of Part II of Waldock's proposed Draft Articles on the Law of Treaties: *Yearbook of the International Law Commission* 1963, vol II, p 46. That proposed provision provided as follows:

> If a representative, who neither possesses ostensible authority under article 4 of part I to bind the State, nor specific authority to do so with regard to the particular treaty, purports to bind the State by an unauthorized signature or by an unauthorized exchange or deposit of an instrument, the State concerned may repudiate the act of its representative, provided that it has not –
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> (a) subsequently ratified the unauthorized act of its representative;
> (b) so conducted itself as to bring the case within the provisions of article 4 of this part.

Admittedly, it was nowhere stated in this proposed provision that such an act was invalid or voidable. However, it is clear that this was what was contemplated. The provision appeared in that part of the proposed draft — Part II — which dealt with the grounds of invalidity of treaties. Concomitantly, the option of "repudiating" the purported treaty-making act which was accorded the State for which the act was purportedly performed was stipulated to be subject to the draft article — proposed Draft Article 4 of Part II — which it was proposed should regulate loss of the right to invoke grounds for invalidating treaties. Moreover, the provision appeared as the first paragraph of an article whose second paragraph undoubtedly set forth a ground of invalidity — the ground which was subsequently to form the subject-matter of Article 47 of the 1969 Vienna Convention. Furthermore, during the discussion of his proposal which subsequently took place in the International Law Commission, Waldock explained his proposed Draft Article 6(1) as dealing with the "essential validity" of treaty-commitments: *ibid*, vol I, p 26 at para 65.

75 At least one member of the Commission concurred with his analysis: Jiménez de Aréchaga, *ibid*, p 24 at para 34.

76 The word "any" does not appear in Article 8 of the Convention. For this change, and one other alteration affecting the formula which follows, see n 82 below.

legal effect".[77] In marked contrast, the effect of "invalidat[ing]" a treaty-making act was accorded to the circumstances which were the subject of the second paragraph of that same draft article — the progenitor of the Vienna Convention's Article 47.[78]

Notwithstanding this rebuff, the Special Rapporteur proposed, during the second reading of Draft Article 32, that its first paragraph be recast so that, like its second paragraph, it afforded a ground for "invalidating" a purported treaty-making act.[79] Some members of the Commission were in agreement with this

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77 Draft Article 32(1), as so adopted, provided as follows:

> If the representative of a State, who cannot be considered under the provisions of article 4 as being furnished with the necessary authority to express the consent of his State to be bound by a treaty, nevertheless executes an act purporting to express its consent, the act of such representative shall be without any legal effect, unless it is afterwards confirmed, either expressly or impliedly, by his State.

Yearbook of the International Law Commission 1963, vol II, p 193.

In the debates which took place in the Commission on Waldock's proposed Draft Article 6(1), the Special Rapporteur's analysis of the subject under consideration in terms of invalidity was explicitly rejected by Ago, *ibid*, vol I, p 23 at para 22 (note also *ibid*, p 26 at paras 61–62) and by Liang (not a member of the Commission, but its Secretary), *ibid*, p 24 at para 39. In view of these — and other — comments, Waldock's proposed Draft Article 6 was referred to the Commission's Drafting Committee for study in connexion with other articles of the draft, including, specifically, those from Part I (which contained the progenitor of the Convention's Article 7): *ibid*, p 27 at para 70. *Pace* Waldock (*ibid*, p 207 at para 76), there is no record of any instruction having been issued to the Drafting Committee that it formulate the draft article in terms of the validity and invalidity of treaty-making acts. Indeed, the draft article — subsequently renumbered (*ibid*, p 317 at para 60) — emerged from that body with its first paragraph bearing precisely the form which is described in the text (*ibid*, p 207 at para 75). The draft article as a whole was adopted by the Commission by a vote of 20 to none, with one abstention: *ibid*, p 208 at para 80.

It might be added that, during the discussion which had taken place in the Commission during the previous year upon what was then Article 4 of the draft — the future Article 7 of the Convention — Briggs rejected any suggestion that the subject in hand was a question of the validity of treaty-making acts: *ibid*, 1962, vol I, p 74 at para 53.

78 Article 47 of the 1969 Vienna Convention provides as follows:

> If the authority of a representative to express the consent of a State to be bound by a particular treaty has been made subject to a specific restriction, his omission to observe that restriction may not be invoked as invalidating the consent expressed by him unless the restriction was notified to the other negotiating States prior to his expressing such consent.

Article 47 of the 1986 Vienna Convention is framed along similar lines.

79 Waldock proposed that Draft Article 32(1) be revised to read as follows:

> Where a representative, who is not considered under article 4 as representing his State for the purpose or as furnished with the necessary authority, purports to express the consent of his State to be bound by a treaty, his lack of authority may be invoked as invalidating such consent unless this has afterwards been confirmed, expressly or impliedly, by his State.

Yearbook of the International Law Commission 1965, vol II, p 72. Note also paragraph 2 of his accompanying observations: *ibid.*

approach.[80] Once more, though, it was rejected by the Commission as a whole.[81] The Commission accordingly retained from Draft Article 32(1) the stipulation that acts of the type under contemplation are "without legal effect".[82] At the same time, Paragraph (1) of that draft article was separated from Paragraph (2), converted into a separate article and moved from that part of the draft which dealt with invalidity to be placed alongside and immediately after the future Article 7 of the 1969 Convention.[83]

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80 See: Amado, *Yearbook of the International Law Commission* 1966, vol I, pt 1, p 14 at para 48; Cadieux, *ibid*, p 13 at para 24; and probably Castrén, *ibid*, p 14 at para 36.

81 Analysis of the matter in terms of invalidity was explicitly rejected by several members of the Commission. See, in particular: Ago, *Yearbook of the International Law Commission* 1966, vol I, pt 1, p 14 at para 39; Briggs, *ibid*, p 12 at para 14 and p 14 at para 44; Tunkin, *ibid*, p 13 at para 18; and Yasseen, *ibid*, p 12 at para 12.

82 Two slight alterations to the formulation of this part of the provision were introduced by the Commission's Drafting Committee: the word "any" was dropped from the formula "without any legal effect" and the words "shall be", which had formerly prefaced this expression, were changed to "is". See *ibid*, vol II, p 115 at para 2.

A more significant change which was instituted by the Drafting Committee was to extend the scope of the provision. In its previous formulation, it had been limited to the act of establishing the consent of a State to be bound by a treaty — as had the Draft Article 6(1) which had originally been proposed to the Commission by the Special Rapporteur and, likewise, his proposed revised version of Draft Article 32(1). The provision now extended to embrace any "act relating to the conclusion of a treaty".

This step, like those mentioned in the text following this note, may well reflect a growing awareness among the members of the Commission of the fact that the juridical notion at play in the future Article 8 was not that of invalidity. Invalidity, at least in its so-called "relative" form (see n 97 below) — which was the form which was invoked by Waldock and others in the present context — is a concept which is generally employed in the law of treaties solely in relation to the act of consent to be bound and the legal relationships which flow from or which are consequent on that act. On the other hand, that a purported treaty-making act has no legal effect is a notion which is easily recognised to be applicable to any act which may occur during the process of the making of a treaty: not just the act of consent to be bound.

83 That paragraph (1) of Draft Article 32 should be moved from the part of the draft articles dealing with invalidity in order either to form part of Draft Article 4 — the future Article 7 of the Vienna Convention — or to be placed immediately after that draft article was an idea which was expressly supported by several members of the Commission: Ago, *ibid*, 1966, vol I, pt 1, p 14 at para 39; Bartos, *ibid*, at para 50; Briggs, *ibid*, p 12 at para 14; Rosenne, *ibid*, p 13 at para 21; and Tunkin, *ibid*, at para 19 and *ibid*, p 14 at para 46. (Support for such a step had also been expressed during the debates which had taken place in the Commission prior to the adoption of Draft Article 32 on its first reading. See: Ago, *ibid*, 1963, vol I, p 23 at para 22; and Liang, *ibid*, p 24 at paras 39–41. Note also: Cadieux, *ibid*, p 24 at para 32; and Jiménez de Aréchaga, *ibid*, at para 34.) However, *pace* Waldock (*ibid*, 1966, vol I, pt 1, p 115 at para 2), there is no evidence of any decision by the Commission that these steps should be taken — only that Draft Article 32 "and the questions arising out of it" be referred to the Drafting Committee: *ibid*, p 14 at para 51. It would, therefore, appear that it was the Drafting Committee itself which resolved upon

At the Vienna Conference, there was again manifest a current of opinion to the effect that the future Article 7 dealt with an issue of validity[84] and that what was set forth in the future Article 8 was, accordingly, a ground of invalidity. So, for example, Japan proposed that the latter of these two articles be returned to Section 2 of Part V of the Convention, which sets forth the grounds of invalidity of treaties.[85] Less dramatic, but symptomatic of the same type of thinking, was the USA's proposal that the future Article 8 be made subject to what was to become Article 45, which deals with the loss of a right to invoke a ground for invalidating, terminating, withdrawing from or suspending the operation of a treaty.[86] Several other States also spoke of the subject-matter of the future Article 8 in terms of the validity and invalidity of treaty-making acts.[87] However, the vast majority of States attending the Conference did not share this analysis;[88] and, although the amendment proposed by Japan was referred to the Conference's Drafting Committee,[89] it was not accepted.[90] Indeed, it may have

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these changes, formally speaking. Whatever the case, the changes which were proposed by that body were subsequently approved by the Commission by a vote of seventeen to none: *ibid,* p 115 at para 4.

In the form in which it was finally adopted by the International Law Commission, Draft Article 7, as it was renumbered, provided as follows:

> An act relating to the conclusion of a treaty performed by a person who cannot be considered under article 6 as representing his State for that purpose is without legal effect unless afterwards confirmed by the competent authority of the State.

Yearbook of the International Law Commission 1966, vol II, p 193.

84 See the new paragraph (3) which Spain proposed for the future Article 7: A/Conf.39/C.1/L.36.

85 A/Conf.39/C.1/L.98.

86 A/Conf.39/C.1/L.56.

87 See: France, A/Conf.39/11, p 79 at para 47; possibly India, *ibid,* at para 42; the USA, A/Conf.39/11, p 76 at para 4; possibly Sweden, A/Conf.39/11, p 78 at para 33; and Venezuela, *ibid,* at para 5.

88 It was expressly rejected by several States. See: Argentina, A/Conf.39/11, p 77 at para 24; Italy, A/Conf.39/11, p 79 at para 40; and Syria, A/Conf.39/11, p 78 at para 35. Several other States advanced analyses or supported positions which necessarily involved its rejection. See nn 112 and 114 below.

Japan's proposed amendment was expressly opposed by Argentina (A/Conf.39/11, p 77 at para 24), Australia (A/Conf.39/11, p 79 at para 49), Bulgaria (A/Conf.39/11, p 77 at para 13), Dahomey (A/Conf.39/11, p 78 at para 28), Greece (A/Conf.39/11, p 77 at para 21), India (A/Conf.39/11, p 79 at paras. 42 and 43), Italy (*ibid,* at para 40) and Syria (A/Conf.39/11, p 78 at para 35). France also opposed the proposal, though it thought it to have "some merit": A/Conf.39/11, p 79 at para 46.

The USA's proposed amendment was expressly opposed by Argentina (A/Conf.39/11, p 77 at para 24), Bulgaria (A/Conf.39/11, p 77 at para 13), Ceylon (*ibid,* at para 16), the Congo (*ibid,* at para 17), Dahomey (A/Conf.39/11, p 78 at para 28) and Syria, *ibid,* at para 35.

89 A/Conf.39/11, p 80 at para 54.

Although it received the support of France (A/Conf.39.11, p 79 at para 47), Greece (A/Conf.39/11, p 77 at para 21) and India (A/Conf.39/11, p 79 at paras 42 and 43), nevertheless, in view of the opposition with which it met from a number of other States (see the preceding note), the USA did not push to a vote that part of its proposed amendment which related to the future Article 45: A/Conf.39/11, p 80 at para 50.

been factors other than a belief that it set forth a ground of invalidity which motivated Japan to make,[91] and certain other States to entertain,[92] that proposal.

It is, of course, possible that there may be circumstances surrounding the performance of a treaty-making act which have the effect of causing that act to be invalid. For instance, the fact that the person who purports to establish the consent of a State to be bound by a treaty is induced to take that step by a bribe which is offered to her by officials who are acting for that State's treaty-partner certainly has the effect of rendering that consent invalid, it being voidable at the option of the State for which it was expressed.[93] Similarly, one possible form which the law might conceivably take is that a treaty-making act is to be deemed invalid if its performance is not consequential upon a decision that it should be performed which has been taken in accordance with those rules of internal law or administrative procedures which govern and regulate the making of decisions on whether such acts should be performed: rules or procedures which identify the person or persons who, or the body or bodies of persons which, are to take that decision; rules or regulations which specify how these persons or bodies are to conduct their deliberations; rules or norms which stipulate what constitutes a decision of these persons or bodies; and so on.[94] However, in such cases as these, it is necessarily presupposed that the State in question — the State whose official is suborned or whose internal laws or procedures are disregarded — does perform a treaty-making act: a treaty-making act which the rule in question deems "invalid".[95] That this is so is clear from the fact that a legal act which is

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90 The Chairman of the Drafting Committee reported that that body had taken no decision on the Japanese proposal, but had left it for consideration at a later stage, when the arrangement of the articles of the future Convention was examined: A/Conf.39/11, p 188 at para 33. However, there is no indication in the records of the Conference that any subsequent decision was taken on the matter.

91 Japan remarked that its proposal was motivated by fears that there were dangers that States would abuse the future Article 8 by invoking it in order to escape the consequences of their treaty-making acts: A/Conf.39/11, p 76 at para 8. In so far as such dangers may exist, they would have been reduced, had the article appeared in Part V of the Convention, since its invocation would then have been subjected to the procedural controls and dispute-settlement mechanisms which are laid down in Section 4 of that part.

The fact that Japan did not suggest any change in the formulation of the future Article 8 might also suggest that it did not in fact consider that provision to set forth a ground of invalidity. However, the formula "without legal effect", as it is used in the Vienna Convention, is not entirely free from ambiguity and may possibly have been understood by Japan to allude to the juridical effects of an invalid act. See n 113 below. Indeed, the USA did not propose any modification to this formulation; yet it spoke of the article as setting forth a ground of invalidity: n 87 above.

92 The proposal was expressly supported by Sweden, A/Conf.39/11, p 78 at para 33. Although France considered the future Article 8 to be "too closely connected" to the future Article 7 to be moved, it did see "some merit" in the Japanese proposal: A/Conf.39/11, p 79 at para 46.

93 See the rule set forth in Article 50 of the 1969 Vienna Convention.

94 Cf the rule in Article 46 of the 1969 Vienna Convention, which is set out in n 9 above.

95 This was pointed out at the Vienna Conference by the Congo: A/Conf.39/11, p 77 at para 17.

deemed "invalid" creates new legal relations under the law of treaties for the State which performs it.[96]

If the invalidity which characterises a treaty-making act is of the type which is commonly termed "relative",[97] then the act concerned brings about all of the legal consequences which the law of treaties accords to a valid act of the type concerned. This remains true, even though, at the same time, there is conferred upon the State performing that act a right to "avoid" those consequences, if it wishes so to do.[98] As long as it fails, for whatever reason, to exercise that right, its treaty-making act will continue to give rise to all of the legal consequences which would have flowed from it, had it been valid. If it never exercises that right or if, as may occur, it loses it — for example, by "confirming" its invalid act[99] — then the same will apply. So, for example, it may be that a State has established its consent to be bound by a treaty in circumstances which cause that consent to be invalid. Nevertheless, if and as long as that consent is not avoided, it will continue to produce all of the legal consequences which are proper in the prevailing circumstances to a valid act of consent. Thus, should the conditions for the entry into force of the treaty be fulfilled, the State will become subject to all of the obligations and be vested with all of the rights for which the substantive provisions of the treaty-text provide.

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96 Strictly speaking, it is not the "invalid" act which creates these relationships, but a rule of law, which generates new legal relations in the event that an "invalid" act of the type in question occurs. The nature and content of these relationships varies depending upon the type of invalidity which afflicts the treaty-making act concerned. See the text following this note.

97 For a brief outline of the concepts of "relative" and "absolute" "invalidity", see Cahier P, "Les Caractéristiques de la nullité en droit international et tout particuliérement dans la convention de Vienne de 1969 sur le droit des traités" (1972) 76 *Revue Générale de Droit International Public* 645, esp 650–52. As Cahier observes, of the two types of invalidity which are described by these terms, it is "relative invalidity" which is the more prevalent, both in the international legal system as a whole and in the law of treaties in particular: *ibid*, p 690.

98 This right is sometimes described as if it consisted in the conferment upon the State concerned of the ability to "confirm" its invalid act, in which event it will be considered that the grounds for the invalidity of that act never existed. See, for example: de la Guardia E and Delpech M, *El Derecho de los Tratados y La Convención de Viena de 1969* (1970), pp 189–90, n 442; and Cahier, n 97 above, pp 651, 677–79 and 690. Certainly, a State which is possessed of a right to avoid the consequences of a treaty-making act is free, should it wish to do so, to confirm that act. Just such a possibility is envisaged in Article 45 of the Vienna Convention. However, as the *chapeau* of that article indicates — and as its title states — that would not be for that State to exercise its right to avoid the consequences of its treaty-making act, but for it to lose that right. Moreover, to describe that right in terms of the confirmation of invalid treaty-making acts is to create the misleading impression that treaty-making acts which are characterised by "relative invalidity" do not produce any legal consequences up until such time as they may be "confirmed" by the States for which they were performed. This is not so, as the very nature of a right to avoid or invalidate suggests and as the text following this note makes clear. That this is indeed the case is in fact recognised by Cahier: *ibid*, pp 651–52.

99 See the rules set forth in Article 45 of the 1969 Vienna Convention.

None of this is contradicted by Article 69 of the Vienna Convention.[100] The absence of "legal force" which Paragraph 1 of that article ascribes to the provisions of a "void" treaty is something which occurs only if and once the "invalidity" of that treaty has been "established under the present Convention": that is, only if the State in which the right to avoid the treaty is vested has in fact taken the steps necessary to exercise that right and has prosecuted to a favourable conclusion the procedures which are laid down in Section 4 of Part V of the Convention.[101]

Even if a State which is vested with the right to avoid the consequences of its invalid act chooses to exercise that right, it will, nevertheless, remain the case that its "invalid" act will continue to give rise to legal relations for that State under the law of treaties. Certainly, as is stipulated in Article 69(1) of the Vienna Convention, "the provisions" of a treaty whose invalidity is "established under the present Convention" will "have no legal force". Thus, the legal relationships which each of the provisions of the treaty would have created, had the treaty been valid, will no longer be maintained in existence. Moreover, it will now be considered that those legal relationships never were generated by those provisions. Nonetheless, while the treaty's "provisions" will no longer have the "force" which would have been proper to them, had the treaty in which they appeared been valid, legal significance will continue to be attached to the fact that the treaty was concluded and entered into force. As Article 69(2)(b) of the Convention makes clear, that fact will serve to provide a legal basis for the doing of those acts which might have been performed in pursuance of the treaty, prior to the invocation of its invalidity.[102]

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100 Article 69 of the 1969 Vienna Convention provides as follows:

1. A treaty the invalidity of which is established under the present Convention is void. The provisions of a void treaty have no legal force.
2. If acts have nevertheless been performed in reliance on such a treaty:
   (a) Each party may require any other party to establish as far as possible in their mutual relations the position which would have existed if the acts had not been performed;
   (b) Acts performed in good faith before the invalidity was invoked are not rendered unlawful by reason only of the invalidity of the treaty.
3. In cases falling under articles 49, 50, 51 or 52, paragraph 2 does not apply with respect to the party to which the fraud, the act of corruption or the coercion is imputable.
4. In the case of the invalidity of a particular State's consent to be bound by a multilateral treaty, the foregoing rules apply in the relations between that State and the parties to the treaty.

Article 69 of the 1986 Vienna Convention is framed along similar lines.

101 Article 69(1) is couched in terms of the invalidity of treaties, rather than of acts of treaty-making. This is probably for the reason that there is little or no practical distinction between the two cases as far as bilateral treaties are concerned: to establish the invalidity of a treaty-making act is effectively to establish the invalidity of the treaty in respect of which that act is performed. This is not so, however, in the case of multilateral treaties. Article 69(4) accordingly makes specific provision for those cases in which that which is affected by invalidity is a treaty-making act performed in respect of a multilateral treaty.

102 See the text at nn 105–7, below. Article 69(2)(b) of the 1969 Vienna Convention is set out in n 100 above.

On the other hand, it may be that the type of invalidity which affects a treaty-making act is that which is usually termed "absolute", rather than "relative". Nevertheless, it remains the case, even then, that the treaty-making act in question gives rise to legal consequences which are generated under and by virtue of the law of treaties.[103] Admittedly, in contrast with an act which suffers from "relative invalidity", these consequences do not include those which are produced by performance of a "valid" act of the type in question. So, for example, an act of consent to be bound which suffers from "absolute invalidity" will not and cannot bring about all of the rights, obligations, freedoms and so on which are provided for in the treaty-text, even in a defeasible form. Nevertheless, legal consequences there are;[104] and these are defined, moreover, by reference to the substantive provisions of the treaty-text. Thus, as Article 69(2)(b) of the 1969 Vienna Convention once more makes clear, upon fulfilment of whatever conditions exist for the entry into force of the treaty concerned,[105] it becomes lawful, *vis-à-vis* the other party or parties to the treaty, for at least one of the parties[106] to perform acts which the treaty either requires to be done or the doing of which it permits.[107]

Paragraph (1) of Article 69 must, therefore, be read in the light of paragraph (2). Indeed, that the latter paragraph of that article qualifies the former is in fact indicated by the conjunction "nevertheless" which appears in the latter's *chapeau*.

103 Rather oddly, Cahier finds it difficult to identify any legal basis for these consequences — or even for those which flow from a treaty which suffers from "relative invalidity" — since the treaty in question, being invalid, is "nul": n 97 above, p 686. It would, indeed, be difficult to identify any such basis, were the treaty non-existent. The conclusion to be drawn must, therefore, be that it is not. That Cahier thinks otherwise is particularly odd, given that he rejects as *"inutile"* the concept of *"inéxistence"* and claims that it *"ne joue aucun rôle"* in international law, as it stands: Cahier, n 97 above, pp 653 and 689.

104 This is so even in the case of a treaty which falls within the scope of Article 51 of the Vienna Convention. Admittedly, that article provides that, if the representative of a State is procured to establish that State's consent to be bound by a treaty by means of coercion directed at his person, then that consent is to be "without any legal effect". However, that, in such a case, there exists in law an act of consent to be bound and that that act gives rise to legal consequences is evident from Article 69(3) of the Convention (set out in n 100 above), which makes it quite clear that the legal consequences outlined in the text following this note will apply. The formula "without any legal effect" is, therefore, hardly apt. See the Netherlands, A/C.6/SR.977, p 110 at para 5. See also n 113 below.

105 Some difficulty might be felt in attributing any "entry-into-force" to a treaty which is tainted by invalidity of the "absolute" type. However, fulfilment of the conditions for the entry into force of a treaty remains of legal significance, even in such a case as this, as is evident from the fact that, in the absence of and prior to their fulfilment, no freedom of the type described in the text will exist.

106 In certain cases, such a freedom is not conferred upon one of the parties. See Article 69(3) of the 1969 Vienna Convention (set out in n 100 above).

107 This freedom or liberty is subject to two limitations, though. First, it does not extend to make lawful the performance of such acts when they are accomplished otherwise than in good faith — as they would be, for example, if they were executed after the cause of the invalidity of the treaty-making act became known to appropriate officials of the State for which that act was performed and subsequently to the removal or disappearance of any practical impediment which there might have been to that State's invoking the cause of invalidity. Secondly, it

Whatever the type of "invalidity" concerned, then, new legal relationships are involved. These are brought about by, and so presuppose, the performance of a treaty-making act. Concomitantly, in the absence of such an act, no such new legal relations will arise. So, for example, if a State does not establish its consent to be bound by a treaty, albeit the case that, if it were to do so, that act would be characterised by "absolute invalidity", then that treaty will not afford it with any lawful ground, such as that envisaged in Article 69(2)(b) of the Vienna Convention, for accomplishing acts which the provisions of that treaty, were they valid, would require to be done. The consequence is that, if no other legal basis exists for the performance of those acts, be it under some other treaty or in customary law, then their accomplishment will place the State concerned in breach of its international legal obligations.

V. Imputability

To consider the rules which are laid down in the Vienna Convention's Article 7 as regulating the validity of treaty-making acts is, therefore, to confound a logically subsequent issue with a juridical operation which is necessarily prior to it: namely, the ascription to States of treaty-making acts.[108] The juridical role of the rules which Article 7 sets forth is, then, no more — and no less — than this: to determine when it is that the person of international law which is the State is considered in law to perform a given type of treaty-making act for the purposes of the law of treaties.[109]

Thus, if an individual engages in conduct which purports to constitute the performance for a State of a particular type of treaty-making act and if the circumstances surrounding that course of conduct are such that, by virtue of one of the rules set forth in Article 7, he is considered to be acting for that State, then, for the purposes of the law of treaties, that State performs a treaty-making act of the type concerned. The legal relations or juridical effects to which such acts give rise under the law of treaties will accordingly ensue — subject to the possibility, always, that, because of the presence of other factors surrounding the accomplishment of the treaty-making act,[110] those legal relations may be tainted by some form of invalidity.

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extends only up until such time as the invalidity of the treaty-making act is invoked.

108 Thus, at the very outset of the International Law Commission's work upon the provision which was subsequently to become Article 7 of the 1969 Vienna Convention, Briggs pointed out that "the Commission was not dealing with the question of validity, a question which would have to be dealt with in later articles", *Yearbook of the International Law Commission* 1962, vol I, p 74 at para 53.

109 Other rules of international law may conceivably yield different answers to the question of when a treaty-making act is performed by a State for the purposes of domains of international law other than the law of treaties: for example, the law of State responsibility. See the text following n 114 below.

110 That is, circumstances other than those whose presence caused the purported treaty-making act to be attributed to the State for which it was purportedly performed.

The converse of this situation is equally straightforward in its analysis. Indeed, it is its natural corollary.[111] If an individual purports to perform a treaty-making act for a State and if the surrounding circumstances are such that, under the rules set forth in Article 7, she is not considered in law to be acting for that State, then, for the purposes of the law of treaties, that State does not perform a treaty-making act of the type in question. That being so, the legal relations or juridical effects to which such an act gives rise under the law of treaties will not — indeed, cannot — ensue, whether in a valid or in an invalid form. For the purposes of the law of treaties, then, the conduct which constituted the purported performance of the treaty-making act is, in and of itself, without legal effect.[112] This is, of course, precisely what is stated in Article 8 of the Vienna Convention.[113]

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111 Malaysia, A/Conf.39/11, p 79 at para 41; and Singapore, A/Conf.39/11, p 76 at para 7. See also Sinclair, n 1 above, p 33. Thus, several members of the International Law Commission considered the rule which is now set forth in the principal clause of Article 8 — the effect of which is described in the text following this note — already to be implicit in the provision which was later to become Article 7 of the Convention. See: Ago, *Yearbook of the International Law Commission* 1966, vol I, pt 1, p 14 at para 37; Briggs, *ibid*, 1963, vol I, p 22 at paras 5; possibly de Luna, *ibid*, p 23 at para 16; Rosenne, *ibid* at para 15; and Tsuruoka, *ibid* at para 19. Indeed, for this reason, some doubts were felt as to whether a provision on the subject was even needed in the draft: Ago, *ibid*, p 23 at para 22 (though see *ibid*, p 26 at para 62); Briggs, *ibid*, p 22 at para 4 (note also *ibid*, 1966, vol I, pt 1, p 12 at para 14); de Luna, *ibid*, 1963, vol I, p 23 at para 16 (though see para 17); Rosenne, *ibid* at para 15; and Tsuruoka, *ibid* at paras 18–19. (Similar doubts were also expressed by certain other members of the Commission, though, at least in one case, these were motivated by quite different considerations: Amado, *ibid*, p 24 at para 33; Cadieux, *ibid* at para 32; and Elias, *ibid* at para 31. Cf also n 6 above.)

112 Several States attending the Vienna Conference analysed the situation in precisely these terms. See: Argentina, A/Conf.39/11, p 77 at para 24; Bulgaria, A/Conf.39/11, p 76 at para 11; Italy, A/Conf.39/11, p 79 at para 42; Switzerland, A/Conf.39/11, p 78 at para 31; and Syria, *ibid*, at para 78. Several States also supported such an analysis, either expressly or implicitly, in the comments which they made on Article 32(1) of the International Law Commission's Draft Articles, as provisionally adopted on first reading — the forebear of the Convention's Article 8. See: Pakistan, A/C.6/SR.791, p 52 at para 27; USA, A/C.6/SR.784, p 19 at para 26, and *Yearbook of the International Law Commission* 1965, vol II, pp 71–72 (though it adopted a quite different position at the Vienna Conference: see the text at nn 86 and 87 above); and Yugoslavia, A/C.6/SR.782, p 12 at para 12. For statements to similar effect in the International Law Commission, see: Ago, *Yearbook of the International Law Commission* 1966, vol I, pt 1, p 14 at para 37; and Tunkin, *ibid*, p 13 at para 19.

113 See n 52 above. Thus, Article 8 — or, rather, the principal clause of the sentence which constitutes that provision — describes the legal consequences of the non-performance of a treaty-making act, rather than the legal fact of its non-performance.

Some, slight, ambiguity in the import of Article 8 is created by Article 51 of the Vienna Convention. There, an almost identical set of words is used to characterise the legal situation which results from the performance of a treaty-making act. Indeed, if anything, the language of that provision is even more emphatic than that of Article 8, since it is there stated that a treaty-making act of

This situation can be described more dramatically in terms of the non-existence of the treaty-making act concerned.[114] This description is quite accurate. It is important, however, to understand it as involving no more than the assertion that there is no act of treaty-making for the purposes of the law of

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the type which is there in question is "without *any* legal effect" (emphasis added). However, this categoric affirmation notwithstanding, it is clear that a treaty-making act which falls within the ambit of Article 51 does in fact give rise to legal consequences. That much is made plain by Article 69(3), which clearly assumes that rights of the type envisaged in paragraph 2(b) of that article are to be vested in a State which performs a treaty-making act of the type described in Article 51. See n 104 above and the text following that note. Indeed, as is evident both from Article 69 and from the location of Article 51 in Section 2 of Part V of the Convention, the formula "without any legal effect", as it appears in Article 51, is used to allude to the legal consequences of an act which is characterised by invalidity — an invalidity which is "absolute" in nature, as is clear, in turn, from the fact that Article 51 is excluded from the scope of Article 45. See the Netherlands, A/C.6/SR.977, p 110 at para 5.

This use of the formula "without legal effect" to refer to the legal consequences of an invalid act appears to have given rise, in the case of at least one State, to some misunderstanding as to the juridical nature of the proposition which is advanced in Article 8. See Sweden, A/Conf.39/11, p 78 at para 33. However, it is quite clear that, of those who stated that a purported, but unsuccessful, act of treaty-making has no legal effect, most meant precisely that, and not that it suffered from some form of invalidity. Thus, Argentina, Italy and Syria all rejected analysis of the situation described in the future Article 8 in terms of invalidity (see n 88 above), while Bulgaria rejected two proposed amendments to that article which would have given the impression that such an analysis was correct (see n 88 above). Again, in the International Law Commission, both Ago and Tunkin stated that invalidity was not in point (see n 81 above) and favoured giving to the future Article 8 a location in the draft which made it clear that that was the case (see n 83 above).

Accordingly, the formula "without legal effect" bears a quite different sense in Article 8 of the Vienna Convention from that which it possesses in Article 51. Whereas, in Article 51, it alludes, somewhat infelicitously, to the juridical consequences of an act which is marked by "absolute invalidity", in the case of Article 8, it is used, with much greater accuracy, to describe the legal situation which is outlined in the text accompanying this note. This difference in the signification of the formula as it appears in Article 8 was recognised during the drafting of the Vienna Convention. Thus, the International Law Commission decided that the progenitor of that article should be moved out of that part of the draft which related to invalidity, where it had originally been located, while the Vienna Conference refrained from adopting the proposal of Japan that it be returned to that section. See the text at n 83 and at nn 85 and 89–90 above.

114 See, in particular, the statement of Dahomey, A/Conf.39/11, p 78 at para 28. Although it is not couched in such striking terms, paragraph 1 of the International Law Commission's Commentary on Article 7 of its Draft Articles on the Law of Treaties is to similar effect, affirming that, in such circumstances, "there [is] no question of any consent having been expressed by" the State concerned (the purported act of treaty-making in question being assumed to be an act of consent to be bound): *Yearbook of the International Law Commission* 1966, vol II, p 193. Statements in similar terms were made by Ago (*ibid*, vol I, pt 1, p 14 at para 39), Briggs (*ibid*, p 12 at para 14) and Yasseen (*ibid* at para 12 and *ibid*, p 14 at para 47). See also the Congo, A/Conf.39/11, p 77 at para 17, and, perhaps, Ceylon, *ibid* at para 14.

treaties. For the purposes of other domains of international law, it is possible that the conduct which constitutes the purported performance of the treaty-making act may "exist" and be attributed to the State for which that act was purportedly performed: for the purposes of the law of State responsibility, for instance. More importantly, though, even for the purposes of the law of treaties, the fact that the State is not deemed to perform an act of treaty-making of the type which is purportedly, but unsuccessfully, performed for it does not mean that the law treats the conduct which constituted the performance of that purported act as never having taken place.[115] Indeed, that conduct may serve, together with the subsequent occurrence of certain other acts or events, to cause the State for which the purported act of treaty-making was purportedly performed to be considered as having performed a treaty-making act of the very type which those deeds purported to be. Just such a possibility is in fact envisaged in the proviso to Article 8 of the Vienna Convention.[116] It should be added that qualifications identical to these need to be made with regard to the proposition which is advanced in the principal clause of that article: that a purported treaty-making act "is without legal effect".[117]

While, then, there was a measure of confusion during the drafting of Articles 7 and 8 of the Vienna Convention as to the precise juridical nature of the rules which were there in point — and, indeed, some confusion as to whether or not rules of international law were in point at all — it was, nevertheless, generally recognised, both by the members of the International Law Commission and by the States attending the Vienna Conference, that the central issue in hand was one of the attribution and non-attribution to States of treaty-making acts.[118] The

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115 Cf de la Guardia and Delpech, n 98 above, pp 189–90, n 442. This fact leads the authors towards the conclusion that the situation under consideration is not one of the non-existence of a treaty-making act, but, rather, of its relative invalidity. However, this is to overlook, amongst other things, the important distinction, made in the text, between the act of treaty-making as a legal act and the conduct which serves to constitute the performance of that act of treaty-making. The law may consider the former not to exist; but that does not necessarily entail that there are no rules of law which attach significance to the occurrence of the latter. Indeed, the rule which is encapsulated in the proviso to Article 8 of the Vienna Convention is just such a rule. (It may be added that to advance the conclusion which is drawn by de la Guardia and Delpech is also to misunderstand the nature of the concept of relative invalidity. See n 98 above.)

116 Article 8 of the 1969 Vienna Convention is set out in n 52 above.

117 This was recognised by Waldock, *Yearbook of the International Law Commission* 1966, vol I, pt 1, p 13 at para 30.

118 Or, more accurately, the attribution, for the purposes of the law of treaties, to a State, as a subject of international law, of conduct which purports to constitute the performance for and by that State of a particular act of treaty-making, such that some other rule of the law of treaties, which defines what may constitute the performance by a State of a particular act of treaty-making, will consider an act of that type as having been performed by the State in question. A treaty-making act has no sense — in the law of treaties, at least — except if and in so far as it is accomplished by a subject of international law. Not being international legal persons, individuals do not, in law, sign treaties or establish their consent to be bound by them: States do. It is precisely whether or not a State has engaged in conduct which the law deems to constitute a treaty-making act which is in issue and to which question the rules of law under consideration provide an answer.

formula which was finally settled upon to reflect this — a formula which the Vienna Conference retained unchanged in any respect which is relevant here from the Commission's Draft Article 6[119] — was one which presented the issue as one of representation *vel non*:[120] "[a] person is considered as representing a State for the purpose of [accomplishing a treaty-making act] if ...".[121] Article 7 of the Vienna Convention can, accordingly, be said to define a "representative" of a State for the purposes of the law relating to the conclusion of treaties.[122]

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119 For the text of Draft Article 6, as finally adopted by the Commission, see n 23 above. The only changes which were made by the Conference to this part of the Commission's Draft Article were, first, to remove the words of exception which had prefaced it, so that the *chapeau* to paragraph (1) now commences with the words which are quoted in the text following this note, and, secondly, to delete the adverb "only" which had preceded the conjunction "if". These two amendments were proposed jointly by Sweden and Venezuela: A/Conf.39/C.1/L.68/Rev.1.

120 See: paragraph 1 of the International Law Commission's Commentary on its Draft Article 6, as finally adopted, *Yearbook of the International Law Commission* 1966, vol II, p 192; and Waldock, *ibid*, 1966, vol I, pt 1, p 109 at para 40 and p 114 at para 51. That the issue should be seen in such terms was first suggested by the Commission's Secretary, Liang, *ibid*, 1963, vol I, p 24 at para 39.

121 This is the formula as it appears in Article 7(1). It is articulated somewhat differently in Article 7(2).

That the future Article 7 should be framed in terms of a list of the cases in which a person is deemed to "represent [a] State" in the performance of treaty-making acts was suggested by Waldock, during the second reading of what was then Article 4 of the Commission's Draft: *Yearbook of the International Law Commission* 1965, vol I, p 38 at para 35. The International Law Commission's Drafting Committee subsequently proposed a new text for the draft article which was worded, for the first time, along the lines which are now to be found in Article 7 of the Convention, including, in particular, predicative use of the expression "representing a State": *ibid*, p 281 at para 10. In the report which he had earlier submitted to the Commission, Waldock also suggested that such a formulation (though in the negative) be given to what was then Draft Article 32(1) — the provision which was later to become the Convention's Article 8: *ibid*, vol II, p 72 at para 6. While no objection was raised to use of the formula in the future Article 7, one member of the Commission, Castrén, did query its use in the case of the future Article 8: *ibid*, 1966, vol I, pt 1, p 12 at para 5.

122 Rosenne, *Yearbook of the International Law Commission* 1966, vol 1, pt 1, p 13 at para 20. See also Article 7 of the International Law Commission's Draft Articles, as finally adopted by the Commission, which is set out in n 83 above. (The Commission's formulation of this provision was unfortunately altered at the Vienna Conference.) Note also, to similar effect, the statement of the EEC at the 1986 Vienna Conference regarding the future Article 7 of the 1986 Vienna Convention (A/Conf.129/C.1/SR.7, p 13) and the remarks of El-Erian, the Expert Consultant to the 1975 Vienna Conference, regarding the provision which was to become Article 12 of the 1975 Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character (A/Conf.67/18, p 98 at para 50).

The identity of the individual referred to in Article 7(1) is accordingly specified in a way which avoids the notion of representation, since that is the very quality whose possession depends upon fulfilment of one or the other of the conditions which are specified in the rest of the sentence constituting that paragraph. It may be noted that, in marked contrast, the individual to which Article 47 relates is described as "a representative". The reason for this difference is that the conduct of the individual to whom Article 47 refers, when he purports to

Although this description is quite accurate, it is, on balance, probably safer not to analyse the matter in such terms.[123] The word "representation" carries with it connotations of agency,[124] a legal concept whose application would be quite

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establish the consent of a State to be bound by a treaty, is assumed to be imputable to the State for which he acts, by virtue of one of the rules set forth in Article 7. He can, therefore, be properly described as its "representative" for the purposes of the performance of that act. See, once more, Rosenne, *ibid.*

As it was adopted on first reading, Article 4 of the Commission's Draft, in those of its provisions which corresponded in substance to paragraph (1) of the Convention's Article 7, referred to the individual who acts for a State as its "representative": see n 15 above. (The formulations which were proposed for those same provisions by the Commission's Special Rapporteur, both on their first and second readings, did likewise: see nn 14 and 16 above.) However, that term formed the grammatical subject of the sentences constituting those provisions: not their predicate. As such — and since those provisions were not couched in the form of a definition — its use was clearly unsatisfactory; for it postulated possession by the individuals concerned of precisely the quality whose enjoyment depended on satisfaction of the conditions which those provisions proceeded to lay down (in so far, that is, as the draft article was capable of being understood at all to set forth rules of law on the imputation of treaty-making acts (see the text at n 15 above)). Nevertheless, the Commission's Drafting Committee, when first proposing to the Commission a formulation along the lines of that which was ultimately to appear in Article 7(1) of the Convention, initially suggested that the sentence constituting that provision should have as its subject the somewhat similar expression "an agent of a State" (*Yearbook of the International Law Commission* 1965, vol I, p 253 at para 52); and, when that wording met with criticism (see n 124 below), one member of the Commission, Lachs, suggested its replacement with the term "a representative": *ibid*, p 253 at para 64.

123 Cf Sereni AP, "La représentation en droit international" (1948) 73(2) *Recueil des Cours* 69 at 85–87.

124 Cf the text which the International Law Commission's Drafting Committee initially proposed for Draft Article 4 during its second reading, which referred to an individual who performs a treaty-making act for a State as its "agent": *Yearbook of the International Law Commission* 1965, vol I, p 253 at para 52. The Drafting Committee subsequently replaced this term with the more simple expression "a person": *ibid*, p 281 at para 10. This change, though, appears not to have stemmed from a wish to avoid any possible implication that the law of agency was in some way pertinent, but, rather, from a desire not to use a term which bears a technical meaning in international law: namely, an individual who is responsible for the conduct of a State's case in proceedings before the International Court of Justice. See Waldock, Rosenne and Lachs, *ibid* at paras 55, 56 and 64, respectively, though cf Ruda, *ibid*, p 254 at para 70.

Occasional remarks may be found during the drafting of Article 7 to the effect that concepts of the law of agency or *mandatum* could be used to help analyse the subject in hand: Liang, *ibid*, 1963, vol I, p 24 at para 39; and de Luna, *ibid*, p 25 at para 49. More particularly, use was sometimes made of certain terms and concepts of the law of agency. See, for example, Spain, A/C.6/SR.792, p 55 at para 2. Putting to one side for current purposes use of the terminology of "authority" and "authorisation", most notable in this connexion was the use which was occasionally made of the notion of "ostensible authority" in order to describe the nature of the juridical concept which was employed in the future Article 7. See, in particular, the texts of Draft Article 6(1) and (2) which were proposed to the Commission by its Special Rapporteur on the first reading of what were subsequently to become Articles 8 and 47 of the Convention: n 74 above and

inapposite in the present context.[125] A preferable notion, which is free of any such implication, is one which is already firmly established in international law:[126] that of imputation.[127] Occasional use was in fact made of the language of imputation and its cognates during the drafting of the Vienna Convention in order to analyse the rules which are the subjects of Articles 7 and 8. Thus, at the Vienna Conference, the delegate of Syria remarked that the question under examination was one of "imputing an act to a State",[128] while the delegate of Argentina spoke in similar terms, utilising the analogous language of "attribut[ion]".[129]

Yearbook of the International Law Commission 1963, vol II, p 46. See also: Ago, *ibid*, vol I, p 23 at para 23; Briggs, *ibid*, p 22 at para 6; Paredes, *ibid* at paras 11 and 13; and Waldock, *ibid* at para 3 and *ibid*, 1965, vol II, p 20 at para 4. (It should be added, though, that use of this concept gave rise to confusion or disquiet among some of the members of the International Law Commission: Ago, *ibid*, 1963, vol I, p 23 at para 23; Briggs, *ibid*, p 22 at para 7; Castrén, *ibid* at para 10; Elias, *ibid*, p 24 at para 30; Rosenne, *ibid*, p 23 at para 15; and Verdross, *ibid*, p 22 at para 14. The Commission's Drafting Committee accordingly decided to avoid reference to the concept in its proposed text for Draft Article 6: Waldock, *ibid*, p 207 at para 76. (*Pace* Waldock, though (*ibid*), there is no record of any formal instruction having been issued to the Drafting Committee to this effect.))

125 One reason why this is so is that, whereas an agent possesses a legal personality distinct from that of its principal, this is not so in the case of an individual who purports to accomplish an act of treaty-making for a State: she enjoys no legal personality of her own under international law, separate from that of the State for which she purports to act. Cf Reuter, *Yearbook of the International Law Commission* 1965, vol I, p 37 at para 16. Clearly, the existence of such an independent legal personality is a factor which may exercise considerable influence over the identification of the circumstances in which acts which are purportedly accomplished by an agent for her principal are and are not attributed to him; for the possibility exists of making her a party to the legal relationship which she purports to create, as well as, or even instead of, her alleged principal.

A further factor which tells against use of the concept of agency is that it suggests existence of two separate persons or bodies, one acting, actually or apparently, on the instructions of the other. Cf, for example, Spain, A/C.6/SR.792, p 55 at para 2. In the present context, two such persons or bodies may well not be involved. The State as a subject of international law clearly cannot itself be such a body, since it, as such, cannot issue instructions, except through the medium of some person or body of persons. Yet there may be no other person or body of persons on whose instructions the individual who performs a purported act of treaty-making claims or appears to act: she may act as if it is her decision, and her decision alone, whether or not the State performs the treaty-making act in question.

126 See, in particular, Chapter II of Part 1 of the International Law Commission's Draft Articles on State Responsibility, as provisionally adopted by the Commission on first reading: A/51/10, pp 126–29.

127 Use of this notion is made by Remiro Brotons in his analysis of Articles 7 and 8 of the Vienna Convention: n 1 above, pp 146, 148, 149, 150, 151, 153, 158 and 159.

128 A/Conf.39/11, p 78 at para 35, *in fine*. Note also, during the preparation of the International Law Commission's Draft Articles, Italy, A/C.6/SR.793, p 61 at para 5.

129 A/Conf.39/11, p 77 at para 24. See also paragraph 1 of the International Law Commission's Commentary on its Draft Article 7, as finally adopted: *Yearbook of the International Law Commission* 1966, vol II, p 193. Both of these comments, as

VI. Conclusions

Notwithstanding the considerable confusion which has surrounded the subject under consideration, the conclusions which are to be drawn are remarkably straightforward.

The circumstances in which a State is to be treated, for the purposes of the law of treaties, as having performed a treaty-making act are defined by rules. These rules are rules of law and, moreover, rules of international law. In particular, they are rules of that part of international law which constitutes the law of treaties.

More significantly, the juridical nature of these rules is that of rules of imputation: that is, rules which cause to be attributed to a State conduct which purports to constitute the performance for and by that State of a particular act of treaty-making.

Certainly, other types of rules, with different juridical natures, are pertinent in the context. Thus, a number of rules may be identified which regulate the conduct of States in this field, either by imposing obligations upon them or by conferring freedoms. Some of these rules are of analytical interest only. It is, for example, of little real interest that a State does not commit any international wrong if it considers a purported treaty-making act as imputable to the State for which it is purportedly performed in circumstances in which that act is indeed deemed to be imputable to that State. It is of not much greater interest that it also commits no wrong if it considers a purported treaty-making act to be imputable to the State for which it is purportedly performed when the circumstances which surround that act are such that that act is not in fact imputed to that State: such a State simply acts as if that is the case which is not.[130] On the other hand, there is a number of freedom-conferring and duty-imposing rules which do have a measure of practical importance. For instance, it may be of considerable value to a State in a given case that it enjoys the freedom to ask of a person who purports to perform a treaty-making act for its putative treaty-partner that she produce full powers designating her as representing that State for that purpose, even though her act of treaty-making is in fact imputable to that State without her exhibiting such a document.[131] Nevertheless, and whatever their importance, such rules as these assume the existence of other

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well as those of Syria and Italy, were made in connexion with what was later to become Article 8 of the Vienna Convention and, as such, were, strictly speaking, articulated in terms of the non-imputation of treaty-making acts to States, rather than their imputation.

130 It commits a mistake, not a wrong. Of course, a State which makes such an erroneous judgment may proceed, in consequence, to engage in other conduct the effect of which is to place it in breach of international law. For example, it may mistakenly consider that it is now entitled to undertake activities in which it is not free to engage if the treaty-making act in question has not in fact been performed. However, in such a case, it is engaging in those activities which places that State in breach of international law and not its act of mistakenly considering its putative treaty-partner to have performed the treaty-making act concerned. This remains so, even if that judgment takes the form of some overt official pronouncement.

131 See the text at n 45 above.

rules whose role it is to impute to States, in the circumstances which they lay down, the conduct of individuals who purport to accomplish treaty-making acts on their behalf. Otherwise, the freedoms which they confer and the duties which they impose would be devoid of point.

Similarly, rules which regulate validity are undoubtedly pertinent to consideration of the performance of treaty-making acts. After all, the fact that an act of treaty-making may be imputed to a State leaves entirely open the question of the validity of that act or of the legal relationships to which it potentially gives rise. Whatever the case, though, rules relating to the invalidity of acts of treaty-making presuppose the attribution of such acts to the State for which they are performed. They, therefore, assume the existence of, and are parasitic upon, rules of a different juridical nature: rules governing the imputation to States of treaty-making acts.