SOME REFLECTIONS ON THE VIENNA CONVENTION ON THE LAW OF TREATIES

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Australia has recently acceded to the Vienna Convention on Treaties, one of the major codifying treaties concluded under United Nations auspices. Mr Brazil who was a member and later Leader of the Australian Delegation to the Conference that drew up the Convention, examines its scope, including its answer to the question—should the Convention cover the topic of treaty-making capacity of parts of federal States? Mr Brazil suggests that the Convention's rules on reference to preparatory materials as interpretative aids should be adopted by Australian courts. Its restatement of the topic of reservations and its reception of the notion of international public order (jus cogens) *are evaluated. The themes of good faith and due process are seen to run through the Convention, which though not yet in force, has already gained wide acceptance.*

> Conferences, adjournments, ultimatums,
> Flights in the air, castles in the air,
> The autopsy of treaties . . .
>
> (Louis MacNiece)

On 13 June 1974 the accession of Australia to the Vienna Convention on the Law of Treaties adopted on 22 May 1969 at Vienna by the United Nations Conference on the Law of Treaties, was deposited with the United Nations Secretary-General. At the date of writing, twenty-two other countries have, by ratification or accession, also consented to be bound by the Convention.[1] It will enter into force on the thirtieth day following the date of deposit of the thirty-fifth ratification.

I

Much has been written already about the Convention;[2] more will undoubtedly come. The preparatory work leading to its adoption is particularly extensive and instructive, embracing not only the records of

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[1] The Convention is set forth in A/CONF.39/27 and Corr. 1; also in (1969) 8 International Legal Materials 679. It will be printed in the *Australian Treaty Series* 1974 No. 2. Countries that have ratified or acceded to the Convention are—Australia, Argentina, Barbados, Canada, Central African Republic, Greece, Italy, Jamaica, Lesotho, Mauritius, Mexico, Morocco, New Zealand, Niger, Nigeria, Paraguay, Philippines, Spain, Sweden, Syrian Arab Republic, Tunisia, United Kingdom and Yugoslavia.

[2] The following is by no means an exhaustive list: Elias, *The Modern Law of*

the two Sessions of the Conference in 1968 and 1969, but also the intensive work of the International Law Commission (ILC) between 1962 and 1966 in preparing the draft articles considered by the Conference; and we are most fortunate in having Shabtai Rosenne's *The Law of Treaties; A Guide to the Legislative History of the Vienna Convention*[3] to light the way through this embarrassment of riches. The extent to which resort may properly be had to the discussions in the ILC in interpreting the Convention is perhaps arguable,[4] but it is clear that the final Commentaries adopted by the ILC in 1966 on its draft articles have a special place as constituting the *exposé des motifs* of the text that formed the main basis of the Convention.

When it is added that the Convention itself consists of 84 highly condensed Articles dealing with many though not, as we shall see, all aspects of the Law of Treaties, it will be understood that the scope of these present reflections must necessarily be severely selective. Their bias will be Australian in the sense of seeking to express a personal Australian viewpoint on parts of the Convention, its background and setting, without, it is hoped, foresaking the objectivity and universality

Treaties (1974); Sinclair, *The Vienna Convention on the Law of Treaties* (1973); Antippes, "Background Report on Codification of the Law of Treaties at the Vienna Conference" (1969) 43 Tulane Law Review 798; Stanford, "United Nations Law of Treaties Conference: First Session" (1969) 19 University of Toronto Law Journal 59; Sinclair, "Vienna Conference on the Law of Treaties" (1970) 19 International and Comparative Law Quarterly 47; Stanford, "Vienna Convention on the Law of Treaties" (1970) 20 University of Toronto Law Journal 18; Kearney, "Future Law of Treaties" (1970) 4 International Law 823; Nahlik, "Grounds of Invalidity and Termination of Treaties" (1971) 65 American Journal of International Law 736; Jacobs, "Innovation and Continuity in the Law of Treaties" (1970) 33 Modern Law Review 508; Germer, "Interpretation of Plurilingual Treaties: A Study of Article 33 of the Vienna Convention on the Law of Treaties" (1970) 11 Harvard International Law Journal 400; Malawer, "New Concept of Consent and World Public Order: 'Coerced Treaties' and the Convention on the Law of Treaties" (1970) 4 The Vanderbilt International 1; Partridge, "Political and Economic Coercion: Within the Ambit of Article 52 of the Vienna Convention on the Law of Treaties?" (1971) 5 International Law 755; Briggs, "Travaux Préparatoires of the Vienna Convention on the Law of Treaties" (1971) 65 American Journal of International Law 705; Kearney and Dalton, "Treaty on Treaties" (1970) 64 American Journal of International Law 495; Wozencraft, "United Nations Arithmetic and the Vienna Conference on the Law of Treaties" (1972) 6 International Law 205; Deutsch, "Vienna Convention on the Law of Treaties" (1971) 47 Notre Dame Law 297; Koeck, " 'Changed Circumstances' Clause after the United Nations Conference on the Law of Treaties (1968-1969)" (1974) 4 Georgia Journal of International and Comparative Law 93.

[3] (1970). The main documentation consists of the *Official Records* of the Conference (two volumes of summary records of the 1968 and 1969 sessions respectively—A/CONF.39/11 and A/CONF.39/11/Add.1—and one volume of documents A/CONF.39/11/Add.2) and the draft articles on the Law of Treaties with commentaries adopted by the ILC in 1966: *Yearbook of the ILC*, 1966 Vol. II 173-274. For earlier antecedents, pre-eminent place must be given to the draft on the Law of Treaties by Harvard Research in International Law: (1935) 29 American Journal of International Law (Supp.) 653.

[4] Shabtai Rosenne, *The Law of Treaties* (1970) 37.

that the subject calls for. The fundamental importance of the institution of the treaty, of course, needs little elaboration. It is the main and much used instrument with which international society is equipped for the purpose of carrying out its multifarious transactions. An increasingly larger part of international legal relations of States is now regulated by treaty law and not by customary international law.

A preliminary comment on terminology is required in view of the confusing variety of nomenclature that has developed for international agreements. As well as "treaty", one finds titles such as "convention", "protocol", "declaration", "charter", "act", "statute", "agreement" and even "*modus vivendi*". In the case of less formal agreements, such names as "exchange of notes", "exchange of letters", "memorandum of agreement" and "agreed minute" have been used. The Convention rightly cuts through this terminological thicket by using "treaty" as a generic term for international agreements governed by international law whether embodied in a single instrument or in two or more related instruments and whatever their particular designation.[5]

II

The Convention is one of the great codifying treaties—in some ways the greatest to date—concluded under the auspices of the United Nations pursuant to its responsibility under Article 13 of the Charter of the United Nations to encourage the development of international law and its codification. While the achievement it represents is immense, the scope of the Convention is nevertheless limited. No apology is needed, since for a number of reasons—practical, theoretical or political—it is almost impossible to capture within a single text all the law of a major topic of international law and all its applications.

The limitations need, however, to be carefully noted. The Convention does not deal with the effect of an outbreak of hostilities upon treaties. Similarly, the Convention does not contain provisions concerning the succession of States in respect of treaties, or provisions on the question of the international responsibility of a State with respect to a failure to perform a treaty obligation.[6] Furthermore, Article 1 of the Convention provides that the Convention only applies to treaties between *States* and then only to such treaties in written form (see Article 2(1)(a)). Article 3 lays down an important rider that the non-application of the Convention to treaties thus excluded—namely, international agreements concluded between States and other subjects of international law (*e.g.* international organizations such as the United Nations) or between other subjects of international law or international

[5] Article 2(1)(a).
[6] Article 73.

agreements not in written form—does not affect the application to them of any rules in the Convention to which they would be subject under international law independently of the Convention, or the application of the Convention to the relations between States as between themselves under treaties to which other subjects of international law are also parties. Article 4 provides that the Convention applies only to treaties which are concluded by States *after* the entry into force of the Convention with regard to such States. That is to say, the Convention *qua* Convention does not have retroactive effect—but this too is subject to a rider recognizing the applicability to prior treaties of any rules in the Convention to which such treaties would be subject under international law independently of the Convention.

This being said, the enumeration of the matters to which the Convention, *qua* Convention, does not apply is almost complete. It only remains to note that the final preambular paragraph of the Convention affirms that the rules of customary international law will continue to govern questions not regulated by the Convention. If there are any gaps in its regulation of the area in which it is expressed to apply, customary international law remains to fill them.

III

Between Part I (Introduction) and Part VIII (Final Clauses), the Convention sets forth Parts dealing with:

Part II Conclusion and Entry into Force of Treaties
Part III Observance, Application and Interpretation of Treaties
Part IV Amendment and Modification of Treaties
Part V Invalidity, Termination and Suspension of the Operation of Treaties
Part VI Miscellaneous Provisions
Part VII Depositaries, Notifications, Corrections and Registration

A perusal of these titles serves usefully to indicate that the focus of the Convention is primarily on the instrument embodying the international contractual obligation rather than on the obligation itself. Mention has already been made that the Convention does not cover international responsibility. Consistently with this approach, while the Convention does not hesitate to classify treaties by reference to their formal characteristics (*e.g.* as being multilateral or bilateral), it does not seek to analyse the nature of international contractual obligations. No doubt the approach was right. It would, however, be proper here to give some recognition to the work of analysis by an early Special Rapporteur of the ILC. Treaty obligations may be of a directly reciprocating type, providing for a mutual interchange of obligations and

benefits. The *ILC Commentaries* refer also to obligations of an "independent" or "integral" character, and explain by footnote:

> A treaty containing "interdependent type" obligations as defined by a previous Special Rapporteur (Sir Gerald Fitzmaurice, Third Report in the *Yearbook of the International Law Commission*, 1958 Vol. II, article 19 and commentary) is one where the obligations of each party are only meaningful in the context of the corresponding obligations of every other party, so that the violation of its obligations by one party prejudices the treaty régime applicable between them all and not merely the relations between the defaulting State and the other parties. Examples given by him were treaties of disarmament, treaties prohibiting the use of particular weapons, treaties requiring abstention from fishing in certain areas or during certain seasons, etc. A treaty containing "integral type" obligations was defined by the same Special Rapporteur as one where "the force of the obligation is self-existent, absolute and inherent for each party and not dependent on a corresponding performance by the others". The examples given by him were the Genocide Convention, Human Rights Conventions, the Geneva Conventions of 1949 on prisoners of war, etc., International Labour Conventions and treaties imposing an obligation to maintain a certain régime or system in a given area, such as the régime of the Sounds and the Belts at the entrance to the Baltic Sea.

The point to note is that international contractual obligations are diverse in character, without being any the less fully international and fully obligatory. The ILC indeed considered whether the conclusion of a treaty providing for obligations of an "interdependent" or "integral" character was so binding as to affect the actual capacity of each party unilaterally to enter into a later treaty derogating from those obligations. It finally dealt with this matter on the basis that, under the existing law, the question was left as a matter of State responsibility if a party to such a treaty afterwards concluded another treaty derogating from it.[7]

IV

Part II on the Conclusion and Entry into Force of Treaties begins with what, in truth, is a pleonasm:

Article 6

Capacity of States to conclude treaties

Every State has capacity to conclude treaties.

"State" here means, of course, sovereign States for purposes of international law;[8] it does not include the constituent parts of federal States

[7] *Yearbook of the ILC*, 1966 Vol. II 216-217.
[8] *Id.* 192.

such as the Canadian Provinces, the Australian States, or the Swiss Cantons. However, the draft article on capacity submitted by the ILC contained an additional paragraph (2) that attempted to deal with the case of federal States, such as Switzerland, whose constitutions, in some circumstances, allow their constituent parts a limited measure of treaty-making capacity.[9] Paragraph (2) had been adopted by the ILC on a vote of 7 in favour, 3 opposed, and 4 abstentions in the 25 member Commission. The inclusion of such a clause in the Convention was, on the initiative of Canada with the support of most other federal States, including Australia, decisively rejected by the Conference by 66 votes to 28, with 13 abstentions.[10] Obviously, we have here an expression of view of some significance that merits examination.

The ILC draft spoke of members of federal unions possessing a capacity to conclude treaties "if such capacity is admitted by the federal constitution and within the limits there laid down". Apart from such a clause being out of place in a Convention that professes to deal only with treaties between sovereign States (Article 1), the ILC's formulation was itself open to a number of serious objections. It in no way sufficiently reflected the fact that to speak of the possession of treaty-making capacity by members of federal unions is to deal with the exceptional at the expense of the normal position. As Lord McNair observed in his authoritative work, *The Law of Treaties*:

> Normally, it is the Federal Government that exercises the totality of international capacity to conclude treaties and it is the exception to find any of the Member States being permitted to participate in this function.
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> From this point of view the United States of America, the Dominion of Canada, and the Commonwealth of Australia may be regarded as belonging to the pure type, in which the whole treaty-making capacity is vested in the Federal Government; the member States or Provinces possess no such capacity, although their co-operation may be required for the purpose of implementing a treaty . . . .[11]

Moreover, the ILC formulation placed undue emphasis on what the written text of the constitution might be considered to "admit". The Israeli representative observed:

> . . . although the text of the constitution of a federal State was extremely important it represented only a part of that State's internal law and could not be considered in isolation from such other important factors as the constitutional practice, the jurisprudence of the constitutional courts and the overall framework of

[9] *Id.* 191.
[10] *Official Records, Second Session* 6-16.
[11] (1961) 37.

> legal relations and administrative arrangements between the federal State and its constituent members.[12]

The Swiss representative, in expressing the same thought, pointed out that, if any clarification of the constitutional position was needed, that was a matter exclusively for the central authorities of the federal State.[13] In many ways, the most serious criticism made of the ILC formulation was that it might encourage third States to act on their own interpretation of the constitution of a federal State in dealings with its constituent parts. It was generally agreed—even by delegations that supported the retention of the ILC formulation—that to do so would be an inadmissible interference with the internal affairs of the federal State.[14]

So the ILC paragraph was completely deleted. We may fairly interpret the decisive vote deleting it as establishing two general points. First, it negated any general idea that members of federal unions can be assimilated to States for the purposes of international law. The Federal Republic of Germany representative said:

> In virtue of Article 1, the Convention applied solely to treaties between States. The components of a federation, *even if* the law conferred upon them a certain capacity to conclude international agreements—as was the case in the Federal Republic of Germany —could not be assimilated in general to States, and that applied just as much to the sphere of treaty law as to general international law.[15]

Secondly, one finds in the Conference discussions the clearest disapproval of any interference by third States by seeking to deal with a component part of a federal State in a way that involves them in internal constitutional questions concerning the treaty-making capacity, or lack of it, of that component part.

Articles 11-15 of Part II of the Convention deal with the definitive expression by a State of its consent to be bound by a treaty. The underlying principle of the provisions is the autonomy of the negotiating States as to the means of expressing their consent. They may choose complex and formal means such as signature followed by an exchange or deposit of an instrument of ratification, or more simplified procedures such as mere signature or exchange of notes. Consistent with this approach, the Articles do not establish any hierarchy as between procedures or any residuary rule such as that treaties require to be ratified except where otherwise provided. The mainly theoretical controversy as to the

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[12] *Official Records, Second Session* 15.

[13] *Id.* 12.

[14] *E.g.* the Canadian, Federal Republic of Germany, Soviet Union and Indian representatives; *Official Records, Second Session* 6-7, 8, 10, 11. The Soviet Union supported retention of the ILC formulation.

[15] *Id.* 8 (emphasis added).

conditions in which a treaty may need ratification[16] has been put aside as being of little practical significance. Whether they be of a formal or informal character, treaties nowadays normally either provide that they shall be ratified, or, by laying down that the treaty shall enter into force upon signature or upon a specified date or event, dispense with ratification. The Convention leaves this matter to the expression of the intention of the negotiating States, without essaying any statement of a controversial residuary rule.

There is probably no topic of international law to which the principle of good faith in international relations has more relevance than the Law of Treaties. One concrete application of that principle is to be found in Article 18, which expresses the obligation of a State not to defeat the object and purpose of a treaty prior to its entry into force. The obligation is to apply in two situations—where a State has adhered to a treaty subject to ratification until it has made clear its intention not to become a party to the treaty, and where it has consented to be bound by a treaty which has not yet entered into force, provided such entry into force is not unduly delayed. It is of interest to note that the ILC proposed a third situation, namely, that where a State has merely agreed to enter into *negotiations* for a treaty, the obligation applies while those negotiations are in progress.[17] An example suggested was the case of a State that, during negotiations concerning territorial waters, exhausted the resources of those waters which had been the reason for the negotiations. However commendable this proposal of an ethical rule of fair dealing in negotiations may have been, the Conference rejected it as not being a fit subject for a legal obligation.[18] We may regard its rejection as an interesting example of distinguishing between law and ethics. More practically, one sees it as a refusal by States to be deprived automatically of their freedom of action by merely entering into negotiations. One may even add that such a rule, if it were given legal force, could undesirably discourage the opening of treaty negotiations.

V

Section 2 of Part II, entitled "Reservations", brings us to one of the major contributions made by the Convention to the Law of Treaties. The title of the Section is a contraction of the title in the ILC draft, "Reservations to Multilateral Treaties". As the President of the Conference (Professor Ago) suggested, the contraction should be taken as meaning that the applicability of reservations only to multilateral treaties was self-evident since a change to a bilateral treaty constituted a new proposal and not a reservation. Oddly enough, there was a difference of

[16] *Yearbook of the ILC*, 1953 Vol. II 112; 1954 Vol. II 127; 1956 Vol. II 123.
[17] *Yearbook of the ILC*, 1966 Vol. II 202.
[18] *Official Records, First Session* 106.

views in the Drafting Committee of the Conference on this point, but the contraction of the title did not signify that the Drafting Committee had "decided" that reservations to multilateral treaties were possible.[19]

However, we must not let such nice points distract us from properly noting the major steps of the re-ordering of the law of reservations to multilateral treaties effectively achieved by the Articles of the Convention. That the Convention, in adopting the Articles more or less in the form proposed by the ILC, has done this is really beyond dispute, notwithstanding the misgivings that were, naturally I think, expressed by some delegations at the Conference that the relatively flexible system of reservations proposed by the ILC would endanger the integrity of multilateral treaties. Prior to the adoption of the Convention, the subject had been considered by the General Assembly itself as well as by the International Court of Justice in 1951 in its advisory opinion concerning the Genocide Convention, and by the ILC.[20] Divergent views were expressed on the fundamental question of the extent to which the consent of the other interested States was necessary for the effectiveness of a reservation. The Harvard Research draft on the Law of Treaties had correctly stated the accepted view prior to World War II, which was that unless otherwise provided in the treaty itself, in order for a State to become a party to a multilateral treaty with a reservation, the *unanimous* consent of the other parties was required.[21] But a majority of the International Court in 1951 said that the unanimity doctrine had not been transformed into a rule of law and that a State making a reservation objected to by one or more but not all the parties to the Genocide Convention could be regarded as a party "if the reservation is *compatible with the object and purpose of the Convention*".[22] The established position of the Soviet Union was that the formulation of a reservation is "an act of State sovereignty" and did not require acceptance by other States. The need for a restatement of the law of reservations was pressing indeed.

The Convention adopts in substance the system on reservations proposed to it by the ILC. Under Article 19(c) of the Convention, the general rule laid down is that a State, when adhering to a multilateral treaty, may formulate a reservation, *unless the reservation is incompatible with the object and purpose of the treaty.* The last Special Rapporteur of the ILC on the Law of Treaties, now Judge Sir Humphrey Waldock of the International Court, who acted as Expert Consultant at the Vienna Conference, said of this limitation on reservations:

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[19] *Official Records, Second Session* 37.

[20] *Yearbook of the ILC*, 1966 Vol. II 35ff.; *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* ICJ Reports 1951 15.

[21] (1935) 29 American Journal of International Law (Supp.) 653, 659-660.

[22] ICJ Reports 1951 15, 24.

> . . . the ILC had certainly intended to state an objective criterion for the compatibility of a reservation with the object and purpose of a treaty . . . the question which then arose was that of the method of application: by collegiate decision [of other interested States] or by decision of each of the other contracting States individually.[23]

The latter method was adopted, undoubtedly a step towards subjectivity. Sir Humphrey explained:

> It was true that, although the ILC had intended to state an objective criterion, the method of application proposed in the draft articles was subjective, in that it depended upon the judgment of States. But the situation was characteristic of many spheres of international law in the absence of a judicial decision . . .

Thus, under Article 20(4), acceptance by another contracting State of a reservation constitutes the reserving State a party to the treaty *qua* that other State; an objection by another contracting State to a reservation does not preclude the entry into force of the treaty as between the objecting State and reserving State *unless* a contrary intention is definitely expressed by the objecting State; and an act expressing a State's consent to be bound by the treaty and containing a reservation is effective as soon as at least one other contracting State has accepted the reservation. As Sir Humphrey observed in the statement already referred to, those evaluating the Article:

> should bear in mind that, under the system adopted by the ILC, no State was obliged to accept the entry into force of a treaty as between itself and a reserving State whose reservation it regarded as incompatible with the object of the treaty.

The Argentine representative, now Judge Ruda of the International Court, said that the theory of unanimous acceptance of reservations was no longer acceptable in modern times, and it was better that a State should consent to part of a multilateral treaty than lose all interest in it. The Inter-American system of reservations (under which a reserving State is not precluded from becoming a party to a convention except *qua* objecting States) was, he considered, most effective, as it promoted relations between States with very diverse interests, and he observed that the ILC's draft was based on the Inter-American experience.[24]

Nevertheless, the working out of the application of the Articles in particular cases is likely to present some nice problems. Equality between a reserving and a non-reserving State may seem less than complete, since the non-reserving State, by reason of its obligations to other non-reserving States, may feel bound to comply with the whole of the treaty, including the provisions from which the reserving State has

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[23] *Official Records, First Session* 126.
[24] *Id.* 129.

exempted itself. The presumption that the making of an objection does not preclude the entry into force of the convention *qua* the objecting State *unless* it definitely expresses that intention may, in practice, inhibit an objecting State that would wish to avoid treaty relations with the reserving State. To do so would require the objecting State to take the possibly diplomatically significant step of expressly rejecting treaty relations under the Convention. A more desirable rule had been proposed by the ILC, but the Conference rejected it.[25] Under the proposed ILC rule the making of an objection automatically precluded treaty relations unless a contrary intention was expressed by the objecting State. Take also the case where one State accepts the reservation, and another State objects to it but allows treaty relations to exist. For the State accepting the reservation, Article 21(1) provides that the reservation:

> modifies for the reserving State in its relations with that other party the provisions of the treaty to which the reservation relates to the extent of the reservation.

Where there is an objection but treaty relations are allowed, Article 21(3) provides that:

> the provisions to which the reservation relates do not apply as between the two States to the extent of the reservation.

So the legal effect of the reservation is substantially the same whether the non-reserving State accepts or objects to the reservation. For practical purposes, therefore, the making of an objection in itself has little significance; the only step having distinctive legal effect appears to be to express definitely the intention that there shall be no treaty relations (Article 20(4)(b)).

So much for the general system on reservations in the Convention. It is, of course, open for the States concerned in drawing up a treaty to displace the operation of these general rules, and Article 19 recognizes this by providing that a State may not formulate a reservation where the reservation is prohibited by the treaty or where the treaty provides that *only* specified reservations, which do not include the reservation in question, may be made. In this latter connection, drafters of treaties need to note that they must provide that *only* specified reservations may be made. Authorization of specified reservations does not exclude the possibility of other reservations, unless the intention to exclude is made clear.[26]

Finally, we should note that Article 20(2) requires the consent of all the parties for acceptance of reservations "when it appears from the

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[25] *Official Records, Second Session* 35.

[26] See *North Sea Continental Shelf Cases* ICJ Reports 1969 4, 38-39, in which Article 12 of the Geneva Continental Shelf Convention allowing reservations "other than to Articles 1 to 3 inclusive" was considered.

limited number of negotiating States and the object and purpose of a treaty that the application of the treaty in its entirety between all the parties is an essential condition of the consent of each one to be bound". A treaty of alliance between a small number of States might be such a case. The provision constitutes all that remains in the Convention of the unanimity doctrine of pre-World War II practice.

VI

Part III of the Convention entitled "Observance, Application and Interpretation of Treaties" begins appropriately with what the ILC justly described as the fundamental rule of the Law of Treaties—*pacta sunt servanda*. This maxim appears as the title of the opening Article (Article 26) and the Italian representative at the Conference piquantly observed that, if Latin were still the language of diplomacy as it had been for over 1,000 years, the maxim itself would have sufficed as the text of the Article.[27] Be that as it may, the text reads:

> Every treaty in force is binding upon the parties to it and must be performed by them in good faith.

The principle of good faith forms an integral part of the legal obligation, which must not be evaded by a literalist or narrow application of the clauses of the treaty. Article 27 states another fundamental rule, namely, that a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. Thus, the restrictions on government action in Australia imposed by section 92 of the Australian Constitution would not excuse internationally a failure to perform a treaty requiring action contrary to its terms, were Australia to be a party to such a treaty. The rule in Article 27 is, of course, well established and may be taken as expressing customary international law on the matter.[28]

The motif of good faith is reiterated in Article 31 which expresses the general rule of interpretation of treaties. That Article and the supplementary provision contained in Article 32 are of such importance and interest that they will be quoted in full.

Article 31

General rule of interpretation

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

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[27] *Official Records, First Session* 155.

[28] *E.g.* McNair, *Law of Treaties* (1961) 100-101, 761. Article 27 is to be distinguished from Article 43 on the international constitutional laws regarding competence to conclude treaties. As the President of the Conference (Professor Ago) observed, there is no conflict between the Articles because Article 24 refers to treaties already in force: *Official Records, Second Session* 54.

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
   (a) any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;
   (b) any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
3. There shall be taken into account, together with the context:
   (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
   (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
   (c) any relevant rules of international law applicable in the relations between the parties.
4. A special meaning shall be given to a term if it is established that the parties so intended.

Article 32

Supplementary means of interpretation

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of Article 31, or to determine the meaning when the interpretation according to Article 31:

(a) leaves the meaning ambiguous or obscure; or

(b) leads to a result which is manifestly absurd or unreasonable.

A number of points may be noted. The Convention does not attempt to codify the many canons of construction, which feature in the jurisprudence of international tribunals as much as in the rulings of domestic courts. Many are only principles of good sense or logic which may be of value in a particular context but irrelevant in another. Rather, the approach, which is surely the right one, is to isolate and codify the relatively few general principles which appear to constitute general rules for the interpretation of treaties. These indeed are allowed by the Convention to have the status of legal rules. Moreover, the rules stated may fairly be claimed to be soundly based on established principles affirmed by international tribunals.[29] The rules involve a progression, if not a hierarchy, of sources of interpretation to which resort may be

[29] *Yearbook of the ILC*, 1966 Vol. II 220-223.

made, in which primacy is given to the terms of the treaty read according to their ordinary meaning in their context and in the light of the object and purpose of the treaty.

That is, the Convention comes down firmly on the side of the "textual" approach to treaty interpretation in preference to the approach of freely ranging over all sources to ascertain the "real" intentions of the parties. The main exponent of the latter approach has been the United States, which moved proposals to that end at the Vienna Conference. The decisive rejection by the Conference of those proposals[30] and the subsequent adoption at the Conference of the Convention rules by unanimous vote may be taken as confirmation that the "textual" approach does indeed constitute the general *opinio juris* on this doctrinally controversial subject. While the outcome of the debate was decisive, we may note that it was keenly conducted. References were made on one side to the undesirability of imposing "over-rigid and unnecessarily restrictive requirements" on the interpretative process. On the other side, Judge Huber's statement was invoked, namely, that international law should avoid the idea of a "will of the parties" floating like a cloud over the *terra firma* of a contractual text.

The approach of giving primacy to the text, as constituting the most authentic expression of the will of the parties, accords closely, of course, with the approach to interpretation of documents and statutes under our own municipal legal system. The reference in Article 31(1) of the Convention to "the ordinary meaning" of terms of the treaty no doubt would have pleased Lord Wensleydale of the "golden rule" immensely.[31] Indeed, if, in the history of legal ideas, we could fully trace the lineage of these elements in the Convention rules, Lord Wensleydale might well be found to have been a distant intervener in the Vienna debates. One point, however, where the Convention rules may seem to depart markedly from the municipal rules is in relation to references to preparatory materials. The preparatory materials of treaties (*travaux préparatoires*) may not, under the Convention, be as freely used as was proposed by some, but they may nevertheless be resorted to fairly readily, *e.g.* to confirm the text though not to contradict it, and also to remove obscurities or ambiguities. The extent to which, say, the legislative history of statutes, including parliamentary debates, may be used to elucidate the text has generally been regarded as much more confined,

[30] The submissions of the United States representative (Professor McDougul) are set forth in (1968) 62 American Journal of International Law 1021. They were rejected by 66 votes to 8, with 10 abstentions: *Official Records, First Session* 185.

[31] *Grey* v. *Pearson* (1857) H.L.C. 61, 106: ". . . in construing wills and indeed statutes, and all written instruments, the grammatical and ordinary sense of the words is to be adhered to, unless that would lead to some absurdity, or some repugnance or inconsistency with the rest of the instrument . . ."

if not absolutely foreclosed.[32] One notes with interest, however, that the use of such materials may possibly become freer.[33] The careful language of Article 32, in its setting of a system of interpretation that gives clear primacy to the text, provides a sound exemplar of how such freer access might properly be developed.

Also, we may note that the occasions on which Australian courts, particularly the High Court, will have to construe treaties, either in the context of legislation to implement a treaty or in a more general setting of having to note and take account of areas of international law governed directly or indirectly by a treaty, are likely to increase. The Law of the Sea Conventions concluded at Geneva in 1958 afford a ready and topical illustration. There can be no doubt that, in principle, the Court should apply the meaning the treaty bears under international law. That law, as we have noted, authorizes and, indeed, in a particular case may require reference to the *travaux préparatoires* of the treaty. It would seem inescapable in that event that the Court should examine those materials. To that significant extent, at least, any municipal embargo on examining "extrinsic" materials in interpreting an instrument must, it is submitted, be regarded as inapplicable.[34]

The phenomenon of treaties drawn up in two or more languages has become extremely common. As the ILC observed, the plurality of authentic texts of a treaty is always a material factor in its definitive interpretation. It sometimes facilitates, but sometimes complicates, the task, as discrepancies between the texts may well occur. One particular case of difficulty is where the treaty deals with legal matters and two or more legal systems having rather different legal concepts are involved. Article 33 of the Convention deals with plurilingual treaties, and provides that each authentic text is equally authoritative unless the treaty

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[32] Brazil, "Legislative History and Interpretation of Statutes" (1961-1964) 4 University of Queensland Law Journal 1.

[33] The Foreword by Sir Garfield Barwick, Chief Justice of the High Court, to Pearce, *Statutory Interpretation in Australia* (1974): "Whilst it is not appropriate for me here to express a concluded or personal view, I may say that I am far from thinking that the knowledge and understanding of the preparatory antecedents of legislation may not be of assistance, at least on some occasions, in its construction. But any tendency to alter or substitute the actual language of the legislature which such knowledge may induce must be eschewed. The Judge's task is construction of what the legislature has enacted and not the effectuation of purposes which it had or may have had but did not enact. However, minds that are conscious of the limited nature of the task might well profit on occasions by knowing what the legislature was endeavouring to do and should not be deflected by that knowledge from deciding whether by the words of the statute the legislature has achieved those intentions. It may be that obscurity of an intention to achieve a particular result which the words of the enactment with due construction could effect may be removed by such knowledge and understanding."

[34] In *Porter* v. *Freudenberg* [1915] 1 K.B. 857, 876, the preparatory materials of the Hague Convention of 1907 on the Laws and Customs of War on Land were referred to.

provides, or the parties agree that, in a case of divergence, a particular text shall prevail. But it is important to note that in law there is only one treaty—one common intention of the parties—even when the texts appear to diverge. Article 33 seeks to safeguard that fundamental principle by expressing a presumption that the terms of the treaty have the same meaning in each authentic text. It follows that every reasonable effort must be made to reconcile the texts, using for this purpose the general and supplementary means of interpretation in Articles 31 and 32. If a difference in meaning still exists, Article 33(4) provides that "the meaning which best reconciles the texts, having regard to the object of the treaty, shall be adopted".

The balance of this formulation merits careful study. The ILC had proposed that a meaning "which as far as possible *reconciles* the texts" shall be adopted.[35] The Harvard Research draft refers, however, to giving a common meaning "which will effect the *general purpose* which the treaty is intended to serve".[36] We may indulge in a touch of chauvinism by observing that the marriage of these two ideas consummated in Article 33(4) of the Convention was suggested by an Australian proposal at the Conference to adopt the meaning that best reconciles the texts consonant with the object and purpose of the treaty.[37] We may note, also, in contrast to the formula of reconciliation in Article 33(4), the view sometimes expressed that the Permanent Court of Justice in the *Mavrommatis Palestine Concessions* case[38] laid down a general rule that the more limited interpretation that can be made to harmonize both texts should always be adopted. As the Harvard Research has pointed out, although the Court regarded the English term "public control" as having a more limited meaning than the French "*contrôle public*" and adopted an interpretation based on the English concept, it nevertheless did not interpret "public control" in its narrowest English sense, but took it as meaning something in the nature of general government regulation, rather than merely government ownership, because that wider meaning was the only one that did not nullify the meaning that *contrôle* had in the French version. The judgment is undoubtedly authority for the principle of harmonizing the texts. It does not rule that the more limited meaning must be adopted in all cases, and its reference as a supporting reason to the fact that the question concerned an instrument laying down the obligations of Great Britain in her capacity as Mandatory for Palestine shows that the object and purpose of the treaty were not absent from the Court's mind.

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[35] *Yearbook of the ILC*, 1966 Vol. II 224 (emphasis added).

[36] (1935) 29 American Journal of International Law (Supp.) 653, 971 (emphasis added).

[37] Document A/CONF.39/C.1/L.197. See also the discussion *Official Records, First Session* 189-190.

[38] *PCIJ (1924) Series A, No. 2*, 19.

Finally on this aspect, we may note for final interment the aberrant view expressed by the King's Bench Division in *R.* v. *The Governor of Brixton Prison*[39] that English Courts were bound to take the English version of an Anglo-French treaty as the authentic text English Courts must consider. The view was reflected in Oppenheims' *International Law* where it was stated that each party is bound only by the text in its own language, at least unless the contrary is expressly provided for.[40] This notion, which clashes with the very idea of a common intention, was justly condemned by Manley O. Hudson as "clearly erroneous"[41] and by the Harvard Research as one it was "impossible to agree with".[42] Of course it finds no place in Article 33 of the Convention.

VII

Section 4 of Part III of the Convention deals with "Treaties and Third States". A preliminary observation is that the Articles (34-38) do not refer to the so called "most-favoured-nation-clause" and they can be considered as in no way touching upon that subject.[43] The proposition laid down in Article 34, that a treaty does not create either obligations or rights for a third State without its consent, has to be read with the statement in Article 38, that nothing in Article 34 or the other provisions in the Section precludes a rule set forth in a treaty from becoming binding upon a third State as a customary rule of international law, recognized as such. In such a case the treaty itself does not have legal effects for third States. For these States the source of the obligation is custom, not the treaty. The Nuremburg ruling that the Hague Conventions on the rules of land warfare have become generally binding rules of customary law is a case in point.[44]

One may argue, as indeed the Conference did, whether Article 38 has a place in a Convention dealing with treaties. The answer that the Conference gave was surely correct. The Article is to be read with Article 43 providing that the invalidity, termination or denunciation of a treaty does not in any way impair the duty of a State to fulfil any obligation embodied in the treaty to which it would be subject under international law, independently of the treaty. The Convention itself contains many rules that undoubtedly bind States as customary law, whether or not they are parties to it when it comes into force as treaty

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[39] [1912] 3 K.B. 190, 196.

[40] 8th ed. (1955) Vol. I 956.

[41] Manley O. Hudson, *The Permanent Court of International Justice* (1943) 559 n. 2.

[42] (1935) 29 American Journal of International Law (Supp.) 653, 972.

[43] Shabtai Rosenne *op. cit.* 231, gives references to discussions of the "most-favoured-nation-clause" in the ILC. See also *Yearbook of the ILC*, 1966 Vol. II 177.

[44] *Judgment of the International Tribunal* [*at*] *Nuremberg* H.M.S.O. Cmd 6964 (1946).

law. Reference has been made above to the Articles which expressly state that the non-applicability of the Convention to certain classes of treaties does not prejudice the applicability to them of rules in the Convention to which they are subject under international law, independently of the Convention (Articles 3, 4).

The growing significance of "law-making" and codifying treaties, such as the Convention itself, makes all of these references apposite and, indeed, necessary to give a proper picture of the significant role such treaties play in contemporary international law. In explaining that role, one cannot do better than refer to two significant statements to be found in the *North Sea Continental Shelf* cases. The judgment of the International Court in those cases in 1969 observed:

> In so far as this contention is based on the view that Article 6 of the Convention [the Continental Shelf Convention] has had the influence, and has produced the effect, described, it clearly involves treating that Article as a norm-creating provision which has constituted the foundation of, or has generated a rule which, while only conventional or contractual in its origin, has since passed into the general *corpus* of international law, and is now accepted as such by the *opinio juris*, so as to have become binding even for countries which have never, and do not, become parties to the Convention. There is no doubt that this process is a perfectly possible one and does from time to time occur: it constitutes indeed one of the recognized methods by which new rules of customary international law may be formed.[45]

In a separate (dissenting) opinion, Judge Lachs stated:

> It is generally recognized that provisions of international instruments may acquire the status of general rules of international law. Even unratified treaties may constitute a point of departure for a legal practice. Treaties binding many States are, *a fortiori*, capable of producing this effect, a phenomenon not unknown in international relations.[46]

VIII

Considerations of length, rather than any absence of intrinsic importance in the topics dealt with, necessitate a merely passing reference to Part IV of the Convention on "Amendment and Modification of Treaties". This brings us to Part V, with its solemn title of "Invalidity, Termination and Suspension of the Operation of Treaties". Invalidity and premature termination take us into the pathology of the treaty institution, but examination of that subject may be postponed in order to examine first those cases where a healthy treaty is terminated.

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[45] ICJ Reports 1969 41.
[46] *Id.* 225.

Most modern treaties provide procedures for their termination or denunciation or fix their duration on a condition or event which is to bring about their termination. The termination of the treaty in such cases is a normal happening involving only a question of interpreting or applying the treaty itself. Article 51 of the Convention deals with the matter.

What of treaties, however, that do not provide for termination or denunciation? Article 56 provides that such a treaty is not subject to denunciation or withdrawal, unless one of two conditions are satisfied. One is where it is *established* that the parties intended to admit the possibility of denunciation or withdrawal (Article 56(1)(a)). We shall return to the vital matter of how this and other grounds for terminating a treaty otherwise than in accordance with its terms are to be *established.* For the present, we need only note that an implied condition of termination where that can be shown to be the common contemplation of the parties is obviously soundly based in principle. The second condition, however, which was originally inserted by a very narrow vote of 26 votes to 25, with 37 abstentions,[47] is perhaps not so unexceptionable. It provides for termination where the right "may be implied by the nature of the treaty" (Article 56(1)(b)), and must be considered as adding something to Article 56(1)(a). The question then arises, just what are the characteristics that make a treaty subject to an implied right of denunciation or withdrawal even though it may not be able to be established under Article 56(1)(a) that the parties intended to admit the possibility? One can only assume that what was in mind was the view supported by some members of the ILC who considered that, in certain types of treaty, a right of denunciation or withdrawal should be presumed unless there are indications of a contrary intention. Treaties of alliance and commercial treaties have been mentioned as possible instances.[48] However, such a rule will need to be applied most carefully if the fundamental principle of *pacta sunt servanda* is not to be prejudiced. Confirmation to that effect is provided by the fact that the Conference rejected decisively a proposal that would have reversed the presumption embodied in Article 56 that a treaty containing no provision for its termination is not subject to denunciation or withdrawal.

Under paragraph (2) of Article 56, twelve months notice of an intention to exercise an implied right to denounce or withdraw from a treaty must be given. This motif of a "due process"—to use the valuable United States constitutional expression—runs through Part V in relation to the premature termination of treaties, as we shall note.

The presumption of the continuance of treaties until terminated in

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[47] *Official Records, First Session* 343.

[48] *Yearbook of the ILC*, 1966 Vol. II 250-251; *Official Records, First Session* 336-337, 339.

accordance with their terms and the concept of due process provide the best kind of starting point for considering the other main features of Part V. The presumption is reinforced by Article 42, the first Article of Part V, which provides in paragraph (1) that a treaty may be invalidated *only* through the application of the Articles of the Convention, and which provides by paragraph (2) that any premature termination of a treaty may take place *only* as a result of the application of the Articles of the Convention. That is to say, the grounds of invalidity and termination set forth in the Convention are to be taken as exhaustive of all such grounds, apart from special cases contained in the treaty itself. In this connection, it is to be observed that neither "obsolescence" nor "desuetude" appear in the Convention as a distinct ground of termination of a treaty. The ILC considered that, while such matters may be the factual cause of the termination of a treaty, the legal basis for such a termination, when it occurs, is the consent of the parties to abandon the treaty, this being implied from their conduct in relation to the treaty.[49] This view has recently come under close scrutiny in the International Court of Justice in the *Nuclear Tests* case. Those Judges who dealt with the matter adopted the legal analysis made by the ILC.[50]

We turn then with interest to the canon of grounds of invalidity of a treaty allowed by the Convention. They are eight in number:

(i) where a State's consent has been expressed in manifest violation of an internal law regarding competence to conclude treaties of fundamental importance (*e.g.* as in the United States where treaties require the advice and consent of the Senate under the Constitution)—Article 46;

(ii) where a specific restriction on the authority of a representative to express consent has not been observed after being notified to the other State—Article 47;

(iii) where there is an error in a treaty relating to a fact or situation which was assumed to exist and which formed an essential basis of the consent to be bound—Article 48;

(iv) where a State has been induced to conclude a treaty by the fraudulent conduct of another negotiating State—Article 49;

(v) where the expression of a State's consent to be bound by a treaty has been procured through the corruption of its representative directly or indirectly—Article 50;

(vi) where the expression of a State's consent to be bound by a treaty has been procured by the coercion of its representative through acts or threats directed at him personally—Article 51;

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[49] *Yearbook of the ILC*, 1966 Vol. II 237.

[50] *Nuclear Tests* case (*Australia* v. *France*) ICJ Reports 1974 253, 338. See also Memorial dated 23 November 1973 filed by Australia on the questions of jurisdiction and admissibility in that case.

(vii) where a treaty has been procured by the threat or use of force in violation of the principles of international law in the UN Charter—Article 52; and

(viii) where, at the time of its conclusion, the treaty conflicts with a peremptory norm of general international law (*jus cogens, i.e.*, a norm from which no derogation is permitted and which can be modified only by a subsequent norm having the same character)—Article 53.

Grounds allowed for premature termination of a treaty are four in number:

(i) material breach of a treaty—Article 60;

(ii) supervening impossibility of performance from the permanent disappearance or destruction of an object indispensable for the execution of the treaty—Article 61;

(iii) an unforeseen and fundamental change of circumstances which constituted an essential basis of the consent of the parties, where the effect of the change is radically to transform the extent of the obligations still to be performed—Article 62; and

(iv) where the treaty comes into conflict with a new peremptory norm of international law (*jus cogens*)—Article 63.

Of these various grounds of invalidity or premature termination, we shall concentrate here on the one that has been the most controversial, namely, conflict with a rule having *jus cogens* status. We may begin by noting that the majority of the rules of general international law do not have that status; States may of their own free will contract out of them. Also, it has been said that the emergence of rules having the character of *jus cogens* is comparatively recent. Doctrinally, however, we may agree with an observation at the Conference that it is difficult to imagine any society, whether composed of individuals or of States, whose law sets no limits whatever to freedom of contract. Historically, we may note the following passage from Hall's *International Law* which evidences that distinguished text's acceptance of the concept:

> The requirement that contracts shall be in conformity with law invalidates, or at least renders voidable, all agreements which are at variance with the fundamental principles of international law and their undisputed applications, and with the arbitrary usages which have acquired decisive authority. Thus a treaty is not binding which has for its object the subjugation or partition of a country, unless the existence of the latter is wholly incompatible with the general security; and an agreement for the assertion of proprietary rights over the open ocean would be invalid, because the freedom of the open seas from appropriation, though an arbitrary principle, is one that is fully received into international law. It may be added

> that contracts are also not binding which are at variance with such principles, not immediately applicable to the relations of states, as it is incumbent upon them as moral beings to respect. Thus a compact for the establishment of a slave trade would be void, because the personal freedom of human beings has been admitted by modern civilized states as a right which they are bound to respect and which they ought to uphold internationally.[51]

In these present times of claims to extensive resources jurisdiction over the high seas and the seabed beneath, the "decisive" authority thus accorded to freedom of the open seas needs substantial modification, but perhaps that only demonstrates that rules of *jus cogens* may develop and change, as indeed the Convention expressly acknowledges.

The keen debate on this subject at the Vienna Conference focussed not so much on the admissibility of the general concept, but rather on whether the identification of those rules having *jus cogens* status could be sufficiently clarified to make its reception into the general code of the law of the treaties acceptable.The ILC text did not specify what those rules were, though illustrative examples were mentioned in a non-exhaustive way in its *Commentaries*.[52] The Convention does not specify those rules either. However, Article 66(a) does provide for a decision by the International Court of Justice on any alleged conflict of a treaty with *jus cogens*, a measure specifically designed to allay the misgivings of those concerned at leaving the application of the concept to unilateral assertion.

In addition, the Convention specifically states that for a rule to have the status of *jus cogens* it must be a norm, accepted and recognized as such "by the international community of States *as a whole*" (Article 53, emphasis added). If, as is permissible, the Conference records are consulted to clarify these words, they show the following statement by the Chairman of the Drafting Committee (Mr Yasseen):

> It appeared to have been the view of the Committee of the Whole that no individual State should have the right of veto [on the acceptance and recognition of a rule of *jus cogens*], and the Drafting Committee had therefore included the words "as a whole" in the text . . .[53]

It is time to return to the motif of "due process" which, as observed earlier, permeates Part V. Simply to allow unilateral determination by one party of the invalidity or premature determination of a treaty would be subversive of *pacta sunt servanda.* Therefore, Article 65 provides for a procedure to be followed involving the giving of three months notice, except in cases of special urgency, so that the other party

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[51] 4th ed. (1895) 343.
[52] *Yearbook of the ILC*, 1966 Vol. II 248.
[53] *Official Records, First Session* 471.

concerned may have an opportunity to object. If objection is raised and no solution is reached within twelve months, then under Article 66:

(a) a party to a dispute concerning the application or the interpretation of the *jus cogens* Articles (Articles 53 and 64) may submit it to the International Court unless the parties by common consent agree to arbitration;

(b) a party to a dispute concerning any of the other Articles in Part V may set in motion the procedure of compulsory conciliation set forth in the Annex to the Convention.

Procedure (b), being concerned with conciliation only, will not produce a binding solution and may not produce an agreed one. Other and binding procedures for the settlement of disputes referred to in (b) may, of course, be available, *e.g.* under the compulsory jurisdiction clause in Article 36(2) of the statute of the International Court, and their applicability is recognized and safeguarded by Article 65(4) of the Convention.

The Convention therefore provides a due process for invalidity or premature termination under the Convention. If it is true that it is a process which may not produce an agreed or binding solution in all cases, one may reflect that that is true in relation to many inter-State disputes. The result, nevertheless, is a gap in the Convention, since the Convention itself postulates that grounds of invalidity must be *"established"* (Article 69(1)), which presumably means something more objective than mere unilateral assertion of invalidity.

Article 69(1) also provides that, where invalidity is established under the Convention, the treaty is "void". The Conference spent much time in discussing the concepts of "void", "null", "invalid", "voidable" and "void *ab initio*". The language of the various relevant substantive Articles varies. Thus fraud is stated to be ground for "invalidating" consent (Article 49). A treaty procured by force is stated to be "void" (Article 52). These different terms can be a cause of difficulty and even of confusion. The pattern and plan of the Convention in this regard is clarified, however, if one takes as one's guide certain observations by the Expert Consultant to the Conference.[54] Fortified by those observations, one may essay the following general analysis. A treaty may be established as without legal force either for reasons of a defect in consent (*e.g.* Article 49 relating to a treaty induced by fraud), or for reasons of public order (*e.g.* Article 53 relating to *jus cogens*). In the first kind of case, either one or both of the parties can be considered as having a choice of invoking the ground of invalidity for the purpose of avoiding the treaty. Where public order is involved, the nullity relates to the treaty itself, not merely to the consent of the States concerned, and the

[54] *Id.* 227.

treaty is described as "void". But—and this is perhaps the most difficult point of the analysis—where invalidity is established even in the first kind of case, it is made retroactive under the Convention and does not operate only from the date on which invalidity is established. There are of course practical inhibitions on how far what has been done already under the treaty may be undone, and acts performed in good faith before the invalidity was invoked are not rendered unlawful by reason only of the invalidity (Article 69(2)(b)), except in the case of conflict with a rule of *jus cogens* (Article 71).

IX

With perhaps some relief, we leave the rather daunting Part V of the Convention to note quickly that, after some saving clauses contained in Part VI, the very practical Part VII dealing with "Depositaries, Notifications, Corrections and Registration" contains what is in many ways the first full exposition of the functions of that important institution of treaty practice, the depositary, as well as a useful "slip rule" for the correction of errors in the text of a treaty. The way is then open to bring these reflections to their conclusion.

X

Brierly's *The Law of Nations*[55] contains an interesting discussion of the relative merits of the codification of international law by the use of expository codes on the one hand and seeking after law-making conventions agreed and ratified by governments on the other. One view referred to is that scientific restatements by a group of eminent and independent lawyers may offer greater possibilities of making progress in codification than attempts to produce texts agreed and ratified by governments.[56] Indeed, at one time, it was considered that, in the very case of the law of treaties, that subject would be best dealt with by an expository code. The decision taken, however, was that the restatement of the law of treaties should appear in the form of a convention. The main reasons for this decision were that the codification of the law of treaties through a multilateral convention would give the new States the opportunity to participate directly in the formulation of the law, and their participation was extremely desirable in order that the restatement of the law of treaties should be placed upon the widest and the most secure foundations.[57] It may be mentioned that this due and proper consideration of the interests of new States was fully vindicated at the Vienna Conference itself when it was the new States of Africa and Asia that rescued the Conference from what could have been a magnificent

[55] 6th ed. Sir Humphrey Waldock (ed.) (1963).
[56] *Id.* 82-83.
[57] *Yearbook of the ILC*, 1966 Vol. II 176.

failure. Since these reflections are not a politico-legal history of the Conference it is unnecessary to go into details here: the story has been told in other places.[58]

The interesting thing is that the Convention, while it was advisedly drawn up in the form of a treaty to be agreed and ratified by governments, is quickly gaining acceptance as the definitive formulation of the branch of the law in question, as though it were an authoritative expository code. It is being given wide application in State practice and in the jurisprudence of international tribunals even though it still lacks the necessary number of ratifications and accessions to bring it into force as a treaty. One may reasonably surmise that it constitutes the main work of reference for treaty practitioners, whether of States that have or have not so far ratified or acceded to it.

Its acceptance as a statement of the modern law of treaties by the highest international judicial tribunal, the International Court of Justice, is especially noteworthy. In the *Namibia* advisory opinion, the International Court stated that the rules laid down by the Vienna Convention on the Law of Treaties concerning termination of a treaty relationship on account of breach, adopted by the Conference without a dissenting vote, may in many respects be considered as a codification of existing customary law on the subject.[59] In the *Appeal relating to the Jurisdiction of the ICAO Council*, the Court again referred to this topic in terms clearly indicating that it regarded the definition of a material breach of treaty contained in Article 60 of the Convention as stating existing customary international law. The Convention is also referred to extensively in the separate opinion of Judge de Castro.[60] In the *Fisheries Jurisdiction* case at the jurisdictional phase, the International Court stated that the principle of termination of a treaty by reason of change of circumstances had been embodied in Article 62 of the Convention, which in many respects may be considered as a codification of existing customary international law on the subject.[61] Reference has already been made to the view expressed in 1974 in the *Nuclear Tests* case which refers to, and adopts, the position taken in the Convention on the so-called obsolescence and desuetude of treaties. That view is to be found in the joint dissenting opinion in that case; the majority judgment found it unnecessary to deal with the matter. The joint dissenting opinion accepted and adopted the definition of "reservation" contained in Article 2(1)(d) of the Convention. It also referred to Articles 45 and 60 of the Convention as indicative of existing law on the loss of a

[58] Elias, *The Modern Law of Treaties* (1974) 7, and Sinclair, "Vienna Conference on the Law of Treaties" (1970) 19 International and Comparative Law Quarterly 47, 68-69.

[59] ICJ Reports 1971 16, 47.

[60] ICJ Reports 1972 46, 67.

[61] ICJ Reports 1973 49, 63.

right for invoking a ground for terminating a treaty for breach. Judge de Castro in his separate dissenting opinion referred to the Vienna Convention as the codification of *communis opinio* in the Law of Treaties and referred specifically to Articles 42(2) and 54 as well as at a later stage to Article 59 on the termination of treaties. Judge Sir Garfield Barwick stated that the Vienna Convention, in general, may be considered to reflect customary international law in respect of treaties. He referred to the Convention in relation to the termination of treaties and also in relation to the question of reservations.[62]

Although, therefore, the Convention on the Law of Treaties has not yet come into force, it is already possible to judge the true value of the achievement it represents. The following comments made by the President of the Vienna Conference, Professor Ago, at its concluding session have already to a large extent been verified by the course of events:

> Certainly from now onwards the juridical basis for international contractual relations would take on a different aspect. A written law would be set up side by side with the old customary law; and he did not think that he was being too optimistic in expressing the view that that [written] law would win acceptance throughout an ever widening circle of nations and would one day replace the old rules altogether.

[62] ICJ Reports 1974 253, 338, 349-350, 357, 381, 383, 404-405, 418.