

## **ANNEX 13**

# The Vienna Conventions on the Law of Treaties

*A Commentary*

VOLUME I

Edited by

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## 1969 Vienna Convention

## Article 13

Consent to be bound by a treaty expressed by an exchange  
of instruments constituting a treaty

- The consent of States to be bound by a treaty constituted by instruments exchanged between them is expressed by that exchange when:
- (a) the instruments provide that their exchange shall have that effect; or
- (b) it is otherwise established that those States were agreed that the exchange of instruments should have that effect.

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## A. General characteristics

### Object and purpose

1. With regard to its object, Article 13 of the 1969 Vienna Convention sets out a means of expressing consent to be bound by a treaty through the exchange of instruments constituting a treaty. It provides that the consent of States to be bound by a treaty constituted by the instruments exchanged between them is expressed by that exchange when the instruments provide that their exchange will have that effect or when it is otherwise established that these States were agreed that the exchange of the instruments should have that effect.

2. Consequently, Article 13 envisages cases where the agreement of the parties is embodied not in a single instrument, but in two or several instruments constituting a treaty. Such agreements are incontestably treaties.<sup>1</sup> The treaty is thus concluded by a duality or plurality of juridical instruments, of which one constitutes the offer or pollicitation (or, if necessary, the counter-offer) to conclude, on the one hand, and the other the acceptance of that offer (or, if necessary, of that counter-offer), on the other hand.<sup>2</sup> It

<sup>1</sup> Under the Vienna Convention, the term 'treaty' is defined by Art. 2(1)(a) as 'an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation'. See in this respect, paras 2 and 3 of the final commentary of draft Art. 2(1)(a) adopted by the ILC during its 18th session, Report of the ILC to the General Assembly (A/6309/Rev.1), *YILC*, 1966, vol. II, p 188.

<sup>2</sup> A. Aust, *Modern Treaty Law and Practice* (2nd edn, Cambridge: Cambridge University Press, 2007), pp 445–6; C. Chayet, 'Les accords en forme simplifiée', *AFDI*, 1957, p 8; F. S. Hamzeh, 'Agreements in Simplified Form—Modern Perspective', *BYBIL*, 1968–69, pp 181–2; J. Masquelin, *Le droit des traités dans l'ordre juridique et dans la pratique diplomatique belge* (Brussels: Bruylant, 1980), pp 300–3, paras 241–3; H. Neuhold, 'Organs Competent to Conclude Treaties for International Organizations and the Internal Procedure Leading to the Decision to Be Bound by a Treaty. Negotiation and Conclusion of Treaties by International Organizations', *ÖZöRV*, 1971, Suppl. 1, p 231; J. L. Weinstein, 'Exchanges of Notes', *BYBIL*, 1952, p 205.

results from the examination of State practice in this respect that the exchange of instruments is usually carried out by an exchange of correspondence (letters or notes)<sup>3</sup> between the head of the diplomatic mission—duly authorized<sup>4</sup>—accredited to the receiving State, on the one hand, and the minister for foreign affairs of that receiving State, on the other hand.<sup>5</sup> Then, as Claude Chayet emphasizes:

La volonté d'aboutir à un accord exprès en forme simplifiée résulte donc en général d'une volonté clairement exprimée antérieurement et qui se traduit par la formule coutumière suivante:

'Si les propositions qui précèdent rencontrent l'agrément du Gouvernement de... un échange de lettres pourrait constater l'accord ainsi réalisé'.

C'est la raison pour laquelle et, fort naturellement, de nombreux échanges de lettres commencent par la formule suivante: «Comme suite à l'échange de correspondance intervenu entre le Ministère des Affaires étrangères et l'Ambassade de... au sujet de...» j'ai l'honneur de vous faire savoir que le Gouvernement de... accepte de considérer...<sup>6</sup>

In order to dissipate any misunderstanding as to the exact contents of the agreement, the confirmative letter or note (acceptance) usually reproduces the contents of the initial letter or note (the offer) *in extenso*.<sup>7</sup> However, this is not always the case, especially when the text of the offer presents a certain length.<sup>8</sup> The contents of the instruments are usually

<sup>3</sup> A. Aust, *supra* n 2, p 102; J. Basdevant, 'La conclusion et la rédaction des traités et des instruments diplomatiques autres que les traités', *RCADI*, 1926-V, vol. 15, pp 609–10; C. Chayet, *supra* n 2, pp 5–6; R. Jongbloet-Hamerlijck, *Het aanwenden van de ratificatie in het volkenrecht. Ontwikkeling en hedendaagse praktijk* (Brussels: Elsevier-Sequoia, 1972), p 217; Sir Ernest Satow, *Satow's Guide to Diplomatic Practice* (5th edn, London: Longman, 1979), p 247, para. 29.34; H. H. M. Sondaal, *De Nederlandse Verdragspraktijk* ('s-Gravenhage: TMC Asser Instituut, 1986), p 49. See also the intervention of Mr Yasseen, chairman of the Drafting Committee (in United Nations Conference on the Law of Treaties, 1st session, Official Documents, Summary Records, p 345, para. 76) and the intervention of Mr Nahlik (Poland) (in 2nd session, Official Documents, Summary Records, p 24, para. 65).

<sup>4</sup> Concerning authorization as regards conclusion of treaties and the notion of full powers in particular, see *supra* the commentary on Art. 7 of the Vienna Convention in this work as well as Hans Blix, *Treaty-Making Power* (London: Stevens & Sons; New York: Frederick A. Praeger, 1960), p 414. With regard to the question of the excess of powers committed by a representative of State in the procedure of concluding a treaty, see *infra* the commentary on Art. 46 of the Vienna Convention. This may be referred to as the issue of 'imperfect exchange' (by analogy with the question of the imperfect ratifications).

<sup>5</sup> J. Basdevant, 'La conclusion et la rédaction des traités et des instruments diplomatiques autres que les traités', *supra* n 3, pp 615–16; F. S. Hamzeh, *supra* n 2, p 188; R. Jongbloet-Hamerlijck, *supra* n 3, p 217; M. Lueke and Ch. Wickremasinghe, 'Analytical Report' in Council of Europe and the British Institute of International and Comparative Law (ed.), *Treaty Making—Expression of Consent by States to be Bound by a Treaty. Conclusion des traités—Expression par les Etats du consentement à être liés par un traité* (The Hague: Kluwer Law International, 2001), p 10; J. Salmon (ed.), *Dictionnaire de droit international public* (Brussels: Bruylant, 2001), see 'Échange de lettres, de notes', sense B, p 408; Sir Ernest Satow, *supra* n 3, p 247, para. 29.34; J. L. Weinstein, *supra* n 2, p 206.

<sup>6</sup> C. Chayet, *supra* n 2, pp 6–7. See also Sir R. Jennings and Sir A. Watts, *Oppenheim's International Law*, vol. 1, part 4 (9th edn, Harlow: Longman, 1996), p 1210, para. 586, fn 9; Sir Ernest Satow, *supra* n 3, p 247, para. 29.34; P-F. Smets, *La conclusion d'accords en forme simplifiée. Etude de droit international et de droit belge et comparé* (Brussels: Bruylant, 1969), p 19.

<sup>7</sup> H. Neuhold, *supra* n 2, p 231.

<sup>8</sup> *Ibid*, p 231 and fn 132 (quoting various examples). For other examples, see the Agreement between the Kingdom of Belgium and the United Nations definitively settling the financial questions outstanding as regards the former Belgian military bases in the Congo and the Agreement between the Kingdom of Belgium and the United Nations relating to the settlement of claims filed against the United Nations in the Congo by Belgian nationals, concluded by exchanges of letters in New York, 20 February 1965. For the text of these agreements, see 535 UNTS 191–203.

negotiated or approved beforehand<sup>9</sup> and the instruments intended to be exchanged are in general communicated as a preliminary, on an unofficial basis.<sup>10</sup> On the other hand, as Jean Masquelin notes:

Il ne faut pas confondre les accords qui comportent une dualité d'instruments et qui ne sont conclus que par la conjonction de ces deux instruments, avec les accords faits en une dualité ou en une pluralité d'originaux.

Comme on le sait, les accords bilatéraux sont généralement faits en deux exemplaires originaux identiques, destinés respectivement à chacune des Parties contractantes. Dans cette hypothèse, il ne s'agit pas d'accords conclus par la jonction de deux instruments distincts.<sup>11</sup>

Consequently, only the first category of agreements concerns Article 13 of the Vienna Convention. As for the *letter agreement* technique,<sup>12</sup> this does not relate to Article 13, as the agreement is not concluded by joining two distinct instruments. Finally it must be emphasized that the *disjunctive exchanges of notes* does not fall, in principle, under the law of treaties insofar as there is no exchange of instruments constituting a treaty, either that the initial note does not formulate an offer to conclude a treaty, or that the acceptance of the initial note formulating an offer to conclude a treaty is not carried out by a confirmative note but through a different behaviour (recognition, acquiescence, etc.).<sup>13</sup> These agreements must be described as not formalized or *solo consensu*.<sup>14</sup>

3. The purpose of Article 13 of the Vienna Convention is to simplify the international procedure for concluding treaties, allowing States eager to conclude immediately to express their consent to be bound by a treaty through a simple exchange of notes or letters constituting a treaty.<sup>15</sup> Arguably, considerations of simplicity, celerity, flexibility, discretion, efficiency, internal or external politics, reasons of domestic constitutional law, or the immediate certainty as to the commitments entered into explain why this means of conclusion is nowadays an undeniable success and very widespread.<sup>16</sup> The conclusion of such treaties is, indeed, *immediate*. The procedure of conclusion is known as 'simplified' or

<sup>9</sup> J. Basdevant, 'La conclusion et la rédaction des traités et des instruments diplomatiques autres que les traités', *supra* n 3, pp 609–10 and 615; J. Salmon (ed.), *Dictionnaire*, *supra* n 5, see 'Échange de lettres, de notes', sense A, p 408; Sir Ernest Satow, *supra* n 3, p 247, para. 29.34; J. Wilmanns, 'Note' in R. Bernhardt (ed.), *Encyclopedia of Public International Law*, vol. III (Amsterdam: Elsevier, 1997), p 695.

<sup>10</sup> C. Chayet, *supra* n 2, p 7 and H. Neuhold, *supra* n 2, p 250.

<sup>11</sup> J. Masquelin, *supra* n 2, p 302, para. 242.

<sup>12</sup> Hanspeter Neuhold defines the technique of the so-called *letter agreement* as such: 'It consists of a letter in duplicate sent to the party with whom the agreement is to be concluded. The latter is requested to sign the copies and return one of them to the party making the offer' (H. Neuhold, *supra* n 2, p 231).

<sup>13</sup> Hanspeter Neuhold states in this respect:

A third category of agreements is characterized by even less formality and usually by the different character of the offer and the acceptance constituting the agreement. The term 'disjunctive exchanges of notes' has been used to describe them. As regards agreements belonging to this type, the offer or proposal of one party contains no express reference to the conclusion of an agreement. The same is true of the more or less formal act by which the other party accepts the proposal. In fact, acceptance by conduct in conformity with the offer or proposal suffices in some cases (H. Neuhold, *supra* n 2, p 232, citing various examples).

<sup>14</sup> For *solo consensus* agreements, see J. Salmon, 'Les accords non formalisés ou *solo consensu*', *AFDI*, 1999, pp 1–28.

<sup>15</sup> F. S. Hamzeh, *supra* n 2, p 183.

<sup>16</sup> A. Cassese, *International Law* (2nd edn, Oxford: Oxford University Press, 2005), p 172; C. Chayet, *supra* n 2, p 7; Sir R. Jennings and Sir A. Watts, *supra* n 6, p 1210, para. 586; R. Jongbloet-Hamerlijnck, *supra* n 3, pp 224–5; Ch. Rousseau, *Droit international public*, vol. I (Paris: Sirey, 1970), p 72, para. 47; Sir Ernest Satow, *supra* n 3, p 247, para. 29.35; J. L. Weinstein, *supra* n 2, p 214.

'short'.<sup>17</sup> For this reason, exchange of letters or notes constituting a treaty are traditionally characterized in the legal literature as *treaties in simplified form*<sup>18</sup> (in French: *accords en forme simplifiée*<sup>19</sup>), as opposed to treaties known as 'formal' or 'solemn'. Their conclusion does not require any subsequent act (such as, for example, ratification), the exchange of instruments constituting a treaty amounting to final consent of the States concerned, if such is however their intention.

4. Accordingly, treaties in simplified form are international treaties with particular methods of conclusion. As outlined by the ILC:

The juridical differences, in so far as they really exist at all, between formal treaties and treaties in simplified form lie almost exclusively in the method of conclusion and entry into force. The law relating to such matters as validity, operation and effect, execution and enforcement, interpretation, and termination, applies to all classes of international agreements.<sup>20</sup>

In consideration of the definition of the term 'treaty' in Article 2(1)(a) of the Vienna Convention, it should be noticed that the Vienna Convention does not make any distinction between treaties in solemn form and treaties concluded by exchange of instruments.

### Customary status

5. In order to determine whether Article 13 of the Vienna Convention reflects a customary means of expressing consent to be bound by a treaty, it is advisable successively to

<sup>17</sup> *Contra*: J. Salmon (ed.), *Dictionnaire*, *supra* n 5, see 'Procédure courte', p 888 who restricts the expression 'short procedure' to treaties concluded by definitive signature.

<sup>18</sup> Treaties in simplified form are to be divided into two categories, namely the category of treaties concluded by signature (Art. 12 of the Vienna Convention) and the category of treaties concluded by exchange of instruments (Art. 13 of the Vienna Convention). With regard to Art. 12, see *supra* the commentary in this work. For treaties in simplified form in general, see, besides the introductory bibliography, the bibliography mentioned *supra* at Art. 12, para. 2, note 4. For various possible definitions of 'treaties in simplified form', see L. Wildhaber, 'Executive Agreements' in R. Bernhardt (ed.), *Encyclopedia of Public International Law*, vol. II (Amsterdam: Elsevier, 1999), pp 313–16.

<sup>19</sup> 'Treaties in simplified form' is the expression used by the ILC during the codification work on the law of treaties. See for instance draft Art. 1(d), draft Art. 4(4)(b) and draft Art. 12(2)(d), and their commentary, provisionally adopted by the ILC at its 14th session, Report of the ILC to the General Assembly (A/5209), *YILC*, 1962, vol. II, pp 161, 165, and 71. See also paras 3 and 8 of the final commentary relating to draft Art. 1 adopted by the ILC at its 18th session, Report of the ILC to the General Assembly (A/6309/Rev.1), *YILC*, 1966, vol. II, pp 188–9, paras 3 and 8. See also, on the one hand, I. Brownlie, *Principles of Public International Law* (7th edn, Oxford: Oxford University Press, 2008), p 611 and A. Cassese, *supra* n 16, p 172 (using the expression 'treaties in simplified form') and, on the other hand, Sir R. Jennings and Sir A. Watts, *supra* n 6, p 1207, para. 585, fn 5 (using the expression 'agreements in simplified form'). Moreover, Special Rapporteur Sir Humphrey Waldock used in its First Report on the Law of Treaties (A/CN.4/144) the expression '*accords en forme simplifiée*'—to use the apt French term' (*YILC*, 1962, vol. II, p 33, para. 8). Finally, it should be noted that *executive agreements* are a feature of US constitutional practice. See, in this respect, L. Wildhaber, 'Executive Agreements' in *supra* n 18, p 316.

<sup>20</sup> See para. 3 of the final commentary of draft Art. 2 adopted by the ILC during its 18th session, Report of the ILC to the General Assembly (A/6309/Rev.1), *YILC*, 1966, vol. II, p 188 and fn 38. See also J. Dehaussy, 'Le problème de la classification des traités et le projet de convention établi par la Commission du droit international des Nations Unies' in *Recueil d'études de droit international en hommage à Paul Guggenheim* (Geneva: Institut Universitaire de Hautes Études Internationales, 1968), p 321; T. O. Elias, *The Modern Law of Treaties* (New York: Oceana; Leiden: A. W. Sijthoff, 1974), p 13; G. Fitzmaurice, 'Do Treaties Need Ratification', *BYBIL*, 1934, p 127; P.-M. Martin, *Droit international public* (Paris, Milan, Barcelona: Masson, 1995), p 127, para. 249; Nguyen Quoc Dinh, P. Daillier, M. Forteau, and A. Pellet, *Droit international public* (8th edn, Paris: LGDJ, 2009), p 160, para. 84; J. Salmon, *Droit des gens*, vol. 1 (13th edn, Brussels: Presses Universitaires de Bruxelles, 1995–96), pp 64–5; J. L. Weinstein, *supra* n 2, p 226.

examine the practice of States and their *opinio juris sive necessitatis*, the works of the UN Conference on the Law of Treaties, as well as case law and legal writings as subsidiary means for the determination of the rules of international law.

### *State practice and opinio juris sive necessitatis*

6. The question of the customary character of exchange of instruments as a means of expressing consent to be bound by a treaty must be examined on the basis of State practice and their *opinio juris sive necessitatis*.

7. The customary character of the rule according to which States can conclude a treaty by exchange of instruments constituting a treaty is firmly established in diplomatic practice. Among the two categories of agreements in simplified form, the category of treaties concluded by exchange of instruments is, by far, the most prevalent and the most widespread.<sup>21</sup> The practice of States, which is relatively old,<sup>22</sup> is indeed abundant. Have been concluded, accordingly, by exchange of instruments:

- circa 25 per cent of all treaties registered with the Secretariat of the League of Nations and published in the League of Nations Treaty Series;
- approximately one-third of the treaties registered each year with the Secretariat of the UN; and
- nearly 53 per cent of the treaties published in the Treaty Series of the United Kingdom.<sup>23</sup>

<sup>21</sup> C. Chayet, *supra* n 2, pp 5–6; J. P. Grant and J. Craig Barker, *Parry & Grant Encyclopaedic Dictionary of International Law* (3rd edn, Oxford: Oxford University Press, 2009), p 202, see ‘Exchange of notes’; F. S. Hamzeh, *supra* n 2, p 181; R. Jongbloet-Hamerlijck, *supra* n 3, p 217; Sir Ernest Satow, *supra* n 3, p 247, para. 29.34 and p 248, para. 29.37. See also R. D. Kearney and R. E. Dalton, ‘The Treaty on Treaties’, *AJIL*, 1970, p 508; H. H. M. Sondaal, *supra* n 3, p 49.

<sup>22</sup> Treaties in simplified form have, in fact, their origin in the US constitutional practice of ‘executive agreements’, developed since the late eighteenth century, most of which are concluded by exchange of notes. See G. Fitzmaurice, *supra* n 20, p 128, fn 1. For the origin of treaties in simplified form, see *supra* para. 6 of the commentary on Art. 12 in this work. Rita Jongbloet-Hamerlijck reports that the exchange of Maratha and Portuguese documents dated 4 May 1779 and 17 December 1779 as well as the exchange of correspondence between Catherine II of Russia and Joseph II of Austria dated 12 April and 18 May 1781 would be the two most ancient treaties in simplified form concluded by exchange of instruments (R. Jongbloet-Hamerlijck, *supra* n 3, p 231). With regard to the first example, see also the Dissenting Opinion of Judge Moreno Quintana, in the *Right of passage over Indian territory case*, *ICJ Reports 1960*, pp 91–2.

<sup>23</sup> Sir Ernest Satow, *supra* n 3, p 248, para. 29.37; J. L. Weinstein, *supra* n 2, pp 213–14. See also A. Aust, *supra* n 2, p 102 and F. S. Hamzeh, *supra* n 2, pp 182–3. For the different statistics in this regard, see inter alia S. Bastid, ‘Enquêtes sur les traités. Résultats d’une enquête sur les conditions de conclusion des traités et sur les clauses relatives au règlement des différends’, *AFDI*, 1967, pp 544–6 (stating that more than 50 per cent of the treaties under review entered into force by signature. However, this study curiously enough does not mention the category of treaties concluded by exchange of instruments so much so that the percentage of 50 per cent should probably comprise both categories of treaties in simplified form); D. J. Bederman, *International Law Frameworks* (New York: Foundation Press, 2001), p 166; H. Blix, ‘The Requirement of Ratification’, *BYBIL*, 1953, pp 359–60; C. Chayet, *supra* n 2, pp 4–7 and 10; J. Dehaussy, ‘Les traités. Conclusion et conditions de validité formelle’ in B. Goldman, Ph. Kahn, and L. Vogel (eds), *Juris-classeur de droit international*, vol. 1 (Paris: Juris-classeur, Sources du droit international, Fasc. 11, 1958), p 27, para. 49; P.-M. Dupuy, *Droit international public* (5th edn, Paris: Dalloz, 2000), p 256, para. 252, fn 1; M. Frankowska, ‘De la prétendue présomption en faveur de la ratification’, *RGDIP*, 1969, pp 77–9; Ph. Gautier, *Essai sur la définition des traités entre Etats. La pratique de la Belgique aux confins du droit des traités* (Brussels: Bruylant, 1993), pp 150–2; F. S. Hamzeh, *supra* n 2, pp 182–3; Nguyen Quoc Dinh, A. Pellet, and P. Daillier, *Droit international public* (7th edn, Paris: LGDJ, 2002), p 144, para. 83 (more than 60 per cent of all treaties concluded by France and the US would be in simplified form); P. Reuter, *Introduction au droit des traités* (3rd edn, revised by Ph. Cahier, Paris: PUF, 1995), p 79, para. 101\*; C. Roche and A. Potot-Nicol, *L’essentiel du Droit international et du droit des relations internationales* (Paris: Gualino éditeur, Coll. les Carrés, 1999), p 16 (treaties in simplified form would represent

As for the *opinio juris sive necessitatis*, States have never disputed the binding character of treaties in simplified form.<sup>24</sup> Despite the different methods of conclusion, States deem that there is a material equivalence between solemn treaties and those concluded in simplified form, all being vested with the same binding force.<sup>25</sup> It arises from the final clauses of the instruments that it is actually by *the act of exchange* of instruments that the treaty is concluded and that the consent of the States to be bound by it is expressed.<sup>26</sup> In other words, States have the legal conviction that the exchange truly concludes the treaty and commits them definitively.

8. In addition, the object of treaties in simplified form is varied. If it is true that initially these treaties were confined to military, administrative, or technical questions, or were related to a treaty in solemn form (interpretative agreements, agreements adopting implementing, provisional, preparatory measures, etc.), treaties in simplified form, nowadays, have truly invaded all fields of international relations.<sup>27</sup> This is evidenced by the multiple exchanges of instruments constituting treaties concluded in the areas of politics, commerce, finance, culture, taxation, aviation, or pertaining to defence, territorial demarcation, dispute settlement, suppressing visas, granting loans, transfer and lease of military bases, development cooperation, compensation, indemnity, etc.<sup>28</sup> As Jacques Dehaussy emphasizes:

aujourd'hui, on observe en pratique, une quasi-interchangeabilité des formes, traités [en forme solennelle] et accords en forme simplifiée ayant des objets semblables et pouvant comporter, à la charge des Etats, les mêmes obligations.<sup>29</sup>

9. Consequently, based on the practice of States and their *opinio juris sive necessitatis*, it may safely be concluded that Article 13 of the Vienna Convention incontestably reflects a customary means of expression of consent to be bound by a treaty.

#### *United Nations Conference on the Law of Treaties*

10. Can the customary character of Article 13 can also be inferred from the work of the UN Conference on the Law of Treaties? The paternity of Article 13 of the Vienna

more than 60 per cent of all treaties concluded); G. Schwarzenberger, *International Law*, vol. 1, *International Law as Applied by International Courts and Tribunals* (3rd edn, London: Stevens & Sons, 1957), p 432; J. L. Weinstein, *supra* n 2, pp 224–5 (more than 85 per cent of all treaties concluded by the UK would be in simplified form); L. Wildhaber, 'Executive Agreements' in *supra* n 18, pp 313 and 317. See also the First Report (A/CN.4/63) of Sir Hersch Lauterpacht dated 24 March 1953, *YILC*, 1953, vol. II, p 114, fn 39 and his Second Report (A/CN.4/87\*) dated 8 July 1954, *YILC*, 1954, vol. II, pp 127–8, para. 2. See finally para. 3 of the final commentary relating to draft Art. 2(1)(a) adopted by the ILC during its 18th session, Report of the ILC to the General Assembly (A/6309/Rev.1), *YILC*, 1966, vol. II, p 188.

<sup>24</sup> C. Chayet, *supra* n 2, p 5; F. S. Hamzeh, *supra* n 2, p 182, fn 3 and pp 185–6; R. Jongbloet-Hamerlijncx, *supra* n 3, p 233, fn 203.

<sup>25</sup> F. S. Hamzeh, *supra* n 2, p 186.

<sup>26</sup> For various examples of final clauses, see *infra* para. 39.

<sup>27</sup> See L. Cavaré, *Le droit international public positif*, vol. II, *Les modalités des relations juridiques internationales. Les compétences respectives des États* (2nd edn, Paris: Pedone, 1962), pp 92–3; J. Dehaussy, 'Les traités. Conclusion et conditions de validité formelle' in *supra* n 23, pp 26–7, para. 48; G. Fitzmaurice, *supra* n 20, p 128; F. S. Hamzeh, *supra* n 2, p 183; R. Jongbloet-Hamerlijncx, *supra* n 3, pp 223–4; H. Neuhold, *supra* n 2, pp 228 and 231; Nguyen Quoc Dinh, P. Daillier, M. Forteau, and A. Pellet, *supra* n 20, p 160, para. 84; Ch. Rousseau, *supra* n 16, vol. I, pp 71–3, para. 47; Sir Ernest Satow, *supra* n 3, p 247, para. 29.35; P.-F. Smets, *supra* n 6, pp 27 ff; J. L. Weinstein, *supra* n 2, pp 211–13.

<sup>28</sup> F. S. Hamzeh, *supra* n 2, p 183; R. Jongbloet-Hamerlijncx, *supra* n 3, pp 218–24; Sir Ernest Satow, *supra* n 3, p 247, para. 29.35; J. L. Weinstein, *supra* n 2, pp 211–13 and the numerous references quoted therein.

<sup>29</sup> J. Dehaussy, 'Les traités. Conclusion et conditions de validité formelle' in *supra* n 23, p 26, para. 48. In this respect, Charles Rousseau specifies that 'il n'existe aucune hiérarchie d'objet entre les traités et les accords en forme simplifiée' (Ch. Rousseau, *supra* n 16, vol. I, p 71, para. 47).

Convention belongs to Poland. This provision originates, indeed, in a proposal (A/CONF.39/C.1/L.89) presented by the Polish delegation aiming at adding an Article 10*bis*, which was worded as follows:

*Consent to be bound by a treaty expressed by an exchange of instruments constituting a treaty*

The consent of States to be bound by a treaty embodied in two or more related instruments is expressed by the exchange of such instruments, unless the States in question otherwise agreed.<sup>30</sup>

11. For the author of the proposal, Article 10*bis* reflected customary international law in its principle. Indeed, the Polish representative, Mr Nahlik, remarked to the Committee of the Whole that:

Articles 10, 11 and 12 in the [International Law] Commission's draft did not cover all the methods whereby a State could express its consent to be bound, and notably the most frequent of them, namely, an exchange of notes, not necessarily signed, where that exchange alone expressed the consent of the parties.<sup>31</sup>

At the ninth plenary meeting of the Conference, he confirmed again the customary character of the exchange of letters as a means of expressing consent to be bound by a treaty. In his view, the draft Articles of the ILC:

did not exhaust the matter, since they left out treaties concluded by an exchange of instruments. In such cases it was simply the act of exchange that should be regarded as constituting the expression of the consent of the parties to be bound by the agreement... As treaties of that type were becoming more and more frequent, the Polish delegation had thought it useful... to propose the inclusion of a new Article 10 *bis* (A/CONF.39/C.1/L.89) governing the case of such treaties...<sup>32</sup>

12. Some delegations at the Conference supported the Polish proposal without reservation and considered that it formulated a customary rule concerning the expression of consent to be bound by a treaty. So Mr Bevens, on behalf of the United States, approved this proposal as '[m]any agreements were, in fact, concluded by an exchange of notes, and some by *notes verbales* without signature. The draft convention did not cover that case, and the gap should be filled'.<sup>33</sup> Hans Blix, on behalf of Sweden, affirmed the existence of a

rule—undisputed in his delegation's view—that when a treaty had been entered into by means of an exchange of notes, the expression of consent lay in that exchange, unless otherwise expressly agreed.<sup>34</sup>

13. Also supporting Poland's proposal, Mr Jiménez de Aréchaga, on behalf of Uruguay, considered, however, that it constituted 'a rule of progressive development'.<sup>35</sup> In this respect, Mr Alvarez, also intervening on behalf of Uruguay, argued that signature would arguably be the customary means of expressing consent to be bound by a treaty.<sup>36</sup>

<sup>30</sup> United Nations Conference on the Law of Treaties, 1st session, Official Documents, Summary Records, p 93, para. 64.

<sup>31</sup> *Ibid.*, p 93, para. 65.

<sup>32</sup> United Nations Conference on the Law of Treaties, 2nd session, Official Documents, Summary Records, p 24, para. 62.

<sup>33</sup> United Nations Conference on the Law of Treaties, 1st session, Official Documents, Summary Records, p 94, para. 1.

<sup>34</sup> *Ibid.*, p 345, para. 81.

<sup>35</sup> *Ibid.*, p 93, para. 66.

<sup>36</sup> *Ibid.*, p 86, para. 12.

14. On the contrary, Mr Bindschedler, on behalf of Switzerland, considered that he could not support the Polish proposal for the following reason:

It seemed to be based on a confusion between a State's consent, which was a unilateral act whereby it agreed to be bound by a treaty, and the entry into force of a treaty. Consent was given by signature or initialling; it could not be expressed by a material act such as an exchange of instruments. It was the entry into force of the treaty that was determined by the exchange of instruments, though the date of entry into force might also be that of the later instrument, if they were not dated identically, or might be laid down in the agreement itself.<sup>37</sup>

As an answer to the intervention of the Swiss representative, Mr Denis, on behalf of Belgium, replied that 'notes exchanged were as often as not unsigned and that their reciprocal delivery was in such cases the means of expressing consent'.<sup>38</sup>

15. In conclusion, the delegations that expressed themselves about the Polish proposal were, at the very least, divided as to the customary character of the means of expressing consent to be bound by a treaty through the exchange of instruments. It results from an examination of the interventions that three positions were thus defended at the Conference. According to the first position, the exchange is a customary means of expression of the consent to be bound by a treaty. The second position supported the view according to which the exchange of instruments as a means of expressing final consent was a matter of progressive development of international law. Finally, a third position claimed that the exchange of instruments can never be a means of expressing the final consent to be bound by a treaty.

16. Nevertheless, it should be noted that States ultimately approved the exchange of instruments as a means of expressing consent to be bound by a treaty. Put to the vote, the Polish proposal was adopted by the Committee of the Whole by 42 votes to 10, with 27 abstentions,<sup>39</sup> on the understanding that the Drafting Committee would make the necessary drafting changes. The Committee of the Whole then adopted the text of Article 10*bis* as redrafted by the Drafting Committee<sup>40</sup> by 69 votes to 1, with 18 abstentions.<sup>41</sup> The UN Conference on the Law of Treaties finally adopted Article 13 of the Vienna Convention, on 29 April 1969, in plenary meeting, by 91 votes to 0.<sup>42</sup>

<sup>37</sup> Ibid, p 94, para. 3. It is to be noted that the Swiss delegate improperly qualified the Polish proposal as an amendment. With regard to the distinction between a motion, a proposal, and an amendment, on the one hand, and their legal consequences, on the other hand, see R. Sabel, *Procedure at International Conferences. A study of the rules of procedure of conferences and assemblies of international inter-governmental conferences* (2nd edn, Cambridge: Cambridge University Press, 2006), pp 145–76, 201–19, and 263–84. For the Rules of procedure of the United Nations Conference on the Law of Treaties, as adopted by that Conference at its 1st plenary meeting, see United Nations Conference on the Law of Treaties, 1st session, Official Documents, Summary Records, pp xxvi–xxx.

<sup>38</sup> United Nations Conference on the Law of Treaties, 2nd session, Official Documents, Summary Records, p 26, para. 2.

<sup>39</sup> United Nations Conference on the Law of Treaties, 1st session, Official Documents, Summary Records, p 94, para. 5.

<sup>40</sup> This text was drawn up as follows:

*Art. 10 bis.* The consent of States to be bound by a treaty constituted by instruments exchanged between them is expressed by that exchange when: (a) the instruments provide that their exchange shall have that effect; (b) it is otherwise established that those States were agreed that the exchange of instruments should have that effect (ibid, p 345, para. 75).

<sup>41</sup> Ibid, p 347, para. 105.

<sup>42</sup> United Nations Conference on the Law of Treaties, 2nd session, Official Documents, Summary Records, p 26.

*Subsidiary means for determination of rules of law*

17. Case law and legal writings, as subsidiary means for the determination of the rules of public international law, confirm that an exchange of notes or letters can constitute an international treaty producing obligatory legal effects for the parties. However, as to the question of determining whether the *exchange* itself constitutes a *means of expressing consent to be bound by a treaty*, these subsidiary means do not bring a concordant answer.

**Case law**

18. International case law recognizes that an exchange of notes or letters can indisputably constitute an international treaty producing binding legal effects for the parties. Some decisions even seem to indicate that the exchange of instruments constituting a treaty can constitute a means of expressing consent to be bound by a treaty. Max Huber, in the case of British possessions in Spanish Morocco, decided in 1925 'que l'échange de lettres mentionné ci-dessus et qui a eu lieu entre les agents autorisés des deux Gouvernements établit de façon manifeste l'accord de leurs volontés'<sup>43</sup> and concludes that an 'accord exécutoire'<sup>44</sup> exists, as a consequence, between the two governments. Thus the arbitral award seems to indicate that the exchange of letters constituting a treaty can constitute a means of expressing consent to be bound by a treaty. Examining the question of the form of binding international engagements in the case concerning the *Customs Régime between Germany and Austria (Protocol of March 19th, 1931)*, the Permanent Court of International Justice (PCIJ) was of the opinion that:

From the standpoint of the obligatory character of international engagements, it is well known that such engagements may be taken in the form of treaties, conventions, declarations, agreements, protocols, or *exchanges of notes*.<sup>45</sup>

However, insofar as the Court did not examine the question from the perspective of the means of expressing consent to be bound by a treaty, one cannot conclude from this Advisory Opinion that the exchange of instruments constitutes a *means of expression of the consent to be bound by a treaty*. In the *Maritime Delimitation and Territorial Questions between Qatar and Bahrain* case, the International Court of Justice (ICJ), without referring *expressis verbis* to Article 13 of the 1969 Vienna Convention<sup>46</sup>, took note that '[the] Parties agree that the exchanges of letters of December 1987 constitute an international agreement with binding force in their mutual relations'<sup>47</sup> and concluded that the exchanges of letters of December 1987 constitutes 'an international agreement creating rights and obligations for the Parties'.<sup>48</sup> If the Court did not explicitly specify that the exchange as such constitutes a means of expressing consent to be bound by a treaty, it nevertheless seems to admit it implicitly.

<sup>43</sup> *British possessions in Spanish Morocco*, arbitral award of 1 May 1925, *RIAA*, vol. II, p 724.

<sup>44</sup> *Ibid*, p 725.

<sup>45</sup> *Customs Régime between Germany and Austria (Protocol of March 19th, 1931)*, Advisory Opinion of 5 September 1931, PCIJ, Series A/B, no.41, p 47, emphasis added.

<sup>46</sup> It is to be noted that the parties in dispute, namely Qatar and Bahrain, were not parties to the 1969 Vienna Convention on the Law of Treaties.

<sup>47</sup> *Maritime Delimitation and Territorial Questions between Qatar and Bahrain* case, Jurisdiction and Admissibility, Judgment of 1 July 1994, *ICJ Reports 1994*, p 120, para. 22.

<sup>48</sup> *Ibid*, p 122, para. 30. On this subject, see also A. Aust, *supra* n 2, pp 51-2 and S. Rosenne, 'The Qatar/Bahrain Case. What is a Treaty? A Framework Agreement and the Seising of the Court', *LJIL*, 1995, pp 165-6.

19. In addition, it results from a careful examination of domestic case law carried out by J. L. Weinstein, that national courts and tribunals also accept that exchanges of instruments can constitute treaties, producing legal effects.<sup>49</sup>

20. Three conclusions emerge from this survey of the case law. First, international courts and tribunals considers that an exchange of notes or letters can constitute an international treaty producing obligatory legal effects for the parties. Furthermore, the arbitral award delivered by Max Huber as well as the judgment delivered by the ICJ in the matter of *Maritime Delimitation and territorial questions between Qatar and Bahrain* seem to indicate that *the exchange* as such can constitute *a means of expressing consent to be bound by a treaty*. Lastly, it should be noted that no arbitral or judicial decision has, to our knowledge, asserted that *Article 13* of the Convention of Vienna as such reflects customary international law.

#### Legal writings

21. Legal writings also confirm that an exchange of notes or letters can constitute an international treaty producing binding legal effects for the parties. However, as to the question of determining whether the *exchange* as such constitutes a *means of expressing the consent to be bound*, the doctrine is, to say the least, divided. Some authors consider that the exchange of notes or letters constitutes a customary means of expression of the consent to be bound by a treaty.<sup>50</sup> Other authors believe, however, that Article 13 codifies custom only in certain respects. Thus, Alexandru Bolintineanu, while not disputing that Article 13 restates a customary means of expression of the consent to be bound by a treaty, nevertheless maintains that the *means of proof known as extrinsic* of the consent of States to be bound by the exchange of instruments constituting a treaty, such as stated in paragraph (b) of Article 13, are not encountered in diplomatic practice, and do not, consequently, seem to belong to customary international law.<sup>51</sup> Other authors still think that Article 13 falls under the progressive development of international law and has subsequently generated a customary rule.<sup>52</sup> So Maria Frankowska argues that 'ni l'échange de notes, ni le paraphe n'étaient considérés, jusqu'à ces derniers temps, comme un procédé de conclusion de traités'.<sup>53</sup> A great number of authors finally assert that exchange of notes or letters are treaties in simplified form concluded by signature.<sup>54</sup> They confirm that an

<sup>49</sup> J. L. Weinstein, *supra* n 2, pp 215–23. See also F. S. Hamzeh, *supra* n 2, p 185 and R. Jongbloet-Hamerlijnck, *supra* n 3, p 229, fn 188.

<sup>50</sup> A. Aust, *supra* n 2, p 102; I. Brownlie, *supra* n 19, p 611; J. Combacau and S. Sur, *Droit international public* (7th edn, Paris: Montchrestien, 2006), p 121; Sir R. Jennings and Sir A. Watts, *supra* n 6, p 1226, para. 601 (cf however p 1210, para. 586); Ph. Manin, *Droit international public* (Paris: Masson, Coll. Droit-Sciences Economiques, 1979), pp 85 and 88; P. Reuter, *La Convention de Vienne du 29 mai 1969 sur le droit des traités* (Paris: Armand Colin, 1970), p 7; P. Reuter, *Introduction au droit des traités*, *supra* n 23, pp 57–8, para. 101; G. Schwarzenberger, *supra* n 23, p 432; M. N. Shaw, *International Law* (5th edn, Cambridge: Cambridge University Press, 2003), pp 818–19; J. L. Weinstein, *supra* n 2, pp 205–26.

<sup>51</sup> A. Bolintineanu, 'Expression of Consent to Be Bound by a Treaty in the Light of the 1969 Vienna Convention', *AJIL*, 1974, p 684. For the question of the methods of proof of the consent, see *infra* paras 42–64.

<sup>52</sup> Let us recall that a conventional rule may produce different effects in relation to a customary rule, namely a effect of codifying, generating or crystallizing a custom.

<sup>53</sup> M. Frankowska, *supra* n 23, p 76. See also M. E. Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (Leiden: Martinus Nijhoff, 2009), p 202.

<sup>54</sup> J. Basdevant, 'La conclusion et la rédaction des traités et des instruments diplomatiques autres que les traités', *supra* n 3, p 617 *juncto* p 615 (cf however p 610); S. Bastid, *Les traités dans la vie internationale. Conclusion et effets* (Paris: Economica, 1985), p 38, para. 30 and p 46, para. 36 (implicitly); H. Blix, 'The Requirement of Ratification', *supra* n 23, p 380 (cf. p 380 where he asserts however that the exchange of notes

exchange of notes or letters can constitute an international treaty producing binding legal effects for the parties. However, it is the signature which, in their opinion, would constitute the means by which the States express their consent to be bound by a treaty composed of exchanged instruments. For these authors, it follows that the exchange does not constitute a means of expressing consent to be bound by a treaty. It is true that these authors can find an argument in the Vienna Convention itself. Just as ratification (Art. 14)—and not the exchange of instruments of ratification (Art. 16(a))—constitutes the means of expressing consent to be bound,<sup>55</sup> in the same way the signature affixed to the instruments (Art. 12)—and not the exchange of these signed instruments (Art. 13)—would constitute the means of expressing consent to be bound.<sup>56</sup> However, these authors do not explain how the exchange of unsigned instruments (eg *notes verbales*) constituting a treaty can, if necessary, definitively engage the States concerned.<sup>57</sup> With respect to exchange of notes, the ILC stated that:

these agreements are usually intended by the parties to become binding by signature alone. On the other hand, an exchange of notes or other informal agreement, though employed for its ease and convenience, has sometimes expressly been made subject to ratification because of constitutional requirements in one or the other of the contracting States.<sup>58</sup>

Consequently, in its draft Article adopted in 1966, the ILC does not mention the exchange of instruments as a means of conclusion of treaties, such treaties being concluded by signature or, if necessary, by ratification.

22. It results from this short outline that the legal literature—intended to be a subsidiary means for the determination of customary international law—is not of any assistance in determining whether Article 13 presents a customary character.

### Conclusion

23. In our opinion, the question of the customary character of the exchange as a means of expressing consent to be bound by a treaty must be settled on the basis of the practice of States themselves and their *opinio juris sive necessitatis*. It arises from the examination of State practice and their *opinio juris sive necessitatis* that Article 13 of the Vienna Convention incontestably reflects a customary means of expression of the consent to be bound by a treaty.

itself establishes and proves the consensus between the parties); L. Cavaré, *supra* n 27, pp 92–3; C. Chayer, *supra* n 2, pp 4 and 7; J. Dehaussy, 'Les traités. Conclusion et conditions de validité formelle' in *supra* n 23, p 26; P.-M. Dupuy, *supra* n 23, pp 255–6, para. 251 (implicitly); T. O. Elias, *supra* n 20, p 24; P.-M. Martin, *supra* n 20, p 127, para. 249 (implicitly); Nguyen Quoc Dinh, P. Daillier, M. Forteau, and A. Pellet, *supra* n 20, pp 157–9, para. 82 *juncto* para. 84; Ch. Rousseau, *supra* n 16, vol. I, p 70, para. 46; D. Ruzié, *Droit international public* (16th edn, Paris: Dalloz, Coll. Mémentos, 2002), p 38; J. Salmon, *Droit des gens*, *supra* n 20, pp 65, 75, 77, and 79; J. Salmon (ed.), *Dictionnaire*, *supra* n 5, see 'Accord en forme simplifiée', p 15 (implicitly) and see 'Procédure courte', p 888; P.-F. Smets, *supra* n 6, pp 33–4. Cf F. S. Hamzeh, *supra* n 2, p 187 and Sir Ernest Satow, *supra* n 3, p 247, para. 29.35 (quoting the commentary of the ILC).

<sup>55</sup> Whereas the instruments of ratification *express* the consent of the States to be bound by the treaty, the exchange of the instruments of ratification *establishes*, in principle, the consent of the State to be bound by the treaty.

<sup>56</sup> Cf Ph. Manin, *supra* n 50, p 88; H. Neuhold, *supra* n 2, pp 229–30 and 248–52.

<sup>57</sup> For the exchange of *notes verbales* and of initialled or sealed notes, see *infra* paras 35–6.

<sup>58</sup> Paragraph 3 of the commentary on draft Art. 12 (Art. 14 of the Convention) provisionally adopted by the ILC during its 14th session, Report of the ILC to the General Assembly (A/5209), *YILC*, 1962, vol. II, p 172 and para. 3 of the final commentary of draft Art. 11 (Art. 14 of the Convention) adopted by the ILC during its 18th session, Report of the ILC to the General Assembly (A/6309/Rev.1), *YILC*, 1966, vol. II, p 197.

## B. Problems of interpretation

24. Article 13 considers the exchange of instruments constituting a treaty as a means of expressing the States' consent to be bound by a treaty. The application of Article 13 can nevertheless raise various problems of interpretation. Therefore, we will successively examine the question of conclusion by exchange of instruments, the definition of the term 'instrument', the characteristics of the instrument, the methods of proof of consent, the date of conclusion, the date of entry into force, and the bilateral or multilateral character of the treaty concluded by exchange of instruments between several States.

### Conclusion by exchange of instruments

25. It must be stressed that it is *the act of exchange* of instruments which expresses and establishes the consent of States to be bound by a treaty thus concluded.<sup>59</sup> Taking into consideration Article 13 of the Vienna Convention, the conclusion *stricto sensu* of a treaty results, indeed, in the confluence of two or several consents to be bound by the treaty through the exchange of instruments.<sup>60</sup> Salmon's *Dictionnaire de droit international public* defines the expression 'exchange of letters, of notes' as follows:

- A. Acte diplomatique constitué par l'échange entre représentants de gouvernements ou d'organisations internationales de deux ou plusieurs lettres ou notes dont le contenu a été préalablement négocié ou agréé. Ces notes sont liées entre elles en ce sens que la note initiale propose que son contenu et la réponse constituent un accord....
- B. L'instrument diplomatique constitué par les documents ainsi échangés...<sup>61</sup>

26. As regards Article 13, the exchange, in our opinion, has a double function: on the one hand, it constitutes or forms the treaty<sup>62</sup> and, on the other hand, it constitutes a means of expressing consent to be bound by that treaty.

27. However, as already stressed, one cannot but note that, more than three decades after the adoption of the Vienna Convention, part of the literature continues to deny the exchange its status as a means of expressing consent to be bound by a treaty. In this respect, some

<sup>59</sup> A. Aust, *supra* n 2, p 102; H. Blix, 'The Requirement of Ratification', *supra* n 23, p 358; J. L. Weinstein, *supra* n 2, p 205. See also the observation of Mr Nahlik (Poland) during the 9th plenary meeting (in United Nations Conference on the Law of Treaties, 2nd session, Official Documents, Summary Records, p 24, para. 62).

<sup>60</sup> P. Reuter, *Introduction au droit des traités*, *supra* n 23, pp 51–2, paras 89–90. *Lato sensu*, the term 'conclusion' designates the whole procedure to be followed in order to be bound by the treaty, consisting of the negotiations, the adoption, and authentication of the text of the treaty, and the expression by States of their consent to be bound by the treaty. See, in this respect, J. Salmon (ed.), *Dictionnaire*, *supra* n 5, see 'Conclusion(s)', sense I, C, a) and b), p 225 and E. W. Vierdag, 'The Time of "Conclusion" of a Multilateral Treaty: Art. 30 of the Vienna Convention on the Law of Treaties and Related Provisions', *BYBIL*, 1988, p 83. *Contra*: A. Aust, *supra* n 2, p 92 and S. Rosenne, 'Treaties, conclusion and entry into force' in R. Bernhardt (ed.), *Encyclopedia of Public International Law*, vol. IV (Amsterdam: Elsevier, 2000), p 933. Cf H. Neuhold, *supra* n 2, p 195, fn 1. The determination of the exact date of conclusion is also relevant in European law. See, in this respect, P. Manzini, 'The Priority of Pre-Existing Treaties of EC Member States within the Framework of International Law', *EJIL*, 2001, pp 785–96. However, the author confuses the operations of conclusion and entry into force of a treaty.

<sup>61</sup> J. Salmon (ed.), *Dictionnaire*, *supra* n 5, see 'Échange de lettres, de notes', p 408. Cf J. Basdevant (ed.), *Dictionnaire de la terminologie du droit international* (Paris: Sirey, 1960), see 'Échange de lettres, de notes', p 246.

<sup>62</sup> In this respect, Art. 13 speaks about 'a treaty constituted by instruments exchanged between them'.

confusion between the exchange of instruments and the signature of these instruments still reigns as regards the conclusion *stricto sensu* of treaties by exchange of instruments.

### Definition of the term 'instrument'

28. Article 13 provides that the exchange of instruments constituting a treaty can express the consent to be bound by a treaty. It poses, consequently, the question of the interpretation of the term 'instrument'. Basdevant's *Dictionnaire de la terminologie du droit international* defines the term 'instrument' as follows:

A.—Terme qui, pris dans son sens propre, désigne le document, l'écrit qui constate un acte juridique, en énonce le contenu.

B.—Par extension, terme employé parfois pour désigner l'acte juridique lui-même.<sup>63</sup>

The *Dictionnaire de droit international public*, published in 2001 and edited by Jean Salmon, defines the term 'instrument' as follows:

A. De manière générale acte formel opposé à l'acte substantiel. Origine: du latin 'instrumentum'. Ant. 'negotium'....

B. Dans le droit des traités: document officiel contenant l'expression de la volonté des sujets de droit....<sup>64</sup>

29. Considering these definitions, the term *instrument* can, within the framework of Article 13 of the Vienna Convention, be defined precisely as a written document containing the will of a subject of law expressing either an offer or pollicitation (or, if necessary, a counter-offer) to conclude a treaty, or an acceptance of such an offer (or, if necessary, of such a counter-offer).

### Characteristics of the instrument

30. The instrument is characterized by the fact that it should not have a particular denomination or be accomplished in accordance with a particular formality.

#### *Absence of particular denomination*

31. It is important to note that the instrument in question should not have a particular denomination.<sup>65</sup> If it emerges from diplomatic practice that the instrument is usually called a note or a letter,<sup>66</sup> practice evidences cases—albeit rare—where the instrument is called correspondence,<sup>67</sup> communication,<sup>68</sup> message,<sup>69</sup> telegram,<sup>70</sup>

<sup>63</sup> J. Basdevant (ed.), *Dictionnaire*, *supra* n 61, see 'Instrument', p 338.

<sup>64</sup> J. Salmon (ed.), *Dictionnaire*, *supra* n 5, see 'Instrument', p 588.

<sup>65</sup> R. Jongbloet-Hamerlijncx, *op cit. supra* n 3, p 217 and M. E. Villiger, *op cit. supra* n 53, pp 199–200.

<sup>66</sup> A. Aust, *supra* n 2, p 102; J. Basdevant, 'La conclusion et la rédaction des traités et des instruments diplomatiques autres que les traités', *supra* n 3, pp 609–10; C. Chayet, *supra* n 2, pp 5–6; Sir Ernest Satow, *supra* n 3, p 247, para. 29.34.

<sup>67</sup> For an example, see J. L. Weinstein, *supra* n 2, p 205, fn 7.

<sup>68</sup> *Ibid*, p 205, fn 8.

<sup>69</sup> *Ibid*, p 215, fn 1.

<sup>70</sup> *Ibid*, p 215, fn 1. See also R. Jongbloet-Hamerlijncx, *supra* n 3, p 225, fn 170 and Ph. Manin, *supra* n 50, p 84. For case law, see the judgment of the Court of Appeal of Paris, dated 24 March 1933 in the case *Banque de l'Union Parisienne c Jaudon* where the Court affirms that the exchange of telegrams of 28 and 29 October 1924 between the French and Soviet governments constitutes an international convention (*Annual Digest and Reports of Public International Law Cases*, 1933–34, vol. 7, case no. 32, pp 78–80 and critical note).

*aidé-mémoire*,<sup>71</sup> or memorandum.<sup>72</sup> In addition, the principle of absence of particular denomination is confirmed by the preparatory work. During the second session of the Vienna Conference, Belgium submitted an amendment (A/CONF.39/L.13), of which the first part aimed at replacing the expression 'exchange of instruments' by the expression 'exchange of letters or notes'.<sup>73</sup> However, Poland objected for the reason that:

The Belgian amendment... would surely not improve the text, since it would unduly restrict the Article's scope. The exchange of letters or notes was certainly the most frequent case of its kind but it was not the only one, since there might be an exchange of memoranda, aide-memoires, and so on. It would be better, therefore, to keep the words 'Exchange of instruments'.

The chairman of the Drafting Committee, Mr Yasseen, stated that:

he regarded the... Belgium amendment... as a substantive change, because it would restrict the scope of the Article as approved by the Committee of the Whole. It was therefore for the Conference to take a decision on the matter.<sup>74</sup>

Belgium finally decided to withdraw the first part of its amendment as 'the discussion had shown that there might be other cases'<sup>75</sup> than these of exchanges of letters or notes.

32. In conclusion, it emerges from diplomatic practice that an exchange of notes, letters, correspondence, communications, telegrams, messages, or memorandum can constitute a treaty and that the consent to be bound by such a treaty can be expressed by the exchange of the aforesaid instruments.

33. Just as the instruments are characterized by an absence of particular denomination, in the same way the treaty itself constituted by these exchanged instruments is not governed by a particular denomination. So the denomination of the treaty thus formed is of little importance.<sup>76</sup> The practice, in this respect, is indeed varied. If it is true that the treaty constituted by exchanged instruments is usually described as an agreement, it can also be referred to as an understanding, a *modus vivendi*, a *modus ad interim* or provisional agreement, a *pactum de contrahendo*, etc.<sup>77</sup>

#### *Absence of formalism*

34. The absence of formalism constitutes the instrument's second characteristic. The instrument is not governed by any particular formality other than demanding that it takes the form of a written document. However, the doctrine has sometimes considered that the instruments must be signed and that they must have a relatively solemn form. Consequently, it is advisable to examine these two questions.

35. On the one hand, do the instruments necessarily have to be signed or can they, for example, take the form of a *note verbale*?<sup>78</sup> The question divides the literature. Some

<sup>71</sup> For an example, see J. L. Weinstein, *supra* n 2, p 215, fn 1.

<sup>72</sup> *Ibid.*

<sup>73</sup> United Nations Conference on the Law of Treaties, 2nd session, Official Documents, Summary Records, p 24, para. 60.

<sup>74</sup> *Ibid.*, p 25, para. 71.

<sup>75</sup> *Ibid.*, p 25, para. 73.

<sup>76</sup> J. L. Weinstein, *supra* n 2, p 209.

<sup>77</sup> *Ibid.*, p 209 (quoting various examples).

<sup>78</sup> A *note verbale* can be defined as a written note, drafted in the third person and unsigned. In this sense: J. Basdevant, 'La conclusion et la rédaction des traités et des instruments diplomatiques autres que les traités', *supra* n 3, p 605; J. Basdevant (ed.), *Dictionnaire*, *supra* n 61, see 'Note verbale', p 422; L. Cavaré, *supra* n 27, p 92, fn 38. Cf the dictionary of public international law, edited by Jean Salmon, defines '*note verbale*' as follows:

authors admit that the exchange of instruments constituting a treaty can be carried out by an exchange of *notes verbales*.<sup>79</sup> Other authors deem that the instruments must necessarily be signed.<sup>80</sup> Others still are of the opinion that the exchange of *notes verbales* is not governed by Article 13, but can nevertheless constitute a means of expressing consent to be bound by a treaty aimed at by Article 11 *in fine* of the Vienna Convention which admits 'any other means, if so agreed'.<sup>81</sup> In our opinion, the question must be settled on the basis of the practice of States themselves. Diplomatic practice is acquainted with cases where the exchange of instruments constituting a treaty takes the form of an exchange of *notes verbales*.<sup>82</sup> Having studied the practice on the matter, Weinstein stresses that:

However, a practice, never widely adopted, developed during the era of the League of Nations of such notes being in the form of *notes verbales*. These were unsigned documents—sometimes stamped with the seal of a Foreign Office or Embassy—and were phrased in a more personal manner than is customary in exchanges of notes. Apart from these features there is no clear distinction between an exchange of notes composed of *notes verbales* and one composed of ordinary notes. The range of subject-matter of *notes verbales* is equally unrestricted... In recent years a development of the *note verbale*—although the parties still, on rare occasions, use the latter title expressly—has been the use of notes, which, though not termed *notes verbales*, are identical in form. These are in some cases unsigned, and in others initialled or stamped with a seal. This, too, is a practice which is not widespread.<sup>83</sup>

Moreover, during the tenth plenary meeting of the Vienna Conference, Mr Denis, intervening on behalf of Belgium, even alleged that 'exchanges of notes were as often as not unsigned'.<sup>84</sup> Finally, let us note that the exchange of two *notes verbales* constituting an agreement satisfies the definition of the term 'treaty' as provided by Article 2(1)(a) of the Vienna Convention.<sup>85</sup>

Note écrite, non signée, rédigée à la troisième personne au nom d'un ministère des affaires étrangères, d'une organisation internationale ou d'une mission diplomatique. Généralement terminée par une formule de courtoisie, la note verbale est paraphée et porte le sceau du service expéditeur. (J. Salmon (ed.), *Dictionnaire*, *supra* n 5, see 'Note verbale', p 758)

<sup>79</sup> H. Blix, 'The Requirement of Ratification', *supra* n 23, p 358; R. Jongbloet-Hamerlijnck, *supra* n 3, p 217; S. E. Nahlik, 'La Conférence de Vienne sur le droit des traités. Une vue d'ensemble', *AFDI*, 1969, p 35, para. 10; H. Neuhold, *supra* n 2, p 230; I. Sinclair, *The Vienna Convention on the Law of Treaties* (2nd edn, Manchester: Manchester University Press, 1984), p 39; M. E. Villiger, *supra* n 53, p 200; J. L. Weinstein, *supra* n 2, p 206.

<sup>80</sup> C. Chayet, *supra* n 2, pp 4 and 7.

<sup>81</sup> L. F. Damrosch, L. Henkin, R. C. Pugh, O. Schachter, and H. Smit, *International Law. Cases and Materials* (4th edn, St Paul, Minn.: West Group, American Casebook Series, 2001), p 473.

<sup>82</sup> For various examples, see R. Jongbloet-Hamerlijnck, *supra* n 3, p 217, fn 118; J. Salmon (ed.), *Dictionnaire*, *supra* n 5, see 'Note verbale', p 758; and J. L. Weinstein, *supra* n 2, pp 206–7. For an example of a pollicitation in the form of a *note verbale*, see the *note verbale* of the Ministry of Foreign Affairs of the Republic of Bulgaria no. KO 655–32–3, dated 16 December 1996, concerning a proposal to conclude an agreement between the Bulgarian and Spanish governments on the abolition of visas for nationals of the two countries who hold diplomatic passports (text in 1996 UNTS 36–7). See also the interventions of Mr Nahlik (Poland) and Mr Bevens (USA) during the 17th and 18th meetings of the Committee of the Whole (in United Nations Conference on the Law of Treaties, 1st session, Official Documents, Summary Records, p 93, para. 65 and para. 1).

<sup>83</sup> J. L. Weinstein, *supra* n 2, pp 206–7.

<sup>84</sup> United Nations Conference on the Law of Treaties, 2nd Session, Official Documents, Summary Records, p 26, para. 2.

<sup>85</sup> H. Neuhold, *supra* n 2, p 230.

36. One can therefore conclude that the instruments should not necessarily be signed and that they sometimes could be initialled and/or sealed with the seal of the Ministry of Foreign Affairs or of the embassy.

37. Moreover, one can raise the question of determining whether the instrument should not assume a slightly solemn form. In this respect, Claude Chayet alleges that:

l'examen attentif de la correspondance diplomatique conduit à la constatation suivante: les fonctionnaires du Ministère des Affaires étrangères, que ce soit en France ou ailleurs, sont conduits... à considérer que la conclusion d'un accord entre chancelleries doit intervenir dans une forme légèrement plus solennelle que celle d'une lettre ou d'une 'note verbale' ordinaire.<sup>86</sup>

This solution, according to Chayet, would be justified insofar as:

il convient de rappeler que la correspondance entre Chancelleries est quotidienne et que l'objet même de cette correspondance est de résoudre les problèmes soulevés par des thèses opposées. On perçoit donc aisément que si la correspondance diplomatique est quotidienne, quotidienne aussi doivent être des lettres par lesquelles sont acceptées ou rejetées, partiellement ou totalement, les prétentions d'États étrangers. Il est clair que tous ces textes constituent, dans une certaine mesure, des accords en forme simplifiée; mais il est tout aussi évident que l'on ne peut retenir une telle conclusion dont l'effet serait de rendre imprécises les limites de cette catégorie d'engagements internationaux.<sup>87</sup>

38. Chayet's thesis calls for several remarks, however. First of all, as already mentioned, the careful examination of diplomatic practice proved that the exchange of instruments constituting a treaty can take place by a simple exchange of *notes verbales*. Moreover, neither the Vienna Convention in general, nor the definition of the term 'treaty' in Article 2(1)(a) of the Convention, requires that the instruments be written in a slightly solemn form. Finally, would Article 13 impose any solemnity in this respect? The following answer, given by Philippe Manin, undoubtedly appears justified:

Cette formule finale qui indique que les notes échangées constituent bien un accord entre États est utile pour distinguer l'accord ainsi conclu de la simple correspondance diplomatique. La C.V. tend d'ailleurs à préconiser qu'il en soit ainsi (Art. 13: 'Le consentement des États à être lié par un traité constitué par les instruments échangés entre eux s'exprime par cet échange, lorsque les instruments prévoient que leur échange aura cet effet'. Lorsqu'il n'en aura pas été ainsi: il faudra rechercher si l'intention des parties était bien de se lier par un accord (CV Art. 13/b)).<sup>88</sup>

Indeed, the *cardo quaestionis* consists less in determining whether the instruments are subjected to a certain solemnity, than in establishing the true intention of the parties. Looking at the definition of the term 'treaty' retained by the Vienna Convention, namely an international agreement concluded between States in written form and governed by international law, it is, indeed, essential to identify the nature of the intention of the parties involved. Did the parties have a political or legal intention 'to conclude an agreement'? There is no choice but to accept that an exchange of notes can constitute a treaty as well as a political agreement.<sup>89</sup> Two assumptions must, in fact, be distinguished in this

<sup>86</sup> C. Chayet, *supra* n 2, p 6. Cf Sir R. Jennings and Sir A. Watts, *supra* n 6, p 1210, para. 586; Sir Ernest Satow, *supra* n 3, p 247, para. 29.34.

<sup>87</sup> C. Chayet, *supra* n 2, p 6.

<sup>88</sup> Ph. Manin, *supra* n 50, pp 85–6.

<sup>89</sup> As rightly emphasized by Anthony Aust, '[e]xchanges of notes (or letters)... may constitute either a treaty or an MOU' (A. Aust, *supra* n 2, pp 27 and 33).

respect. On the one hand, from a political intention to conclude, a political agreement (gentlemen's agreement or memorandum of understanding) can result which does not contain legal obligations—but only political obligations—for the *gentlemen* involved. On the other hand, from a legal intention to conclude, a legal agreement can result which will not necessarily be a treaty. If, and only if, subjects of international law had the legal intention to conclude a written agreement and had submitted it to international law (and not to another legal order, such as, for example, the national law of one of the parties), the legal agreement could be described as a 'treaty'.<sup>90</sup> In the case of exchange of instruments constituting a treaty, it emerges from diplomatic practice that States usually have recourse to formulae or formal clauses in order to express their legal intention clearly to conclude a treaty.<sup>91</sup> The States' resort, in their diplomatic correspondence, to slightly solemn formulae or formal clauses is precisely to dispel any ambiguity as to the legal nature of their solicitation or acceptance.

39. So, for example, are the following formulae and formal clauses mostly stipulated in the solicitations or counter-offers of States willing to conclude a treaty by exchange of notes or letters:

If the proposals that precede meet the approval of your Government, I propose that the present note and your reply in the affirmative shall constitute an Agreement between our two Governments, which will enter into force on the date of your reply;

I have the honour to inform you that the Government of...is prepared to conclude with the Government of...an Agreement under the following conditions, which will enter into force on...;

The Embassy proposes that the present note and the confirmative answer of the Ministry of Foreign Affairs constitute an agreement between...and...which will enter into force a month after the date of reception of the aforesaid confirmative note of the Ministry of Foreign Affairs and which will remain in force for the duration of a year.

Such clauses or formulae using the term 'agreement' or the expression 'to enter into force' indicate that the State in question is prepared to conclude a treaty and formulates, for this purpose, a legal offer. In the same way, the following formulae and clauses are often stipulated in the confirmative note (the acceptance) addressed to the State author of the initial note (the offer):

I have the honour to acknowledge receipt of note No...of Your Excellency on..., conceived in these terms:

[Text of the initial note]

I have the honour to inform Your Excellency that the Government...accepts the aforesaid proposals and that Your Excellency's note, as well as the present reply, are regarded as constituting an Agreement made between our two Governments on the matter;

or,

The Ministry of Foreign Affairs of the Kingdom of...presents its compliments to the Embassy of the Republic of...and has the honour to acknowledge receipt of the note of the Embassy of..., No..., which reads as follows:

[Text of the initial note]

<sup>90</sup> On the distinction between the terms 'agreement' and 'treaty', see Ph. Manin, *supra* n 50, p 75.

<sup>91</sup> Cf C. Chayet, *supra* n 2, p 6; Sir R. Jennings and Sir A. Watts, *supra* n 6, p 1210, para. 586, fn 10.

The Ministry has the honour to inform the Embassy that the proposals which precede meet the approval of the Kingdom of...and that the Embassy's note and the present confirmative note constitute an Agreement between the Kingdom of...and the Republic of...which will enter into force on the date of this note.

Such clauses or formulas employing the terms 'approval' and 'agreement', combined with the expression 'to enter into force' indicate that, on the one hand, the recipient State of the initial note has understood that the author State of the initial note has the intention to conclude a treaty and that, on the other hand, by sending a confirmative note he expresses his acceptance with regard to the offer formulated in the initial note.

40. However, such slightly solemn formulae or clauses cannot be considered as essential formal conditions. Unlike Claude Chayet claims, one cannot *a priori* exclude that the ordinary and daily correspondence between Ministries of Foreign Affairs and diplomatic missions can be described as treaties constituted by exchanges of letters or notes.<sup>92</sup> As Paul Reuter emphasizes:

on peut conclure de l'examen d'une masse de correspondance échangée, qu'il en résulte un traité.<sup>93</sup>

The question of determining whether an exchange of correspondence constitutes a treaty must amount to a question of intention. Did the ministers, diplomatic agents, or empowered civil servants intend to solve the problem in question by means of a legal agreement governed by public international law, thus offering an obligatory legal answer to the parties in question?<sup>94</sup> If such is the case, a treaty was concluded. Just as the majority of natural persons contract daily in national law, in the same way it is not impossible that States conclude, through their ordinary correspondence, treaties daily, most of the time—it is true—on minor matters. It is, however, to be noted that States are not always aware of the legal consequences of their intentions and their acts on the matter.<sup>95</sup>

41. In conclusion, it emerges from the diplomatic practice of States that an exchange of notes, letters, correspondence, communications, telegrams, messages, memoranda, or *notes verbales* can constitute a treaty if such is the intention of the States and that the consent to be bound by such a treaty can be expressed by the exchange of the said instruments.

<sup>92</sup> R. Jongbloet-Hamerlijnck, *supra* n 3, p 225.

<sup>93</sup> P. Reuter, *Introduction au droit des traités*, *supra* n 23, p 79, para. 101\*.

<sup>94</sup> F. S. Hamzeh, *supra* n 2, p 186 and M. E. Villiger, *supra* n 53, p 199. On the much debated distinction between the intention of a minister for foreign affairs and the intention of his government as regards the legal scope of signed minutes, see *Maritime Delimitation and Territorial Questions between Qatar and Bahrain* case, Jurisdiction and Admissibility, Judgment of 1 July 1994, *ICJ Reports 1994*, pp 121–2, paras 26–7 as well as the following critical observations in legal literature: E. Lauterpacht, "Partial" judgments and the inherent jurisdiction of the International Court of Justice' and E. W. Vierdag, 'The International Court of Justice and the law of treaties' in V. Lowe and M. Fitzmaurice (eds), *Fifty years of the International Court of Justice. Essays in honour of Sir Robert Jennings* (Cambridge: Cambridge University Press, 1996), p 471, fn 6 respectively p 165; S. Rosenne, 'The Qatar/Bahrain Case. What is a Treaty? A Framework Agreement and the Seising of the Court', *supra* n 48, pp 169–70. Cf M. Dixon, *Textbook on International Law* (6th edn, Oxford: Oxford University Press, 2007), p 63.

<sup>95</sup> See, in this respect, the warning of E. W. Vierdag, 'The International Court of Justice and the law of treaties' in *supra* n 94, pp 165–6.

## Methods of proof of consent

### *Diplomatic practice*

42. On a preliminary basis, from contemporary diplomatic practice the following observation ensues. The exchanged instruments constituting a treaty are usually not submitted to ratification, acceptance, or approval.<sup>96</sup> Consequently, the conclusion of the treaty is immediate and in simplified form.

43. However, practice evidences cases—rather rare, it is true<sup>97</sup>—where States conduct an exchange of notes,<sup>98</sup> letters,<sup>99</sup> declarations,<sup>100</sup> or *notes verbales*<sup>101</sup> subject to ratification or approval.<sup>102</sup> In this case, the exchange of instruments does not constitute a mode of conclusion, the treaty being concluded by ratification or approval. Since it must be concluded in solemn form, the treaty, consequently, is not concluded immediately.

### *Methods of proof of collective will*

44. The methods of proof of consent to be bound by exchange of instruments constituting a treaty are enumerated in paragraphs (a) and (b) of Article 13 of the Vienna Convention according to which the consent of States to be bound by a treaty constituted by instruments exchanged between them is expressed by that exchange: when the instruments provide that their exchange will have that effect; or when it is otherwise established that those States were agreed that the exchange of instruments would have that effect. These methods can be described as methods of proof of collective will. The exchange of instruments constituting a treaty will constitute, indeed, a means of expressing consent of the States to be bound by the treaty insofar as these States have expressed an *agreement* in that sense: either the instruments constituting the treaty in question envisage it expressly or implicitly (intrinsic proof), or it is otherwise established that these States were expressly or implicitly agreed that it would be so (extrinsic proof).

### Intrinsic proof

45. The first method of proof of collective will of States is the proof known as 'intrinsic' such as provided for in Article 13(a) of the Convention, by virtue of which the exchange

<sup>96</sup> R. Jongbloet-Hamerlijck, *supra* n 3, p 217.

<sup>97</sup> See the intervention of Mr Nahlik (Poland) during the 59th meeting of the Committee of the Whole (in United Nations Conference on the Law of Treaties, 1st session, Official Documents, Summary Records, p 346, para. 94).

<sup>98</sup> For examples of exchanges of notes between two States subject to two ratifications, subject to two approvals or subject to one ratification and one approval, see J. L. Weinstein, *supra* n 2, p 210, respectively fns 9, 10, and 13. For more examples, see R. Jongbloet-Hamerlijck, *supra* n 3, p 216.

<sup>99</sup> For examples, see R. Jongbloet-Hamerlijck, *supra* n 3, pp 216–17.

<sup>100</sup> With regard to exchanged instruments, Jules Basdevant states that:

On en trouve parfois, surtout sous le nom de déclarations échangées, dans lesquelles est réservée la ratification des deux Gouvernements: cette réserve paraît avoir été plus fréquente autrefois qu'aujourd'hui, bien qu'elle n'ait pas complètement disparu. (J. Basdevant, 'La conclusion et la rédaction des traités et des instruments diplomatiques autres que les traités', *supra* n 3, p 610)

For an example of exchange of declarations subject to ratification, see Basdevant, *ibid*, p 615, fn 2.

<sup>101</sup> For an example of exchange of *notes verbales* subject to ratification, see J. L. Weinstein, *supra* n 2, p 206, fn 8.

<sup>102</sup> J. Basdevant, 'La conclusion et la rédaction des traités et des instruments diplomatiques autres que les traités', *supra* n 3, p 615, fn 2; Sir Ernest Sarow, *supra* n 3, p 247, para. 29.35; J. L. Weinstein, *supra* n 2, p 224.

between States of instruments constituting a treaty expresses their consent to be bound by the treaty when the instruments provide that their exchange will have that effect. In other words, the proof of the agreement to grant to the exchange the quality of means of expression of the consent to be bound will be found, either explicitly or implicitly, intrinsically in the text of the treaty itself. One can cite, as an example, the exchange of notes of 17 and 25 August 1950 constituting an agreement between the Netherlands and Luxembourg regarding the placement of Dutch agricultural workers in Luxembourg.<sup>103</sup> The initial note No. 1277 dated 17 August 1950, written by the envoy extraordinary and minister plenipotentiary of the Netherlands in Luxembourg and addressed to the minister for foreign affairs of Luxembourg, contains the following final clause:

The present note, and Your Excellency's reply, shall be considered as constituting an agreement between our two Governments on the subject.<sup>104</sup>

The confirmative note written by the Luxembourg minister for foreign affairs addressed to the envoy extraordinary and minister plenipotentiary of the Netherlands to Luxembourg first acknowledges receipt of the Dutch note, then reproduces the contents of the aforesaid note in full, and ends with the following final clause:

Your Excellency's note, and the present reply, shall be considered as constituting an agreement between our two Governments on the subject.<sup>105</sup>

Thus, the proof of this (explicit) will can be found in the text of the treaty itself.<sup>106</sup> In the same way, one can reasonably infer from a final clause stipulating that the treaty will enter into force on the date of the confirmative note, that the exchange amounts to final consent. Also, for example, the exchange of notes of 23 May 1950 constituting an agreement between the United States and Iran relating to mutual defence assistance.<sup>107</sup> The initial note originating from the US Acting Secretary of State and addressed to the chargé d'affaires *ad interim* of Iran contains the following final clause:

I propose that, if these understandings meet with the approval of the Government of Iran, this note and your note concurring therein will be considered as confirming these understandings, effective on the date of your note...<sup>108</sup>

The confirmative note written by the chargé d'affaires *ad interim* of Iran and addressed to the US Acting Secretary of State first acknowledges receipt of the US note, then reproduces the contents of the aforesaid note in full, and ends with the following final clause:

I have the honour to concur in the proposals made in your note and to inform you that the understandings set forth therein meet with the approval of the Government of Iran. That note and the present note, accordingly, are considered as confirming these understandings, effective on this date...<sup>109</sup>

<sup>103</sup> For the text of the agreement, see 81 UNTS 14–19.

<sup>104</sup> 81 UNTS 19.

<sup>105</sup> *Ibid.*

<sup>106</sup> This conclusion is, otherwise, confirmed by a footnote in the UNTS indicating that the agreement entered 'into force on 25 August 1950, by the exchange of the said notes' (81 UNTS 15).

<sup>107</sup> For the text of the agreement, see 81 UNTS 4–11.

<sup>108</sup> 81 UNTS 8.

<sup>109</sup> 81 UNTS 10.

Proof of the common will of the two contracting parties is thus implicitly enshrined in the very text of the treaty, namely in the final clause concerning its entry into force.

46. In these cases, proof of common will of States thus emerges intrinsically from the very text of the treaty. For this reason, this proof is known as 'intrinsic'.

#### Extrinsic proof

47. The second method of proof of collective will is the proof known as 'extrinsic'. Consequently, proof of collective will should be sought outside the text of the treaty. According to Alexandru Bolintineanu, extrinsic proof would not have been established in customary international law at the time of the adoption of the Vienna Convention, in the absence of diplomatic practice in this sense.<sup>110</sup> So the admission of extrinsic proof by Article 13(b) would, it is submitted, amount to a progressive development of international law on the matter. Weinstein seemed to refute this allegation by affirming in 1952 that:

In some cases exchanges of notes have been ratified although there was no provision for this in the agreement: e.g. Exchange of Notes of 4 July 1948 between the United States and Turkey: *U.N.T.S.* 34 (1950), p. 185.<sup>111</sup>

48. In any event, as general international law on the matter does not impose formal requirements, the Vienna Conference deemed the period convenient for admitting extrinsic proof for the purpose of establishing whether the States in question did not *otherwise* express a collective will as to the legal consequences of the exchange of their instruments constituting a treaty. In this respect, the principle of the autonomy of will of the negotiating States constitutes, indeed, a guiding principle.<sup>112</sup> It is the *ratio legis* of Article 13(b) of the Vienna Convention, which stipulates that the consent of States to be bound by a treaty is expressed by the exchange of instruments when it is *otherwise* established that these States were agreed that the exchange would have that effect. In this respect, Paul Reuter, the Special Rapporteur on the law of treaties concluded between States and international organizations or between two or more international organizations, stressed in 1975 that:

It could hardly be denied that, in the spirit of the Vienna Convention, the words 'it is otherwise established that the...States...were agreed' could apply to an oral or even a tacit agreement.<sup>113</sup>

49. The problem is, however, that the 1969 Convention does not identify the means which make it possible to discover the collective intention of the parties. Due to the general and vague character of the expression 'is otherwise established', Article 13(b) seems to admit all means of proof of the collective intention of the parties.<sup>114</sup>

<sup>110</sup> A. Bolintineanu, *supra* n 51, p 684.

<sup>111</sup> J. L. Weinstein, *supra* n 2, p 224, fn 5.

<sup>112</sup> H. Blix, 'The Requirement of Ratification', *supra* n 23, p 359; A. Bolintineanu, *supra* n 51, pp 673-4, 677, and 684; P. Reuter, *La Convention de Vienne du 29 mai 1969 sur le droit des traités*, *supra* n 50, pp 15-16; I. Sinclair, *supra* n 79, p 41.

<sup>113</sup> Intervention of Mr Reuter during the 27th session, 1353th meeting of the ILC (*YILC*, 1975, vol. I, p 269).

<sup>114</sup> In this sense: A. Bolintineanu, *supra* n 51, p 683; S. Rosenne, "Consent" and Related Words in the Codified Law of Treaties' in *Mélanges offerts à Charles Rousseau. La communauté internationale* (Paris: Pedone, 1974), p 245.

50. If the text of the treaty itself does not solve the question of the legal consequences of the exchange of instruments, the intention of States having carried out such exchange of instruments constituting a treaty will have to be established, in accordance with the principles of interpretation as set forth in Articles 31 to 33 of the Vienna Convention. Consequently, a careful examination will be necessary, among other things, of the context,<sup>115</sup> of any later agreement,<sup>116</sup> of any subsequent applicative and interpretative practice,<sup>117</sup> of the preparatory work of the treaty,<sup>118</sup> as well as all the circumstances relating to its conclusion.<sup>119</sup> In addition, it is not ruled out that the common and constant practice of the States concerned can also, if necessary, constitute an indicium, even an acceptable means of proof.<sup>120</sup> Thus, the fact that similar treaties concluded by the parties between them or concluded by each of the parties with third States were concluded by exchange of instruments constituting treaties, can constitute evidence of the will of the States concerned.<sup>121</sup> In the same way, it is probable that the note published by the Secretariat of the United Nations accompanying the publication of the treaties in the United Nations Treaty Series and indicating that the treaty in question 'entered into force on...by the exchange of the aforesaid notes', also constitutes an acceptable means of proof.<sup>122</sup>

<sup>115</sup> For recourse to the context as a general rule of treaty interpretation, see Art. 31(1) and (2) of the Vienna Convention. Paul Reuter specifies furthermore, as regards the entry into force, that:

Bien entendu, si un traité par échange de lettres se présente comme un accord accessoire à un ensemble plus vaste d'accords constituant une unité, l'accord par échange de lettres n'entre en vigueur qu'avec l'ensemble dont il fait partie (exemple: accord par échange de lettres entre l'Allemagne et la France sur la Sarre inclu (*sic*) dans le traité CECA, du 18 avril 1951). (P. Reuter, *Introduction au droit des traités*, *supra* n 23, p 79, para. 101\*)

<sup>116</sup> For recourse to any subsequent agreement as a general rule of treaty interpretation, see Art. 31(3)(a) of the Vienna Convention.

<sup>117</sup> For recourse to any subsequent practice as a general rule of treaty interpretation, see Art. 31(3)(b) of the Vienna Convention. On the distinction between applicative, interpretative, modifying, and abrogative subsequent practice, see G. Distefano, 'La pratique subséquente des Etats parties à un traité', *AFDI*, 1994, pp 41–71.

<sup>118</sup> For recourse to the preparatory work of the treaty as a supplementary rule of treaty interpretation, see Art. 32 of the Vienna Convention.

<sup>119</sup> For recourse to the circumstances of conclusion as a supplementary rule of treaty interpretation, see Art. 32 of the Vienna Convention.

<sup>120</sup> Cf the First Report (A/CN.4/63) of Sir Hersch Lauterpacht dated 24 March 1953, *YILC*, 1953, vol. II, pp 112 and 115, para. 5(d); the Second Report (A/CN.4/87\*) of Sir Hersch Lauterpacht dated 8 July 1954, *YILC*, 1954, vol. II, p 127 and the observations of the government of the United States and the Special Rapporteur, Sir Waldock in the Fourth Report on the Law of Treaties of the Special Rapporteur, Sir Humphrey Waldock (A/CN.4/177 and Add.1 and 2), *YILC*, 1965, vol. II, pp 37 and 39. Cf also the Harvard Research Draft Code on the Law of Treaties, *AJIL*, Suppl. 1935, vol. 29, p 769.

<sup>121</sup> For the question of recourse to the relevant practice of parties vis-à-vis third States, see esp. the case concerning the *Air Service Agreement of 27 March 1946 between the United States of America and France*, decision of 9 December 1978 (*RIAA*, vol. XVIII, p 441, paras 70–1) and the case concerning the *Interpretation of the Air Transport Services Agreement between the United States of America and Italy of 6 February 1948*, Advisory Opinion of 17 July 1965 (*RIAA*, vol. XVI, p 101, para. 7). On the limited application of the analogy in search of the intention of the parties, see V. D. Degan, *L'interprétation des accords en droit international* (The Hague: Martinus Nijhoff), 1963, pp 100–2, paras 65–6, p 116, para. 72 and pp 132–4, para. 78 (and the references to arbitration case law and case law of the PCIJ and the ICJ).

<sup>122</sup> See esp. Art. 5(2) and Art. 12(5) of the Regulations on the registration and the publication of treaties and international agreements. For a consolidated version of the aforesaid Regulations, see 859/860 UNTS 12–20. See also the *note verbale* LA 41 TR/230 of the Legal Counsel of the United Nations dated 3 February 2010. Cf M. Frankowska, *supra* n 23, p 79 as well as the Second Report of 8 July 1954 (A/CN.4/87\*) by Sir Hersch Lauterpacht, *YILC*, 1954, vol. II, p 129. As regards the requirement of the temporal character of the registration or filing and recording of treaties as well as their publication, see *infra* in this work the commentary on Art. 80 of the 1969 Convention.

51. Lastly, a certain doctrine accepts that the nature, the contents, or the object of the treaty constitutes evidence of the collective will of the States. Thus, exchanges of notes regulating matters of lesser importance would not be subject to ratification, except when expressly contrary clauses are contained in the notes.<sup>123</sup> If it is true that State practice accepts in general that consent is expressed by the exchange when it concerns an administrative, interpretative, or implementing agreement, one cannot, however, establish the criterion of the object of the treaty as a legal principle. As already pointed out, there is a quasi-interchangeability of forms for similar objects of minor or major importance.<sup>124</sup> Here still, it is only if one particular intention can be deduced from the nature of the act due to a common and constant practice of the States in question, that the criterion of the nature of the conventional act could, if necessary, be retained.

52. In conclusion, it boils down to the issue of the intention—if not real, at the very least supposed—of the States in question. In this respect, States have complete freedom to express their collective will on this subject by whatever means. This is why Article 13(b) seems to accept all means of proof of collective will as to the legal consequences of the exchange. In the best of cases, the interpreter will gather from the context, the preparatory work, the circumstances of the conclusion of the treaty, the practice of the States concerned, and the note published in the United Nations Treaty Series, a number of indicia, even of evidence allowing him to detect the collective intention of the States concerning the legal consequences of the exchange of their instruments constituting a treaty.<sup>125</sup> In the worst of cases, the intention of the parties will have to be established, and even presumed, on the basis of only one element of evidence. International law, however, leaves to the free examination of the interpreter—if necessary, of the judge—the task of solving the delicate question of the weighing of indicia of the evidence thus obtained. As Manfred Lachs underlined, an international jurisdiction ‘enjoys a complete liberty of action and appreciation as for the evidence which are presented to him, and that for the facts as for the law’.<sup>126</sup> Thus, the interpreter, starting from the indicia and evidence brought to his attention, will

<sup>123</sup> Sir R. Jennings and Sir A. Watts, *supra* n 6, p 1230, para. 603; S. Rosenne, ‘“Consent” and Related Words in the Codified Law of Treaties’ in *supra* n 114, p 247; the observation of the Special Rapporteur, Sir Waldock, in his Fourth Report on the Law of Treaties (A/CN.4/177 and Add.1 and 2), *YILC*, 1965, vol. II, p 38, para. 4. Cf G. Fitzmaurice, *supra* n 20, p 127 (quoting Oppenheim).

<sup>124</sup> See A. Bolintineanu, *supra* n 51, pp 677–8; J. Dehaussy, ‘Les traités. Conclusion et conditions de validité formelle’ in *supra* n 23, pp 26–7, para. 48; P.-F. Smets, *supra* n 6, p 31. Cf L. Wildhaber, ‘Executive Agreements’ in *supra* n 18, p 314.

<sup>125</sup> Cf the observation of Special Rapporteur, Sir Humphrey Waldock in his Fourth Report on the Law of Treaties (A/CN.4/177 and Add.1 and 2), *YILC*, 1965, vol. II, p 38, para. 3. As regards research by the interpreter of the parties’ common will, see inter alia the arbitral award rendered on 9 December 1966 by HM Queen Elizabeth II of the United Kingdom with the Report, in appendix, of the Court of Arbitration chaired by Lord McNair in the *Argentina-Chile Frontier Case* (in *ILR*, 1966, vol. 38, p 89), the decision regarding the *Delimitation of the Border between Eritrea and Ethiopia*, dated 13 April 2002, adopted unanimously by the Eritrea-Ethiopia Boundary Commission, chaired by Sir Elihu Lauterpacht (previously unpublished, p 21, para. 3.4) as well as the arbitral award of 12 March 2004 in the case concerning the *Auditing of accounts between the Kingdom of the Netherlands and the French Republic pursuant to the additional Protocol of 25 September 1991 to the Convention on the Protection of the Rhine against pollution by Chlorides of 3 December 1976* (previously unpublished, p 26, para. 62) where the Arbitral Tribunal concludes that ‘[a]ll the elements of the general rule of interpretation [codified in Art. 31 of the Vienna Convention] provide the basis for establishing the common will and intention of the parties by objective and rational means’.

<sup>126</sup> M. Lachs, ‘La preuve et la Cour internationale de Justice’ in Ch. Perelman and P. Foriers (eds), *La preuve en droit* (Brussels: Bruylant, 1981), p 111. See also G. Niyungeko, *La preuve devant les juridictions internationales* (Brussels: Bruylant, 2005), p 484.

have to determine if the parties in question wanted to express, by the exchange, their consent to be bound by the treaty. Let us underline finally that neither the Vienna Convention on the Law of Treaties, nor customary international law contains any supplementary rule in the event of absence of intention on behalf of the interested States.<sup>127</sup>

### *Methods of proof of individual will*

53. On the one hand, contrary to Articles 12, 14, and 15 of the Vienna Convention which deal with the expression of the consent of *a State* to be bound by a treaty by affixing a final signature, by ratification, or by accession, Article 13 refers to the expression of the consent of *States* to be bound by a treaty through the exchange of instruments constituting a treaty.<sup>128</sup> Conventional practice, however, presents cases where the exchanged instruments reserve ratification or approval for only one State.<sup>129</sup> In this case, the treaty is concluded by exchange of instruments for one, and by ratification or approval for the other. Legal (ie national constitutional law) and political reasons can, indeed, explain why the same treaty can thus be concluded in simplified form for one party and in solemn form for the other.<sup>130</sup> This practice, however, is not covered by Article 13, insofar as, in such a case, the expression of *consent* to be bound by a treaty by exchange of instruments does not emanate from *States* but from *only one State*.

54. On the other hand, contrary to Article 12(1)(c) and Article 14(1)(c) and (d) of the Vienna Convention which accept, as methods of proof of individual will, the proof by full powers, unilateral declaration during the negotiation, or by signature subject to ratification, Article 13 only admits methods of proof of collective will for the purpose of determining whether the exchange of instruments constituting a treaty expresses the consent of States to be bound by a treaty.

55. The drafting of Article 13 is all the more regrettable since several Articles of the Vienna Convention consider directly or indirectly the assumption of the consent of *a State* to be bound by the exchange of instruments constituting a treaty. First, Article 11 of the Convention provides that '[t]he consent of *a State* to be bound by a treaty may be expressed by...exchange of instruments constituting a treaty...'.<sup>131</sup> Next, the assumption is

<sup>127</sup> For the examination of the question of the absence of a supplementary rule, see *infra* paras 56–64.

<sup>128</sup> On this question, see S. Rosenne, "Consent" and Related Words in the Codified Law of Treaties' in *supra* n 114, pp 240–1 and M. E. Villiger, *supra* n 53, p 199. See also the interventions of Messrs Rosenne (Israel), Harry (Australia), Yasseen (chairman of the Drafting Committee), Jagota (India), and Baden-Semper (Trinidad and Tobago) during the 59th meeting of the Committee of the Whole and the proposal of the Chairman Mr Elias (Nigeria) to leave it to the Drafting Committee to decide whether the word 'States' in the phrase 'The consent of States' at the beginning of the Article should remain in the plural (in United Nations Conference on the Law of Treaties, 1st session, Official Documents, Summary Records, pp 345–7, paras 79–80, 86, 88, 96, and 104–5).

<sup>129</sup> A. Bolintineanu, *supra* n 51, p 681; C. Chayet, *supra* n 2, p 9; P. Reuter, *Introduction au droit des traités*, *supra* n 23, p 60, para. 107; D. Ruzié, *supra* n 54, p 39. For an example of exchange of notes between two States subject to one ratification only, see J. L. Weinstein, *supra* n 2, p 210, fn 11. Cf the example given by J. Basdevant, 'La conclusion et la rédaction des traités et des instruments diplomatiques autres que les traités', *supra* n 3, p 610, fn 1. For an example of exchange of notes between two States subject to one approval only, see J. L. Weinstein, *supra* n 2, p 210, fn 12.

<sup>130</sup> T. O. Elias, *supra* n 20, p 24; R. Jongbloet-Hamerlijncx, *supra* n 3, pp 225–6. See also para. 3 of the commentary on draft Art. 12 (Art. 14 of the Convention) provisionally adopted by the ILC during its 14th session, Report of the ILC to the General Assembly (A/5209), *YILC*, 1962, vol. II, p 172 and para. 3 of the final commentary on draft Art. 11 (Art. 14 of the Convention) adopted by the ILC during its 18th session, Report of the ILC to the General Assembly (A/6309/Rev.1), *ACDI*, 1966, vol. II, p 197.

<sup>131</sup> Emphasis added. Cf the intervention of Mr Baden-Semper (Trinidad and Tobago) during the 59th meeting of the Committee of the Whole (in United Nations Conference on the Law of Treaties, 1st session, Official Documents, Summary Records, p 347, para. 104).

also present in Article 18(a) of the Convention, by virtue of which a State must refrain from acts which would defeat the object and purpose of a treaty when it has exchanged instruments constituting the treaty subject to ratification, acceptance, or approval, until it has made clear its intention not to become a party to the treaty. Lastly, the methods of proof of the individual will as regards ratification envisaged in Article 14(1) of the Convention accept that the exchange of notes or letters can be subject to ratification for only one State when the representative of that State has signed the treaty subject to ratification (Art. 14(1)(c) of the Convention) or when the intention to ratify appears from the full powers of its representative or was expressed during the negotiation (Art. 14(1)(d) of the Convention).

#### *Suppletory presumption?*

56. For some authors, the formal criterion of the denomination of the instruments constituting a treaty constitutes an indicium of a piece of evidence of the intention of the States.<sup>132</sup> The exchange of instruments called 'notes' or 'letters' would express, consequently, because of their very name, the consent of States to be bound by the treaty thus concluded.<sup>133</sup> Other authors, who put the accent on the form in which the treaty is concluded, note that, in the case of treaties concluded in the form of exchange of notes or letters, the exchange is worth final consent to be bound by the treaty, unless the States expressly provide for ratification. Thus, Sir Robert Jennings and Sir Arthur Watts note that the '[e]xchanges of notes [do] not normally require ratification, unless expressly provided'.<sup>134</sup>

57. The question therefore arises whether a rebuttable presumption would exist under the terms of which a treaty constituted by exchange of notes or letters is supposed to be concluded by that exchange on the assumption that the States in question did not express their intention on this subject either in their instruments or otherwise. It is appropriate to examine this question under the Vienna Convention, on the one hand, and under customary international law, on the other hand.

#### The Vienna Convention

58. The Vienna Convention does not contain any suppletory presumption on this subject. Neither the text of Article 13 of the Convention, nor its context, mentions such a subsidiary rule, according to which the consent of States to be bound by a treaty constituted by exchanged instruments is expressed by that exchange, unless the States in question otherwise agreed. Moreover, the preparatory work confirms this conclusion with certainty. As already mentioned, Article 13 originates in a Polish proposal (A/CONE.39/C.1/L.89).<sup>135</sup> Draft Article 10*bis*, as submitted by the Polish delegation, contained a

<sup>132</sup> Observation of the Special Rapporteur, Sir Waldock, in his Fourth Report on the Law of Treaties (A/CN.4/177 and Add.1 and 2), *YILC*, 1965, vol. II, p 38, para. 4; L. Wildhaber, 'Executive Agreements' in *supra* n 18, p 314.

<sup>133</sup> A. Cassese, *supra* n 16, p 172; J. L'Huillier, *Éléments de droit international public* (Paris: Ed. Rousseau, 1950), p 188, para. 319. Cf Harvard Research Draft Code on the Law of Treaties, *supra* n 120, p 769. See also for the definition of the expression 'treaty in simplified form', the text of draft Art. 12(2)(d) as well as para. 7 of the commentary, provisionally adopted by the ILC during its 14th session, Report of the ILC to the General Assembly (A/5209), *YILC*, 1962, vol. II, pp 161 and 171-3. See also the observation of Special Rapporteur, Sir Waldock, in his Fourth Report on the Law of Treaties (A/CN.4/177 and Add.1 and 2), *YILC*, 1965, vol. II, p 38, para. 4.

<sup>134</sup> Sir R. Jennings and Sir A. Watts, *supra* n 6, p 1229, para. 606, fn 5 *in fine*. Cf G. Fitzmaurice, *supra* n 20, p 127.

<sup>135</sup> See *supra* at para. 10.

suppletory presumption in favour of the exchange as a means of expressing the consent to be bound. Put to the vote, the Polish proposal was adopted by the Committee of the Whole 'on the understanding that the Drafting Committee would make the necessary drafting changes'.<sup>136</sup> The Drafting Committee redrafted the text of Article 10*bis* as follows:

Article 10 bis

The consent of States to be bound by a treaty constituted by instruments exchanged between them is expressed by that exchange when:

- (a) the instruments provide that their exchange shall have that effect;
- (b) it is otherwise established that those States were agreed that the exchange of instruments should have that effect.<sup>137</sup>

The chairman of the Drafting Committee, Mr Yasseen, justified the deletion of the suppletory presumption enshrined in the Polish proposal:

so as to take account of the Committee of the Whole's decisions on the other articles relating to the expression of consent; the Committee of the Whole had deemed it inappropriate to include a subsidiary rule in favour of a particular method of expressing that consent. The wording of the Polish amendment might be construed to mean that it was stating a subsidiary rule establishing the presumption that an exchange of instruments constituted a treaty. That was the conclusion that had been arrived at by the majority of the members of the Drafting Committee.<sup>138</sup>

In accordance with its own initial decision, the Committee of the Whole thus decided in favour of the suppression of the presumption and adopted, in this respect, the text altered by the Drafting Committee.<sup>139</sup>

59. One may, consequently, conclude that the Vienna Convention does not contain any suppletory presumption in favour of the exchange as a means of expressing consent to be bound by a treaty.<sup>140</sup>

#### Customary international law

60. Although the Vienna Convention does not contain any presumption, it is nevertheless advisable to determine whether such a presumption would exist in customary international law. What is the conventional practice of States in this respect and what is their *opinio juris sive necessitatis*? If necessary, would a later interpretative agreement<sup>141</sup> or a common interpretative practice establishing such an agreement<sup>142</sup> exist between the States parties to the Vienna Convention with regard to the application or interpretation of Article 13?

<sup>136</sup> United Nations Conference on the Law of Treaties, 1st session, Official Documents, Summary Records, p 94, para. 5.

<sup>137</sup> Ibid, p 345, para. 75.

<sup>138</sup> Ibid, p 345, para. 77. See also the observations of Mr Yasseen, chairman of the Drafting Committee, in response to the intervention of the Swedish representative, Mr Blix (ibid, p 346, para. 89) and in response to the intervention of the Canadian representative, Mr Wershof (ibid, p 346, para. 99). See finally the intervention of the representative of Uruguay, Mr Jiménez de Aréchaga (ibid, pp 346–7, paras 100–3).

<sup>139</sup> Ibid, p 347, para. 105.

<sup>140</sup> For the absence of any suppletory presumption in favour of signature or ratification in the Vienna Convention, see *supra* in this work paras 34–5 of the commentary relating to Art. 12.

<sup>141</sup> For recourse to any subsequent agreement as a general rule of treaty interpretation, see Art. 31(3)(a) of the Vienna Convention.

<sup>142</sup> For recourse to subsequent practice as a general rule of treaty interpretation, see Art. 31(3)(b) of the Vienna Convention.

61. State practice seems to be uniform in this respect. Hans Blix, examining the League of Nations period as well as the period 1945–53, affirmed in an article published in 1953 that:

An examination of the modern practice of States gives convincing support to Professor Lauterpacht's view. Exchanges of notes frequently lack provisions concerning the mode of entry into force; in such cases they are not, as a rule, ratified. Of the League treaties, some seventy-five such exchanges of notes were found, and none of them was ratified. Of the United Nations treaties, 125 such exchanges of notes were found, and only one of them was ratified.<sup>143</sup>

In his capacity as head of the Swedish delegation at the Vienna Conference, Mr Blix alleged the existence of

a legal presumption, a residual rule—which was undisputed in his delegation's view—that when a treaty had been entered into by means of an exchange of notes, the expression of consent lay in that exchange, unless otherwise expressly agreed.<sup>144</sup>

In his view, it would appear to be 'a rule to the effect that no subsequent approval was required after the exchange of instruments, unless otherwise agreed between the parties'.<sup>145</sup> Maria Frankowska, carrying out the examination of the 1,579 treaties contained in volumes 453 to 552 of the United Nations Treaty Series covering the period 1963–65, arrived at the same conclusion. Out of a total of 1,579 treaties, 151 treaties did not contain a clause relating to the means of expressing the consent to be bound by the treaty. She concludes that:

Tous ces traités sont entrés en vigueur en vertu de la procédure à un degré (soit par la signature, soit par l'échange de documents constituant l'accord). Il n'y en a pas un seul qui ait été ratifié ou approuvé.<sup>146</sup>

62. As for the *opinio juris sive necessitatis*, a treaty constituted by exchange of notes or letters would be, in the spirit of these States, necessarily supposed to be concluded by the exchange, if the States in question did not express their intention on this subject. For which other reasons, if not those of simplicity and convenience, would States have recourse to the exchange of instruments? Such is the thesis of the second Special Rapporteur, Sir Hersch Lauterpacht.<sup>147</sup> As for the ILC, although it defended a similar

<sup>143</sup> Exchange of notes between the United States of America and Turkey, relating to the application of most-favoured-nation treatment to the merchandise trade of certain areas under occupation or control. The notes were exchanged at Ankara on 4 July 1948. The fifth Article of these notes lays down the duration of the Agreement, but provides nothing as to the manner in which it was to enter into force. A footnote in the *United Nations Treaty Series* states that the Agreement 'came into force on the 13 July 1948, by notice of ratification thereof given to the Government of the United States of America by the Government of Turkey' (34 UNTS 185).

(Original note, H. Blix, 'The Requirement of Ratification', *supra* n 23, p 366.)

<sup>144</sup> United Nations Conference on the Law of Treaties, 1st session, Official Documents, Summary Records, p 345, para. 81.

<sup>145</sup> *Ibid*, p 345, para. 82. Mr Blix concluded that 'the Drafting Committee's text [deleting the residual legal presumption] would throw doubt on the existence of that rule and would therefore be a step backwards rather than forwards. In fact, it was purely descriptive' (*ibid*, p 345, para. 83).

<sup>146</sup> M. Frankowska, *supra* n 23, pp 78–9. See also G. Fitzmaurice, *supra* n 20, p 129.

<sup>147</sup> See in this respect the First Report (A/CN.4/63) of Sir Hersch Lauterpacht dated 24 March 1953, *YILC*, 1953, vol. II, pp 112 and 115 and his Second Report (A/CN.4/87\*) dated 8 July 1954, *YILC*, 1954, vol. II, p 127.

thesis at a given moment,<sup>148</sup> it did not, however, retain it in the final text of its draft Articles adopted in 1966, even if the final commentary is still reminiscent of that view at a certain point.<sup>149</sup>

63. In our opinion, the arguments put forward by Blix and Frankowska are hardly convincing. It is very probable that States were agreed *otherwise* (for example, in an exchange of mails, a verbal or even tacit agreement between the negotiators concerned) that the exchange of their instruments would express their final consent to be bound by the treaty, this not being obviously observable to the researcher in the library carrying out the analysis of the conventional practice of States. As for Lauterpacht's thesis, by presuming *ex officio* consent by the exchange, it restricts, to some extent, the freedom of expression of States by preventing them from expressing their intention *a posteriori* on this subject. Ultimately, as Mr Jiménez de Aréchaga correctly emphasizes, there is a 'danger of introducing a presumption in virtue of which a State could become bound to another State by such a simple and common act as an exchange of notes'.<sup>150</sup> Consequently, we are of the opinion that no legal presumption exists in favour of the exchange in general international law. No hierarchy exists between the various means of expression of consent to be bound by a treaty, nor any presumption in favour of one particular means.<sup>151</sup> Ultimately, the question of determining whether the exchange expresses consent to be bound by a treaty is essentially a question of intention.<sup>152</sup>

64. In conclusion, neither the Vienna Convention nor customary international law establishes a suppletory presumption in favour of the exchange.

### Date of conclusion

65. It should first be noted that the conclusion of a treaty and its entry into force are two distinct legal operations,<sup>153</sup> even if they may coincide. If, taking Article 13 of the Vienna Convention into consideration, the conclusion *stricto sensu* of a treaty results from the conjunction of two or several consents to be bound by the treaty through the exchange of instruments, the entry into force enables the treaty to produce its full juridical effects.

66. As previously emphasized, the *act of exchange* of instruments constituting a treaty thus expresses the consent of States to be bound by a treaty. We still have to determine the *exact date of exchange* of the instruments. The question is of particular interest, insofar as,

<sup>148</sup> See for the definition of the expression 'treaty in simplified form', the text of draft Art. 12(2)(d) as well as para. 7 of the commentary, provisionally adopted by the ILC during its 14th session, Report of the ILC to the General Assembly (A/5209), *YILC*, 1962, vol. II, pp 161 and 171-3.

<sup>149</sup> See para. 3 of the final commentary of draft Art. 11 (Art. 14 of the Convention) adopted by the ILC during its 18th session, Report of the ILC to the General Assembly (A/6309/Rev.1), *YILC*, 1966, vol. II, p 197. For the literature, see also T. O. Elias, *supra* n 20, p 24 and G. Fitzmaurice, *supra* n 20, pp 127-9. On the work of the ILC, see A. Bolintineanu, *supra* n 51, p 676.

<sup>150</sup> United Nations Conference on the Law of Treaties, 1st session, Official Documents, Summary Records, p 347, para. 102.

<sup>151</sup> In this sense: A. Bolintineanu, *supra* n 51, p 676; J. Combacau and S. Sur, *supra* n 50, pp 119-20; Ph. Manin, *supra* n 50, p 87 and J. Salmon, *Droit des gens*, *supra* n 20, p 79. For the absence of any suppletory presumption in favour of signature or ratification in customary international law, see *supra* paras 34-5 of the commentary relating to Art. 12.

<sup>152</sup> G. Schwarzenberger, *supra* n 23, p 431.

<sup>153</sup> In this regard, it should be noted that the 1969 and 1986 Vienna Conventions on the Law of Treaties also treat these topics separately. Indeed, Part II, entitled 'Conclusion and Entry into Force of Treaties', has three sections: Section 1 entitled 'Conclusion of Treaties'; Section 2 entitled 'Reservations'; and Section 3 entitled 'Entry into Force and Provisional Application of Treaties'.

with regard to Article 13, it is the date of exchange that determines the *dies a quo* of the obligation not to defeat the object and purpose of a treaty prior to its entry into force.<sup>154</sup>

67. On a theoretical level and by analogy with national law, several possibilities can, indeed, be contemplated to determine the exact date of exchange of the instruments: the theory of emission (or declaration) of acceptance (date of the last of the instruments constituting a treaty), the theory of forwarding of acceptance (dispatch date of the last of the instruments constituting a treaty), the theory of reception of acceptance (date of reception of the last of the instruments constituting a treaty), even the theory of awareness (or effective information) of acceptance. Let us note that the question matters only if the acts (drafting, sending, reception, and reading of the last instrument constituting a treaty) are spread over time. Thus, an acceptance written, read aloud, and given the same day by a head of a diplomatic mission to a minister for foreign affairs implies that the treaty will be concluded the same day. It is only if these acts are not carried out at the same time, that the question of the determination of the exact date of exchange arises.

68. It should be noted that the authors have never genuinely studied the question of the date of conclusion of a treaty concluded by exchange of instruments, the doctrinal examination falling exclusively on the date of entry into force. The examination of the date of entry into force can, however, be relevant to the examination of the date of conclusion. Indeed a connection exists between the date of conclusion and that of entry into force of a treaty concluded by exchange of instruments insofar as, in accordance with Article 24(2) of the Vienna Convention, a treaty enters into force, unless a contrary intention appears, as soon as the consent to be bound by the treaty has been established for all the negotiating States, *in casu* on the date of the exchange of instruments.<sup>155</sup> Within the limits specified *supra*, one should note that the literature is divided between the theory of emission of acceptance and that of reception of acceptance. Indeed, some authors assert that the date of the last instrument determines the date of the exchange and, consequently, the date of conclusion of the treaty. Thus, Chayet claims that:

Dans l'hypothèse d'un échange de lettres c'est en principe et, sauf stipulation contraire explicite ou implicite, la date de la deuxième ou encore de la dernière lettre qui constitue le point de départ.<sup>156</sup>

Weinstein defends the same thesis, while upholding that:

As there are no rules prescribing the form of exchanges of notes, so there are none prescribing the time at which agreements concluded in this manner shall become effective. In the absence of an express provision, when the date of the notes is the same that date will be decisive for the purpose; when the dates are different the date of the later note will have that effect.<sup>157</sup>

Other authors, on the other hand, allege that the date of reception of the last instrument determines the date of the exchange and, consequently, the date of conclusion of the treaty.<sup>158</sup> Finally, other authors still are profoundly hesitant. Thus, Satow hesitates between the date of the last note or the date of its reception. In fact, it is suggested that:

<sup>154</sup> Article 18(b) of the Vienna Convention.

<sup>155</sup> For the question of the entry into force, see *infra* paras 73–6.

<sup>156</sup> C. Chayet, *supra* n 2, p 8.

<sup>157</sup> J. L. Weinstein, *supra* n 2, pp 209–10.

<sup>158</sup> Nguyen Quoc Dinh, P. Daillier, M. Forteau, and A. Pellet, *supra* n 20, p 159, para. 84: 'Autrement, les signatures s'effectuent par un échange de notes ou de lettres, la date du traité étant celle de la réception de la deuxième lettre ou note'.

Normally the Notes exchanged recording the agreement bear the same date, in which case, unless they provide otherwise, the agreement has effect from that date. If they bear different dates, that of the last Note, or at any rate the date of its receipt, is the governing date (unless it is otherwise provided), since the agreement cannot be regarded as completed until it is plain that it has been accepted on both sides.<sup>159</sup>

And Fitzmaurice declares that:

...an exchange of notes...come[s] into force either on the actual date of the exchange, or perhaps on the date of the last note of the series, or on a date agreed upon and indicated in the notes themselves, as the parties may desire.<sup>160</sup>

69. It emerges from an examination of the literature that none of the two theories creates unanimity. These findings can probably be explained by the fact that the term 'exchanges' and the verb 'to exchange' can be defined in various ways. The *Dictionnaire de droit international public*, edited by Jean Salmon, thus defines the term 'exchanges' as follows:

- A. Remise réciproque de biens, de documents ou de personnes.  
Exemple: échange de territoires, de prisonniers, de ratifications, etc.
- B. Fait de s'exprimer tour à tour oralement ou par écrit.  
Exemple: échange de consentement, échange de lettres.<sup>161</sup>

Thus, meaning A of the term 'exchange' would be devoted to the theory of reception of acceptance, whereas meaning B would support the theory of emission of acceptance. The *Oxford English Reference Dictionary* defines the term 'exchange' as follows:

- 1. The act or an instance of giving one thing and receiving another in its place.  
...
- 7a. A short conversation, esp. a disagreement or quarrel. b. A sequence of letters between correspondents.<sup>162</sup>

Adoption of the first meaning implies the adoption of the theory of reception, while the theory of forwarding results from the adoption of the second meaning.

70. Taking stock of these developments, we are of the opinion that the following conclusions can be formulated. First, States themselves can freely set the time of the conclusion of the treaty. Nothing prevents them from settling this question as they wish, considering the dispositive character of the law governing this issue. Next, it emerges from Article 13, interpreted in good faith in accordance with the ordinary meaning to be given to the terms in their context and in the light of its object and purpose, that the theory of forwarding as well as that of reception can, as a supplementary rule, be defended *a priori*. However, the theories of emission and of effective awareness of the acceptance must be rejected. On the one hand, the theory of emission of acceptance (date of the last instrument) must, in our opinion, be rejected for the simple reason that a written note or letter—formulating an acceptance of an offer—can only be sent after a certain time. If the sending of the acceptance did not take place, no exchange can take place. Coexistence

<sup>159</sup> Sir Ernest Satow, *supra* n 3, pp 247–8, para. 29.36.

<sup>160</sup> G. Fitzmaurice, *supra* n 20, p 127.

<sup>161</sup> J. Salmon (ed.), *Dictionnaire*, *supra* n 5, see 'Échange', p 407.

<sup>162</sup> J. Pearsall and B. Trumble (eds), *The Oxford English Reference Dictionary* (2nd edn, Oxford: Oxford University Press, 1996), p 488.

of expressed and declared wills certainly exists, but no conjunction or union of wills. Consequently, no treaty could be concluded. It should, however, be noted that publication in the United Nations Treaty Series of treaties concluded by exchange of instruments indicates as date and place of conclusion *lato sensu* the dates and places indicated in the instruments (offers and acceptance) and, by deduction, as the date of conclusion *stricto sensu* the date of the last instrument constituting acceptance.<sup>163</sup> On the other hand, we believe that the theory of awareness of acceptance also cannot be retained, due to the fact that reading of an exchanged note or letter—formulating an acceptance of offer—can take place a certain time after the exchange itself. In other words, the exchange having already taken place, the treaty was already concluded. The late reading of exchanged instruments constituting a treaty is not, in this respect, a decisive criterion. Let us now determine why the theory of forwarding of acceptance (dispatch date of the last of the instruments constituting a treaty) as well as the theory of reception of acceptance (date of reception of the last of the instruments constituting a treaty) can be defended *a priori*. Let us recall that the date of dispatch and reception may coincide in the assumption of a delivery of a note expressing acceptance. This will generally be the case when the exchange of notes or letters takes place between the head of the diplomatic mission and the minister for foreign affairs during a ceremony or a meeting at the Ministry of Foreign Affairs. In this case, the two theories lead to the same conclusion. However, insofar as instruments exchanged by post are concerned, the question takes on its full importance in that the forwarding of mail can take several days, even several weeks.<sup>164</sup> The reason why the two theories can be defended can be summarized as follows. For the State of despatch of the instrument expressing acceptance, the exchange will be, in its opinion, already carried out by the sending of the aforesaid instrument, insofar as the expression of its acceptance is final at this time, except intercepting the sending of the mail *in extremis*. Thus, for the State of despatch, the theory of despatch will determine the exact date of conclusion. On the other hand, for the recipient State of the instrument expressing acceptance, the exchange will only, in its opinion, be carried out at the time of reception of acceptance of its offer. Thus, for the recipient State, the theory of reception will determine the exact date of conclusion.

71. Consequently, the question arises of determining which theory was considered by the UN Conference on the Law of Treaties. We are of opinion that, by analogy with Article 16 *juncto* Article 73 of the Vienna Convention, the theory of reception of acceptance can probably be regarded as having been implicitly retained at the Vienna Conference.<sup>165</sup> Indeed, the purpose of Article 16 is to determine the exact time of establishment of consent

<sup>163</sup> See eg the exchange of notes of 17 and 25 August 1950 constituting an agreement between the Netherlands and Luxembourg regarding the placement of Dutch agricultural workers in Luxembourg (81 UNTS 14–19). As the agreement did not contain any mode or date for its entry into force, the entry into force, as indicated in the footnote of the UNTS, namely 25 August 1950, coincides in conformity with Art. 24(2) of the Vienna Convention, with the date of conclusion *stricto sensu*.

<sup>164</sup> In this regard, one should note that diplomatic practice is not uniform. For example, whereas Belgian practice favours, in principle, the sending of the instruments by post, Dutch practice prefers, in principle, that the exchange of notes or letters takes place at the Ministry of Foreign Affairs, in order to determine with certainty the exact moment of the conclusion of the treaty. See also Philippe Manin, who specifies that '[d]ans le cas de l'échange de notes, c'est l'échange matériel de notes—qu'il se fasse de la main à la main ou par la voie postale—qui crée l'engagement' (Ph. Manin, *supra* n 50, p 88).

<sup>165</sup> On the question of the validity of the reasoning *per analogiam* in public international law, see J. Salmon, 'Le raisonnement par analogie en droit international public' in *Mélanges offerts à Charles Chaumont. Le droit des peuples à disposer d'eux-mêmes. Méthodes d'analyse du droit international* (Paris: Pedone, 1984), pp 495–525.

of a State to be bound by a treaty through instruments of ratification, acceptance, approval, or accession. In this respect, it provides, as a supplementary rule, that the aforementioned consent is established at the time either of the exchange of the aforesaid instruments between the contracting States, either of their deposit with the depositary, or of their notification to the contracting States or to the depositary, if so agreed. The ILC comments on this Article by specifying that 'in the case of exchange of instruments there is no problem; it is the moment of exchange'.<sup>166</sup> The exact moment of exchange remains thus unspecified. However, the Commission determines by analogy the exact moment of the exchange of instruments in its commentary relating to the procedure of notification. Indeed, it specifies initially that the procedure of notification of instruments either to the contracting States or to the depositary is equivalent, in the first case, with a simplified form of exchange of instruments and, in the second case, with a simplified form of deposit of instruments.<sup>167</sup> The Commission concludes its commentary by determining the exact date of establishment of consent to be bound by a treaty through instruments of ratification, acceptance, approval, or accession in the case of the procedure of notification as follows:

If the procedure agreed upon is notification to the contracting States, ... the consent of the notifying State to be bound by the treaty vis-a-vis another contracting State will be established only upon its receipt by the latter. On the other hand, if the procedure agreed upon is notification to the depositary, the same considerations apply as in the case of the deposit of an instrument; in other words, the consent will be established on receipt of the notification by the depositary.<sup>168</sup>

Ultimately, Article 16 of the Convention retains, as a supplementary rule, the theory of reception of the instrument of ratification, acceptance, approval, or accession for purposes of determining the exact moment of establishment of the consent of the State to be bound by a treaty by ratification, acceptance, approval, or accession. In addition, the Vienna Conference retained the theory of reception, as a supplementary rule, for all notifications and communications to be made by any State under the Vienna Convention (Art. 78).

72. In conclusion, the theory of reception of the instrument—as applied to the four means of consent to be bound by a treaty: ratification, acceptance, approval, and accession—could apply *per analogiam* to treaties concluded by exchange of instruments within the framework of Article 13 of the Convention. No compelling reason exists, indeed, to determine in another way the moment of establishment of the expression of consent to be bound by exchange of instruments constituting the treaty. In addition, Article 78 confirms the theory of reception should the exchange take place by notification of the instruments. Consequently, the *act of exchange* of instruments constituting a treaty that expresses the consent of States to be bound by a treaty, unless a contrary intention appears, will be carried out at the time of the date of reception of the last of the instruments constituting a treaty. It is on the date of reception of the last of the instruments constituting the treaty that this treaty will be concluded. This conclusion

<sup>166</sup> Paragraph 3 of the final commentary of draft Art. 13 (Art. 16 of the Convention) adopted by the ILC during its 18th session, Report of the ILC to the General Assembly (A/6309/Rev.1), *YILC*, 1966, vol. II, p 201.

<sup>167</sup> See, in this respect, para. 4 of the final commentary of draft Art. 13 (Art. 16 of the Convention) adopted by the ILC during its 18th session, Report of the ILC to the General Assembly (A/6309/Rev.1), *YILC*, 1966, vol. II, p 201.

<sup>168</sup> Paragraph 4 of the final commentary of draft Art. 13 (Art. 16 of the Convention) adopted by the ILC during its 18th session, Report of the ILC to the General Assembly (A/6309/Rev.1), *YILC*, 1966, vol. II, p 201. See also, in particular, for the notification of notes, J. Wilmanns, 'Note' in R. Bernhardt (ed.), *supra* n 9, pp 694–5.

was confirmed to the present author by the treaty sections of various ministries of foreign affairs.

### Date of entry into force

73. It must be reiterated that the conclusion of a treaty and its entry into force cover two distinct legal operations, even if they may coincide. If, taking Article 13 of the Vienna Convention into consideration, the conclusion *stricto sensu* of a treaty results from the conjunction of two or several consents to be bound by the treaty through the exchange of instruments, only the entry into force produces, in principle, the full juridical effects of the treaty in question.

74. In accordance with Article 24(1) and (2) of the Vienna Convention, a treaty concluded by exchange of instruments enters into force in such manner and upon such date as it may provide or as the negotiating States may agree.<sup>169</sup> In theory, the methods and the date of entry into force are proposed in the offer and are confirmed on acceptance. In the absence of such provisions or of such an agreement, a treaty concluded by exchange of instruments enters into force on the date of the exchange.<sup>170</sup>

75. It emerges from an examination of diplomatic practice that a treaty concluded by exchange of notes or letters usually contains provisions relating to its entry into force.<sup>171</sup> Thus, the treaty can, for example, provide that it enters into force on the date of the confirmative note,<sup>172</sup> on the date of reception of the confirmative note, or 15 days after the date of reception of the confirmative note.<sup>173</sup> The treaty can enter into force in the future or produce its effects retroactively<sup>174</sup> or on a certain<sup>175</sup> or uncertain<sup>176</sup> future date.

<sup>169</sup> On the subject in general, see C. Chayet, *supra* n 2, p 8; G. Fitzmaurice, *supra* n 20, p 127; R. Jongbloet-Hamerlijck, *supra* n 3, p 217; P.-F. Smets, *supra* n 6, pp 167–71; J. L. Weinstein, *supra* n 2, pp 209–10 (quoting various examples).

<sup>170</sup> For the question of determining the exact date of the exchange, see *supra* paras 65–72.

<sup>171</sup> *Contra*: H. Blix, 'The Requirement of Ratification', *supra* n 23, p 366; C. Chayet, *supra* n 2, p 8. However, J. L. Weinstein (*supra* n 2, p 213) calculated that the League of Nations Treaty Series contained 4,831 treaties, of which 1,078 were concluded by exchange of instruments. Blix alleged that 75 exchanges of notes did not contain any clause regarding entry into force. Therefore, only 6.9 per cent of the treaties concluded by exchange of notes at the time of the League of Nations did not contain such a clause. In conclusion, the majority of the exchange of notes did contain clauses regarding their entry into force. On the basis of the same statistics provided by J. L. Weinstein (*supra* n 2, pp 213–14), we calculated that this percentage amounts however to 35.7 per cent for the treaties concluded by exchange of notes published in the United Nations Treaty Series for the period 1946–51. Nevertheless, on the basis of data provided by M. Frankowska covering the period 1963–65 (*supra* n 23, pp 78–9), this percentage seems to diminish considerably.

<sup>172</sup> See eg the exchange of notes of 30 July and 10 December 1982 constituting an agreement between the United States and Israel concerning general security of military information (2001 UNTS 4–11).

<sup>173</sup> See eg the exchange of notes of 19 April 1996 and 6 October 1997 constituting an agreement between Austria and the Netherlands concerning the legal status of Austrian employees at the Europol Drugs Unit (1998 UNTS 80–1).

<sup>174</sup> See eg the exchange of notes of 17 and 25 March 1949 constituting an agreement between the United States and Peru superseding the Agreement of 9 March and 4 August 1944 relating to a cooperative programme for anthropological research and investigation in Peru (89 UNTS 16–22). For more examples, see H. Neuhold, *supra* n 2, p 249, fn 191.

<sup>175</sup> See eg the exchange of notes of 18 December 1996 constituting an agreement between Latvia and Denmark on the readmission of persons entering a country and residing there without authorization (1999 UNTS 388–94).

<sup>176</sup> See eg the exchange of notes of 16 December 1996 constituting an agreement between Spain and Bulgaria on the abolition of visas for holders of diplomatic passports (1996 UNTS 36–7 and 42).

76. In conclusion, unless otherwise specified, a treaty concluded by exchange of instruments thus enters into force on the date of exchange of the instruments.

### Bilateral or multilateral treaty

77. The exchange of the instruments constituting a treaty normally fits into a bilateral relation between two subjects of international law, exceptionally in a multilateral relation between several subjects.<sup>177</sup> Theoretically, the exchange of instruments within a bilateral relation leads to the conclusion of a bilateral treaty, except in the case when one of the parties acts in its own name as well as on behalf of another party.<sup>178</sup> The exchange of instruments within a multilateral relationship leads to the conclusion either of a multilateral agreement (States A, B, C, and D) or a bilateral agreement<sup>179</sup> (State A on the one hand, and States B, C, and D on the other hand), as the case may be.<sup>180</sup> On this subject, Anthony Aust notes that:

A treaty which is part bilateral and part multilateral can be constituted by a series of parallel exchanges of notes, all identical in substance, between one state and a number of states (A-B; A-C; A-D, etc.). In such a case, it is important to make clear in the notes who are the parties. In an exchange between, say, four states there could be *four* parties (A, B, C and D), or *two* (A and B+C+D). When there are only two parties it may also be necessary to make clear whether the treaty can be terminated only by one of the parties, or whether one of the states constituting the (collective) party can, by withdrawing from the treaty, bring about its termination.<sup>181</sup>

In this respect, the Special Rapporteur on the law of treaties concluded between States and international organizations or between two or more international organizations, Paul Reuter, made it clear that 'in the unlikely event that a tripartite agreement should be concluded by an exchange of letters, such exchange would in effect establish three sets of bilateral relations'.<sup>182</sup> Likewise, Sir Francis Vallat, intervening during the 17th session of the ILC, pointed out that:

<sup>177</sup> A. Aust, *supra* n 2, pp 23 and 103; C. Chayet, *supra* n 2, p 8; F. S. Hamzeh, *supra* n 2, p 189; Sir Ernest Satow, *supra* n 3, p 248, para. 29.38, fns 99 and 100; J. L. Weinstein, *supra* n 2, p 207. See also *mutatis mutandis* the final commentary relating to draft Art. 13 (of the 1986 Convention) adopted by the ILC, Report of the ILC to the General Assembly on the work of its 34th session (A/37/10), *YILC*, 1982, vol. II, Part Two, p 30, para. 1. See finally the intervention of Sir Francis Vallat and the proposal of Mr Quentin-Baxter (Chairman of the Drafting Committee) at the 27th session of the ILC (*YILC*, 1975, vol. I, p 231, para. 38 and p 269, para. 70).

<sup>178</sup> J. L. Weinstein, *supra* n 2, p 207, fn 4, quoting as example the exchange of letters of 23 August 1949 constituting an agreement between Belgium, acting in its name and on behalf of Luxembourg (within the framework of the Belgo-Luxembourg Economic Union), on the one hand, and Chile, on the other hand, completing the Protocol, signed at Geneva on 30 October 1947, for the provisional application of the General Agreement on Tariffs and Trade. For the text of the agreement, see 46 UNTS 164-8.

<sup>179</sup> While a bilateral treaty is concluded by two parties, each party could be composed of one or more subjects of international law.

<sup>180</sup> A. Aust, *supra* n 2, p 23. For various examples, see A. Aust, *supra* n 2, p 23, fns 41 and 42; C. Chayet, *supra* n 2, p 8, fn 10; Sir Ernest Satow, *supra* n 3, p 248, para. 29.38; J. L. Weinstein, *supra* n 2, p 207, fns 5 and 6.

<sup>181</sup> A. Aust, *supra* n 2, p 23.

<sup>182</sup> Fourth Report on the question of treaties concluded between States and international organizations or between two or more international organizations, by Mr Paul Reuter, Special Rapporteur (A/CN.4/285), *YILC*, 1975, vol. II, p 34.

Until the middle of the nineteenth century, agreements between three or more States were concluded by means of bilateral exchanges of instruments. That was a very cumbersome procedure... Mathematically, the number of instruments to be prepared for ' $n$ ' contracting parties would be  $n(n-1)$ . Thus if there were three contracting parties, six instruments would be needed, but if the nine States members of the European Community concluded an agreement with the Community itself, under the bilateral exchange procedure, ninety instruments would be needed.<sup>183</sup>

78. It should, in addition, be noted that a bilateral treaty can also be concluded by a double exchange of instruments sent to a third party. Such was the case of the double exchange of letters between Qatar and Saudi Arabia, on the one hand, and Bahrain and Saudi Arabia, on the other hand, in which the ICJ had to examine the legal consequences in the case concerning *Maritime Delimitation and Territorial Questions between Qatar and Bahrain*.<sup>184</sup> In the context of a mediation, sometimes referred to as 'good offices', the

King of Saudi Arabia then sent the Amirs of Qatar and Bahrain letters in identical terms dated 19 December 1987, in which he put forward new proposals [relating to certain means of dispute settlement]. Those proposals were accepted by letters from the two Heads of State, dated respectively 21 and 26 December 1987.<sup>185</sup>

As Anthony Aust mentions:

This complicated scheme was necessary because of political sensitivities, but the text of each letter and of the announcement had been agreed in advance with Saudi Arabia by Qatar and Bahrain; and thus, although three states were involved, there were in fact only two parties, Qatar and Bahrain.<sup>186</sup>

As said previously, the Court noted that '[t]he Parties agree that the exchanges of letters of December 1987 constitute an international agreement with binding force in their mutual relations'<sup>187</sup> and concluded that the exchanges of letters of December 1987 constitute 'an international agreement creating rights and obligations for the Parties'.<sup>188</sup>

### C. Problems of validity

79. On the one hand, some authors have supported the thesis according to which the expression 'agreements in simplified form' refers to agreements concluded by organs constitutionally incompetent to engage the State.<sup>189</sup> Certain authors have even alleged that

<sup>183</sup> *YILC*, 1975, vol. I, p 235, para. 26.

<sup>184</sup> On this subject, see A. Aust, *supra* n 2, p 22.

<sup>185</sup> *Maritime Delimitation and Territorial Questions between Qatar and Bahrain* case, Jurisdiction and Admissibility, Judgment of 1 July 1994, *ICJ Reports 1994*, p 116, para. 17.

<sup>186</sup> A. Aust, *supra* n 2, p 22.

<sup>187</sup> *Maritime Delimitation and Territorial Questions between Qatar and Bahrain* case, Jurisdiction and Admissibility, Judgment of 1 July 1994, *ICJ Reports 1994*, p 120, para. 22.

<sup>188</sup> *Ibid*, p 122, para. 30. On this subject, see also A. Aust, *supra* n 2, pp 51–2 and S. Rosenne, 'The Qatar/Bahrain Case. What is a Treaty? A Framework Agreement and the Seising of the Court', *supra* n 48, pp 165–6.

<sup>189</sup> See eg J. Basdevant, 'La conclusion et la rédaction des traités et des instruments diplomatiques autres que les traités', *supra* n 3, pp 615–16 and 544; J. Devaux, 'La conclusion des traités internationaux en forme s'écartant des règles constitutionnelles et dite "conclusion en forme simplifiée"', *Revue internationale française du droit des gens*, 1936, I, pp 299–309; Ph. Gautier, *supra* n 23, pp 68–70, 149–309, and 533–5; J. Masquelin, *supra* n 2, pp 293–300, paras 235–40; J. Verhoeven, *Droit international public* (Brussels: Larquier, 2000), pp 387–9.

agreements in simplified form are not treaties in a strict sense, but international agreements other than treaties.<sup>190</sup>

80. On the other hand, certain Latin-American States, such as Costa Rica, Guatemala, and Peru, expressed reservations with regard to Article 11 of the 1969 Vienna Convention.<sup>191</sup> From the contents of the aforesaid reservations it emerges that these States indirectly expressed a reservation with regard to Article 13 of the Vienna Convention. Thus Costa Rica made the following reservation with regard to Article 11:

The delegation of Costa Rica wishes to make a reservation to the effect that the Costa Rican system of constitutional law does not authorize any form of consent which is not subject to ratification by the Legislative Assembly.<sup>192</sup>

Guatemala, during the signing of the Vienna Convention, expressed three reservations, the second of which is drawn up as follows:

II. Guatemala will not apply articles 11, 12, 25 and 66 in so far as they are contrary to the provisions of the Constitution of the Republic.

Upon ratification of the Convention on the Law of Treaties, Guatemala stated that:

With respect to reservation II, which was formulated [upon signature] and which indicated that the Republic of Guatemala would not apply articles 11, 12, 25 and 66 of the [said Convention] insofar as they were contrary to the Constitution, Guatemala states:...(ii) That it also confirms the reservation with respect to the non-application of articles 11 and 12 of the Convention. Guatemala's consent to be bound by a treaty is subject to compliance with the requirements and procedures established in its Political Constitution....

On 15 March 2007, however, the government of Guatemala informed the Secretary-General that it had decided to:

Withdraw in their entirety the reservations formulated by the Republic of Guatemala on 23 May 1969 and confirmed upon 14 May 1997 to Articles 11 and 12 of the Vienna Convention on the Law of Treaties.

Finally, for the government of Peru:

...the application of articles 11, 12 and 25 of the Convention must be understood in accordance with, and subject to, the process of treaty signature, approval, ratification, accession and entry into force stipulated by its constitutional provisions.<sup>193</sup>

Other States, such as Austria, Belgium, Denmark, Finland, Germany, the Netherlands, and Sweden, formulated objections to such reservations for the reason that the means of expressing consent to be bound formulated in Article 11 of the Vienna Convention were firmly anchored in customary international law and reflected universally accepted legal norms. Consequently, these States deemed such reservations to be incompatible with the

<sup>190</sup> J. Basdevant, 'La conclusion et la rédaction des traités et des instruments diplomatiques autres que les traités', *supra* n 3, pp 615 and 544. See also Art. 1(b) of the Harvard Research Draft Code on the Law of Treaties according to which '[t]he term "treaty" does not include an agreement effected by exchange of notes' (Harvard Research Draft Code on the Law of Treaties, *supra* n 121, p 657).

<sup>191</sup> Article 11 enumerates various means of expressing consent to be bound by a treaty, among which is the exchange of instruments constituting a treaty.

<sup>192</sup> This Costarican reservation was made upon signature and confirmed upon ratification.

<sup>193</sup> This Peruvian reservation was made upon ratification of the Vienna Convention.

object and purpose of the Vienna Convention. However, it should be noted that these objections do not prevent the Vienna Convention from entering into force between the States having formulated objections, on the one hand, and the States authors of the reservations, on the other hand.

81. There arises, then, the problem of the validity of treaties concluded in accordance with Article 13 of the Vienna Convention in the international legal order as well as in the domestic legal order of the States.<sup>194</sup>

### International validity

82. The international validity of treaties concluded by exchange of instruments constituting a treaty is undisputed. As already mentioned, Article 13 of the Vienna Convention restates a rule of customary international law. Indeed, international treaty law put several means at the disposal of States by which they can express their consent to be bound by a treaty.<sup>195</sup> Article 13 formulates one of these means, namely the expression, by an exchange of instruments constituting a treaty, of consent to be bound by a treaty.

83. As previously noted,<sup>196</sup> it arises, moreover, from the contemporary diplomatic practice that States conclude treaties, today more than ever, in simplified form.<sup>197</sup> The undeniable success of this method of conclusion is explained by its simplicity, promptness, flexibility, and effectiveness. As soon as the instruments are exchanged, the treaty is concluded.

84. In conclusion, subject to the grounds of invalidity listed in the Vienna Convention, the international validity of treaties concluded by an exchange of instruments is firmly established in international law. Article 13 codifies, in this respect, a rule of customary international law.<sup>198</sup>

### Internal validity

85. International law, in theory, refers to the internal law of each State, to determine the State organs vested with treaty-making power, ie these organs having competence to conclude treaties. Two particular hypotheses must hold our attention here.

86. The first hypothesis covers situations where the competence to conclude treaties or, at the very least, certain categories of treaties, is, according to the constitutional law of a State,<sup>199</sup> shared between the executive power and the legislative power of that State. In this case, the executive will be unable to conclude without prior legislative authorization

<sup>194</sup> L. Wildhaber, 'Executive Agreements' in *supra* n 18, p 316.

<sup>195</sup> See, in this respect, Art. 11 of the Vienna Convention and the commentary in this work as well as the first report by Paul Reuter dated 3 April 1972 (A/CN.4/258) on the question of treaties concluded between States and international organizations or between two or more international organizations, *YILC*, 1972, vol. II, p 188, para. 56. See also P.-M. Dupuy, *supra* n 23, p 256, para. 252; E. W. Vierdag, 'The Law Governing Treaty Relations Between Parties to the Vienna Convention on the Law of Treaties and States Not Party To the Convention', *AJLL*, 1982, p 788.

<sup>196</sup> For the diplomatic practice, see *supra* paras 6-9.

<sup>197</sup> C. Chayet, *supra* n 2, p 7; M. Frankowska, *supra* n 23, p 71.

<sup>198</sup> P. Reuter, *La Convention de Vienne du 29 mai 1969 sur le droit des traités*, *supra* n 50, p 7.

<sup>199</sup> It should be noted that the expression 'constitutional law' of a State must be understood here in its broadest sense, including, among other things, the constitution, institutional laws and other laws, as well as the customs and constitutional practices of the State. Indeed, it can result from a custom or a constitutional practice of the State that the treaty-making power is also granted to organs other than those officially mentioned by the constitution of that State.

for that purpose.<sup>200</sup> In other words, two State organs are vested with treaty-making power, the intervention of the legislative organ being a prerequisite to any final consent of the State expressed by the executive in the treaty-concluding procedure. Consequently, for this purpose, in order to be able to conclude a treaty by an exchange of instruments, the executive will have to be duly authorized by the legislative organ. In the absence of such authorization, the treaty concluded by the executive will be tainted with a defect in constitutionality and could be declared invalid in the internal legal order, although Article 27 of the Vienna Convention in theory prohibits States from invoking on the international plane such a declaration of invalidity of a treaty with regard to their internal law.<sup>201</sup> The international validity of the treaty in question could also be challenged. Indeed, under Article 46 of the Vienna Convention, the fact that the consent of a State to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties, can be invoked by that State as invalidating its consent to the double restrictive condition that this violation was manifest and concerns a rule of its internal law of fundamental importance.<sup>202</sup> In this regard, the ICJ 'notes that there is no general legal obligation for States to keep themselves informed of legislative and constitutional developments in other States which are or may become important for the international relations of these States'.<sup>203</sup>

87. The second hypothesis covers cases where, although only the executive is vested with the competence to conclude treaties, the production of effects of treaties in the internal legal order is subject to a law of consent or approval, thus admitting its reception in the domestic legal order.<sup>204</sup> In this case, the default of consent or approval does not affect the international validity of a treaty,<sup>205</sup> but 'only' its reception in the internal legal order.<sup>206</sup> In the absence of such legislative approval, the treaty concluded by the executive will be, although valid on the international plane, inapplicable on the internal plane. In this respect, it should be noted that the inapplicability of a treaty concluded and entered into force on the international plane can engage the international responsibility of the

<sup>200</sup> J. L'Huilier, *supra* n 133, pp 187–8, para. 319. Such act of the parliament is sometimes referred to by authors as 'constitutional ratification'. See H. Blix, 'The Requirement of Ratification', *supra* n 23, p 352; G. Fitzmaurice, *supra* n 20, pp 113–18; Ph. Gautier, *supra* n 23, p 160. See also para. 1 of the final commentary relating to draft Art. 11 (Art. 14 of the Convention) adopted by the ILC during its 18th session, Report of the ILC to the General Assembly (A/6309/Rev.1), *YILC*, 1966, vol. II, p 197.

<sup>201</sup> As Luzius Wildhaber points out, jurisprudence, in general, is not very prepared to declare an agreement in simplified form invalid under national law (L. Wildhaber, 'Executive Agreements' in *supra* n 18, p 316).

<sup>202</sup> See Art. 46 of the Vienna Convention and the commentary in this work. See also *Land and Maritime Boundary between Cameroun and Nigeria* case, Judgment of 10 October 2002, *ICJ Reports 2002*, p 430, para. 265.

<sup>203</sup> *Land and Maritime Boundary between Cameroun and Nigeria* case, Judgment of 10 October 2002, *ICJ Reports 2002*, p 430, para. 266.

<sup>204</sup> See eg J. Dehaussy, 'Les traités. Conclusion et conditions de validité formelle' in *supra* n 23, p 28, para. 51 and Ph. Gautier, *supra* n 23, p 160.

<sup>205</sup> The reason is that only the executive being vested with the treaty-making power, no provision of internal law regarding the competence to conclude treaties, therefore, was breached within the meaning of Art. 46 of the Vienna Convention. In this sense: J. Salmon, *Droit des gens*, *supra* n 20, p 151. Cf *Maritime Delimitation and Territorial Questions between Qatar and Bahrain* case, Jurisdiction and Admissibility, Judgment of 1 July 1994, *ICJ Reports 1994*, pp 121–2, paras 26–7 where the Court accepts the international validity of the Minutes signed at Doha on 25 December 1990 by the ministers of foreign affairs of Bahrain, Qatar, and Saudi Arabia and rejects the argument invoked by Bahrain to the effect that according to the Constitution of Bahrain, treaties concerning the territory of the State can enter into force only after their positive enactment as a law.

<sup>206</sup> Cf J. Salmon, *Droit des gens*, *supra* n 20, p 96.

State in question.<sup>207</sup> Thus, insofar as the treaty must produce its effects in the internal legal order,<sup>208</sup> the executive will take care not to conclude a treaty by an exchange of instruments whenever the reception of the treaty in question is submitted to parliamentary approval. In this case, the negotiating executive will affix, for example, a signature subject to ratification, acceptance, or approval or shall exchange the instruments constituting a treaty subject to ratification, acceptance, or approval,<sup>209</sup> or shall successfully negotiate a final clause known as 'notification of the fulfilment of the internal legal requirements'.

88. Ultimately, the fact that Article 13 makes it possible to conclude by an exchange of instruments constituting a treaty does not exempt the negotiators from respecting the constitutional provisions or practices governing the internal aspects of the procedure for the conclusion of treaties.<sup>210</sup> In any event, although treaty law allows States to conclude in simplified form, the executive willing to conclude a treaty by an exchange of instruments constituting a treaty, shall, at any time, be bound to respect the requirements and practices of its constitutional law pertaining to the internal aspects of the procedure of concluding treaties.<sup>211</sup> Thus, when it results from constitutional law that the head of the State, a minister, a head of a mission, or a permanent representative cannot, on behalf of the State, express the final consent of that State to be bound by the treaty, it will not conclude in simplified form but in solemn form.<sup>212</sup> It remains, however, that Article 13 of the Vienna Convention constitutes a rule of international law which grants States the faculty to conclude by an exchange of instruments constituting a treaty. However, Article 13 does not oblige States to conclude in such a way. In other words, Article 13 contains a permissive norm, authorizing a conduct and not a prescriptive norm, requiring a given conduct.<sup>213</sup> In this respect the ICJ recalled that 'both customary international law and the Vienna Convention on the Law of Treaties leave it completely up to States as to which procedure they want to follow'.<sup>214</sup>

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<sup>207</sup> S. Rosenne, 'Treaties, conclusion and entry into force' in *supra* n 60, p 935; J. Salmon, *Droit des gens*, *supra* n 20, p 97.

<sup>208</sup> Indeed, it is not ruled out that the executive deems in certain cases that the treaty in question should not be integrated in the internal legal order of the State.

<sup>209</sup> Regarding ratification, see in this work *infra* the commentary on Art. 14. As already mentioned, the hypothesis of the exchange of instruments constituting a treaty subject to ratification, acceptance, or approval is, otherwise, envisaged in Art. 18(a) of the 1969 Vienna Convention.

<sup>210</sup> J. Dehaussy, 'Les traités. Conclusion et conditions de validité formelle' in *supra* n 23, p 27, paras 48–9 and P.-M. Dupuy, *supra* n 23, p 255, para. 250 and pp 256–7, para. 252; P. Reuter, *Introduction au droit des traités*, *supra* n 23, p 56, para. 98. *Contra*: A. Cassese, *supra* n 16, p 172.

<sup>211</sup> Cf C. Chayet, *supra* n 2, p 11; J. Combacau and S. Sur, *supra* n 50, p 121.

<sup>212</sup> See in this respect Art. 14(1)(c) of the Vienna Convention. Special Rapporteur Sir Humphrey Waldock, rightly underlined that '[n]ormally, a State would protect its position under its internal law by making its signature subject to ratification or approval' (*YILC*, 1965, vol. II, p 35, para. 4). See also paras 3 and 8 of the final commentary relating to Art. 11 (Art. 14 of the Convention) adopted by the ILC during its 18th session, Report of the ILC to the General Assembly (A/6309/Rev.1), *YILC*, 1966, vol. II, pp 197–8. See further the intervention by Mr Blix (Sweden) during the 16th meeting of the Committee of the Whole (in United Nations Conference on the Law of Treaties, 1st session, Official Documents, Summary Records, p 88, para. 32). See finally J. Masquelin, *supra* n 2, p 355, para. 297. Cf P.-M. Dupuy, *supra* n 23, pp 256–7, para. 252.

<sup>213</sup> A. Cassese, *supra* n 16, p 172.

<sup>214</sup> *Land and Maritime Boundary between Cameroun and Nigeria* case, Judgment of 10 October 2002, *ICJ Reports 2002*, p 429, para. 264.

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## 1969 Vienna Convention

## Article 29

## Territorial scope of treaties

Unless a different intention appears from the treaty or is otherwise established, a treaty is binding upon each party in respect of its entire territory.

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1. One can find in the 1969 Convention on the Law of Treaties (as well as in its counterpart of 1986) Articles that may not exactly correspond to general international law, Articles likely to be controversial or that may prove difficult to interpret. Yet, at first sight there appears to be no cause for concern when considering Article 29. It looks rather easy to understand and seems not to have caused much debate in the course of its preparation. Its conditions of adoption at the Vienna Conference in 1969, where 97 delegations voted in favour of it with no votes against or any abstentions, were also rather unusual. It did not give rise to any reservations or interpretative statements, another fact that simply adds to its singularity. Furthermore, two States (Finland and Greece) even put forward proposals to the UN General Assembly seeking to delete what has become Article 29 from the ILC 1966 draft, arguing that it was useless.<sup>1</sup>

2. The Article on the territorial scope of treaties was ultimately not deleted but what has been said until now should not lead one to think that no interpretative difficulties of any kind will be encountered when analysing it. Even though one might consider the task of interpreting the obvious to be an easy one, if one examines the text more closely, one can see that Article 29 does present a number of difficulties. However, much of what was considered by the ILC, the 1969 Vienna Conference, or by Special Rapporteur Sir Gerald Fitzmaurice is no longer part of today's interpretative difficulties.<sup>2</sup>

### A. General characteristics

3. Even though it has not always been easy to define the expression 'territorial application' of treaties with precision, the rule stated in Article 29 of the 1969 Vienna Convention on the Law of Treaties is nonetheless usually considered to reflect general international law.

#### Dual sense of the territorial scope of treaties

4. Every treaty has a specific subject matter and States bound by the treaty are to apply it in good faith in both its temporal and spatial dimensions. For the non-experts, however, a treaty's spatial application may lead one to think that it applies only to what forms the specific subject matter of the treaty. For instance, one could easily think that the 1971 Ramsar Convention on Wetlands of International Importance (2 February 1971) applies to 'areas of marsh, fen, peatland or water, whether natural or artificial, permanent or temporary, with water that is static or flowing, fresh, brackish or salt, including areas of marine water the depth of which at low tide does not exceed six metres'<sup>3</sup> and that it

<sup>1</sup> *YILC*, 1966, vol. II, p 65.

<sup>2</sup> As far as the territorial scope of treaties was concerned, Sir Gerald seems to have been quite anxious about the application of treaties in what was called the 'dependent territories' (*YILC*, 1959, vol. II, p 76), many of which still existed at the time.

<sup>3</sup> Convention on Wetlands of International Importance especially as Waterfowl Habitat, Ramsar (Iran), 2 February 1971, 996 UNTS 245.

applies solely to such areas within the territory of a State party to it. Likewise, one could think that the 1985 Granada Convention on the Protection of the Architectural Heritage of Europe applies solely to monuments, buildings, and structures defined in Article 1<sup>4</sup> or further that the 1923 Geneva Convention and Statute on the International Regime of Maritime Ports (9 December 1923) applies solely to ‘ports which are normally frequented by sea-going vessels and used for foreign trade’.<sup>5</sup> The list of such treaties is endless, and for each of them it would be possible to think that the definition that it gives of the spaces or subject matters with which it deals fully answers the question of the applicability of the treaty. In short, it would be possible to believe that the description, more or less precise, of the material object of the treaty coincides with what one can call the territorial scope of the treaty concerned.

5. The ILC itself sometimes followed the approach *supra* of the notion of the territorial application of treaties and has not always been able clearly to distinguish between the subject matter of a treaty and its territorial scope. For example, in the 1964<sup>6</sup> and 1966<sup>7</sup> Commission commentaries on the corresponding drafts, one reads that ‘certain types of treaty, by reason of their subject matter, are hardly susceptible of territorial application in the ordinary sense’. Most treaties, however, have application to territory—‘have their effect territorially’, in the 1964 commentary—and a question may arise as to what is their precise scope territorially. In some cases, the provisions of the treaty expressly relate to a particular territory or area. Both the 1964 and the 1966 commentaries give as relevant examples the 1920 Spitsbergen Treaty<sup>8</sup> and the 1959 Antarctica Treaty.<sup>9</sup> If one uses this quite restrictive formulation of the territorial scope of a treaty, one notes that these two treaties could be applied solely in the territory that respectively constitutes their subject matter.

6. The ILC itself seems to have given vague support to this approach of the territorial application of treaties. The phrase in the 1964 commentary referred to ‘the field of application of a treaty’ and the commentary of 1966 to ‘the application of a treaty extending to the whole of the territory of each of the parties’. For reasons having nothing to do with the present discussion, these phrases were replaced at the Vienna Conference by the present wording proposed by Ukraine: ‘a treaty binds each of the parties with regard to all its territory’. One would think that even the expression ‘territorial application of treaties’ itself thus deleted from the body of Article 29 (although it remained as its title) would naturally lead to such restrictive interpretation.

7. Without a doubt this restrictive conception of territorial scope is incorrect for a number of reasons. First, although it makes an implicit distinction between the material

<sup>4</sup> 3 October 1985, 1496 UNTS 147; CETS No. 121.

<sup>5</sup> 9 December 1923, 58 LNTS 285.

<sup>6</sup> *YILC*, 1964, vol. II, p 179. See for a similar way of thinking Roberto Ago (*YILC*, 1964, vol. 1, p 55, para. 61) or yet another member of the Commission, Milan Bartoš (*ibid*, p 5, para. 65). Sir Ian Sinclair (*The Vienna Convention on the Law of Treaties* (2nd edn, Manchester: Manchester University Press, 1984), p 87) is quite near to it as well as are Anthony Aust (*Modern Treaty Law and Practice* (2nd edn, Cambridge: Cambridge University Press, 2007), pp 202–3) and P. K. Menon (*The Law of Treaties between States and International Organizations* (Lewiston: The Edwin Mellon Press, 1992), p 64). See, on the contrary, for a conception similar to that put forward in this contribution, C. Ioannou, C. Economides, C. Rozakis, and A. Fatouros, *Public International Law* (in Greek) (Athens: Sakkoulas, 1983), Book I, vol. 2, p 148.

<sup>7</sup> *YILC*, 1966, vol. II, p 213.

<sup>8</sup> 21 October 1920, 2 LNTS 8.

<sup>9</sup> 1 December 1959, 402 UNTS 71.

subject and the legal application of a treaty, it clearly favours the former. It should be remembered, however that a treaty is above all a legal instrument. The question of its material application is in some way only a secondary one. This becomes very clear when something goes wrong with the execution of a treaty and in that sense relates closely to the 'pathology' of international relations (international responsibility, for instance). To return to the example of the Ramsar Convention, we note that, in this case, different categories of State agents, no matter where they are located, must comply with its provisions, not simply the biologists, ornithologists, or police officers acting in or near the Ramsar Convention wetlands.

8. Secondly, there is a striking contradiction between (1) the principle, approved quite early on, of the binding effect of a treaty in respect of the entire territory of a State party to the treaty and (2) the idea of applying the treaty only to those parts of a State territory that form the territorial subject matter of the treaty. This contradiction becomes quite serious when one considers a treaty such as the 1959 Antarctica Convention (1 December 1959) (especially for States having no territorial claims on the frozen continent). The same can also be said in respect of the 1979 Moon Treaty,<sup>10</sup> which prohibits territorial claims on this celestial body. Territorial scope and subject matter of a treaty are obviously two quite different things.

9. The ILC commentaries mentioned *supra*, which are quite misleading as we have noted, are surprising, however, if one considers the clear position taken by ILC Special Rapporteur Sir Humphrey Waldock. Sir Humphrey distinguished clearly between 'the object to which the treaty applies' and 'the territorial application of a treaty'. And in his personal commentary, Fitzmaurice's successor goes on to say:

The 'territorial application' of a treaty signifies the territories which the parties have purported to bind by the treaty and which, therefore, are the territories affected by the rights and obligations set up by the treaty. Thus, although the enjoyment of the rights and the performance of the obligations contained in a treaty may be localized in a particular territory or area, as in the case of Antarctica, it is the territories with respect to which each party contracted in entering into the treaty which determine its territorial scope.

Sir Humphrey concludes that 'in such a case is the application of the treaty [not] confined to the particular territory or area'.<sup>11</sup> Besides, as he put it during the 1964 debate, 'the real problem was that of the territory with regard to which the treaty was binding, rather than the territory in which it was to be performed'.<sup>12</sup> This way of thinking should be kept in mind in the discussion to follow.

### Article 29 and customary law

10. In his 1959 report to the ILC, Fitzmaurice analysed the territorial application of treaties in four long, complex, and, in the end, not very useful articles.<sup>13</sup> The credit for simplifying such complexity goes undoubtedly to Waldock in his Third Report to the Commission,<sup>14</sup> as well as to the Commission itself in the report addressed to the General

<sup>10</sup> 18 December 1979, 1363 UNTS 3.

<sup>11</sup> *YILC*, 1964, vol. II, p 12.

<sup>12</sup> *YILC*, 1964, vol. I, p 46, para. 2. G. Tunkin takes a similar view (*YILC*, 1964, vol. I, p 49, para. 32).

<sup>13</sup> *YILC*, 1959, vol. II, pp 47–8.

<sup>14</sup> *YILC*, 1964, vol. II, p 12.

Assembly in 1964.<sup>15</sup> Although the actual wording of Article 29 goes back to the Vienna Conference, it has to be admitted that ever since the 1964 Waldock Report the principle underlying this Article had been accepted. Some of the complications of the Fitzmaurice draft still remained but only as a part of the commentaries on this provision respectively written by Waldock and the ILC.

11. The principle according to which 'a treaty is binding upon each party in respect of its entire territory' seems to have been accepted without any difficulty, at least as far as the 'metropolitan territory' of a contracting State is concerned. Sir Humphrey Waldock and the ILC referred at length to the practice of some States (although few in number), to case law (although, primarily, to domestic case law), and to authors' writings on the subject.<sup>16</sup> The principle has become even more consensual in that an appropriate exception to it was also approved at the same time: 'unless a different intention appears from the treaty or is otherwise established'. In other words, the principle remains valid 'unless a different intention appears from the treaty or is otherwise established'.

12. Essentially, then, a sort of auxiliary legal norm, Article 29 has not met with any notable difficulties from States. For instance, the United States observed that the definition of the scope of application of a treaty in this Article is 'self-evident'.<sup>17</sup> Kenya found the wording of Article 29 'comprehensive and lucid'.<sup>18</sup> And as we have noted *supra*, Greece, in a rather odd yet at the same time eloquent tribute, even questioned the need for the Article, stating that it merely creates 'a refutable legal presumption'.<sup>19</sup>

13. Can a legal norm that is 'self-evident', one that satisfies everyone, one that is unanimously adopted by an important codification conference, one that is confirmed some years later by another codification conference, then be anything other than a norm with strong customary character? After all, customary law loves nothing more than consensus, consistency, and flexibility. Furthermore, the *a priori* application of a treaty on the entire territory of a contracting State can be seen as yet another form of the principle of the interpretation of treaties *in good faith* by contracting States<sup>20</sup> (Arts 26 and 31 of the Vienna Convention). Such a close link with one of the most central principles of international treaty law underlines again the customary nature of Article 29.<sup>21</sup>

## B. Scope of the exception included in Article 29

14. Even if one considers that the provision of Article 29 reflects international customary law, a difficulty is likely to arise which is not certain to have been noted either by the ILC

<sup>15</sup> *YILC*, 1964, vol. II, p 179.

<sup>16</sup> eg see A. McNair, *The Law of Treaties* (Oxford: Clarendon Press, 1961), pp 116–17. Many other international law handbooks published after the Vienna Conference confirm the validity and the customary character of Art. 29.

<sup>17</sup> *YILC*, 1966, vol. II, p 65.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> Paul Reuter, ILC Special Rapporteur on the law of treaties concluded between States and international organizations or between international organizations, observes with perspicacity that 'the authors of that provision had simply wanted to enunciate a rule for the interpretation of treaties' (*YILC*, 1977, vol. I, p 117, para. 24).

<sup>21</sup> In French case law, the *commissaire du gouvernement* of the Conseil d'Etat stated in a case concerning the application of a French-Australian extradition treaty to New Caledonia that 'le cocontractant de la France est en droit de penser que, dans le silence de la convention, celle-ci régit, au nom de l' "effet utile" des traités, tous les territoires unis par les Articles 2 et 72 de la Constitution en une République indivisible' (*Mme Smets*, 14 May 1993, *RGDIP*, 1993, p 1056).

or by the case law, or even by the writings on the subject. The rule contained in the provision (ie a treaty is binding in respect of the entire territory of the contracting State) suffers a notable exception, which goes back to the different intention presumably expressed by contracting States. The question is to determine which, in this provision, is the place ascribed respectively to the rule and to its exception or, differently put, to determine up to what point, if ever, the exception could manage to overrule the rule. Certainly, in an orthodox legal discourse, such questions are easy to answer (interpretation *stricto sensu* of exceptions, etc.) but, progressively, some complications have appeared as far as the interplay between rule and exception in Article 29 is concerned.

15. This closely corresponds to what happened during the early stages of the crafting of Article 29. Indeed in the first stages of drafting, everything seemed—almost—clear. For example, in his 1964 commentary on the Article 29 draft, Waldock specifically emphasizes that ‘the territorial application of a treaty is essentially a question of the intention of the parties’<sup>22</sup> but also insists on the fact that when a State does not intend to enter into the treaty obligations on behalf of and with respect to all its territory, it must make its intention ‘plain’.<sup>23</sup> In the draft itself, the Special Rapporteur states that such ‘contrary intention’ should be ‘expressed in the treaty’<sup>24</sup> and should ‘appear from the circumstances of its conclusion or the statements of the parties’; furthermore, said intention should be ‘contained in a reservation’.<sup>25</sup> Despite the important simplification made by the Commission in its 1964 draft (‘unless the contrary appears from the treaty’),<sup>26</sup> the commentary to this provision (following Sir Humphrey) still requires that the general rule ‘should apply in the absence of any *specific* provision or indication in the treaty as to its territorial scope’.<sup>27</sup>

16. Nevertheless, in the commentary to its 1966 draft, while still requiring a ‘specific provision or indication in the treaty’ in order to allow the general rule to be defeated, the Commission concedes that the international jurisprudence and the writing of jurists on the question argue that ‘a treaty is to be presumed to apply to all the territory of each party unless it otherwise appears from the treaty’<sup>28</sup> (‘à moins qu’une solution différente ne ressorte du traité’, in the French version). More importantly, the 1966 ILC draft reinforces the exception, which from ‘unless the contrary appears from the treaty’ (the wording of 1964) now becomes (in 1966) ‘unless a different intention appears from the treaty or is otherwise established’. This wording change means that from now on a ‘different intention’ may be more easily established. Another change should also be noted. In the 1966 version (as well as in the provision’s final version), the exception is no longer placed at the end of the phrase, as it was initially the case, but at the beginning. Thus in the grammatical structure of Article 29, the exception actually precedes the rule.<sup>29</sup> This is an important point given that in international law language is never innocent.<sup>30</sup>

<sup>22</sup> *YILC*, 1964, vol. II, p 12, para. 2.

<sup>23</sup> *Ibid*, p 13, para. 4.

<sup>24</sup> Should this be a cumulative condition? Nothing is clear on this particular point, which contributes to a certain confusion in the Waldock draft.

<sup>25</sup> *YILC*, 1964, vol. II, p 12.

<sup>26</sup> *Ibid*, p 179.

<sup>27</sup> *Ibid*, p 179, para. 2 (emphasis added). The French version of the commentary states: ‘disposition ou indication précise’.

<sup>28</sup> *YILC*, 1966, vol. II, p 213, para. 2.

<sup>29</sup> This is true of the English, French, and Russian versions of Art. 29 but, quite strangely, not of the Spanish version, which keeps on placing the rule before the exception.

<sup>30</sup> See on this point P. Reuter, ‘Quelques réflexions sur le vocabulaire du droit international’, *Mélanges Louis Trotabas* (Paris: LGDJ, 1970), pp 423–45.

17. Be that as it may, it is apparent that the exception in the final version has two parts. Its first element is also, chronologically speaking, the first to have been retained by the Commission in its 1964 draft. It is also more closely linked to the text of the treaty itself insofar as the said exception must 'appear from the treaty' itself ('ressortir du traité'; 'desprender del tratado'). All this depends, of course, on the interpretation of the text of the treaty according to the usual methods of interpretation as set out in Articles 31 to 33 of the Vienna Convention. However, what one could term an 'objective' approach did not stand alone for very long. The 1966 ILC draft, drawing its inspiration from the 1964 Waldock draft, introduced a second element to the exception to the rule. This takes the form of a 'different intention' 'otherwise established' ('par ailleurs établie'; 'intención [que] const[a] de otro modo'). It is easy to see that this element, quite vague in itself, somewhat blurs the distinction between the rule and the exception to the rule, which could become a source of a dispute. It also undermines the rule of the restrictive interpretation of exceptions.

18. Thus the finding of a 'different intention' 'otherwise established' is subject to two conditions. First, such an intention must be 'established' with a sufficient degree of certainty; otherwise it would be very easy to overcome the rule stated in Article 29. Beyond this the 'different intention', if not stated within the treaty itself, must be looked for 'elsewhere'. Far from constituting a form of limitation on the search for a 'different intention', this expression could just as easily mean that the judge or international arbitral tribunal ought to, as the need arises, look for it by ignoring the methods of interpretation recognized by the Vienna Convention.

19. To sum up, then, in the terms of the definitive version of Article 29, the 'establishment' of the 'different intention' can be effected by two different means—either by being 'established otherwise', as we have just seen, or by finding it 'arising directly from the treaty', that is to say, following the common rules of interpretation of treaties. The alternative contained in the exception cannot be ignored. In addition, there is no question of privileging one method over the other, the two having obviously been given equal weight. Now this leads to the inescapable conclusion that there is an increased possibility that an exception to the rule (that is to say, a 'different intention') could indeed be 'established'.

20. Furthermore, it is helpful to point out several other problems that the expression 'different intention' can create. As stated *supra*, the word 'intention' refers above all to the subjective thinking of the authors of the treaty concerned. This implies that on the basis of some indication expressing this intention, the international judge or arbitral tribunal must then take on the delicate task of reconstituting the will of parties, with all the difficulties this entails.

21. One can also point out several additional difficulties, other than those inherent in any search for the subjective will of the parties. Which subjective wills are we really talking about here? Are they the intentions of the original authors of the treaty? Or do they include the subjective wills of the parties who adhere to the treaty later without having been able to (or wishing to, in some cases) participate in the treaty's preparation and who (hypothetically) could possess territory that might cause problems with regard to the application of Article 29? In the same way, should the 'intention' of the State with regard to the territory about which the particular problem of application arises take precedence over the 'intention' of the other contracting parties? Despite the absence of international case law on this point and even though the ILC's *travaux* speak of 'the intention of the

or by the case law, or even by the writings on the subject. The rule contained in the provision (ie a treaty is binding in respect of the entire territory of the contracting State) suffers a notable exception, which goes back to the different intention presumably expressed by contracting States. The question is to determine which, in this provision, is the place ascribed respectively to the rule and to its exception or, differently put, to determine up to what point, if ever, the exception could manage to overrule the rule. Certainly, in an orthodox legal discourse, such questions are easy to answer (interpretation *stricto sensu* of exceptions, etc.) but, progressively, some complications have appeared as far as the interplay between rule and exception in Article 29 is concerned.

15. This closely corresponds to what happened during the early stages of the crafting of Article 29. Indeed in the first stages of drafting, everything seemed—almost—clear. For example, in his 1964 commentary on the Article 29 draft, Waldock specifically emphasizes that ‘the territorial application of a treaty is essentially a question of the intention of the parties’<sup>22</sup> but also insists on the fact that when a State does not intend to enter into the treaty obligations on behalf of and with respect to all its territory, it must make its intention ‘plain’.<sup>23</sup> In the draft itself, the Special Rapporteur states that such ‘contrary intention’ should be ‘expressed in the treaty’<sup>24</sup> and should ‘appear from the circumstances of its conclusion or the statements of the parties’; furthermore, said intention should be ‘contained in a reservation’.<sup>25</sup> Despite the important simplification made by the Commission in its 1964 draft (‘unless the contrary appears from the treaty’),<sup>26</sup> the commentary to this provision (following Sir Humphrey) still requires that the general rule ‘should apply in the absence of any *specific* provision or indication in the treaty as to its territorial scope’.<sup>27</sup>

16. Nevertheless, in the commentary to its 1966 draft, while still requiring a ‘specific provision or indication in the treaty’ in order to allow the general rule to be defeated, the Commission concedes that the international jurisprudence and the writing of jurists on the question argue that ‘a treaty is to be presumed to apply to all the territory of each party unless it otherwise appears from the treaty’<sup>28</sup> (‘à moins qu’une solution différente ne ressorte du traité’, in the French version). More importantly, the 1966 ILC draft reinforces the exception, which from ‘unless the contrary appears from the treaty’ (the wording of 1964) now becomes (in 1966) ‘unless a different intention appears from the treaty or is otherwise established’. This wording change means that from now on a ‘different intention’ may be more easily established. Another change should also be noted. In the 1966 version (as well as in the provision’s final version), the exception is no longer placed at the end of the phrase, as it was initially the case, but at the beginning. Thus in the grammatical structure of Article 29, the exception actually precedes the rule.<sup>29</sup> This is an important point given that in international law language is never innocent.<sup>30</sup>

<sup>22</sup> *YILC*, 1964, vol. II, p 12, para. 2.

<sup>23</sup> *Ibid*, p 13, para. 4.

<sup>24</sup> Should this be a cumulative condition? Nothing is clear on this particular point, which contributes to a certain confusion in the Waldock draft.

<sup>25</sup> *YILC*, 1964, vol. II, p 12.

<sup>26</sup> *Ibid*, p 179.

<sup>27</sup> *Ibid*, p 179, para. 2 (emphasis added). The French version of the commentary states: ‘disposition ou indication précise’.

<sup>28</sup> *YILC*, 1966, vol. II, p 213, para. 2.

<sup>29</sup> This is true of the English, French, and Russian versions of Art. 29 but, quite strangely, not of the Spanish version, which keeps on placing the rule before the exception.

<sup>30</sup> See on this point P. Reuter, ‘Quelques réflexions sur le vocabulaire du droit international’, *Mélanges Louis Trotabas* (Paris: LGDJ, 1970), pp 423–45.

17. Be that as it may, it is apparent that the exception in the final version has two parts. Its first element is also, chronologically speaking, the first to have been retained by the Commission in its 1964 draft. It is also more closely linked to the text of the treaty itself insofar as the said exception must ‘appear from the treaty’ itself (‘ressortir du traité’; ‘desprender del tratado’). All this depends, of course, on the interpretation of the text of the treaty according to the usual methods of interpretation as set out in Articles 31 to 33 of the Vienna Convention. However, what one could term an ‘objective’ approach did not stand alone for very long. The 1966 ILC draft, drawing its inspiration from the 1964 Waldock draft, introduced a second element to the exception to the rule. This takes the form of a ‘different intention’ ‘otherwise established’ (‘par ailleurs établie’; ‘intención [que] const[a] de otro modo’). It is easy to see that this element, quite vague in itself, somewhat blurs the distinction between the rule and the exception to the rule, which could become a source of a dispute. It also undermines the rule of the restrictive interpretation of exceptions.

18. Thus the finding of a ‘different intention’ ‘otherwise established’ is subject to two conditions. First, such an intention must be ‘established’ with a sufficient degree of certainty; otherwise it would be very easy to overcome the rule stated in Article 29. Beyond this the ‘different intention’, if not stated within the treaty itself, must be looked for ‘elsewhere’. Far from constituting a form of limitation on the search for a ‘different intention’, this expression could just as easily mean that the judge or international arbitral tribunal ought to, as the need arises, look for it by ignoring the methods of interpretation recognized by the Vienna Convention.

19. To sum up, then, in the terms of the definitive version of Article 29, the ‘establishment’ of the ‘different intention’ can be effected by two different means—either by being ‘established otherwise’, as we have just seen, or by finding it ‘arising directly from the treaty’, that is to say, following the common rules of interpretation of treaties. The alternative contained in the exception cannot be ignored. In addition, there is no question of privileging one method over the other, the two having obviously been given equal weight. Now this leads to the inescapable conclusion that there is an increased possibility that an exception to the rule (that is to say, a ‘different intention’) could indeed be ‘established’.

20. Furthermore, it is helpful to point out several other problems that the expression ‘different intention’ can create. As stated *supra*, the word ‘intention’ refers above all to the subjective thinking of the authors of the treaty concerned. This implies that on the basis of some indication expressing this intention, the international judge or arbitral tribunal must then take on the delicate task of reconstituting the will of parties, with all the difficulties this entails.

21. One can also point out several additional difficulties, other than those inherent in any search for the subjective will of the parties. Which subjective wills are we really talking about here? Are they the intentions of the original authors of the treaty? Or do they include the subjective wills of the parties who adhere to the treaty later without having been able to (or wishing to, in some cases) participate in the treaty’s preparation and who (hypothetically) could possess territory that might cause problems with regard to the application of Article 29? In the same way, should the ‘intention’ of the State with regard to the territory about which the particular problem of application arises take precedence over the ‘intention’ of the other contracting parties? Despite the absence of international case law on this point and even though the ILC’s *travaux* speak of ‘the intention of the

parties' in the plural,<sup>31</sup> it would seem that the judge or the international arbitral tribunal would have to take into account the 'intention' of that State, given that in such cases, specific internal constitutional considerations would enter into play.<sup>32</sup> In considering a government's proposal according to which 'a State, which is composed of distinct autonomous parts, should have the *right* to declare to which of the constituent parts of the State a treaty is to apply', the Commission felt that the words 'unless a different intention appears from the treaty or is otherwise established' gave the text of what became Article 29 'the necessary flexibility...to cover all legitimate requirements in regard to the application of treaties to territory'. To put it differently, the Commission did not bluntly oppose such a right being given to a State, a right which was not, according to that government, to be considered a reservation. Some members of the Commission as well, primarily Shabtai Rosenne, referred to the same issue, stating that 'reservations related to the substantive provisions of a treaty' and 'a reservation dealing with the territorial application of a treaty would be of a different character, unless the treaty expressly provided for that type of reservation'.<sup>33</sup> Rosenne's statement and the Commission's quasi endorsement of this view would largely benefit the State concerned. In particular, the State's declarations concerning the parts of its territory where the treaty ought (or ought not) to apply would be freed from the strict discipline to which a reservation is normally subject.

22. It is true, on the other hand, that by 2007 the ILC had provisionally adopted a draft guideline 1.1.3, according to which 'a unilateral statement by which a State purports to exclude the application of a treaty or some of its provisions to a territory to which that treaty would be applicable in the absence of such a statement constitutes a reservation'.<sup>34</sup> Professor Alain Pellet, the Special Rapporteur on reservations to treaties, had explained in the 1998 commentary to his Third Report on reservations that:

as could be seen from Article 29 of the 1969 and 1986 Vienna Conventions, a statement by which a State purported to exclude the application of a treaty to a territory meant that it sought 'to exclude or to modify' the legal effect which the treaty would normally have

and such a statement therefore constituted, according to the Special Rapporteur, a 'true' reservation, *ratione loci*.<sup>35</sup>

<sup>31</sup> See commentaries in *YILC*, 1964, vol. II, p 179, para. 2 and *YILC*, 1966, vol. II, p 213, para. 2 (emphasis added). More generally, the International Court of Justice insists on 'the primary necessity of interpreting an instrument in accordance with the intentions of the parties at the time of its conclusion' (*Legal Consequences for States of the Continued Presence of South Africa in Namibia*, Advisory Opinion, 21 June 1971, *ICJ Reports 1971*, p 16, para. 53).

<sup>32</sup> Fitzmaurice, in particular, attached a great importance to the constitutional specificities of States with regard to the territorial application of the treaties that bound them (*YILC*, 1959, vol. II, p 48). The European Court of Justice has also stated that 'the status of the French overseas departments within the Community is primarily defined by reference to the French Constitution' (Judgment of 10 October 1978, *Hansen/Hauptzollamt Flensburg*, ECR 1978, p 1787, para. 10).

<sup>33</sup> Shabtai Rosenne further stated that 'he would have no objection to the concept of a reservation being broadened so as to cover that type of quasi-reservation, but the wording of the definition [of a reservation] would have to be adjusted' (*YILC*, 1964, vol. I, p 48, para. 26). See for an opposite point of view Sinclair, *supra* n 6, p 91.

<sup>34</sup> Report of the ILC, 59th session, 2007, p 47.

<sup>35</sup> *YILC*, 1998, vol. II, p 93, para. 498. At the same time the Special Rapporteur recalled that a reservation could also be made at the time of the notification of the extension of the application of a treaty to a territory, an action which in itself did not, of course, constitute a reservation. Obviously endorsing the Special Rapporteur's viewpoint Yves Daudet explains that 'une extension de l'application territoriale ne saurait constituer une réserve, à l'inverse de la déclaration excluant une partie du territoire (comme la "clause coloniale" qui en est incontestablement une)' ('Travaux de la Commission du droit international', *AFDI*, 1998, pp 494–511, esp. p 509). This logic could nevertheless prove rather odd insofar as a 'non-extension' is, in fact, an 'exclusion' or, in other words, a 'non-exclusion' tacitly constitutes an extension. Reservations would thus merge constantly with non-reservations.

23. Still there has not been any unanimity on this subject, even within the ILC. It is thus unclear that such a position accurately reflects what was achieved by the Vienna Conventions of 1969 and 1986. More specifically, this way of thinking seems to minimize the considerable scope of the exception to the principle of full territorial application ('unless a different intention appears from the treaty or is otherwise established'). Guideline 1.1.3 mentioned *supra* would have been totally consistent with Article 29 if it had stated that a unilateral declaration of a State would constitute a reservation when it is not founded on a different intention emerging from the treaty or otherwise established.<sup>36</sup> It may be that the Commission is actually working on the point in question not according to a logic of codification but rather in a logic of progressive development of international law, which in and of itself is perfectly acceptable. However, the States concerned must still be convinced. This would not seem to be an easy task, given the particularly negative reactions of the United Kingdom, one of the principal States interested in the matter.<sup>37</sup>

24. In any event and speaking hypothetically, if one remains faithful to Article 29 of the 1969 Vienna Convention and wants to establish a certain balance between the rule (integral territorial application) and the exception (modified territorial application), a certain flexibility is required. Such flexibility could be based on the general principle of law prohibiting the abuse of law (and the relationship of which with the rule of application of treaties in good faith is undeniable). Thus, for example, contrary to what some delegates at the Vienna Conference claimed,<sup>38</sup> the territorial application of a treaty could not be determined in an absolute way at the time of the expression by such or such State of its consent to be bound by the treaty. If that had been the case, the territorial scope of the treaty would have been determined unilaterally by the 'different intention' of a single party with complete disregard for every contractual relationship that the ratification of a treaty creates and necessarily implies.<sup>39</sup> Of course nothing forbids the explicit conferral of a State's future right to extend (or not to extend) subsequently the application of a treaty to a given territory.<sup>40</sup> Similarly, it is possible for a treaty to refer, in regard to its application *ratione loci*, not to territories designated by name but rather to categories of territories. For example, a treaty that applies to French overseas departments is considered implicitly to give France the responsibility for determining to which French possessions the treaty in question will be applied, since it is of course understood that France has the power to grant or remove the status of overseas departments in relation to a French territorial possession.

<sup>36</sup> Some commentators seem to think that the Commission in its current composition is working to reconstruct the 1969 Vienna Convention principle on the territorial scope of treaties. See Carlo Santulli, 'Travaux de la Commission du droit international', *AFDI*, 2000, pp 403–31, esp. p 415.

<sup>37</sup> *BYBIL*, 1999, pp 411–14. Quite critical also is A. Aust, *supra* n 6, p 206.

<sup>38</sup> Namely, Australia (Official Records, 1st session, 1968, p 176, para. 53).

<sup>39</sup> Jiménez de Aréchaga stated on this point in 1964 that:

any party wishing to restrict the territorial application of a treaty was bound to insert a proviso to that effect or to bear the onus of proving the existence of such an intention at the time when the treaty was drawn up. If that onus was to be placed on the State concerned, it was necessary to be liberal as to ways and means of proving the intention. (*YILC*, 1964, vol. I, p 52, para. 69)

<sup>40</sup> In general, in such cases, a period of time is allotted to the State concerned, often for the purpose of consultations with the local population in question. See the example of former Art. 227(5)(a) of the Treaty establishing the European Economic Community, which allowed the Danish government, until 31 December 1975, to extend the application of this Treaty to the Faroe Islands—an extension which never took place. Equally interesting are the many bilateral agreements entered into by the Federal Republic of Germany (before reunification) with regard to West Berlin. According to the practice followed in that context, any such bilateral agreements also applied to West Berlin unless there was an intervening statement by the German government

25. As a preliminary practical conclusion relating to this point, one could argue that the exception to the principle laid down by Article 29, whatever difficulties may arise from its implementation, should not easily become subservient to the principle. Without claiming that the exception is the same as the principle (in which case Art. 29 would be stripped of any usefulness or indeed of any meaning), it is first necessary to exhaust any possibility that a 'different intention' was expressed. Without Article 29 leading to confusion or, even more, to a complete reversal of the burden of proof, that burden of proof should be lighter for a State that alleges during litigation that a territory, not necessarily belonging to it,<sup>41</sup> is excluded from the scope of a treaty or, on the contrary, that it is included therein. The rest is a question of the specific case and the diligence of the judge.

26. On the other hand, of course, a clear reversal of the relationship between the rule and the exception to it can be written into the treaty itself, on the basis of appropriate clauses, the best known of which is the 'colonial clause'. In such cases, the 'different intention' clearly arises from the treaty or, if one prefers, there is actually no need to look for such an 'intention' since the mere existence in the treaty of such a territorial clause is *prima facie* evidence of such an intention. The question of the 'different intention' should then logically refer to the sole words 'unless...otherwise established'. The ILC's somewhat complicated *travaux* between 1964 and 1966 have decided otherwise.

### C. The problem of the 'colonial clause'

27. Large portions of the political and legal stakes involved in Article 29 are likely to be lost on a non-initiated reader today. The vast—and highly sensitive—problem of the 'colonial clause' was, in fact, a major focus of the debates concerning the 'territorial application' of the treaties—both within the ILC and at the Conference of Vienna. Academic writing during this period was also concerned with the issue.<sup>42</sup> Almost all the colonial powers at the time carefully distinguished, in terms of law enforcement, a territorial base, that we could call the 'metropolis', as well as extra-metropolitan territories located, for the most part, overseas (known as 'salt water colonies'). This distinction, which found its origin either in *de facto* situations (geographical remoteness, security issues,...), or in a more or less open kind of discrimination, was also reflected in the application of standards of international law, in particular treaty law, in the 'colonies'. Insofar as the non-metropolitan territory could be considered to be part of the territory of the contracting State, or insofar as such a territory could or could not become the object for the treaty's application, there existed a problem of territorial modification of the application of the treaty, which *a priori* the ILC had to take into account.

#### The debate on the 'colonial clause'

28. Of course, the debate on the 'colonial clause' was made more difficult by the impossibility of defining in a global way the 'colony' to which an international treaty concluded by the

within three months following the entry into force of the agreement. See, among many examples, Art. 7 of the financial assistance agreement signed with Senegal on 28 December 1973 (1983 UNTS 43).

<sup>41</sup> This State could very well be a State to which the territory in question does not belong. Indeed, the spatial application of a treaty is a question that interests all the contracting parties. At the very least, they all have the right to know the spatial extent of their treaty commitments.

<sup>42</sup> See, *inter alios*, J. E. S. Fawcett, 'Treaty Relations of British Overseas Territories', *BYBIL*, 1949, pp 86–107; P. Lampué, 'L'application des traités dans les territoires et départements d'outre-mer', *AFDI*, 1960, pp 907–24.

metropolis could or<sup>43</sup> could not apply. Classifying protectorates (such as, in the past, Morocco or Tunisia), associated 'States' ('free' or not), mandates and trust territories, 'traditional' colonies, extra-metropolitan possessions having the same status as the metropolis (as, eg, the Algerian departments of France), territories with unspecified status, entities enjoying a high degree of decentralization or *condominia* in the same legal category did not lend much rationality to the debate. Admittedly, all these territories do have in common the fact of being 'dependent', according to the generic term favoured by Fitzmaurice in his Fourth Report to the ILC<sup>44</sup> or constituting 'territories for whose international relations a State is responsible', according to terminology once traditionally found in the Council of Europe<sup>45</sup> conventions<sup>46</sup> (and taken over, in a slightly different form, by Waldock in his Third Report).<sup>47</sup> The problem with these terminologies is, of course, that they do not establish criteria for distinguishing between 'metropolitan' and 'other' territories and thus obscure even more the considerable difference between these two categories of territories, even though both Fitzmaurice and the Council of Europe also attach considerable importance to this distinction. Should it be noted that the United Kingdom government is 'internationally responsible' for the Pitcairn Islands just as much as it is for Kent or that the Wallis and Futuna Islands are, from an international point of view, as 'dependent' on the French government as is the Île-de-France?

29. In addition to its complexity, the system suggested by Fitzmaurice in 1959 had the major fault of being very politically incorrect. Simplified as well as softened, the 'colonial clause' did not meet with any more success in Waldock's successive reports. It is worth noting that in the emotional climate of the time, many members of the ILC or States sought to condemn the 'colonial clause'. The debate quickly became ideological. Behind the condemnation of the 'colonial clause', to the merits and demerits of which few paid any attention, speakers wished to condemn colonialism,<sup>48</sup> a system which,

<sup>43</sup> The ambiguity of the 'colonial clause' is actually already clear in the conjunction 'or' indicating the alternative. In fact, there exist several forms of 'colonial clauses'. See, for a brief overview, Yuen-Li Liang, 'Colonial Clauses and Federal Clauses in Multilateral United Nations Instruments', *AJIL*, 1951, pp 108–28 or S. Rosenne, 'United Nations Treaty Practice', *RCADI*, 1954-II, vol. 86, pp 275–444, esp. pp 377–8.

<sup>44</sup> *YILC*, 1959, vol. II, p 48. A 'dependent' territory would be for him any 'not-metropolitan' territory, the 'metropolitan' one being defined as one 'administered directly by [the State's] central government under the basic constitution of the State, in such a manner that this government is not subject, either in the domestic or in the international field, to any other or ulterior authority' (*ibid*, Arts 26 and 27 of his draft). This effort of clarification may be criticized for taking as an absolute model what Sir Gerald knew best, namely the self-government of British colonies and other dependent territories. However, such a model had little to do with what, eg, France had experienced under the Third and Fourth Republics. It should be noted as well that, as expected, not all the 'dependent' territories were placed under the same rubric by Fitzmaurice; instead several categories were distinguished among them. The whole gave an appalling complexity to the system and a certain sense of an unsuccessful attempt to catalogue heterogeneous situations.

<sup>45</sup> eg Art. 56, para. 1 (former Art. 63, para. 1) of the European Convention on Human Rights provides that any State may at the time of its ratification or at any time thereafter declare by notification addressed to the Secretary General of the Council of Europe that the present Convention shall, subject to paragraph 4 of this Article, extend to all or any of the territories for whose international relations it is responsible.

<sup>46</sup> Other international organizations use similar expressions. For instance, the United Nations Convention on the Prevention and Punishment of the Crime of Genocide (78 UNTS 277) refers to 'territories for the conduct of whose foreign relations that Contracting Party is responsible' (Art. 12).

<sup>47</sup> *YILC*, 1964, vol. II, p 12 ('territories for which the parties are internationally responsible').

<sup>48</sup> Some interventions have been quite outspoken. Thus, for Czechoslovakia, the colonial clause formulation 'was contrary to the requirements for the speedy liquidation of colonialism' (*YILC*, 1966, vol. II, p 64). G. Tunkin asked whether it was 'appropriate for the Commission to act as if the world had stood still and give its approval to colonial institutions' (*YILC*, 1964, vol. I, p 49, para. 35). Several other members of the Commission intervened in a supportive sense. The debate continued later without anything new being added within the Sixth Committee of the General Assembly.

incidentally, became considerably weakened between Fitzmaurice's 1959 report and Waldock's final report in 1966. Duly chastised, the Commission in its last report to the General Assembly chose to adopt a neutral wording, very close indeed to the wording of current Article 29,<sup>49</sup> in order to replace the expression 'territories for which the parties are internationally responsible' (previously proposed by Waldock), given that the Commission was eager, as it explained, to 'avoid the association of the latter term with the so-called "colonial clause"'.<sup>50</sup>

30. However, the simple avoidance of speaking about something that may be the source of embarrassment does not make that thing disappear as if by magic. The ILC elegantly sidestepped this issue by affirming that 'its task in codifying the modern law of treaties should be confined to formulating the general rule regarding the application of a treaty to territory'.<sup>51</sup> The flexibility of the rule ('unless a different intention...') is there to ensure this minimum duty to which the Commission will from now on restrict itself. The remainder will be a question of practice and interpretation of that practice.

### Transformations of the 'colonial clause'

31. It is hardly surprising to note that the issue of the territorial application of treaties continues to interest first and foremost the former European colonial powers, those which (although at times without much enthusiasm) have retained some of their overseas possessions, including some for which the 'colonial clause' had been conceived in the past.

32. Permitting the exclusion of a given territory from the territorial scope of a treaty's application (for political, constitutional, economic, ethnic, religious, environmental, or other reasons) does not deprive the 'clause' of its usefulness. On the contrary and among other things, it is, and has often been, beneficial to the territory in question, albeit paradoxically, since it preserves the idea of a separation in relation to the rest of State territory—the 'metropolis'—and thus allows in a certain way a legitimization of a future struggle for autonomy or even secession.

33. Ever since the 1950s the practice has been quite rich and has recently further expanded, proving that the modulation of the territorial effects of treaty application remains useful. And since it is useful, it cannot be condemned, even if one does condemn the expression 'colonial clause' which, it is true, has become increasingly problematic in most languages today. Words are responsible for more evil than things. Language is less neutral than reality.

34. It is impossible, of course, to draw up a complete list of treaties with flexible territorial application. However, two key treaties have emerged in the conventional history of Europe during the last half century. The first example relates to Article 56(1) of the European Convention on Human Rights<sup>52</sup> which, as has already been mentioned, allows a contracting State to extend the Convention to any or all 'of the territories for whose international relations it is responsible'. In other words, the principle is here the non-extension of the Convention to these territories, the precise determination of which is problematic, to say the least. Moreover, this provision provides a clear example of the

<sup>49</sup> Article 25 of the Commission's last report was thus drafted: 'Unless a different intention appears from the treaty or is otherwise established, the application of a treaty extends to the entire territory of each party' (*YILC*, 1966, vol. II, p 213).

<sup>50</sup> *Ibid*, commentary, para. 3.

<sup>51</sup> *Ibid*.

<sup>52</sup> Signed on 4 November 1950 (213 UNTS 221).

possibility for a single State party to determine, largely unilaterally, the territorial scope of a treaty. Implemented quite early by Denmark,<sup>53</sup> the United Kingdom,<sup>54</sup> and the Netherlands,<sup>55</sup> the modification mentioned *supra* has been historically one of the causes—or one of the pretexts—that prevented the country of René Cassin from ratifying the Convention for quite some time, precisely because of the possibility it afforded to exclude French overseas possessions from the protection of the Convention. Actually this was quite a specious argument because it would have been sufficient for France to notify the extension of the Convention to any territory, the international relations for which the French Republic was responsible, which France finally did when it ratified it.

35. To this major limitation *ratione loci*, the Convention also adds two other limitations. The first (Art. 56(4)) allows a State party, having extended the application of the Convention to a territory for which it has international responsibility, to exclude, in relation to that territory, the possibility for the European Court of Human Rights to accept individual petitions within the meaning of Article 34 of the Convention. It is all the more important to acknowledge that the very existence of this possibility (already made use of by several states concerned, but not by France) hardly appears justifiable after Protocol 11 (11 May 1994) came into force on 1 November 1998, a protocol that generalizes and broadens the right of individuals to refer to the European Court of Human Rights, whereas the absence of such reference considerably reduces the significance of the Convention.

36. The second limitation is more unexpected. *Ratione loci*, it is also a limitation *ratione materiae* in the sense that the provisions of the Convention shall be applied 'in such territories, with due regard to local requirements' (Art. 56(3)). Where the Convention is extended, a kind of adaptation of human rights is thus operated. This genuine adjustment to the concept of human rights overseas is a provision that seems to be relatively valued by the British and Dutch but has not convinced the French. Such a material modification of the local application of the Convention contradicts in all cases the concept of human rights both as a universal value and something universally consistent. From a 'universalist' point of view, one could unequivocally condemn the provision of Article 56(3) (and even perhaps Art. 56 as a whole). On the other hand, if one takes the current (albeit not necessarily modern) 'communitarian' point of view, Article 56(3) may prove a prescient insight by its drafters in favour of a place for minorities and indigenous peoples inhabiting the last 'colonies' of European powers. The adaptation of human rights to 'local requirements' could help to consolidate the cohesion of these continually threatened human groups, notwithstanding the rights of their individual members.<sup>56</sup>

37. It is obvious that both political and moral justification of this provision, as well as its practical implementation, can only cause thorny legal problems. It is, for example, this kind of awkward dilemma that seems to characterize one of the few judgments of the European Court

<sup>53</sup> Extended to Greenland on 13 April 1953.

<sup>54</sup> Extended on 23 October 1953 to 42 territories in Africa, Asia, America, and Europe (Channel Islands, Isle of Man, Gibraltar, Malta, and Cyprus). Some other overseas territories were added later. It is to be noted that Hong Kong had never been added, before its retrocession to China, to the Art. 56 list. See Ch. Lush, 'The Territorial Application of the European Convention on Human Rights: Recent Case Law', *JCLQ*, 1993, pp 897–908.

<sup>55</sup> The territories concerned were Surinam and the Antilles (extension on 1 December 1955). Belgium did this at the same time for its colonies in Africa.

<sup>56</sup> S. Karagiannis, 'L'aménagement des droits de l'homme outre-mer: la clause des "nécessités locales" de la Convention européenne', *RBDI*, 1995, pp 224–305, esp. pp 274 ff.

of Human Rights in which the Court had to discuss that provision. In its *Tyrer* judgment,<sup>57</sup> the Court actually decided not to take into account the 'local requirements' which, according to the British government, had been expected to justify a punishment of flogging imposed on a petty offender by a court on the Isle of Man. The tortuous reasoning of the Court (proof of its discomfort?) makes it impossible to know with any certainty whether the condemnation of the United Kingdom was due to the Isle of Man's location near England's coast (even though it enjoys broad internal autonomy), thus not making it one of the territories for which the clause in Article 56 was originally conceived, or due to the fact that there were no real 'local requirements' (the popular feeling in favour of retaining judicial corporal punishment was the only one raised), or even to the fact that the non-derogatory nature of Article 3 of the Convention, which prohibits degrading punishment, overrides all other considerations. It is perhaps the absence of such a non-derogatory right that later justified the Court in its application of the 'local requirements' clause in the case of *Py v France*.<sup>58</sup> What was at issue here was the absence of voting rights at local elections for some categories of French citizens living in New Caledonia (those not living there for a significant period of time). For the Strasbourg Court, the 'local requirement' here was obviously the concern of preserving peace in New Caledonia by preventing an influx of people from mainland France that would probably alter the demographic balance between rival communities in New Caledonia. As previously stated, communitarianism may well thrive on the ground of the limitation of human rights, with the blessing of the European Convention (and of the Court) on Human Rights.

38. The other major European treaty that shows a very clear application of the possibility of modification of the rule contained in Article 29 of the Vienna Convention on the Law of Treaties is the Treaty of 25 March 1957 establishing the European Community.<sup>59</sup> Articles 349 and 355 of the Treaty on the Functioning of the European Community (TFEU) (former Art. 299 of the EC Treaty) deal in great detail with its territorial scope. No fewer than eight categories of territories are dealt with in this provision, categories to which one can add a ninth, that of Article 204 TFEU (former Art. 188 of the EC Treaty), which deals only with Greenland. Moreover, this luxury in adaptation becomes almost ostentatious if we take into account other numerous situations—which leads us rather far afield from the problem of the 'colonial clause', given that the case here concerns European metropolitan territories—linked to texts maintaining a sometimes ambiguous relationship with the EC Treaty (and now with the TFEU), which is, however, supposed to take precedence over such texts. One can mention, for example, a declaration of Greece annexed to the Accession Treaty of 19 November 1979 referring to the special status of Mount Athos, Protocol No. 3 annexed to the Accession Treaty of 24 June 1994, relating to 'traditional Sami areas', or Council Regulation (EEC) No. 2913/92 of 12 October 1992<sup>60</sup> establishing the Community Customs Code, which excludes some Italian and German territories from Community customs territory.

39. The amendment of former Article 299(2) of the EC Treaty brought about by the Treaty of Amsterdam of 2 October 1997<sup>61</sup> is also worthy of mention. While the original version of this provision provided for a gradual, yet complete, implementation of the EC Treaty provisions in the French overseas departments, the Amsterdam version of Article 299(2) reverts to a more differentiated form of application of the treaty in these departments, to

<sup>57</sup> *Tyrer v United Kingdom*, 25 April 1978, Series A, no. 26.

<sup>58</sup> Judgment of 11 January 2005 (Reports, 2005, vol. I).

<sup>59</sup> 294 UNTS 17.

<sup>60</sup> OJ L 302 of 19 October 1992.

<sup>61</sup> OJ C 340 of 10 November 1997.

which the Azores and Madeira (belonging to Portugal) and the Canary Islands (belonging to Spain) have been added. The Council, responsible for the implementation of this modification, was given the responsibility of taking into account 'the special characteristics and constraints of the[se] outermost regions without undermining the integrity and the coherence of the Community legal order, including the internal market and common policies'. Such specificity of the territorial scope of the EC Treaty is justified by references to the 'structural social and economic situation' of these areas, 'which is compounded by their remoteness, insularity, small size, difficult topography and climate, economic dependence on only a few products, the permanence and combination of which severely restrain their development'. There seems not to be any fundamental change to all this in the actual TFEU. Its Article 349 adds to the list *supra* two small French islands in the Caribbean Sea, namely Saint-Barthélemy and Saint-Martin (of course, the French part of this island). The mentioning of these two islands in the list of Article 349 of the TFEU is justified by the fact that they became autonomous overseas communities (communautés d'outre-mer) in the beginning of 2007 whereas up to that year they formed part of the overseas department of Guadeloupe. Another change is the specification according to which the Council, acting on a proposal from the Commission and after consulting the European Parliament, will take measures of adaptation of the European Union law:

in particular areas such as customs and trade policies, fiscal policy, free zones, agriculture and fisheries policies, conditions for supply of raw materials and essential consumer goods, State aids and conditions of access to structural funds and to horizontal Union programmes.

40. These major changes with regard to the application of European Union legislation in these regions, which had been called for by the populations concerned (at the very least, called for by their elected officials) for many years, would be sufficient in and of themselves to give a new impetus to what was once called the 'colonial clause'. It would thus not be an overstatement to speak of a true thirst for modification of the territorial scope of certain European treaties.

#### D. Sub-national entities and the territorial scope of treaties

41. Over and above recent international activism by sub-national entities, which has also been encouraged by some international organizations<sup>62</sup> and which concerns unitary States almost as much as federal States, the application of Article 29 of the 1969 Vienna Convention in the case of federal States raises particular, yet not always clearly identified, problems, given that the so-called 'federal clause' may lead to the partial territorial application of certain treaties. The serious complications to which the 'federal clause' has given rise are probably responsible for the growing distrust levelled against it.

<sup>62</sup> See, as regards the Council of Europe, the European Framework Convention on Transfrontier Co-operation between Territorial Communities or Authorities signed in Madrid on 21 May 1980 (1272 UNTS 61; CETS No. 106, vol. IV, p 226) completed by the Strasbourg Additional Protocol signed on 9 November 1995 (CETS No. 159). One can still find in the 1966 ILC's draft of the Convention on the Law of Treaties a possibility for federated states to be given a kind of treaty making power (see Art. 5, para. 2 of this draft in *YILC*, 1966, vol. II, p 191, which reads: 'States members of a federal union may possess a capacity to conclude treaties if such capacity is admitted by the federal constitution and within the limits there laid down') but the codification Conference decided otherwise. The literature on the role of sub-national entities in international law, once rather poor, is becoming extremely important. See eg the numerous contributions to the workshop held by the SFDI, *Les collectivités territoriales non-étatiques dans le système juridique international* (Paris: Pedone, 2002).

### Unclear data relating to the problem

42. International law recognizes only States and as a rule does not recognize sub-national entities. Accordingly, the 1969 Vienna Convention grants *treaty-making power* solely to States (Arts 2 and 6). Even its Article 3 ('international agreements not within the scope of the present Convention'), though liberal and permissive, does not authorize a position that would allow sub-national entities the possibility to conclude genuine international treaties. Keeping this in mind, the question of territorial application of treaties in relation to the internal structure of States parties to a treaty could easily have been done away with, insofar as it is presented as a negative form of treaty-making power: if sub-national entities cannot sign international treaties, neither can they prevent the implementation on their 'territory' of treaties signed by the 'central' State.

43. However, in order to preserve the constitutional rights of federated entities, some federal States began the practice of imposing on their partners the insertion of what has been called a 'federal clause' into international treaties. According to Special Rapporteur Waldock's commentary:

the aim of this type of clause is to prevent those provisions of the treaty which concern matters falling within the competence of the individual component states from becoming binding upon the federation until each component state has taken the necessary legislative action to ensure the implementation of those provisions.<sup>63</sup>

Understood in this way, the 'federal clause' carries as a consequence, with regard to the federal State,<sup>64</sup> an entry into force of the treaty characterized by a certain progressiveness, insofar as its application to the territory of the federal State becomes dependent on this State's various component entities taking suitable legislative measures. Indirectly, the federal State disappears behind the federated entities while the latter come out of the shadows and become, in practice, actors in international relations since, without their positive action, the treaty will at best bind the federal State only partially. Even their lack of action is likely to give them an importance as far as the federal State's partners are concerned and, ultimately, as far as international law is concerned.

44. Even if one disregards this major distortion of the theory of international law, the practical drawbacks of the 'federal clause' are significant. It is already possible to question the sincerity of the commitment of the federal State to be bound, when—and, in any case, as long as—no federate entity has taken the appropriate legislative measures. Moreover, when only some among them have taken the required measures, the problems arising from such a situation will become even more numerous. So one may ask: will the treaty come into force only when all the federated states have taken the necessary measures (one could also ask what a 'necessary' measure is in this context and who makes that determination)? Or, on the contrary, could a certain number of 'legislative approvals' by federated entities be considered sufficient?<sup>65</sup> If the latter assumption proves to be correct, new and almost inextricable problems are likely

<sup>63</sup> *YILC*, 1964, vol. II, p 14, para. 5.

<sup>64</sup> This progressiveness could be seen either as a reference to a material entry into force (ie making internal legislation conform to the objectives of the treaty) or to a formal—and more traditional—one. In both cases, the treaty would apply only to the territory of the federated States having taken the 'necessary legislative action'. Needless to say that, on this assumption, the federal clause, by cutting up the territory of the federal State, produces practical effects similar to those of the colonial clause.

<sup>65</sup> Waldock answers this question in the negative (*YILC*, 1964, vol. II, p 14, para. 5). To maintain this negative stance, however, amounts to virtually excluding a federal State from ever becoming party to a treaty on the

to then appear in the area of international responsibility (as regards, in particular, the connection of an occurrence giving rise to an international dispute in relation to some other federated entity not having, *ex hypothesi*, the same 'status' with regard to the treaty).

### Relative dissatisfaction with the 'federal clause'

45. Aware of these problems, Herbert Briggs, at the time a member of the Commission, stated that Article 29 of the Convention should not deal with federal clauses since he considered that the matter primarily concerned not international but internal constitutional law.<sup>66</sup> Nevertheless, the 'federal clause' does internationalize the constitutional difficulties of a federal State. In addition to the fact that contracting States do not understand in what manner they will be confronted with the internal problems of their federal partner, the partner can only be weakened by a situation that reveals its internal operational difficulties to the rest of the world.<sup>67</sup> If one adds to this the legal insecurity resulting from such situations,<sup>68</sup> one can understand why the federal clause, once relatively common in treaties, has become increasingly rare.<sup>69, 70</sup> Thus, Sir

basis of the 'federal clause' when the number of the federated States composing it is particularly high. Although any parallelism with international organizations is, by nature, a rather bold position, one cannot refrain from mentioning, in this respect, the precedent of the United Nations Convention on the Law of the Sea (UNCLOS) of 10 December 1982 (1833 UNTS 397), which, in its Annex IX (Art. 3, para. 1), specifies that an international organization has the power to become party to this Convention under the condition, *inter alia*, that a majority of its member States have already become party to it. This provision was designed almost exclusively for the benefit of the European Community (currently, the European Union), which is the international organization that currently most resembles a federal model.

<sup>66</sup> *YILC*, 1966, vol. II, Part Two, p 51, para. 28.

<sup>67</sup> Difficulties that add to a certain 'international' fragility, which would be inherent to the federal State, according to the Badinter Commission in its opinion no. 1 of 2 November 1991 (2), b); *RGDIP*, 1992, p 265. According to Frédérique Coulée, federalism would in itself constitute 'un défaut structurel rendant difficile tout engagement international de l'Etat fédéral' ('Collectivités territoriales non étatiques et champ d'application des traités internationaux' in SFDI, *Les collectivités territoriales non-étatiques dans le système juridique international* (Paris: Pedone, 2002), pp 95–124, esp. p 118).

<sup>68</sup> F. Coulée, *ibid*, p 119 and R. L. Looper, 'Federal State' Clauses in Multilateral Instruments', *BYBIL*, 1955–56, pp 162–203, esp. p 164.

<sup>69</sup> The principal example of a treaty containing a 'federal clause' remains the Constitution of the International Labour Organization (15 UNTS 41). Its Art. 19, para. 7(b) is about 'Conventions and Recommendations which the federal government regards as appropriate under its constitutional system, in whole or in part, for action by the constituent states, provinces, or cantons rather than for federal action'. Hence the great theoretical importance of this clause since through the Constitution of the International Labour Organization (ILO) all international labour conventions can be at issue. The question greatly interested academic writers in the past. See, among many others, M. O. Hudson, 'The Membership of the United States in the International Labour Organisation', *International Conciliation*, 1935, pp 122–30; R. Stewart, 'Canada and International Law Conventions', *AJIL*, 1938, pp 36–62; K. H. Bailey, 'Australia and International Labour Conventions', *International Labour Review*, 1946, pp 329–56; J. Secretan, 'Swiss Constitutional Problems and the International Labour Organisation', *International Labour Review*, 1947, pp 1–20. It is to be noted that some international labour conventions adapt themselves specifically to the requirements of the federal system of some States. See on this point, J. F. MacMahon, 'The Legislative Techniques of the International Labour Organisation', *BYBIL*, 1965–66, pp 1–109, esp. pp 58–9. It is also interesting to note that the ILO Constitution allows a 'colonial clause'. Article 35, para. 1 permits the non-extension of a labour convention to the 'non-metropolitan territories for whose international relations [States parties] are responsible' so long as 'the subject-matter of the Convention is within the self-governing powers of the territory or the Convention is inapplicable owing to the local conditions or subject to such modifications as may be necessary to adapt the Convention to local conditions'. Yet, and this is not usual (see Aust, *supra* n 6, pp 202–4), a State not extending a labour convention to a non-metropolitan territory is asked to explain the reasons for this non-extension. In a certain way, then, the 'colonial clause' begins to resemble a 'federal clause'. However, is there really a great difference between these two territorial clauses?

<sup>70</sup> Without doubt, the development of domestic jurisprudence in the federal States, especially in constitutional matters, is there for a reason. Thus the US Supreme Court, in its ruling *Missouri v Holland* (252 US 416)

Gerald Fitzmaurice had already in his 1959 report, incorporated in Article 26 ('Application to metropolitan territory') of his draft Convention a paragraph 3 which read:

the constituent states, provinces or parts of a federal union or federation, notwithstanding such local autonomy as they may possess under the constitution of the union or federation, are considered to be part of its metropolitan territory for treaty and other international purposes.<sup>71</sup>

46. Thereafter, certain treaties of major importance went so far as to contain truly 'anti-federal' clauses. For example, despite resistance from several federal States,<sup>72</sup> the two United Nations Human Rights Covenants of 16 December 1966 provide that their provisions 'shall extend to all parts of federal States without any limitations or exceptions'.<sup>73</sup> The presence of these clauses in the Covenants is explained by the very nature of the Covenants. However, it is not clear that this is good legal strategy. Taking so obvious a position against the internal constitutional protection of legislative power of federated states (legislative power that very often relates to human rights enshrined in the two Covenants) can easily cause a backlash to the detriment of these instruments insofar as, in several constitutional systems, the representatives of the federated states have input with regard to the ratification of these instruments. Basically a choice must be made: either to opt for a full but perhaps belated application of a treaty in a federal State or

in 1920, cleared the situation by allowing the federal State to conclude treaties that became binding on federated states even if they related to fields within the jurisdiction of the latter. The situation has been similar in Australia after a case was brought before the High Court of Australia in 1983 (*The Commonwealth v Tasmania [Tasmanian Dam]*, 158 CLR 1). Nguyen Quoc Dinh, P. Daillet, M. Forteau, and A. Pellet (*Droit international public* (8th edn, Paris: LGDJ, 2009), p 243, fn 141) explain the rarefaction of the 'federal clause' by the rise to power of the federal State that succeeds a first phase that is often observed and that is characterized by a relatively loose federal bond. History would thus push for centralization and international law would complete its triumph. However, the situation remains different from one federation to another and we should indicate that the United States and Australia count among the federal States that are relatively 'centralized' with regard to the treatment of international relations. In contrast, the solution to this problem is quite different in Germany. Rather classically, according to § 32 para. 1 of the German Basic Law of 1949, 'relations with foreign States shall be conducted by the Federation' but at the same time § 30 provides that, 'except as otherwise provided or permitted by this Basic Law, the exercise of State powers and the discharge of State functions is a matter for the Länder'. The ingredients of an open conflict between Federation and Länder are readily available although § 32 para. 2 seems eager to propose a solution: 'Before the conclusion of a treaty affecting the special circumstances of a Land, that Land shall be consulted in timely fashion' (official English translation available at: <<http://www.btg-bestellservice.de/pdf/80201000.pdf>>). Yet, 'consulting' cannot be deemed sufficient insofar as, ultimately, only the Länder can implement an international treaty *ex hypothesi* interfering with their legislative competence. The solution seems to reside rather in what has been called the Lindau Agreement concluded in 1957 between the Federation and the Länder. Sometimes considered a gentlemen's agreement, the Lindau Agreement provides that in the case of treaties affecting the Länder, the Länder must give their consent (and not merely their opinion) before the Federation can validly enter into a treaty.

<sup>71</sup> *YILC*, 1959, vol. II, p 47. However, Sir Gerald conceded, in his commentary on this provision, that the words by which the first paragraph of Art. 26 of his draft began ('Unless a treaty otherwise provides...') 'in no way prevent[ed] the insertion of the so-called "federal clause" in treaties, where there is agreement to do this' (*ibid*, p 75, para. 130).

<sup>72</sup> A proposal submitted to the United Nations Commission on Human Rights by Yugoslavia, a federal State, shows an unmistakable interest in this respect. Under the terms of this proposal, a federal State could not ratify the International Covenant on Civil and Political Rights unless 'it has previously ensured the application thereof throughout its territory' (M. J. Bossuyt, *Guide to the Travaux Préparatoires of the International Covenant on Civil and Political Rights* (Dordrecht: Martinus Nijhoff, 1987), p 763). There was no vote on this proposal.

<sup>73</sup> Article 28 of the International Covenant on Economic, Social and Cultural Rights (993 UNTS 3) and Art. 50 of the International Covenant on Civil and Political Rights (999 UNTS 171). However, the Human Rights Committee insists, quite naturally, on the fact that the periodic reports of States parties to the Covenant on Civil and Political Rights contain specific information on compliance of federated State law with provisions of the Covenant.

instead to choose an implementation that may be partial but occurs more quickly. The choice could vary with time and treaties, but it is certain that Article 29, quite liberal here as elsewhere, does allow such an option.

47. Similarly it is not prohibited for a specific treaty to envisage a different definition of the 'federal clause' from the commonly accepted one.<sup>74</sup> Such is the case, for instance, in the American Convention on Human Rights of 22 November 1969, where Article 28(2) provides that:

with respect to the provisions over whose subject matter the constituent units of the federal State have jurisdiction, the national government shall immediately take suitable measures, in accordance with its constitution and its laws, to the end that the competent authorities of the constituent units may adopt appropriate provisions for the fulfillment of this Convention.<sup>75</sup>

Since this provision seems to imply an obligation for the federal State that becomes party to the Convention ('shall take' ['prendra' 'deve tomar'] and even more importantly, 'immediately'), the Convention departs significantly from the 'federal clause' in the way that classical doctrine and Special Rapporteur Waldock had envisaged. It is actually much closer to the 'anti-federal clause' contained in the two Covenants of 1966. It thus seems rather difficult to accommodate the subtleties of federalism within treaties for the protection of human rights.<sup>76</sup>

48. It can be added however that, in spite of the wording of Article 28, the American Convention on Human Rights is commonly regarded as containing a more or less traditional 'federal clause'.<sup>77</sup> This interpretation seems to rely on the fact that it was the delegation of the United States that specifically insisted on the inclusion of a 'federal clause' in the Convention. For example, this delegation, referring to future Article 28 of the San José Convention, pointed out that on this basis, the local federal State 'is merely obligated to take suitable measures to the end that state and local authorities may adopt provisions for the fulfillment of this Convention' and to consider that these 'suitable measures could consist of recommendations to the states'.<sup>78</sup> It is acknowledged that one is here quite far

<sup>74</sup> Moreover, it is possible that a milder form of 'federal clause' would not completely clear the federal State of the application of the treaty on its territory. Thus, eg Art. 34(b) of the UNESCO Convention concerning the protection of world cultural and natural heritage of 23 November 1972 (1037 UNTS 151) requires the federal government, with regard to the provisions of the Convention:

the implementation of which comes under the legal jurisdiction of individual constituent states, countries, provinces or cantons that are not obliged by the constitutional system of the federation to take legislative measures [to] inform the competent authorities of such states, countries, provinces or cantons of the said provisions, with its recommendation for their adoption.

A more classical obligation of result seems thus to be replaced here by an obligation of conduct insofar as it is assumed (insofar as it is hoped, to tell the truth) that the friendly pressure of the federal government will encourage the federated authorities to take all suitable measures.

<sup>75</sup> 1144 UNTS 123.

<sup>76</sup> See for a more ancient study M. Sørensen, 'Federal States and the International Protection of Human Rights', *AJIL*, 1952, pp 195–218.

<sup>77</sup> See, inter alios, H. Gros Espiell, 'La Convention américaine et la Convention européenne des droits de l'homme. Analyse comparative', *RCADI*, 1989-VI, vol. 218, pp 166–411, esp. pp 383–7; H. Faúndez Ledesma, *El sistema interamericano de protección de los derechos humanos. Aspectos institucionales y procesales* (San José: Instituto interamericano de derechos humanos, 1996), pp 61–2; and, quite critically, S. Davidson, *The Inter-American Human Rights System* (Aldershot: Dartmouth, 1998), pp 42–3.

<sup>78</sup> As cited in Th. Buergenthal, 'The Inter-American System for the Protection of Human Rights' in Th. Meron (ed.), *Human Rights in International Law: Legal and Policy Issues* (Oxford: Clarendon Press, 1984), pp 439–93, esp. p 446.

from the provision of Article 28. The entire matter seems to constitute a contradiction between the 'ordinary meaning to be given to the terms of the treaty' and the will of the parties such as reflected in the *travaux préparatoires* of the Convention. However, the 1969 Vienna Convention privileges the 'ordinary meaning'. And one expert on this problem admits that the drafters of Article 28 were not necessarily aware of the legal difficulties this provision would cause.<sup>79</sup>

49. The Inter-American Court of Human Rights addressed this clause rather belatedly, a surprising fact considering the rather high number of federal States bound by the American Convention. In its judgment of 27 August 1998, in the case *Garrido and Baigorria v Argentina (reparations)*,<sup>80</sup> where it was led to discuss Article 28 of the American Convention,<sup>81</sup> the Court adopted a position that is subtle, if not totally convincing or satisfactory. For the Court, Article 28 refers to the case where competence in relation to human rights lies with federated states, an assertion which, at first sight, sounds purely descriptive rather than normative in nature but which has the immense merit of not closing the door to possible support by the United States or Canada in the future. However, in the eyes of the Court, Argentina always behaved 'as if the federal State had jurisdiction over human rights matters' ('como si dicha competencia correspondiera al Estado federal'; No. 46 of the judgment). So the Court had no hesitation in invoking the principle of estoppel. One has no way of knowing with certainty the conduct that prevented Argentina from being able to invoke Article 28 nor, moreover, what a State must do (or, more simply, not do) to benefit from this provision (at least as it is interpreted by a majority of commentators and, obviously—but implicitly—by the Court itself). Thus here a real legal difficulty has met with a real legal enigma.

50. And this reality persists. Federal States are definitely not like other States. As noted by an excellent analyst,<sup>82</sup> a federal State must constantly battle on two fronts at the international level: (1) against other States participating in the negotiations which are reluctant to appreciate its particular situation; and (2) against the federated entities composing it, which are unwilling to trust it. If the possibility of benefiting from the 'federal clause' is not offered, the federal State could be tempted by a 'territorial clause', which, drawing a sort of inspiration from the 'colonial clause', would be covered all the same by Article 29 of the Vienna Convention. Failing this, a federal State might be tempted to formulate reservations of a territorial nature. However, it is not at all clear that a reservation could really replace a federal or a territorial clause; the need for any reservation—whenever, of course, a treaty does not prohibit them—to be compatible with the object and purpose of the treaty is likely to limit fairly strictly the use of reservations for 'federalist' purposes. Indeed, using a reservation to make the application of a treaty depend on the implementation of its provisions by the federated states, over which the federal State would have no constitutional means of applying pressure, appears immediately to be only slightly in compliance with Article 19 of the Vienna Convention on the Law of Treaties. Thus, for example, the attempt of Australia<sup>83</sup> to circumvent, by means of a reservation, the 'anti-federal clause' of

<sup>79</sup> Ibid, p 447.

<sup>80</sup> *Inter-American Yearbook on Human Rights*, vol. 4, p 3473.

<sup>81</sup> It is true that, in earlier phases of this case, Argentina showed great reluctance to rely on Art. 28 of the Convention (see para. 45 of the judgment of 27 August 1998) before recognizing its own responsibility in this case relating to the disappearance of two persons held by the police force of the province of Mendoza.

<sup>82</sup> B. R. Opeskin, 'Federal States in the International Legal Order', *NILR*, 1995, pp 353–86, esp. p 361.

<sup>83</sup> 1197 UNTS 414. See on this issue G. Triggs, 'Australia's Ratification on the International Covenant on Civil and Political Rights: Endorsement or Repudiation?', *ICLQ*, 1982, pp 278–306.

Article 50 of the International Covenant on Civil and Political Rights met with an objection (admittedly a very courteous one) by the Netherlands. More reassured by the Tasmanian Dam case of 1983 than worried by the Dutch reprimand, however, Australia replaced the reservation in 1984 by a 'declaration' under the terms of which 'the implementation of the treaty throughout Australia will be effected by the Commonwealth, State and Territory authorities having regard to their respective constitutional powers and arrangements concerning their exercise', given that 'Australia has a federal constitutional system in which legislative, executive and judicial powers are shared or distributed between the Commonwealth and the constituent States'.<sup>84</sup>

### E. Other questions

51. The discussions that took place within the ILC during the first half of the 1960s also focused on certain aspects of the territorial application of treaties, which ultimately did not find any place as such in the Commission's draft or in the text of Article 29 finally adopted by the Codification Conference in 1969. The issues of the extraterritorial application of treaties and of the composition of the territory on which a treaty is to apply will nevertheless be discussed here.

#### What constitutes territory under Article 29?

52. The question as to what constitutes territory under Article 29 was not actually one that stirred great discussions within the ILC. Without any real debate on the matter, the commentary adopted by the Commission in 1964 merely indicates that the expression 'the entire territory of each party' ('a comprehensive term', according to the Commission) includes 'all the land and appurtenant territorial waters and air space which constitute the territory of the State'.<sup>85</sup> The 1966 commentary is identical in its wording,<sup>86</sup> a fact that points either to the lack of interest the members of the Commission had for the question or to their deeply held conviction that what is obvious does not call for comments, comments which, in a worst case scenario, could actually render the obvious less so.

53. Is it, however, so obvious? To begin with, the term 'territorial waters', modified by the adjective 'appurtenant', is likely to raise some questions. First, in the context of the time, 'appurtenance' and even more so its French counterpart '*adjacence*'<sup>87</sup> is one of those expressions that international law loves to use when it is not sure of what solution to propose. It should be recalled that at the time (in 1964 as well as in 1966), there was a raging battle around the question of the actual extent of the territorial sea. Even at the time, one could see the emergence of territorial seas that could extend up to 200 nautical miles from the baseline. The criterion of 'appurtenance' put forward by the Commission, (even if timidly) could have constituted, in this context, an additional weapon in the hands of powers (especially western), which militated against excessive expansion of the maritime zones of the coastal States.

<sup>84</sup> At: <[http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-4&chapter=4&lang=en#EndDec](http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en#EndDec)>.

<sup>85</sup> *YILC*, 1964, vol. II, p 179, para. 3.

<sup>86</sup> *YILC*, 1966, vol. II, p 213, para. 3.

<sup>87</sup> One should note that even if used almost as synonyms in the ILC commentaries, the two words ('appurtenance' and 'adjacence') are not the same.

54. Moreover, the term ‘territorial waters’ is unknown to conventional international law, including international treaty law to which the Commission itself had contributed. The Geneva Convention of 29 April 1958 on the Territorial Sea and Contiguous Zone, which was adopted on the basis of drafts written by the Commission, recognizes both territorial sea and internal waters; it makes no mention, however, of ‘territorial waters’. It would be possible, however, on the faith of a few bits of discussion within the Commission to consider that ‘territorial waters’ would include both territorial sea and internal waters, two maritime zones deemed to be subject to the sovereignty of the coastal State. Obviously agreeing with Charles Rousseau, Special Rapporteur Waldock quoted him as follows: ‘Spatial application of a treaty and territory under the sovereignty of a State party to it coincide absolutely’.<sup>88</sup>

55. Similarly, intervening later in the debate, the Netherlands mentioned treaties ‘which lend themselves to application on the continental shelf, which is not under the Geneva Convention [of 29 April 1958 on the Continental Shelf], “territory” of the coastal State’.<sup>89</sup> It is quite possible, however, that the Dutch intervention on this occasion had confused the scope of treaties and their subject matter.<sup>90</sup> In any event, the government of the Netherlands subsequently proposed a redrafting of what would become Article 29 that read as follows: ‘[t]he scope of a treaty extends to the entire territory of each party, and beyond it as far as the jurisdiction of the State extends under international law, unless the contrary appears from the treaty’.<sup>91</sup> After receiving this suggestion, the Special Rapporteur then proposed in his Sixth Report a second paragraph to the future Article 29, which read: ‘[a] treaty may apply also in areas outside the territories of any of the parties in relation to matters which are within their competence with respect to those areas if it appears from the treaty that such application is intended’.<sup>92</sup> This wording is

<sup>88</sup> ‘Il y a coïncidence exacte entre la sphère d’application spatiale du traité et l’étendue territoriale soumise à la souveraineté étatique’ in *YILC*, 1964, vol. II, p 13, para. 3. In his *circulaire* of 30 May 1997 relating to the development and conclusion of international agreements by France (*JORF*, 31 May 1997, p 8415), the French Prime Minister considers that the territorial sea, because it is implicitly covered by the various territorial clauses that can be inserted into a treaty, ‘does not have thus to be expressly stated’ (Art. III, 2). Nothing of course prevents a treaty from expressly referring to maritime zones. Thus, eg, Art. 2 of the Chicago Convention of 7 December 1944 on International Civil Aviation (15 UNTS 295) indicates that ‘for the purposes of this Convention, the territory of a State shall be deemed to be the land areas and territorial waters adjacent thereto under the sovereignty, suzerainty, protection or mandate of such State’.

<sup>89</sup> *YILC*, 1966, vol. II, p 64.

<sup>90</sup> Theory concerning the subject matter of a treaty is naturally not to be neglected. Also, a large number of treaties deploy some of their concrete effects outside the territory of the contracting State. Mention may for instance be made of the treaties relating to Antarctica and outer space and treaties on the law of war and humanitarian law, given that many military operations inevitably take place outside the territory of a contracting State (eg on the open sea or in an occupied territory). Apart from such specific constraints, it is, on the other hand, difficult to support the position that a treaty applies to territories escaping the State’s sovereignty (cf R. Jennings and A. Watts, *Oppenheim’s International Law* (9th edn, Harlow: Longman, 1992), pp 1250–1, fn 621), such as, eg, lease territories, or military bases abroad (unless, of course, the aforementioned bases are explicitly subject to the sovereignty of the State that occupies them, such as the British ‘sovereign base areas’ in Cyprus; see, however, in this respect, Art. 355(5)(b) TFEU). Thus, according to several authors, no legal international provision, to start with that of Art. 29 of the Vienna Convention 1969, would oblige a State party to seek and arrest the authors of violations of international humanitarian law conventions outside their own territory (cf P. Gaeta, ‘Is NATO Authorized or Obligated to Arrest Persons Indicted by the International Criminal Tribunal for the Former Yugoslavia?’, *EJIL*, 1998, pp 174–81, esp. p 179; S. Lamb, ‘The Power of Arrest of the International Criminal Tribunal for the Former Yugoslavia’, *BYBIL*, 1999, pp 165–244, esp. p 221, fn 191).

<sup>91</sup> *YILC*, 1966, vol. II, p 66.

<sup>92</sup> *Ibid.*

obviously more restrictive than that of the Netherlands. Despite the fact that it could also rely on a similar proposal by the US government, the Commission did not adopt it.

56. Several explanations for this can be proposed. First of all, the Special Rapporteur does not seem to have supported his own proposal with much enthusiasm. Several members of the Commission took a negative stance towards the additional paragraph proposed by Waldock. Thus, formulating the criticism that has probably weighed the most in the Commission's decision not to accept the proposal of the Special Rapporteur, Angel Paredes believed that the phrase 'areas outside the territories of any of the parties' was so broad 'that it could even mean that the treaty could be imposed on countries which had nothing to do with it and which would thus be subjected to a sort of colonization'.<sup>93</sup> Fearing once again that it would be accused of colonialist objectives, insufficiently freed from confusion between the territorial application of a treaty and its subject matter, the Commission did not have too much difficulty in closing off debate. It considered that it could always shelter behind the term 'unless the contrary appears from the treaty' with which the draft at that time began.<sup>94</sup> According to Senjin Tsuruoka, this clause

should be interpreted fairly broadly, in the positive as well as the negative sense, so that it was understood that the treaty—if its object so required or the intention was clear—was applicable outside the territory of the parties.<sup>95</sup>

57. Despite its interest, it is doubtful that the Commission specifically endorsed this way of thinking. While referring implicitly to the Dutch and US proposals in its 1966 report, the Commission directed the debate instead towards the idea of the extraterritoriality of treaties. Even though its reference to the ability of treaties to govern the high seas (or outer space) is undoubtedly relevant, the Commission remains silent on other aspects of the law of the sea, aspects that it certainly knew to be far more complex.<sup>96</sup> Here it is especially important to consider the continental shelf, over which the coastal State has 'sovereign rights' for purposes of exploration and exploitation of some of its natural resources,<sup>97</sup> as well as to consider the contiguous zone, in which the coastal State has certain rights of police enforcement.<sup>98</sup> The general perception regarding these two maritime zones is that they cannot *a priori* be considered as part of the 'territory' of the coastal State insofar as they are not under the coastal State's sovereignty.

58. Moreover, nothing can be argued in favour of Tsuruoka's broad conception of Article 29. If the continental shelf and the contiguous zone do not constitute elements of the 'territory', it is unclear how the clause 'unless a different intention appears from the treaty or is otherwise established'<sup>99</sup> could ever mean that these maritime zones become part of the said 'territory'. It will always be difficult to see within a single concept its polar opposite. Furthermore, the desire to overly extend the meaning of this clause, the precise meaning of which, as noted *supra*, already poses problems, would eventually deprive it of

<sup>93</sup> *YILC*, 1966, vol. I, Part Two, p 47, para. 91.

<sup>94</sup> 'Unless a different intention appears from the treaty or is otherwise established', in the actual version.

<sup>95</sup> *YILC*, 1966, vol. I, Part Two, p 49, para. 15.

<sup>96</sup> *YILC*, 1966, vol. II, pp 213–14, para. 5.

<sup>97</sup> Article 77, para. 1 UNCLOS (1833 UNTS 397) or Art. 2, para. 1 of the 1958 Geneva Convention on the Continental Shelf (499 UNTS 311).

<sup>98</sup> Article 33, para. 1 UNCLOS or Art. 24, para. 1 of the 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone (516 UNTS 205).

<sup>99</sup> At that time: 'Unless the contrary appears from the treaty'.

any real significance. However, the provision of Article 29 is only a residual rule of interpretation. Article 29 is not predestined to become some kind of imperative law. States should thus feel free to provide for the implementation of treaty provisions on their respective continental shelves. The difference with the application of treaties to the various portions of their 'true' territory is that the application to the continental shelf cannot take advantage of the flexibility permitted under Article 29. Therefore, the extension of the treaty to the continental shelf of the contracting States must be explicit rather than implied.<sup>100</sup>

59. Finally, the examination of the components of 'territory' within the meaning of Article 29 would not be complete without a brief evocation of the exclusive economic zone. The exclusive economic zone made its first appearance in the 1982 United Nations Convention on the Law of the Sea, which explicitly enshrined it for the first time. Although reminiscent in some respects of the continental shelf issue, the exclusive economic zone differs from it (as regards the subject of this study) because of its particularly elusive legal nature. While the continental shelf is to be considered essentially as part of the high seas, an assertion that effectively excludes any 'territorial' rights on it by the coastal State, the legal nature of the exclusive economic zone remains unspecified. At the time of the Third United Nations Conference on the Law of the Sea, the radical opposition between supporters of a purely 'economic' character for the economic zone and supporters of a 'territorial' character for the economic zone meant that the 1982 Convention refused to decide between these trends.<sup>101</sup> Since it is neither part of the 'territory' of the States nor part of the high seas, the exclusive economic zone could not, in any event, be directly concerned with Article 29 of the Vienna Convention.

### The question of the 'extraterritorial' application of treaties

60. If words had exact meaning, then the 'extraterritorial' application of treaties would appear to be the complete antithesis of their 'territorial' application. Seen in this light, then, the question of the 'extraterritorial' application would not logically justify any developments within the framework of a study on Article 29 of the Vienna Convention. Yet it has caused and continues to cause problems that are not easy to solve. First, a precise definition of the concept of 'extraterritorial' application is not at all self-evident. The concept would appear, in fact, to cover two realities, albeit related ones, regarding the State party to the treaty. On the one hand, it would suggest the application of a treaty to the territory of States not bound by it. On the other hand, it would also suggest the application of the treaty to areas certainly not belonging to the territory of the States parties, such as the one cited *supra*, but not belonging either to the territory of other States.

<sup>100</sup> Besides, of course, treaties specifically referring to the continental shelf such as the Geneva Convention 1958 mentioned *supra*, can also be given as an implicit example of the will of States. Council Regulation No. 2913/92 of 12 October 1992 establishing the Community Customs Code where under the terms of Art. 23, para. 1(h) 'products taken from the seabed or subsoil beneath the seabed outside the territorial sea provided that that country has exclusive rights to exploit that seabed or subsoil' are to be considered 'goods originating in a country' (OJ L 302, 19 October 1992, p 1). See for details M. Michael, *L'applicabilité du traité instituant la CEE et du droit dérivé au plateau continental des Etats membres* (Paris: LGDJ, 1984).

<sup>101</sup> See on this question Arts 55–9 UNCLOS. See for details S. Karagiannis, 'L'Article 59 de la Convention des Nations Unies sur le droit de la mer (ou les mystères de la nature juridique de la zone économique exclusive)', *RBDI*, 2004, pp 325–418.

61. The difficulty in dealing with this question arises mainly from the fact that the ILC has never taken the trouble to clarify the idea of the 'extraterritorial application' of a treaty, an idea that the majority of its members, however, has always explicitly rejected. It could certainly be argued that it is unnecessary to define what it is not addressed, but this loophole, which has formal logic on its side, finds perhaps in this case, some natural limits.

62. The first assumption mentioned *supra* is, prima facie, the issue of a treaty *inter alios actus* and one can here essentially refer the reader to developments relating to the question previously discussed in this commentary. Yet we should indicate that the *res inter alios acta* issue has never been a serious issue—or cause for concern—for the Commission in its overall consideration of Article 29.

63. It remains, however, that it is possible for a treaty to be extended to the territory of another State, 'which is not itself a contracting party', with the assent of that State. The Third Report of Sir Humphrey Waldock expressly considered the possibility of such an 'extension', which can be regarded as a form of 'extraterritoriality'.<sup>102</sup> However, the Commission did not adopt this proposal from its Special Rapporteur. It was felt (logically) that the problematic issue here concerned the *res inter alios acta* issue, or rather the flexibility introduced into this rule, which one finds today in Articles 35 and 36 of the Convention.

64. On the other hand, the second form of 'extraterritoriality', that is the application of the treaty to areas not placed by international law under the sovereignty of any State (party or not to the treaty in question) remains relevant. Under this heading (and under the conditions seen *supra*) one could list several maritime zones and, in first place, the continental shelf, the exclusive economic zone, the high seas or Antarctica, at least for the so-called non-claimant States. Admittedly, several international treaties would apply in such spaces, but it is difficult to argue that this would be the result of the application of Article 29 of the Vienna Convention. To take one of the most striking examples, that of ships flying the flag of a contracting State, if the treaty binding the latter applies even to those ships sailing on the high seas, this is so certainly not on the basis of any theory of 'floating territory'<sup>103</sup> (which intellectually could still refer, although with some difficulty, to Art. 29), but rather on the basis of international custom, which pursues both a healthy and necessary goal, namely, according to the famous expression of Gilbert Gidel,<sup>104</sup> to ensure the 'rule of law' (*juridicité*) in the sea (and especially on the high seas). This customary norm was, in its substance, codified by the United Nations Convention on the Law of the Sea.

65. Finally it is important to note that some treaties, primarily those relating to the protection of human rights, are characterized by a tendency to go beyond territorial application *stricto sensu*. They would apply not only to the territory included within the sovereignty of the contracting party, in short on that party's own territory, but also to the territory on which it extends its 'jurisdiction'. The most famous such example is certainly Article 1 of the European Convention on Human Rights under which 'the High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention'.<sup>105</sup>

<sup>102</sup> *YILC*, 1964, vol. II, p 15.

<sup>103</sup> See on this point L. Lucchini and M. Voelckel, *Droit de la mer*, vol. I (Paris: Pedone, 1990), p 148, fn 173.

<sup>104</sup> *Le droit international public de la mer*, 1934, vol. 1, p 225.

<sup>105</sup> It is characteristic in this respect that the international Covenant relating to civil and political rights of 16 December 1966, although favouring, textually, a 'territorialist' approach as regards its own application (Art.