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# Some Diplomatic Problems of Codification of the Law of Treaties

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# SOME DIPLOMATIC PROBLEMS OF CODIFICATION OF THE LAW OF TREATIES

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*The International Law Commission is presently engaged in a project to codify the Law of Treaties. A project of this magnitude is, of course, replete with many substantive legal problems. The author, while fully cognizant of the ramifications of the legal issues presented by the codification, takes as his central topic some of the less obvious but, perhaps ultimately more critical problems, related to the codification project. After defining the scope of the project and tracing the remote and recent history of the codification of treaty law, the author discusses the structural form which the restatement of treaty law has taken, the impact which the political attitudes of participating states have had on the project and the conditions—both procedural and in terms of political climate—necessary for a successful diplomatic negotiation and adjustment of conflicting state interests.*

Since 1962 the International Law Commission has been intensively engaged, on the basis of a series of reports submitted by its present Special Reporter, Sir Humphrey Waldock, in the codification of the Law of Treaties. It hopes to complete this project in 1966 and submit the results of its labors to the Twenty-First Session of the General Assembly of the United Nations.[1] This intensive work had been pre-

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[1] The reports submitted by Sir Humphrey Waldock are as follows: *First Report, on the conclusion, entry into force and registration of treaties,* 2 YEARBOOK INT'L LAW COMM'N 27 (A/CN. 4/144) (1962); *Second Report, on the essential validity, duration and termination of treaties,* 2 YEARBOOK INT'L LAW COMM'N 36 (A/CN. 4/156 and Adds. 1-3) (1963); *Third Report, on the application, effects, revision and interpretation of treaties,* 2 YEARBOOK INT'L LAW COMM'N 5 (A/CN. 4/167 and Adds. 1-3) (1964); *Fourth Report, revision of articles 1-31 in the light of the comments of Governments,* U. N. Doc. No. A/CN. 4/177 and Adds. 1-2, to be published in 2 YEARBOOK INT'L LAW COMM'N (1965); *Fifth Report, revision of articles 32-51 in the light of the comments of Governments,* U. N. Doc. No. A/CN. 4/183 and Adds. 1-4, to be published in 2 YEARBOOK INT'L LAW COMM'N (1966); *Sixth Report, revision of articles 52-73 in the light of comments of Governments,* U. N. Doc. No. A/CN 4/186 and Adds., to be published *ibid.* The text of articles 1-73 as adopted in 1962-1964 on the basis of the first three reports is reproduced in English, French and Spanish, in U. N. Doc. No. A/CN. 4/L. 107. For the comments of governments and the observations of delegations in the Sixth Committee on articles 1-54, see U. N. Doc. No. A/CN. 4/175 and Adds. 1-4, and on the remaining articles, U. N. Doc. No. A/CN. 4/182 and Adds. The Commission completed its revision of articles 1-29 and 48 at the first part of its Seventeenth Session (1965) and included the text of the articles provisionally adopted, but without commentaries, in its *Report to the General Assembly,* U. N. Doc. No. A/6009. It completed its revision of articles 30-47 at the second part of its Seventeenth Session (Jan.

ceded by sporadic discussions on the topic, especially in 1950, 1951 and 1959, and a long succession of reports by the previous Special Reporters.[2] This paper is not concerned so much with the legal problems (each one of the seventy-three articles which the International Law Commission included in the first reading of its draft (1962-1964) is worthy of a dissertation or thesis in itself), as it is with two or three of the general problems which have arisen, problems which might belong equally to the discipline of international relations as to that of international law.

The three aspects of the Codification of the Law of Treaties to be accorded special attention are:

1) how the topic ever came to be chosen in the first place;
2) its scope; and
3) what kind of problems will confront the political organizations after the International Law Commission has finished its work.

## I

The question of the codification of international law has been on the agenda of international organizations since the early days of the League of Nations. Except for an equivocal decision regarding the treatment of reservations to multilateral treaties of which the Secretary-General of the League of Nations acted as depositary and certain other ephemera, no progress was made regarding the codification of the law of treaties, and the problem was in effect dropped from the codification program of the League of Nations.[3] However, if the League of Nations

1966) similarly including the text of the articles provisionally adopted (U. N. Doc. No. A/CN. 4/L. 113), without commentaries, in its *Report* (U. N. Doc. No. A/CN. 4/18). The Commission hopes to complete its re-examination of the remaining articles, and adopt the final text of the articles and commentaries, at its Eighteenth Session (May 1966) and submit the results of its work to the Twenty-first Session of the General Assembly of the United Nations (Sept. 1966).

[2] Brierly, *First Report on the Law of Treaties*, 2 YEARBOOK INT'L LAW COMM'N 222 (A/CN. 4/23) (1950); *Second Report*, 2 YEARBOOK INT'L LAW COMM'N 70 (A/CN. 4/43) (1951); *Report on reservations to multilateral conventions*, (A/CN. 4/41) *id.* at 1; *Third Report on the Law of Treaties*, 2 YEARBOOK INT'L LAW COMM'N 50 (A/CN. 4/54) (1952); Lauterpacht, *First Report on the Law of Treaties*, 2 YEARBOOK INT'L LAW COMM'N 90 (A/CN. 4/63) (1953); *Second Report on the Law of Treaties*, 2 YEARBOOK INT'L LAW COMM'N 123 (A/CN. 4/87) (1954); Fitzmaurice, *First Report on the Law of Treaties*, 2 YEARBOOK INT'L LAW COMM'N 104 (A/CN. 4/101) (1956); *Second Report on the Law of Treaties*, 2 YEARBOOK INT'L LAW COMM'N 16 (A/CN. 4/107) (1957); *Third Report on the Law of Treaties*, 2 YEARBOOK INT'L LAW COMM'N 20 (A/CN. 4/115) (1958); *Fourth Report on the Law of Treaties*, 2 YEARBOOK INT'L LAW COMM'N 37 (A/CN. 4/120) (1959); *Fifth Report on the Law of Treaties*, 2 YEARBOOK INT'L LAW COMM'N 69 (A/CN. 4/130) (1960). For the texts of articles tentatively adopted on the basis of the First and Second Reports of Brierly and the First Report of Fitzmaurice, in 1951 and 1959 respectively, see U. N. Doc. No. A/CN. 4/L. 99 (1962).

[3] For documentation relating to the codification of the Law of Treaties, see LEAGUE of NATIONS Doc. Nos. C. 196. M. 70. 1927. V., pp. 105 and 271, C. 198. M. 72. 1927. V., A. 18. 1927. V., and A. 105 1927. V. On the question of reservations, see *Report of the*

was inactive in the codification of the law of treaties, a different situation existed on the American continent. In 1925, the American Institute of International Law adopted an elaborate proposal for the codification of public international law, of which Project No. 21, consisting of six articles, dealt mainly with the formal parts of the law of treaties. This initiative bore fruit in two directions, one official and one unofficial. On the official level, the Sixth International American Conference, held in Havana in January and February of 1928, adopted a series of conventions, one of which is the so-called Havana Convention on Treaties, consisting of twenty-one articles.[4] This is more elaborate than the American Law Institute's draft because it goes beyond the purely formal parts of the law of treaties and deals with some of the more difficult substantive parts, such as the termination of treaties, the caducity of treaties, the execution of treaties, and the like (matters which, in the exploratory discussions in the League of Nations had been excluded from any possible projected codification). On the unofficial level, pride of place has to be given to the draft on the Law of Treaties produced by the Harvard Research in International Law.[5] This draft consists of thirty-six articles, covering virtually the whole of the law of of treaties, but its real value lies in its extremely painstaking and detailed commentaries, in which State practice, national and international, is very carefully examined and all the facts properly marshalled. It remains the most significant work on the law of treaties produced under private auspices, with the exception of one or two major books on the law of treaties by individual authors which have been written since the Harvard draft was completed. Indeed, it would not be an exaggeration to state that the Harvard draft constitutes the point of departure for all modern research into the law of treaties, including the work of the International Law Commission, and one may regret that it has not yet been found possible to bring it up to date.

As a matter of interest, it might also be noted that the principal scientific, non-governmental, organization devoted to the codification of international law and its progressive development, the Institute of International Law, in this epoch displayed no interest in any of the

*Subcommittee of the Committee of Experts for the Progressive Codification of International Law*, LEAGUE OF NATIONS DOC. No. C. 211. 1927. V., and LEAGUE OF NATIONS OFF. J., 8th Ass. 770-72, 800, 880 (1927) (discussion in the 45th Session of the Council of the League, June 1927). In 1951 the International Court of Justice expressed the opinion that the recommendation then made by the League Council constituted "at best" the "point of departure of an administrative practice." *Reservations to Genocide Convention*, Advisory Opinion of May 28, 1951, I. C. J. Rep. 15, 25.

[4] 22 AM. J. INT'L LAW 138 (Supp. 1928).

[5] 29 AM. J. INT'L LAW 653 (Supp. 1935).

problems of the law of treaties. In the whole period from its establishment in 1873 until after World War II, substantive questions of the law of treaties were not examined by the Institute, save for resolutions adopted in 1885, 1891 and 1892, dealing with the publication of treaties.[6] Those resolutions in part bore fruit in Article 18 of the Covenant of the League of Nations, now substituted by Article 102 of the Charter of the United Nations.

A marked change is noticeable in the approach of the United Nations to this question. Article 18 of the Statute of the International Law Commission, adopted in 1947, required the Commission to survey "the whole field of international law with a view to selecting topics for codification, having in mind existing drafts, whether governmental or not." The Secretary-General was asked to submit preparatory documentation for the first meeting of the Commission. Accordingly in 1949 he submitted a memorandum entitled *Survey of International Law in relation to the Work of Codification of the International Law Commission.*[7] This document was submitted anonymously, but it is now known that it was composed by the late Sir Hersch Lauterpacht.[8] The memorandum contains a remarkable section on the law of treaties, the central feature of which is the observation that "persuasive reasons may be adduced in support of the view that it is desirable to include the entire subject of treaties within the orbit of codification."[9] Apart from reasons of technical order which are discussed in paragraph 91 of the memorandum, paragraph 92 hints at more general considerations connected with the operation of the doctrine of *rebus sic stantibus.* The memorandum concludes on this point: "There is reason to believe that this is the kind of subject which, both because of its importance and of its political implications, can be suitably treated by a highly authoritative body such as the International Law Commission in connection with the codification of the law of treaties."[10]

At the Commission's first session in 1949, this memorandum was discussed point by point. After a brief debate at the sixth meeting, the Commission decided to include the topic of treaties in the list of subjects to be retained by it. At the next meeting a series of votes was held to determine the order of priority of discussion of the topics, and the

[6] INSTITUT DE DROIT INTERNATIONAL, TABLEAU GÉNÉRAL DES RÉSOLUTIONS (1873-1956), publié par Hans Wehberg (1957), pp. 133-37.
[7] U. N. Doc. No. A/CN. 4/1 Rev. 1 (1949).
[8] Statement of Dr. Liang, Secretary of the International Law Commission, at its 535th meeting. 1 YEARBOOK INT'L LAW COMM'N 52 (1960).
[9] *Ibid.*
[10] *Id.* at 53.

law of treaties headed the list, receiving twelve votes out of the fifteen members of the Commission.[11] In that way, the question of the law of treaties was taken upon the agenda of the International Law Commission and placed high on its original priority list of topics for codification.

Progress, however, was slow, although not without major significance for the current phase. The discussions of 1950 and 1951, on the basis of the first two reports of Professor Brierly, apart from their impact on various matters of substance, are important for the bearing they have had on the broad scope of the subject, as well as for drawing attention to the delicate problem, to which further reference will be made, of the place to be accorded in the codification to treaties to which an international organization is a party. Discussions in the General Assembly in 1950, 1951 and 1959, in the International Court of Justice in 1951, and in the Commission in 1950 and 1951 on the question of reservations to multilateral conventions are the beginning of the modern statement of the law by the Commission which in effect has abandoned the system which prevailed in the League of Nations and which, in its early years, the Commission itself was prepared to endorse.[12] The two reports submitted by Sir Hersch Lauterpacht were bold and imaginative, and showed that no mundane approach was being conceived. Rather, he hoped to put into execution the plan already indicated in the Secretary-General's memorandum of 1949, namely, to cover the entire subject of treaties. Even more significant are the conclusions drawn by the Commission from the five reports submitted by Sir Gerald Fitzmaurice, and its 1959 discussion on the first of these. As regards the scope of the topic, Fitzmaurice followed in the footsteps of his predecessors and envisaged covering practically the entire subject of treaties. He differed from both his predecessors, however, in one very material respect. The draft articles submitted by Brierly and Lauterpacht had been terse, and if there was no specific decision by the Commission, nevertheless there seems to have been a general understanding that the objective was to produce a draft which could form the basis of an international convention. In this respect, however, Fitzmaurice's approach was entirely different, and has led to deep controversy. He considered (and he is not alone in this view) the topic to be quite unsuitable for codification by means of an international convention, and preferred to restate the law in the form of an expository code. The result is a massive

[11] YEARBOOK INT'L LAW COMM'N 48, 58 (1949).

[12] See articles 18-22 of the draft articles on the law of treaties as adopted in 1965, *supra* note 1.

collection of draft articles, going with considerable detail and finesse into many of the niceties of diplomatic and treaty-making practice. This approach seems to have caused some discomfort to the Commission, and those of its members schooled in civil law systems expressed themselves as being quite unused to this form of presentation of a series of legal rules, the more so as much of the material was descriptive rather than normative. The debate in this fundamental aspect came to a head after Fitzmaurice resigned from the Commission following his election, in 1960, as a judge of the International Court. The Commission, on appointing the present Special Reporter in 1961, held a general debate on the future of the codification of this topic, and this debate led to a very firm decision by the Commission to complete the codification of the law of treaties in a form which could serve as a basis of a convention. The Commission therefore took a formal decision which abandons the expository code approach, and instructed the new Special Reporter to work on the assumption that he was preparing the basis for an international convention.[13]

It should be emphasized that this series of decisions adopted by the International Law Commission was taken with the full knowledge and subsequent approval of the General Assembly. In 1949, the General Assembly approved the selection of topics for codification made by the International Law Commission and the priority list,[14] and from time to time it had taken note of the various Progress Reports relating to the law of treaties which were submitted by the Commission. In 1961 the General Assembly formally took note, *inter alia,* of the decision made in connection with the appointment of the Special Reporter and recom-

[13] *Report of the International Law Commission Covering the Work of its Thirteenth Session* 2 YEARBOOK INT'L LAW COMM'N 128 (A/4843) (1961). In this connection, it has recently been disclosed that Sir Humphrey Waldock, on being approached to assume the duties of Special Reporter, had "virtually made his acceptance conditional on the draft articles being given the form of a convention." Roberto Ago, speaking as Chairman of the Sixteenth Session of the Commission (1964) at the 851st meeting of the Sixth Committee, U. N. GEN. ASS. OFF. REC. 20th Sess., 6th Comm. (A/C. 6/851) (1965). The Commission in its new composition after the election of 1961 reaffirmed the 1961 decision in 1962. *Report of the International Law Commission Covering the Work of its Fourteenth Session,* 2 YEARBOOK INT'L LAW COMM'N 160 (A/5209) (1962). It again affirmed it in 1965, in the light of certain comments by governments. International Law Comm'n, *Report,* U. N. GEN. ASS. OFF. REC. 20th Sess., Supp. No. 9 (A/6009) (1965). Nevertheless, the Commission has experienced considerable difficulty, both as a matter of substance and as one of drafting, in shaking off the traces of the expository code approach. Part I (articles 1-29) as adopted in 1962 in particular contained much purely descriptive material, most of which was shorn away in 1965 following severe criticism both by governments and by some members of the Commission itself. This partly accounts for the relatively slow progress made in the revision of those articles at the first part of the Seventeenth Session. For an important doctrinal criticism of this aspect, see Lissitzyn, *Efforts to Codify or Restate the Law of Treaties,* 62 COLUM. L. REV. 1184 (1962).

[14] U. N. GEN. ASS. OFF. REC. 4th Sess., Resolution 373 (IV) (A/1251) (1949).

mended that the Commission continue its work in the field of the law of treaties.[15] This has given to the Commission's decisions a general measure of political backing. On the other hand, except for the question of reservations to multilateral conventions, which was of immediate urgency and to which different considerations applied, the General Assembly as a whole had not yet evinced much interest in the detailed work of the Commission on the law of treaties.

Things began to change in 1960, however. In the General Assembly of that year, a somewhat spontaneous debate was held regarding the work of the Sixth Committee itself, and this soon spread over into becoming a general debate on the future of the codification effort. Undoubtedly this debate was influenced, apart from other considerations, by the success of the first United Nations codification conference of 1958 on the law of the sea. The experience of that Conference had shown at least two things. One was that if there is sufficient political interest in a topic, such as was the case for the law of the sea, it is feasible to convene a codification conference, even if several aspects of the topic are matters of high legal and political controversy. The second was that the manner in which the International Law Commission produced its draft articles as the basis for the work of a codification conference was on the whole adequate for the purpose. As a result of the debate, the General Assembly decided to review the whole question of future work in the field of the codification and progressive development of international law.[16] In 1961 no less than forty-seven governments suggested that the law of treaties should now be treated by the Commission,[17] and by 1962 this figure had reached fifty-six.[18] Thus, when the Commission commenced its present phase on the law of treaties, on the basis of its 1961 decision it had the positive backing of approximately fifty percent of the total membership of the United Nations of that period. Furthermore, it is clear from the debates on the

[15] U. N. GEN. ASS. OFF. REC. 16th Sess., Resolution 1686 (XVI) (A/5036) (1961). For the Commission's formal reaction to that Resolution, see U. N. GEN. ASS. OFF. REC. 17th Sess., 6th Comm. (A/C. 6/SR. 734) (1962), and the subsequent formal approval by the General Assembly of the progress of the work on that basis, embodied in U. N. GEN. ASS. OFF. REC. 17th Sess., Resolution 1765 (XVII) (A/5287) (1962); U. N. GEN. ASS. OFF. REC. 18th Sess., Resolution 1902 (XVIII) (A/5601) (1963); Resolution 2045 (XX), Dec. 8, 1965 (A/6014).

[16] U. N. GEN. ASS. OFF. REC. 15th Sess., Resolution 1505 (XV) (A/4605) (1960).

[17] This figure is based on the replies of governments submitted in response to Resolution 1505 (XV) *supra* note 16, and the debate in the Sixth Committee in 1961 on agenda item 65, U. N. GEN. ASS. OFF. REC. 15th Sess., 6th Comm. (A/C. 6/SR.-649) (1961). See U. N. GEN. ASS. OFF. REC. 16th Sess., Annexes, Agenda Item No. 70, at 18 (A/C. 6/L. 491) (1961), and U. N. GEN. ASS. OFF. REC. 16th Sess., Resolution 1686 (XVI) (A/5036) (1961).

[18] BRIGGS, THE INTERNATIONAL LAW COMMISSION 332, 338 (1935).

reports of the International Law Commission in the 1962 and 1965 sessions of the General Assembly that the majority of members of the United Nations are now in favor of consummating the codification of this topic by means of a multilateral convention, although here and there the idea is still put forward that it would be better to do it by means of a code. It is doubtful if the reasons for this different approach are exclusively political. In many respects it is likely that they emerge from the intellectual difficulty of answering the question: What would be the source of validity of an international convention on the law of treaties itself? As a theoretical matter, there is undoubtedly force in this, but putting the matter on the political plane, where it ultimately belongs, the theoretical question loses much of its significance because there is a general interest and a general demand today to codify the law of treaties and all other branches of international law, in the form of general multilateral conventions, in the belief that only in that way can the rights of every State to participate in the work of formulating the codification convention be fully assured.[19] Nevertheless, there is one aspect of political significance in this question, to which reference will be made later.

This marked change in the general interest of codifying the law of treaties is not confined to the United Nations. Contrary to previous experience, the Institute of International Law has, since 1948, taken on its agenda two difficult parts of the law of treaties, namely, the questions of interpretation and the modification and termination of treaties. Lauterpacht, and later Fitzmaurice, were the Institute's Reporters on interpretation. The work undertaken at their direction, which is of the highest value, ended in a resolution adopted by the Institute in its 1956 session at Granada. So far as the second question is concerned, the initiative for which came from Georges Scelle, work has continued under the direction of Professor Giraud as Reporter, and this year the present writer was appointed to that position. The topic has, however, been limited to the termination of treaties, and remains on the Institute's agenda. Characteristic of the Institute's approach to both questions has been its refusal to deal with the detailed and secondary rules which are taken for granted and are more or less commonplace (although some of them have had to be included in the Commission's text). Emphasis has been placed on seeking out the real problems of substance with the purpose of extracting from these problems any rules

[19] *Cf.* statement by the Chairman of the Commission's Seventeenth Session, Milan Bartosh, at the 851st meeting of the Sixth Committee, U. N. GEN. ASS. OFF. REC. 20th Sess., 6th Comm. (A/C. 6/SR. 851) (1965).

of genuine legal content or indicia of legal policy attracting a sufficiently broad consensus, and enunciating them in the form of a resolution of the Institute. In relation to interpretation, the Institute was at least partially successful, and the Granada Resolution of 1956 became the point of depature for the fuller provisions which the International Law Commission included in its draft articles in 1964.[20] With respect to termination, the Institute has not yet reached final decisions, but it is aware of the need to co-ordinate its work with the progress of the International Law Commission and with future developments on the diplomatic level.[21] Its approach has been similar, in that it is seeking out the underlying problems rather than the superficial and formal ones, and its previous work, although incomplete, has been of the greatest value to the International Law Commission, which has managed to include four articles on the difficult matter of the revision of treaties within the framework of its more comprehensive approach to the entire question of the Law of Treaties.[22]

## II

Closely connected with the choice of the topic itself is the question of its scope. In so far as the League of Nations thought at all of codifying the law of treaties, it took under advisement only a very small part of the law, namely, that relating to the conclusion of treaties and, as has been seen, there was no political backing even for that in the period between the two World Wars. From the very beginning, however, the International Law Commission has seen its task as an attempt to codify what it calls the "entire subject" of treaties,[23] and on this there exists general political agreement. There may be room for discussion as to what precisely is included in the "entire subject," that is

[20] For the Granada Resolution, see 46 ANNUAIRE DE L'INSTITUT DE DROIT INTERNATIONAL, SESSION DE GRENADE 359 (1956). For the Commission's broader approach, see articles 69-71 of the draft articles adopted in 1964 in the Commission's Report on its Sixteenth Session. International Law Comm'n, *Report*, U. N. GEN. ASS. OFF. REC. 19th Sess., Supp. No. 9 (A/5809) (1964); 2 YEARBOOK INT'L LAW COMM'N 199-206 (1964). Note also, in the Institute of International Law, the Resolution adopted at the Brussels Session of 1936 on a limited aspect of the interpretation of the most-favored-nation clause. TABLEAU GÉNÉRAL, *supra* note 6, at 131.

[21] 50 ANNUAIRE DE L'INSTITUT DE DROIT INTERNATIONAL, SESSION DE BRUXELLES 361 (1963).

[22] U. N. GEN. ASS. OFF. REC., articles 65-68, *supra* note 20, at 19.

[23] Thus, in its initial resolution on the question of reservations to multilateral conventions, the General Assembly recited in the third preambular paragraph that the Commission was "studying the whole subject of the Law of Treaties." U. N. GEN. ASS. OFF. REC. 5th Sess., Resolution 478 (V) (A/1775) (1950). The necessity for the completion of the Commission's work on the entire subject was also one of the themes that preceded the adoption of Resolution 1452 (XIV) on the same topic. U. N. GEN. ASS. OFF. REC. 14th Sess., Resolution 1452 (XIV) (A/4311) (1959). For more general support for this idea, see the series of resolutions at note 15 *supra*.

to say whether the controlling rules of law governing a given situation be squarely within the laws of treaties or in some other branch of international law; but that is not the real point in connection with the scope of the topic. The main question of scope has related to something quite different.

As is the case for all international law, the international law of treaties developed from the practice of States, and until very recently the only type of treaty which could be conceived was a treaty concluded between States. But starting with the League of Nations, and intensified by the United Nations, a new type of international treaty has become common, one to which an international organization is a party. These treaties themselves fall into two categories, one between a State and an international organization, and one between two or more international organizations themselves. It is easy to say that the "entire subject" includes treaties concluded by international organizations and that there is no real difference of *substance* in the rules of the law of treaties applicable to that kind of treaty or to a treaty concluded between States. In its early considerations of the topic, the International Law Commission, without perhaps going into the matter very thoroughly, also assumed that the law of treaties would apply more or less automatically to treaties to which international organizations were a party, although at the same time it restricted the formulation of the rules to treaties concluded between States.[24] However, on purely theoretical grounds, closer inspection of the matter may lead to the conclusion that this is an assumption which yet has to be proved.

But apart from this theoretical aspect, there is also a political aspect, because it appears that there is considerable political opposition to placing international organizations on the same level as States, and this political opposition is itself a reflection of very acute differences of national interest on the very question of the nature and role of international organizations and, above all, of the United Nations, in the world today. Evidence of this appeared in the course of the codification of the law of the sea when the question arose of the right of international organizations to sail ships under the flags of international organizations. (The political background of that question can be found in Korea.) In effect, both the International Law Commission and the 1958 Conference on the Law of the Sea decided to leave this question

[24] International Law Comm'n, *Report*, U. N. GEN. ASS. OFF. REC. 5th Sess., 6th Comm. 88 (A/1316) (1950). This approach was confirmed in 1959, in para. (6) of the commentary on article 2 then adopted. International Law Comm'n, *Report*, U. N. GEN. ASS. OFF. REC. 14th Sess., 6th Comm. 5 (A/4169) (1959).

open.[25] The question came to a head in the period 1962 to 1965 in connection with the law of treaties. In 1962, the Commission adopted a definition of the term "treaty" for the purposes of its draft articles which would have included treaties concluded between two or more States or other subjects of international law and governed by international law. At the same time, it inserted a provision in its article on capacity to conclude treaties, stating that in the case of international organizations, capacity to conclude treaties depends on the constitution of the organization concerned.[26] However, the written comments of governments on this disclosed a quiet but rather significant opposition,[27] and on reconsidering the matter in 1965, the Commission dropped these references to international organizations. It defined the term "treaty" for the purpose of the present articles 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"; and from the article on capacity it removed all reference to the capacity of international organizations to conclude treaties. The only concession was to include a general reservation to the effect that the fact that the present articles do not relate to treaties concluded between States and other subjects of international law or between such other subjects of international law shall not affect the legal force of treaties or agreements or the application to them of any of the rules set forth in the present articles to which they would be subject independently of these articles.[28]

In justification of this change, the Commission explained that many of its draft articles as provisionally adopted in the period 1962 to 1964 were formulated in terms applicable only to treaties concluded between

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[25] Article 7 of the Convention on the High Seas of 1958. See also 2 YEARBOOK INT'L LAW COMM'N 102 (A/CN. 4/103) (1962) and discussion at the 347th meeting; para. (5) of the Commentary to article 30 on the Law of the Sea (1956), International Law Comm'n, *Report*, U. N. GEN. ASS. OFF. REC. 11th Sess., 6th Comm. 25 (A/3159) (1956).

[26] Draft articles on the law of treaties adopted in 1962, articles 1(1)(*a*) and 3(3). And see International Law Comm'n, *Report*, U. N. GEN. ASS. OFF. REC. 17th Sess., 6th Comm. 7( A/5209) (1962).

[27] U. N. Doc. No. A/CN. 4/175 and Adds. 1-4. See also the comments of the Special Reporter in his *Fourth Report*, U. N. Doc. No. A/CN. 4/177, particularly in the section on "Title—Draft Articles on the Law of Treaties" and on the provisions mentioned in the previous footnote.

[28] Revised texts of articles 1(1) *(a)*, 2 and 3. International Law Comm'n, *Report*, U. N. GEN. ASS. OFF. REC. 20th Sess., Supp. No. 9, at 6 (A/6009) (1965). For added emphasis, the Commission also inserted a new article, tentatively numbered 0, expressly limiting the scope of the present articles to treaties concluded between States. See also the written comments of Yugoslavia on this point. U. N. Doc. No. A/CN. 4/175/Add. 5.

States, and that further special study of treaties concluded by international organizations would be needed before the Commission could be in a position to codify satisfactorily the rules applicable to this category of treaties. It further stressed that it considered its primary task at the present stage of the codification of international law as being to codify the fundamental principles of the law of treaties, and that it would lead to greater clarity and simplicity in the statement of those principles if the draft articles were explicitly confined to treaties concluded between States.[29] Several members of the Commission considered this change in the definition of treaty to be a retrogressive step and expressed doubts as to the validity of the first contention.[30] On the other hand, the logic of the Commission's argument that further and more detailed study of the practice and law regarding the treaties of international organizations would be required, seems, on reflection, inescapable.

## III

What explanation can be offered for this change in the general political attitude towards the codification of the law of treaties? In the first place, there is the inherent importance of the subject. The law of treaties, the law of contracts to use the common law term, the law of obligations to use the civil law term, constitutes the very heart of any coherent legal system. All codification of the different branches of international law which has been undertaken hitherto, such as the law of the sea and the law of diplomatic and consular relations, has related to peripheral, though not by any means unimportant, aspects of the law of treaties. They were peripheral in the sense that without a clear statement of the general international law of treaties they are, so to speak, suspended in midair, just as, in some respects the codification of the law of treaties is open-ended until progress is made on the closely related topic of the responsibility of States. The central importance of the law of treaties in any codified system of international law has always been recognized by private scholars. If governments have been hesitant about it, several reasons may be advanced. One, for instance, can be found in the high degree of technicality of the subject; in the difficulty of analyzing in concrete terms the political interests of one or

[29] *Id.* paras. 19-21, at 4. *Cf.* para. (6) of the commentary to article 2 as adopted in 1959, *supra* note 24.

[30] See discussion at the 776th, 777th and 810th meetings (1965). Similarly, during the debate in the Sixth Committee in the Twentieth Session of the General Assembly, some delegations were critical of this decision of the Commission, although it seems to have attracted the support of the majority.

more governments towards different segments of the topic. Another can be found in the assumption that failure to succeed in codifying the law of treaties could do inestimable harm, both to the codification effort as a whole and probably to the whole fabric of customary international law. It was necessary to gain some experience in codification of the peripheral matters before governments could, with any degree of confidence, embark upon the codification of such a central topic as the law of treaties. Considerable general experience in codification has now been accumulated, both in the so-called unsuccessful Hague Conferences of 1930, and in the United Nations Codification Conferences of 1958, 1960, 1961 and 1963. It is significant that the substantial political support for the codification of the law of treaties started making itself felt from 1961 onwards, that is to say, after there had already been two highly successful codification Conferences convened under the auspices of the United Nations and working on the basis of projects produced by the International Law Commission.

But there may be other reasons altogether for this changed attitude today in contrast with the attitude of the League of Nations. First of all, one must remember that in terms of sheer quantity, treaty law today exceeds in bulk and in practical importance customary international law. The greater part of the day-to-day international legal relations of States are now governed by treaty and not by customary law. This is so both for bilateral relations and for multilateral relations.[31] This was not true as late as 1958, but is a direct consequence of the codification of the law of the sea and of the law of diplomatic and consular relations. Customary international law still remains, but it provides the background for this written law.[32] It is sufficient to compare the 205 volumes of the *League of Nations Treaty Series* with the *United Nations Treaty Series,* already over 500 volumes, in order to see, in very concrete terms, the tremendous growth in international treaty-making. In this situation, it is illogical not to have the law of treaties itself codified in written form. There is yet another reason which has come out in the course of the discussions in the International Law Commission. Most significantly in connection with the topic of *rebus sic stantibus,* which is perhaps the most political of all the different aspects of the law of treaties, but also in connection with other topics, such as the separability of treaty provisions, or the validity of

[31] Rohn, *Institutionalism in the Law of Treaties: A Case of Combining Teaching and Research,* American Society of Int'l Law, Proceedings 93-98 (1965).

[32] *Cf.* article 62 of the draft articles adopted in 1964 and articles 30 *(bis)* adopted in January, 1966.

a treaty the conclusion of which has been procured by force, attention has been called time and time again to the abuses of the traditional and partly obscure doctrines of the law of treaties made by the Nazis in the revisionist period of German history and the reaction to what was called the *Diktat* of Versailles. The conclusion from this is that uncertainty with regard to the substantive rules of the law of treaties had become a factor working against the maintenance of international peace; in this respect the guarded approach which was evinced in the Secretary-General's memorandum of 1949 may be seen to have been a product of this uncertainty. This may be coupled with still another reason: the League of Nations was an unbalanced organization because of the absence of the United States and the Soviet Union, and this may have unconsciously influenced the decision not to deal with the law of treaties within the framework of that particular codification effort. Even today, when the United Nations is virtually universal, difficulties are experienced in dealing with the codification of international law (as in other areas of international relations) due to China's inadequate representation. It is therefore significant that among the fifty-six States which in 1961 and 1962 positively endorsed the codification of the law of treaties, and in effect insisted on its being given immediate priority by the International Law Commission, are included all five permanent members of the Security Council. This is an indication of a general political interest in reducing the law of treaties to some kind of order in the form of a written codification. It is the identification and existence of this concrete interest which constitutes the point of departure for consideration of the problem of the final stage of the codification of the law of treaties through a conference of plenipotentiaries.

## IV

All experience shows that the existence of a general and at times nebulous political interest does not constitute a sufficient basis for a diplomatic conference. For any diplomatic negotiation to be successful, the negotiators must be in the position of being able to identify the concrete national interests of their own side and of the other side so that the negotiation, which consists essentially of a process of adjustment, can follow a proper and logical pattern. A diplomatic conference for the codification of a branch of international law is no exception. In connection with the law of the sea, this was a problem to which both the General Assembly and the International Law Commission had paid

particular attention in the preliminary phases, for it was widely recognized that in many cases the interests of States would largely be in conflict. Broadly speaking, the same was true of the codification of diplomatic and consular relations, although there the interests of States were largely common and reciprocal. On the other hand, there is at least one instance in which insufficient attention was paid to various social or demographic factors. That is the codification attempted about ten years ago of the problem of nationality, including statelessness. It is significant that the diplomatic conference which was convened to complete that topic finally adopted a convention which varied considerably from the draft produced by the International Law Commission.[33] This seems to indicate that technical perfection, from the legal point of view, is not a sufficient basis for a diplomatic conference if the conflicting national interests and their underlying reasons are also not sufficiently taken into consideration and accommodation found for them in the preliminary stages.

This is the real difficulty regarding a diplomatic conference on the law of treaties. In the same way that technical perfection is not a sufficient basis for a diplomatic conference, so it can be said that the existence of a general political interest in codification of a topic is also not a sufficient basis for the successful conclusion of a diplomatic conference. Insofar as the law of treaties is concerned, it is almost impossible to identify and pin down with any degree of precision the long-term national interests of a given State. The reason is simple. On almost every aspect of the law of treaties, each State may find itself on one side of an issue today and on the other tomorrow; further, the particular position of governments may be excessively prompted by transient considerations related to pending disputes or situations. That this is not a theoretical possibility can be seen from a cursory glance at the Reports of the International Court of Justice for 1952, when the United Kingdom was applicant in the *Anglo-Iranian Oil Co.* case, and respondent in the *Ambetielos* case, on almost the same point of law. More recently, the attitudes of Cyprus, Greece and Turkey on questions of the law of treaties seem to reflect in part current political controversies between those countries. In other words, interests of States in the law of treaties are general and uncrystallized, rather than concrete in terms

[33] For the Commission's draft, see *Report*, Ch. II, U. N. GEN. ASS. OFF. REC. 9th Sess., 6th Comm. 5 (A/2693) (1954). For the text of the Convention on the Reduction of Statelessness, of August 28, 1961, and the final act of the Conference, see U. N. Doc. Nos. A/CONF. 9/14 & Add. 1, and A/CONF. 9/15. It may be noted that neither in the final act, nor in the Resolutions adopted, did the Conference pay the usual tribute to the International Law Commission for its work in this field.

of permanent and clearly identifiable interests as they were in the law of the sea or even in the law of diplomatic and consular relations. Even the widely held view that the so-called new States have fundamentally different ideas for the law of treaties from those held by the older States can find little to support it either in practice or in the International Law Commission. The new States may today have certain special problems vis-a-vis the old States which lead them to take a certain view of a given problem of the law of treaties, and in many instances—such as the problems arising from the so-called State succession—the controlling rules of law are found elsewhere than in the law of treaties. When those same new States have controversies with other new States, or even with old States, in which these special prolems are not prominent, their attitudes are quite different. In these circumstances, one may legitimately ask: How can the *normal* processes of diplomacy operate in a codification conference for the law of treaties? The question is almost impossible to answer. Those who take another view sometimes point to the Havana Conference of 1928 of the American States (despite the small number of ratifications given to the Havana Convention on Treaties). But there seems to be all the difference in the world between a regional codification, in which the philosophy of a community of interests is dominant, and a universal codification, in which this element of homogeneity is completely absent. The International Law Commission seems to be fully aware of this, for obviously it has been trying to produce a text which, while meeting the requirements of technical precision and accuracy, is also not unmindful of the general conflicts of interests that exist with regard to the law of treaties, and such trends on the matter as have become politically identifiable. There, unlike the situation in the League of Nations, isolated aspects of the law of treaties have been discussed in almost every session of the General Assembly since 1946, and recently the Secretariat submitted to the Commission a memorandum detailing these different discussions.[34] On many points of the law of treaties, therefore, there is a certain amount of general political experience which the Commission has been able to take into account. But, nevertheless, the central problem of the fluidity and ambivalence of the national attitudes of States on all questions connected with the law of treaties remains.

In these circumstances, what, it may be asked, are the primary conditions for the success of the final phase of the codification effort? It is

[34] 2 YEARBOOK INT'L LAW COMM'N 1 (A/CN. 4/154) (1963).

suggested that at bottom they can be reduced to two. The first is that there should be general realization that an agreed restatement of the law of treaties in some generally accepted form is an essential requirement for the stability of international relations. The second group of conditions are of a procedural character.

Realization and genuine acceptance of the first requirement should provide the unifying factor where ephemeral national interests, based upon existing political controversies, would be the divisive element. A philosophy of this kind provides the principal explanation and justification for the refusal of the International Law Commission to continue its restatement of the law of treaties in the form of an expository code and to prepare its draft in a form which could serve as the basis of a future convention. Adoption of this form means that the draft articles will reach a relatively high level of abstraction which is only partly concretized in the commentaries which the Commission has appended to its draft articles. This form of legislative drafting, which is common in the drafting of international conventions, means that the day-to-day applications are left to practice, including of course judicial practice, and it opens the way to flexibility by endowing the statement of the law with considerable resilience and self-adaptability to constantly changing circumstances. Too detailed and too precise a codification of the law of treaties could have exactly the opposite result from that which is desired. The danger of over-specificity is that it might lead to greater international controversy and that it would therefore not lead to international stability.

At the same time, it should be noted, it is now clear that the use of this technique, and the advances which have been made by the Commission in clarifying the different points of the law of treaties since 1962, are sowing some seeds of major political difficulty. The possibility exists that this difficulty may become sufficiently acute to raise serious questions as to the opportuneness of carrying too far the formal codification of the law in the present state of international relations, and more particularly even if the draft articles are couched in a form which can serve as a basis for a multilateral convention, whether that would be the most appropriate form for the consummation of the topic. This difficulty has its source in the inadequacies of contemporary international procedures for the pacific settlement of international disputes and in the inability of the United Nations to refine to any appreciable extent its dispute-settlement processes. While this is not directly connected with the law of treaties as such, and indeed is a common feature

of the application of international law in general, its interaction upon the law of treaties raises peculiarly delicate problems. The level of abstraction reached in the formulation of many of the substantive articles on the law of treaties is liable, unless carefully circumscribed both in formulation and in closely interconnected procedural provisions, to be misinterpreted as importing into the statement of the law a higher degree of subjectiveness than is usual in international law, and in turn there is a risk that this may impair the general stability of treaties and thus become a source rather than a cure for international disputes. A highly subjective approach, for instance, was introduced into the law of reservations in the advisory opinion of 1951 although there the practical impact is, it is believed, relatively limited and the risks can be easily exaggerated. It is otherwise as regards the complex of articles dealing with, for example, the invalidity and termination of treaties. Both within the Commission and outside it the question has been repeatedly posed of the degree to which the formulation of these substantive rules should include built-in elements of procedure for the settlement of controversies relating to the application of the substantive rules, or whether the interrelation of substance and procedure can, *as far as the Commission is concerned,* be limited to making the *application* of carefully framed and closely interlocked substantive rules dependent upon the observance of orderly procedures, leaving the elaboration of those procedures to the political organs responsible for the implementation and development of provisions such as those found in Article 33 of the United Nations Charter. This question came to the fore particularly in 1963. Then the Commission decided to adopt the latter approach and, while trying to frame its substantive articles as tautly as possible, squarely based the procedural articles (draft articles 49, 50 and 51) for the application of substantive rules on the United Nations Charter which deliberately excludes elements of compulsion in the choice of the methods for the pacific settlement of disputes. A number of important governments, however, have indicated that they regard this as insufficient, and that the acceptability of some of these cardinal substantive provisions will be dependent upon far stronger procedural guarantees —in some cases the compulsory jurisdiction of the International Court of Justice is demanded—than have so far been vouchsafed.

In its second reading of the relevant articles in January 1966, the Commission, though aware of the significance of this problem, retained its earlier approach for the substantive articles. On the other hand, however, the Commission has not yet re-examined the main procedural

article (article 51) which was regarded as a key article in the draft, but it is significant that the Special Reporter, in his Fifth Report, has recommended no fundamental change in its structure and content. In adopting this position, the Special Reporter was influenced by the fact that judging from recent debates in the General Assembly and in the Special Committee on Principles of International Law concerning Friendly Relations and Co-operation among States which met at Mexico City in 1964, no significant change has occurred in the political attitudes of States towards the major problems of the machinery for the pacific settlement of disputes, including the attitudes towards the International Court of Justice and its compulsory jurisdiction.[35]

As indicated, this is probably a problem—a major problem of contemporary international organization—which passes far beyond the conceptual framework of the law of treaties. Article 33 of the Charter is undoubtedly as relevant to the application of the law of treaties as to any other branch of international law; and if other branches of international law, including those containing highly subjective elements (such as the reformulation, in subjective terms, of the rules on innocent passage in the 1958 Geneva Conference on the law of the sea, thereby overruling the more objective formulations of the International Law Commission) has been possible without undue sensitivity for the interrelation between procedure and substance, it may be asked why the codification of the law of treaties should be any different. Having regard to the overriding importance of treaties in contemporary international relations, the implications of binding the codified law too closely to particular methods of dispute-settlement, however desirable this may be from an aesthetical and even from an idealistic point of view, may well be found to have a forward-reach of profound consequences, for which the world may not yet be prepared. The solution of these political problems, which go to the root of the whole system of the Charter and of normal bilateral international relations, is not within the terms of reference of the International Law Commission and its work on the law of treaties, although the Commission cannot ignore them. Their solution has to be envisaged on the political level and in realistic terms, before irrevocable decisions are taken on the steps which should follow the submission of the Commission's final report and recommendations on the law of treaties.

[35] See Waldock, *Fifth Report, Observations of the Special Rapporteur on Article 51*, U. N. Doc. No. A/CN. 4/183/Add. 4. For the Report of the Special Committee, see U. N. Doc. No. A/5746 (to be published U. N. GEN. ASS. OFF. REC. 20th Sess., Annexes, Agenda Item No. 90), particularly chapter IV.

For these and other reasons, it is essential that the diplomatic stages of the codification of the law of treaties should not take place under unnecessary time pressures. They should be conducted in accordance with a procedure properly tailored to the substance of the topic, and not simply a repetition of the procedure of the General Assembly. Working under the pressure of time is frequently a useful device for negotiations on concrete problems. For example, the fact that the Codification Conferences of 1958, 1961 and 1963 worked to a close time-schedule was a factor which led to the successful conclusion of those Conferences. Parenthetically, it may be observed that the 1930 Conference is sometimes said to have failed partly because insufficient time was allocated to it; but there it was a matter of two or three weeks, whereas for 1958 something like nine weeks was allocated. For the law of treaties, however, it is doubtful if one should think even in terms of nine weeks. The customary procedure of the United Nations Codification Conferences is that the text of the International Law Commission, which has the status of the basic text, is first examined in committee, and then in plenary, where a two-thirds majority of those present and voting is required for the adoption of amendments, proposals and the final adoption of the basic text.[36] This underlying principle of dividing the work of the Codification Conferences into a committee stage and into a plenary stage is eminently sensible. The procedure is closely modelled on that of the General Assembly, but, as the President of the Conference on Consular Relations has recently stated, those rules are designed to regulate political debates, and may not be well suited to discussions of a legal nature.[37] In all the conferences which have taken place to date, the plenary stage has followed immediately on the committee stage. It may, however, be asked whether this is really desirable when dealing with the law of treaties.

The International Law Commission has been working on the law of treaties for something like sixteen years. Perusal of the legal periodicals over this period discloses considerable discussion on the work of the Commission, much of which has been incorporated into the intellectual baggage which is part and parcel of the work of the International Law Commission. Something similar may have to be done for the diplomatic phase itself, and for that reason one ought to contem-

[36] *Cf.* Rule 35 of the Rules of Procedure of the Geneva Conference of 1958. U. N. CONF. LAW. OF THE SEA OFF. REC., vol. II, p. XXXIII (A/CONF. 13/35). See also the *Report of the Secretary-General on the Method of Work and Procedures of the Conference,* para. 28, *id.* vol. I, at 175 (A/CONF. 13/11).

[37] Stephan Verosta, speaking as representative of Austria, at the 851st meeting of the Sixth Committee, Oct. 14, 1965. U. N. Doc. No. A/C. 6/SR. 851, para. 23.

plate, and governments ought to contemplate, a diplomatic conference which would take place in two stages, the first stage being the committee stage, and then the second stage, the plenary stage, taking place several months later in order to give governments and publicists an opportunity for a second look at the codification as it emerges from the committee stage and before the final seal of political approval is placed upon it.[38]

In light of these considerations, the intention of the Secretariat of the United Nations to submit to the next session of the General Assembly a study of the procedural and organizational problems involved in a diplomatic conference on the law of treaties, and to do so after informal consultation with members of the International Law Commission,[39] is doubly welcome as an important innovation. On the one hand, it will assist the Commission in presenting its articles and recommendations, having due regard for the practical problems of such a diplomatic conference (assuming that the Commission finally decides to make that recommendation to the General Assembly), and on the other, it will facilitate the task of the General Assembly, and of the individual governments, when they have to make concrete decisions of a political character on this highly technical legal subject. Indeed, this seems essential to a successful culmination of this long effort to codify the law of treaties.

[38] *Id.* at para. 25.

[39] Statement of Mr. Baguinian, Secretary of the Sixth Committee (and of the Int'l Law Comm'n) in the 850th meeting of the Sixth Committee, Oct. 13, 1965. U. N. Doc. No. A/C. 6/SR. 850, para. 43.