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## CHAPTER 8

### TREATY SIGNATURE

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To become a party to a treaty, a State must express its consent to be bound by the treaty. Such consent can be expressed in a variety of ways, including through signature of the treaty by a proper representative of the State.<sup>1</sup> Under modern treaty practice, however, States often express their consent to be bound by a separate act of ratification that is carried out after signature. For bilateral treaties, this ratification is typically manifested by the exchange of instruments of ratification. For multilateral treaties, it is typically manifested by the deposit of an instrument of ratification or accession with a central depository, such as the United Nations. When a treaty is subject to discretionary ratification after signature, the signature is referred to as a ‘simple signature,’ whereas a signature that indicates consent to be bound is referred to as a ‘definitive signature.’<sup>2</sup>

A simple signature does not commit a State to ratify a treaty, let alone comply with its terms. In the popular press, parties to a treaty are often referred to as ‘signatories,’ but this reference confusingly blurs the distinction between definitive and simple signature. Although a simple signature does not make a State a party to a treaty, it can create benefits and obligations for the signatory State. This chapter considers those

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<sup>1</sup> International organizations can also consent to treaties in a variety of ways, including through signature. VCLT, Arts. 11-17; Chapter 7 in this volume..

<sup>2</sup> *United Nations Treaty Handbook* (2006) 2-3 <<http://untreaty.un.org/English/TreatyHandbookEng.pdf>>. For a more complete discussion of the methods for expressing consent to be bound and for bringing a treaty into force, see Chapter 7 in this volume.

benefits and obligations and examines in particular why States often prefer simple signature subject to ratification in lieu of other methods of joining a treaty, the legal consequences of a simple signature, and the process by which a State can terminate its signatory obligations.

### **I. WHY DO STATES UTILIZE SIMPLE SIGNATURE?**

When the Western world was composed primarily of monarchies rather than representative democracies, signature was more commonly viewed as consent to be bound, since monarchs (and thus their agents, or ‘plenipotentiaries’) had the authority to unilaterally bind their States to treaties.<sup>3</sup> The central legal issue under that regime was one of agency—that is, whether the monarch’s purported representative actually had the authority to make the commitment. The conferral of ‘full powers’ on an agent would define the scope of the agent’s authority to bind the State in treaty negotiations. ‘Ratification,’ under that regime, was a confirmation by the monarch that the agent had acted with authority.

This treaty practice became more complicated after the American and French revolutions of the late eighteenth century. Both the United States and post-revolutionary France included a clause in the full powers of their agents reserving the right of the State

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<sup>3</sup> Jose Sette Camara, *The Ratification of International Treaties* (Ontario Publishing, Toronto 1949) 22-25; Francis O. Wilcox, *The Ratification of International Conventions* (Allen & Unwin, London 1935) 21-22. Even in the eighteenth century, however, not all rulers had ‘the power to make public treaties on their own authority; some are forced to take counsel of a senate or of the representative body of the Nation.’ Emmerich de Vattel, *The Law of Nations or the Principles of Natural Law Applied to Conduct and to the Affairs of Nations and of Sovereigns* (Charles G. Fenwick (trs), Carnegie Inst of Wash 1916) (1758) 160.

to decide whether to ratify the treaty after signature.<sup>4</sup> The United States repeatedly had to remind other countries during the nineteenth century that its signature did not constitute a promise of ratification.<sup>5</sup> Eventually, ‘European governments ceased to protest against the American practice; and unratified treaties became a common feature of international relations.’<sup>6</sup> Similarly, in countries following the approach of the French Constitution, ‘only the Legislative Power . . . could approve a treaty,’ and thus ‘the plenipotentiary, receiving his powers from the Executive, could not bind the State with his signature.’<sup>7</sup>

This history suggests one of the primary reasons that modern States frequently prefer simple over definitive signature: it better accommodates domestic treaty-making requirements. Many countries today divide their treaty power between the executive and legislative departments, at least for certain types of agreements.<sup>8</sup> In these countries, the executive department will typically have the authority to engage in a simple signature on behalf of the State but may lack the authority to commit the State more fully to the treaty, whether through definitive signature or some other mechanism. In the United States, for example, the President often is required to obtain either the consent of a supermajority of the Senate or the agreement of a majority of both houses of Congress before concluding a

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<sup>4</sup> Samuel B. Crandall, *Treaties: Their Making and Enforcement* (2d edn John Byrne & Co., Washington 1916) 94.

<sup>5</sup> J. Mervyn Jones, *Full Powers and Ratification* (Cambridge University Press, Cambridge 1946) 76-77. See also, John Bassett Moore, *A Digest of International Law* (Government Printing Office, Washington 1906) (vol 5) 189 (describing a treaty negotiation with Spain in 1819 in which Secretary of State John Quincy Adams explained to the Spanish minister that ‘by the nature of our Constitution, the full powers of our ministers never are or can be unlimited’).

<sup>6</sup> Jones (n 5) 77.

<sup>7</sup> Camara (n 3) 28-29.

<sup>8</sup> Duncan B. Hollis, ‘A Comparative Approach to Treaty Law and Practice’ in Duncan B. Hollis, Merritt R. Blakeslee and L. Benjamin Ederington (eds), *National Treaty Law and Practice* (Martinus Nijhoff, Leiden, 2005) 25-26, 32-37.

treaty.<sup>9</sup> In the United Kingdom, by contrast, the executive has essentially plenary treaty-making authority, although the treaties that are concluded by the executive do not become part of the domestic law of the United Kingdom until they are implemented by the Parliament.<sup>10</sup> In some countries, such as France and Germany, parliamentary approval is not required as a general matter but is required for certain categories of treaties.<sup>11</sup>

As a result, domestic law will in some instances prevent a country from expressing its consent to be bound to a treaty through signature. When this is the case, the executive will typically have the authority to sign the treaty but will be required to wait to ratify it until the completion of required domestic procedures. Even when domestic law allows the executive to commit the State to a treaty without legislative approval, the executive may have other reasons for not wanting to commit the State to the treaty through signature. For example, the executive may want time to consider more fully the implications of the treaty, to gauge domestic reactions to the treaty, or to obtain necessary implementing legislation before the treaty becomes binding. As a result, most modern multilateral treaties (and many bilateral ones) allow for ratification after signature as an available means for States to consent.<sup>12</sup> This does not mean, of course, that States no

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<sup>9</sup> The US Constitution states that the president has the power to make treaties ‘by and with the Advice and Consent of the Senate . . . provided two thirds of the Senators present concur.’ US Const art II, § 2. Despite this language, the United States often concludes international agreements through a ‘congressional-executive agreement’ process that involves a majority of both houses of Congress rather than a supermajority of the Senate. In some instances, such as when settling international claims, presidents have the authority to conclude ‘sole executive agreements’ without any participation by Congress.

<sup>10</sup> Ian Sinclair and others, ‘United Kingdom’ in *National Treaty Law and Practice* (n 8) 733-35.

<sup>11</sup> Michel Eismann and Raphael Rivier, ‘France’ in *National Treaty Law and Practice* (n 8) 258-60; Hubert Beemelmans and Hans D. Treviranus, ‘Federal Republic of Germany’ in *National Treaty Law and Practice* (n 8) 323-24.

<sup>12</sup> *Restatement (Third) of the Foreign Relations Law of the United States* § 312, cmt d (American Law Institute, Philadelphia 1987) (‘A state can be bound upon signature, but that has now become unusual

longer use definitive signature to consent to a treaty. Indeed, this method of expressing consent is still common, especially for bilateral treaties.<sup>13</sup>

Commentators have debated whether, when a treaty is silent about how consent to be bound is to be expressed, there is a presumption in favor of either definitive signature or ratification.<sup>14</sup> The VCLT does not take a position on this issue, instead simply referring to the intention of the States parties as expressed in negotiations and in the full powers of the representatives.<sup>15</sup> In any event, the issue has little practical significance today since most modern treaties specify how consent to be bound is to be expressed.<sup>16</sup>

Multilateral treaties are often open for signature for only a limited period of time.<sup>17</sup> Even after the period for signing has expired, however, a State may have the ability to join the treaty by submitting an instrument of accession with the treaty depository, if the treaty so permits.<sup>18</sup> Accession, like ratification, avoids the domestic legal issues that can be associated with definitive signature, since the executive department can wait to accede until after it has obtained legislative agreement.

Simple signature nevertheless carries potential benefits for States over accession.

For States that have participated in treaty negotiations, a simple signature can be a useful

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as regards important formal agreements.’); Martin A. Rogoff, ‘The International Legal Obligations of Signatories to an Unratified Treaty’ (1980) 32 *Maine L Rev* 263, 266-67 (‘While at one time signature played a more important role in the process whereby a state assumed treaty obligations, today the crucial event is ratification.’).

<sup>13</sup> Anthony Aust, *Modern Treaty Law and Practice* (2d edn Cambridge University Press, Cambridge 2007) 96.

<sup>14</sup> Ian Sinclair, *The Vienna Convention on the Law of Treaties* (2d edn Manchester University Press, Manchester 1984) 39-40.

<sup>15</sup> VCLT, Arts. 12(1)(c), 14(1)(d).

<sup>16</sup> Aust (n 13) 96-97; Sinclair (n 14) 40.

<sup>17</sup> Aust (n 13) 98.

<sup>18</sup> *United Nations Treaty Handbook* (n 2) 2. For more information on accession as a method of consent to be bound, see Chapter 7 in this volume.

means of marking the conclusion of those negotiations. A simple signature might also indicate to other States that ‘the results of the negotiations are apparently approved by the executive department of government.’<sup>19</sup> Depending on the treaty, a simple signature can also confer certain entitlements, such as the ability to participate in preparatory commissions or meetings of the treaty body,<sup>20</sup> the right to formulate objections to reservations,<sup>21</sup> and the right to participate in the correction of errors.<sup>22</sup>

## **II. LEGAL OBLIGATIONS TRIGGERED BY SIMPLE SIGNATURE**

In the nineteenth century, some countries such the United States maintained that, when a treaty was ratified, it would operate retroactively to the time of signature, at least with respect to inter-state obligations, as opposed to private rights.<sup>23</sup> This view was abandoned in the twentieth century, and the modern presumption under international law

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<sup>19</sup> Wilcox (n 3) 27.

<sup>20</sup> For example, under the Rome Statute of the International Criminal Court, signatories are entitled to observer status in the Assembly of States Parties. Rome Statute of the International Criminal Court (opened for signature 17 July 1998, entered into force 1 July 2002), 2176 UNTS 90, art 112. In addition, signatories were entitled to participate in the Preparatory Commission for the Court. Laurence Boisson de Chazournes, Anne-Marie La Rosa, and Makane Moïse Mbengue, ‘Article 18’ in Olivier Corten and Pierre Klein (eds), *The Vienna Convention on the Law of Treaties: A Commentary* (vol 1) (OUP, Oxford 2011) 369, 391-92.

<sup>21</sup> *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* (Advisory Opinion) [1951] ICJ Rep. 15, 28 (May 28); see also Rogoff (n 12) 275 (‘The *Reservations* case thus recognizes signature as conferring certain legal rights on a signatory.’).

<sup>22</sup> VCLT, art 79(1).

<sup>23</sup> Wilcox (n 3) 39-40; 2 Charles Cheney Hyde, *International Law Chiefly as Interpreted and Applied by the United States* (Little, Brown, Boston 1922) 49-50 (‘It is laid down as a rule of the law of nations, that in the absence of special agreement, a treaty upon the exchange of ratifications operates retroactively, as from the date of signature.’); *Haver v Yaker* (1869) 76 US 32, 34 (‘[A]s respects the rights of either government under it, a treaty is considered as concluded and binding from the date of its signature. . . . But a different rule prevails where the treaty operates on individual rights.’).

is that treaties do not operate retroactively.<sup>24</sup> Article 28 of the VCLT now provides that '[u]nless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party.'<sup>25</sup> Since it is only a presumption, it can be overridden by the parties to the treaty.<sup>26</sup> There was also some debate in the nineteenth and early twentieth centuries over whether a State that had signed a treaty subject to ratification was obligated to proceed with the ratification.<sup>27</sup> The modern view is that a simple signature does not carry with it any legal obligation of ratification.<sup>28</sup>

A simple signature may nevertheless trigger some legal obligations, stemming either from the VCLT or customary international law.<sup>29</sup> Article 18 of the VCLT provides that, after a State has signed a treaty, it 'is obliged to refrain from acts which would

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<sup>24</sup> Camara (n 3) 121-24; J. Mervyn Jones, 'The Retroactive Effect of the Ratification of Treaties' (1935) 29 Am J Int'l L 51. However, as provided in Article 24(4) of the VCLT, '[t]he provisions of a treaty regulating the authentication of its text, the establishment of the consent of States to be bound by the treaty, the manner or date of its entry into force, reservations, the functions of the depositary and other matters arising necessarily before the entry into force of the treaty apply from the time of the adoption of its text.'

<sup>25</sup> Vienna Convention on the Law of Treaties (opened for signature 23 May 1969, entered into force 27 January 1980), 1155 UNTS 331, art 28.

<sup>26</sup> Camara (n 3) 121.

<sup>27</sup> John Eugene Harley, 'The Obligation to Ratify Treaties' (1919) 13 Am J Int'l L 389, 404 ('An examination of the opinions of writers and authorities shows that upon the subject of ratification three fairly distinguishable views prevail: 1, that no obligation to ratify exists, ratification being purely a matter of discretion; 2, that a moral obligation exists; 3, that where the negotiator has remained within his instructions, a perfect or legal obligation exists.').

<sup>28</sup> Aust (n 13) 106; Arnold Duncan McNair, *Law of Treaties* (2d edn Clarendon, Oxford 1961) 133-35. See also *Research in International Law*, 'Law of Treaties' (1935) 29 Am J Int'l L 657, 770 ('[M]odern writers are practically unanimous in holding that there is no *legal* obligation to ratify a treaty which has been signed on its behalf.').

<sup>29</sup> Sometimes treaties will specify obligations that apply in the interim between signature and ratification. Joni S. Charme, 'The Interim Obligation of Article 18 of the Vienna Convention on the Law of Treaties: Making Sense of an Enigma' (1991) 25 Geo Wash J Int'l L & Econ 71, 78-79; Rogoff (n 12) 280-81.

defeat the object and purpose' of the treaty 'until it shall have made its intention clear not to become a party to the treaty.'<sup>30</sup> It is not clear to what extent this provision reflects customary international law. Some commentators contend that, at least at the time it was included in the VCLT, it reflected progressive development rather than established state practice.<sup>31</sup> In any event, the VCLT has now been in force for many years and has been ratified by over 110 States, and even some countries that are not parties to it (such as the United States) appear to accept that the obligation recited in Article 18 is now a matter of customary international law.<sup>32</sup> That is also the view of a number of commentators.<sup>33</sup> To the extent that Article 18 does reflect customary international law, the signing obligation would apply even to States that have not ratified the Vienna Convention.

The Vienna Convention does not define the circumstances under which actions by a State will 'defeat the object and purpose' of a treaty. The phrase 'object and purpose' appears in a number of places in the Convention, but each time the context has potentially

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<sup>30</sup> VCLT, art 18(a). Under Article 18(b), a State that has expressed its consent to be bound by a treaty is 'obliged to refrain from acts which would defeat the object and purpose . . . pending the entry into force of the treaty and provided that such entry into force is not unduly delayed.' For discussion of the meaning of 'undue delay,' see Mark E. Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (Martinus Nijhoff, Leiden 2009) 252.

<sup>31</sup> Shabtai Rosenne, *Developments in the Law of Treaties, 1945-1986* (Cambridge University Press, Cambridge 1989) 149 (noting that 'article 18 . . . is in many circles regarded as highly controversial, at least with regard to the question of whether it is declaratory of customary international law or innovative'); Sinclair (n 14) 43 (noting that Article 18 'in all probability constitutes at least a measure of progressive development').

<sup>32</sup> For statements by U.S. officials suggesting at various times that Article 18 reflects customary international law, see Curtis A. Bradley, 'Unratified Treaties, Domestic Politics, and the U.S. Constitution' (2007) 48 Harv Int'l LJ 307, 315 n.36.

<sup>33</sup> Boisson de Chazournes and others (n 20) 382-83; Paolo Palchetti, 'Article 18 of the 1969 Vienna Convention: A Vague and Ineffective Obligation or a Useful Means of Strengthening Legal Cooperation?' in Enzo Cannizzaro (ed), *The Law of Treaties Beyond the Vienna Convention* (OUP, Oxford 2011) 25, 26; Villiger (n 30) 252.



different connotations.<sup>34</sup> For example, under Article 19 of the Convention, States are precluded from attaching a reservation to their ratification of a treaty if the reservation is ‘incompatible with the object and purpose of the treaty.’<sup>35</sup> The word ‘incompatible’ in that limitation may not signify the same limitation as the word ‘defeat’ in Article 18.

There is almost no state practice that would help clarify the content of the signing obligation.<sup>36</sup> There is also relatively little judicial precedent, and most of what there is long predates the VCLT. In its commentary on the draft article that became Article 18, the International Law Commission (ILC) cited a 1926 decision by the Permanent Court of International Justice, *Case Concerning Certain German Interests in Polish Upper Silesia*.<sup>37</sup> In that case, Poland challenged the right of Germany to alienate property located in territory that Germany was ceding to Poland in the Treaty of Versailles, between the time of Germany’s signing of the treaty and the treaty’s entry into force. The court concluded that Germany’s action would not have violated the treaty even after ratification, and the court therefore observed that it ‘need not consider the question whether, and if so how far, the signatories of a treaty are under an obligation to abstain from any action likely to interfere with its execution when ratification has taken place.’<sup>38</sup> As a result, the court did not actually address the existence or scope of an interim signing obligation.

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<sup>34</sup> David S. Jonas and Thomas N. Saunders, ‘The Object and Purpose of a Treaty: Three Interpretive Methods’ (2010) 43 Vand J Transnat’l L 565.

<sup>35</sup> VCLT, art 19(c). See also Chapter \_\_ in this volume.

<sup>36</sup> Aust (n 13) 94; Edward T. Swaine, ‘Unsigning’ (2003) 55 Stan L Rev 2061, 2078.

<sup>37</sup> *Certain German Interests in Polish Upper Silesia (Germany v Poland)* [1926] PCIJ Rep Series A No. 7 (May 25). See also *Draft Articles on the Law of Treaties with Commentaries*, [1966] 2 YB Int’l L Comm’n 169, 202 (citing the decision) <[http://untreaty.un.org/ilc/texts/instruments/english/commentaries/1\\_1\\_1966.pdf](http://untreaty.un.org/ilc/texts/instruments/english/commentaries/1_1_1966.pdf)>.

<sup>38</sup> 1926 PCIJ at 40.

Another decision that is often cited in support of the Article 18 signing obligation is a 1928 decision by an arbitral tribunal, *Megalidis v Turkey*.<sup>39</sup> In that case, the tribunal held invalid a Turkish seizure of a Greek national's property that had occurred between the time that Turkey had signed a peace treaty with Greece and the time when the treaty entered into force. The tribunal reasoned that 'from the time of the signature of the Treaty and before its entry into force the contracting parties were under the duty to do nothing which might impair the operation of its clauses.'<sup>40</sup> Although this decision is more directly supportive of a signing obligation than the *Upper Silesia* decision, it involved the behavior of a State that had become a party to the treaty by the time of the decision and thus does not necessarily speak to the obligations of a signatory that has not ratified a treaty.<sup>41</sup>

The intellectual history of the Article 18 signing obligation can be traced to a 1935 Harvard research project that attempted to codify international law, the treaty portions of which were an early precursor to the VCLT. The Harvard project stated that a signatory State was 'under no duty to perform the obligations stipulated' in the treaty until the State ratified the treaty, but that 'under some circumstances' the State would be obligated as a matter of 'good faith' to 'refrain from taking action which would render performance by any party of the obligations stipulated impossible or more difficult.'<sup>42</sup>

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<sup>39</sup> *Megalidis v Turkey* (Turkish-Greek Mixed Arb Trib 1928) 4 Ann Dig Pub Int'l L 395.

<sup>40</sup> *Ibid* 396.

<sup>41</sup> Swaine (n 36) 2070 n.44. See also Palchetti (n 33) 32 ('[T]he few cases which are generally regarded as the most notable precedents in relation to the obligation now laid down in Article 18 mainly concern claims addressed to a state which ultimately became party to the treaty.'). In addition, Turkey's actions in the case may have independently violated a restriction in international law on the expropriation of alien property. Charme (n 29) 81 n.39.

<sup>42</sup> *Research in International Law* (n 28) 781.

Subsequently, the ILC, led by a series of four prominent Rapporteurs, spent two decades drafting the Vienna Convention, building on the work of the Harvard project.

The first Rapporteur, JL Brierly, concluded that even the modest obligation referred to in the Harvard research project was moral rather than legal in nature. He subsequently explained that, while ‘[a] certain amount of material exists concerning an alleged obligation on the part of States not to do anything, between the signature of a treaty on their behalf, and its ratification, that would render ratification by other States superfluous or useless,’ the material supporting even this narrow obligation was ‘of too fragmentary and inconclusive a nature to form the basis of codification.’<sup>43</sup> Perhaps not surprisingly, in light of the position of the Rapporteur, the possibility of including such an obligation in the proposed treaty was initially rejected.

A subsequent Rapporteur, Hersch Lauterpacht, believed that the obligation did have legal status, but described the obligation narrowly as ‘prohibit[ing] action in bad faith deliberately aimed at depriving the other party of the benefits which it legitimately hoped to achieve from the treaty and for which it gave adequate consideration.’<sup>44</sup> The subsequent Rapporteurs, Gerald Fitzmaurice and Humphrey Waldock, continued to focus on actions that would impair the ability of the parties to comply with or obtain the benefits of the treaty. Waldock, for example, referred to an obligation to ‘refrain during at least some period from acts calculated to frustrate the objects of the treaty.’<sup>45</sup>

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<sup>43</sup> *Documents of the 4th Session Including the Report of the Commission to the General Assembly*, [1952] 2 YB Int'l L Comm'n 54, UN Doc A/CN.4/SER.A/1952/Add.1.

<sup>44</sup> *Documents of the 5th Session Including the Report of the Commission to the General Assembly*, [1953] 2 YB Int'l L Comm'n 110, UN Doc A/CN.4/SER.A/1953/Add.1.

<sup>45</sup> *Documents of the 14th Session Including the Report of the Commission to the General Assembly*, [1962] 2 YB Int'l L Comm'n 110, UN Doc A/CN.4/SER.A/1962/Add.1.

This drafting history makes clear that the signing obligation is not a general obligation to comply with the terms of the treaty, or even an obligation to comply with the most important provisions in the treaty. Instead, the signing obligation appears to have been designed to ensure that one of the signatory parties, typically in a bilateral arrangement, does not change the status quo in a way that substantially reduces either its ability to comply with its treaty obligations after ratification or the ability of the other treaty parties to obtain the benefit of the treaty.<sup>46</sup> Considered in these terms, the signing obligation may have little relevance to some treaties, such as human rights treaties, where pre-ratification conduct inconsistent with the treaty is not likely to undo the bargain reflected in the treaty.<sup>47</sup>

The examples of prohibited signatory conduct provided by the Harvard research project are illustrative:

(1) A treaty contains an undertaking on the part of a signatory that it will not fortify a particular place on its frontier or that it will demilitarize a designated zone in that region. Shortly thereafter, while ratification is still pending, it proceeds to erect the forbidden fortifications or to increase its armaments within the zone referred to.

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<sup>46</sup> Bradley (n 32) 308. For descriptions of the signing obligation in similarly narrow terms, see Aust (n 13) 119 ('The state must therefore not do anything which would prevent it being able fully to comply with the treaty once it has entered into force.');

Villiger (n 30) 249 ('A State's act will defeat the treaty's object and purpose if it renders meaningless subsequent performance of the treaty, and its rules.');

Rogoff (n 12) 298-99 ('The most likely conclusion to be drawn . . . is that the purpose of the rule is to prevent a signatory from claiming the benefits to which it is entitled under the treaty while at the same time engaging in acts that would materially reduce the benefits to which the other signatory or signatories are entitled.');

*Report of the International Law Commission*, Fifty-ninth session, GAOR, Sixty-second Session, Supplement No. 10 (2007), A/62/10, 67 ('It is unanimously accepted that article 18, paragraph (a), of the Convention does not oblige a signatory State to respect the treaty, but merely to refrain from rendering the treaty inoperative prior to its expression of consent to be bound.').

<sup>47</sup> Bradley (n 32) 308. See also Jan Klabbbers, 'How to Defeat a Treaty's Object and Purpose Pending Entry into Force: Toward Manifest Intent' (2001) 34 *Vand J Transnat'l L* 283, 330 ('[P]articularly with non-contractual, normative, multilateral arrangements, the interim obligation laid down in Article 18 of the Vienna Convent does not provide much relief.').

(2) A treaty binds one signatory to cede a portion of its public domain to another; during the interval between signature and ratification the former cedes a part of the territory promised to another State.

(3) A treaty binds one signatory to make restitution of certain property to the other signatory from which it has been wrongfully taken, but, while ratification is still pending, it destroys or otherwise disposes of the property, so that in case the treaty is ratified restitution would be impossible.

(4) A treaty concedes the right of the nationals of one signatory to navigate a river within the territory of the other, but the latter soon after the signature of the treaty takes some action which would render navigation of the river difficult or impossible.

(5) By the terms of a treaty both or all signatories agree to lower their existing tariff rates, but while ratification of the treaty is pending one of them proceeds to raise its tariff duties.

(6) A treaty provides that one of the signatories shall undertake to deliver to the other a certain quantity of the products of a forest or a mine, but while ratification is pending the signatory undertaking the engagement destroys the forest or the mine, or takes some action which results in such diminution of their output that performance of the obligation is no longer possible.<sup>48</sup>

The records of the ILC's deliberations on the VCLT suggest additional possible examples. The Italian jurist Roberto Ago stated that if a treaty 'provided for the cession by a State of installations owned by it in the territory of another State' or 'relat[ed] to the return by a State of works of art formerly taken from the territory of another State,' there would be a violation of the signing obligation if the state destroyed the installations or works of art prior to ratification.<sup>49</sup> The Polish jurist Manfred Lachs expressed the view that if a group of countries signed a treaty calling for a reduction of their armed forces and one of them increased their armed forces between the time of signature and

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<sup>48</sup> *Research in International Law* (n 28) 781-82.

<sup>49</sup> *Summary Records of the 788th Meeting*, [1965] 1 YB Int'l L Comm'n 87, 92, UN Doc. A/CN.4/SER. A/1965 (remarks of Roberto Ago).

ratification, there would be a violation of an obligation ‘not to invalidate the basic presumption of the agreement.’<sup>50</sup>

### **III. Terminating the Legal Effects of Simple Signature**

Whatever the extent of the signing obligation, Article 18 of the VCLT makes clear that it lasts only until the signatory State ‘shall have made its intention clear not to become a party to the treaty.’<sup>51</sup> There is little State practice involving this provision. Although it is not uncommon for signatory States to delay their ratification of a treaty, these States generally do not make express statements indicating that they do not intend to ratify the treaty.

A much-discussed example of a signatory making such an intention clear is the United States’ announcement in 2002 that it did not intend to ratify the Rome Statute of the International Criminal Court. The United States signed the treaty in December 2000, shortly before President William J. Clinton left office. At that time, President Clinton expressed concern about what he referred to as ‘significant flaws’ in the treaty and noted that he did ‘not recommend that [his] successor submit the Treaty to the Senate for advice and consent until our fundamental concerns are satisfied.’<sup>52</sup> He also observed, however, that by signing the treaty the United States was ‘reaffirm[ing] [its] strong support for international accountability and for bringing to justice perpetrators of genocide, war

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<sup>50</sup> Ibid 97 (remarks of Manfred Lachs).

<sup>51</sup> VCLT, art 18. See also Rogoff (n 12) 296 (‘Any obligations imposed on a signatory should terminate when that state indicates that it will not ratify the treaty, since a signatory is under no obligation to ratify a signed agreement, and may refuse ratification for any reason.’).

<sup>52</sup> President William J. Clinton, ‘Statement on Signature of the International Criminal Court Treaty’ (Dec. 31, 2000) <[http://clinton4.nara.gov/textonly/library/hot\\_releases/December\\_31\\_2000.html](http://clinton4.nara.gov/textonly/library/hot_releases/December_31_2000.html)>.

crimes, and crimes against humanity,’ and that, as a signatory, the United States would ‘be in a position to influence the evolution of the Court.’<sup>53</sup>

Two years later, under the administration of President George W. Bush, the United States sent a letter the Secretary-General of the United Nations stating that ‘the United States does not intend to become a party to the treaty,’ and that ‘[a]ccordingly, the United States has no legal obligations arising from its signature [of the treaty].’<sup>54</sup> In deciding to send this letter, the Bush administration may have been concerned that its plan to conclude ‘non-surrender’ agreements with individual States, whereby these States would agree not to extradite US personnel to the International Criminal Court, would be viewed as an effort to defeat the object and purpose of the treaty.<sup>55</sup>

The United States’ announcement was referred to by a number of commentators as an ‘unsigned’ of the ICC treaty, although there was no attempt to physically remove the earlier signature. Nor does the VCLT or state practice provide any support for the possibility of such a physical ‘unsigned.’ In fact, the United Nations Treaty Collection still lists the United States as a signatory to the Rome Statute, albeit with a footnote

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<sup>53</sup> Ibid.

<sup>54</sup> Letter from John R. Bolton, Under Sec’y for Arms Control & Int’l Sec., U.S. Dep’t of State, to Kofi Annan, Sec’y General, United Nations (6 May 2002) <<http://usinfo.org/wf-archive/2002/020506/epf110.htm>>. For discussion of the U.S. action, see Bradley (n 32) 311-12, 317.

<sup>55</sup> These non-surrender agreements are also referred to as ‘Article 98 agreements,’ because the United States was seeking to obtain the benefit of Article 98(2) of the Rome Statute, which provides that:

The Court may not proceed with a request for surrender which would require the requested State to act inconsistently with its obligations under international agreements pursuant to which the consent of a sending State is required to surrender a person of that State to the Court, unless the Court can first obtain the cooperation of the sending State for the giving of consent for the surrender.

referencing the letter from 2002.<sup>56</sup> Despite criticism of the United States' announcement on policy grounds, it appears to have been consistent with the terms of Article 18.<sup>57</sup>

Absent an express statement such as the one that the United States made with respect to the Rome Statute, it will often be unclear whether a State that has signed a treaty continues to have an intent to ratify the treaty. Although a long passage of time might suggest a lack of such an intent,<sup>58</sup> this is not entirely clear, since States sometimes ratify treaties many years after signature.<sup>59</sup>

The ability of States to decide not to ratify a treaty after signature can create strategic problems in the treaty process, especially for multilateral treaties that are the product of extensive negotiation.<sup>60</sup> In particular, there is a danger that a signatory could influence the text and implementation of a treaty without ever intending to becoming a party to it and thereby compromise the interests of those States that do become parties. The 'object and purpose' obligation probably does not significantly alleviate this danger,

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Rome Statute (n 20), art 98(2).

<sup>56</sup> United Nations Treaty Collection, Rome Statute of the International Criminal Court <[http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=XVIII-10&chapter=18&lang=en#10](http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-10&chapter=18&lang=en#10)>.

<sup>57</sup> Aust (n 13) 117-18. More generally, see Villiger (n 30) 250 (noting that a State that has signed but not ratified a treaty 'is free at any time to make its intention clear not to become a party to the treaty, *i.e.*, either by means of an express statement or through implied conduct, in which case Article 18 can no longer be invoked'); Hans Blix, 'Developing International Law and Inducing Compliance' (2002) 41 *Colum J Transnat'l L* 1, 5 ('Clearly, in the cases where signature does not signal the state's consent to be bound, a simple but formal announcement by a government clarifying that it will not proceed with ratification or any other form of confirmation will be enough to terminate the limited legal effect that flowed from the signature.').

<sup>58</sup> *Restatement (Third)* (n 12) § 312, cmt i ('The obligation [not to take actions that would defeat the object and purpose of the treaty] . . . continues until the state has made clear its intention not to become a party *or if it appears that entry into force will be unduly delayed.*') (emphasis added).

<sup>59</sup> For a particularly dramatic example of a long delay between signature and ratification, the United States signed the Convention on the Prevention and Punishment of the Crime of Genocide in 1948 but did not ratify until forty years later, in 1988.

<sup>60</sup> Swaine (n 36) 2071-77.



since it operates only until such time as a State makes clear its intent not to ratify the treaty, and its scope is sufficiently modest that it may not deter signatures that do not reflect a good faith intent of ratification.

Presumably, States will face reputational incentives not to sign treaties in bad faith, and one can imagine that a pattern of signatures that do not lead to ratification will reduce a State's negotiating leverage over time. In addition, there may be ways to design treaties to address the problem of disingenuous signatures—for example, by specifying that the treaty does not take effect unless and until particular States ratify it.<sup>61</sup> As an example, the Nuclear Non-Proliferation Treaty required ratification by Great Britain, the Soviet Union, and the United States, along with forty other States, before it would take effect.<sup>62</sup> It might also make sense to impose some sort of statute of limitations on the legal effect of a signature, so that other States will stop relying on it after a certain period of time has elapsed.<sup>63</sup>

## CONCLUSION

In sum, there are a variety of reasons why it is common today for States to sign treaties subject to ratification, including perhaps most notably domestic constitutional considerations. Such simple signature can confer legal and other benefits on States and also potentially create an obligation, as set forth in Article 18 of the VCLT, not to take actions that would defeat the object and purpose of the treaty. The precise scope of this

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<sup>61</sup> Bradley (n 32) 331 n. 111.

<sup>62</sup> Treaty on the Non-Proliferation of Nuclear Weapons (opened for signature 1 July 1968, entered into force 5 March 1970), 729 UNTS 161, art IX.

<sup>63</sup> Bradley (n 32) 336.

obligation is uncertain, although the drafting history of Article 18 suggests that the obligation was intended to apply only to acts that would substantially reduce either the signatory State's ability to comply with its treaty obligations after ratification or the ability of the other treaty parties to obtain the benefit of the treaty. A State can terminate the legal effect of a simple signature by making clear its intent not to ratify the treaty, although this ability to terminate can present some strategic concerns for the treaty process.

### **RECOMMENDED READING**

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David S. Jonas and Thomas N. Saunders, 'The Object and Purpose of a Treaty: Three Interpretive Methods' (2010) 43 Vand J Transnat'l L 565

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