Preliminary Remarks

With its Report on the work of its 18th session in 1966 the International Law Commission has laid its draft of a multilateral convention on the general law of treaties between States before the UN General Assembly. The General Assembly decided on 5 December 1966 to call a conference of plenipotentiaries for the years 1968 and 1969 to agree on a convention on the law of treaties and invited the UN Member States, etc., to submit their written comments and observations on the draft not later than 1 July 1967*). The draft is printed below p. 562.

The draft is the result of approximately seventeen years work by the ILC. It is an outstanding and balanced achievement on the part of this body. See vol. 13 (1950/51), p. 382 *et seq.* of this periodical where the ILC-regulations, as they were formulated at that time, were reproduced; see also the paper of Yuen-li Liang: The Preparatory Work for the International Law Commission, *loc. cit.*, pp. 249–265.

It seems appropriate now, having regard to the imminent diplomatic conference, that there should be a scientific appraisal of certain crucial articles and problems of this draft. Without attempting a systematic connection, those articles of the draft have been preferred whose present version could give grounds for certain suggested amendments.

The fundamental decisions of the ILC, reached after many years of work and discussion, are left untouched. Thus the question whether the law of treaties can suitably be laid down in the form of a multilateral convention was only raised in connection with the question of interpretation of treaties, in which context the question assumes special significance.

The authors of the individual contributions are responsible for their contents. As they express their opinions freely, contradictions between the various papers are sometimes inevitable.

The length of the individual contributions was strictly limited in order to make the publication easily readable. Some of the authors were able to base their work on their own previously published monographies and papers and have referred to them.

*) Resolution 2166 (XXI), GAOR 21st session, suppl. No. 16 (A/6316), p. 95 *et seq.*

In order to make a really internationally useful contribution to the discussion which can be easily read by all delegations, the authors, who all belong to the Institute or are connected with it as former research fellows, have in many cases written their contributions in English or else have checked the technical terminology of the translations. Translations were made by Mrs. Genette Dagtoglou, M. A. Oxon., Heidelberg, Mr. S. F. Du Toit, B.A., LL.B., Johannesburg, and Miss Jutta Zeumer of the Institute; the linguistic check of most of the contributions was made by Mr. Robert Hollweg, B.S., LL.B., Chicago, Ill. (USA), currently guest fellow at the Institute; we should like to thank them here for their willing cooperation and excellent work.

If the critical studies of the 1966 draft published here should only cause the articles, formulations and questions to be examined once more in detail in the course of the diplomatic conference, and if this re-examination results in their improvement, whether as suggested here or otherwise, this publication will have fulfilled its purpose. Although, in the effort to make an active contribution by means of suggested amendments, critical remarks predominate in these papers and expressions of agreement are only occasionally to be found, this fact should not be misunderstood as a lack of respect for the excellent scientific achievement of the ILC's draft.

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This publication does not purport to be a general estimation of the draft, nor does this introduction. But it seems important to point out some questions which will emerge from its application when it comes into force as a convention. Whether and how rapidly the draft will become established as a convention in the practice of States remains to be seen. A multilateral convention on the law of treaties will, at first, only be applicable to treaties, all of the parties to which were already previously bound under the convention by ratification or accession. It may be that an increasing number of States will be prepared to submit even their previous treaty relations, individually or collectively, to the new law of treaties. This possibility would still exist even if the draft does not become a binding convention or if some States wish to limit their commitment, at the beginning, to certain particular treaties. The draft does not say anything about the possibility of its own retroactive application, nor what conditions there are for its coming into force. It should expressly provide that both those who are parties to the convention and those who are not, have the possibility to subject either all or certain particular treaty relations already in existence retroactively, either from the time they were entered

into or beginning at a later date, to the new rules on the law of treaties, and also to do so under certain reservations. How far a commitment to the new text may be limited by reservations should also be explained. In short, the new treaty should clarify how far it intends its own rules to be applicable to itself. Nor would it matter if only some of the parties to a multilateral convention submit themselves to the new law of treaties in their mutual relations, with the result that these mutual relations no longer precisely coincide in content with those of the other parties to the multilateral convention concerned; such relative applicability would be nothing new: it could also result from reservations which are only accepted by some of the treaty parties. But there is the prospect that gradually the number of multilateral convention parties who submit to the Law of Treaties will outweigh the number that do not, and in this way the new Law of Treaties will establish itself step by step. Possibly some measures should be taken against the disadvantageous effects of the inequality of multilateral treaty relations, but this difficulty should not be insuperable.

These and other similar difficulties in the application of the new Law of Treaties will also need clarification through practice. In this respect the practice of a supranational authority would be especially useful. The question arises as regards the subjection of disputes or doubtful points in the Law of Treaties to the general or to a special international jurisdiction. Some of the problems, as, for example, the controversial question of the invalidity of a treaty, are *expressis verbis* referred by art. 62 of the draft to the general proceedings for dealing with disputes laid down in art. 33 of the UN-Charter. A general submission of conflicts to an international jurisdiction of whatever sort by a final clause in the Law of Treaties could endanger the acceptance of the draft as a treaty obligation by many States. Instead, however, a supplementary protocol separate from the main treaty containing this point could be open to subscription. Hence there would be the prospect that willingness to submit to an international jurisdiction on the Law of Treaties would increase as the new Law of Treaties establishes itself with regard to its contents. The ICJ could acquire the important activity of authentic interpretation of the Law of Treaties, for instance, concerning the contents and extent of *ius cogens*, the peremptory rules which set aside treaties and prevail over them.

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