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## Internal Limitations on External Commitments—Article 46 of the Treaties Convention<sup>†</sup>

The United Nations Conference on the Law of Treaties has completed for submission to the nations of the world the most far-reaching codification effort in the field of international law that has thus far been attempted. The basis of its work has been the seventy-five draft articles on the Law of Treaties which were refined by the International Law Commission<sup>1</sup> over a period of fifteen years.

In the first session of the Conference that was held in Vienna from March 26 to May 24, 1968, all seventy-five of the draft articles were reviewed by the Committee of the Whole. Numerous amendments were accepted, though those were only a fraction of the amendments proposed. Sixty-nine draft articles were approved, of which three are new. One article was deleted, and twelve articles, including three new articles, were deferred for further consideration by the Committee of the Whole at the second session which began on April 8, 1969, in Vienna.

The deferred articles related, for the most part, to multilateral treaties and are involved in the "all-States" issue, the Communist bloc attempt to open the way for East Germany to become a party to "general multilateral treaties". Another of the deferred articles, a new article 62 *bis*, related to disputes-settlement procedure, a subject that the International Law Commission draft left undetermined for all practical purposes.<sup>2</sup>

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<sup>†</sup>Article 46 of the Vienna Convention on the Law of Treaties (1969) is referred to in the manuscript as Article 43 which is the number it had as a draft article. The full text of the convention appears on pages 172-203.

<sup>1</sup>The draft articles and the Commission's Commentary thereon are reprinted in 61 AM. J. INT'L L. 255.

<sup>2</sup>Article 62 of the ILC draft provides that claims that a treaty should be terminated or suspended on the ground that it is invalid, is not binding or has been materially breached, are to be handled under Article 33 of the United Nations Charter—which is scarcely more than an expression of pious hope that the parties will reach some agreed solution.

At the second session of the Conference, which concluded on May 23, 1969, the open issues were, with very considerable effort, disposed of. The "All States" issue was referred to the United Nations General Assembly, where, as a political issue, it obviously belongs. A disputes-settlement procedure was adopted that requires a mandatory conciliation procedure for all disputes over the termination or suspension of a treaty because of claims of invalidity, changes of circumstance, material breach and the other grounds found in part 5 of the Convention. However, claims that a treaty is void because of conflict with an imperative norm of international law (*jus cogens*, Articles 53 and 64), are made subject to compulsory jurisdiction of the International Court of Justice. Finally, in view of the innovative character of a number of articles, the Conference decided to include a specific provision on the non-retroactivity of the Convention, under which it will apply only to treaties that enter into force after the date of its own entry into force.

In the articles that make up the convention the delegates grappled with the old and the new, with form and substance, with such widely ranging topics as *pacta sunt servanda*, *rebus sic stantibus*, interpretation, functions of depositaries, correction of error in a text, and the effect of error upon validity.

This effort to harness a horde of problems by the checkrein of a treaty on treaties stems from the determination of the International Law Commission to provide solutions for every controverted issue in treaty law that was not being handled under some other rubric by the Commission.<sup>3</sup> The determination, while praiseworthy, could recall the most quoted line of Alexander Pope,<sup>4</sup> particularly as the fact that neither a long history of doctrinal dispute nor an absence of practice and precedent deterred the Commission from proffering a solution.

Rather than attempting a necessarily superficial survey of all the draft articles, concentration upon a single article which deals with a subject of long-standing controversy may be valuable in demonstrating how the interaction of study, investigation, comment and revision over a period of twenty years has fashioned a provision that is reasonable and generally accepted through a reconciliation of doctrinal differences.

Article 43 of the Commission's draft deals with a dispute of substantial antiquity—not dating back to Guelph and Ghibelline but certainly with roots in the divine right of kings—the conflict between constitutional limita-

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<sup>3</sup>State responsibility and state succession are excluded by Article 69; international organizations by Article 1 as complicated by Articles 3 and 4.

<sup>4</sup>*Essay on Criticism*, Part II, line 66.

tions upon authority to commit the State internationally and the necessity of international reliance upon apparent authority to commit the State internationally.

The International Law Commission's draft Article 43 provided:

"A state may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent unless that violation of its internal law was manifest."<sup>5</sup>

This text is a middle ground between opposing schools of thought classically grouped under the convenient umbrellas of monism and dualism. The monists, holding the view that internal law and international law are one, deduced from this concept of unity that international commitments which did not meet internal limitations on making treaties are unlawful because of a failure of consent. The dualists, holding the distinctness of internal and international law, concluded that while a treaty obligation may be invalid internally because of failure to comply with constitutional requirements, the international obligation is unimpaired if it measures up to international law requirements, because those requirements do not comprehend any referent to the internal law. There is an essential bootstraps element in each position because the conclusion depends upon acceptance of a semantic assumption.

The sharp opposition of these positions was blurred by adherents on each side who sought to introduce various elements of reasonableness into these exercises in pure reason. The Commentary to the Commission's draft Article 43 suggests that there are not two, but three, major schools of thought. The first of these is the strict monist view, which is described as holding that "internal laws limiting the power of state organs to enter into treaties are to be considered part of international law so as to avoid, or at least render voidable, any consent to a treaty given on the international plane in disregard of a constitutional limitation; the agent purporting to bind the state in breach of the constitution is totally incompetent in international as well as national law to express its consent to the treaty."<sup>6</sup>

The second school of thought postulates a modified monism: "... good faith requires that only notorious constitutional limitations with which other states can reasonably be expected to acquaint themselves should be taken into account. In this view, a state contesting the validity of a treaty on constitutional grounds may invoke only those provisions of the constitution which are notorious."<sup>7</sup>

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<sup>5</sup>61 AM. J. INT'L L. 394.

<sup>6</sup>*Id.* at 394-95.

<sup>7</sup>*Id.* at 395.

The third group, the dualists, consider "that international law leaves to each state the determination of the organs and procedures by which its will to conclude treaties is formed, and is itself concerned exclusively with the external manifestations of this will on the international plane. . . . Under this view, failure to comply with internal requirements may entail the invalidity of the treaty as domestic law, and may also render the agent liable to legal consequences under domestic law; but it does not affect the validity of the treaty in international law so long as the agent acted within the scope of his authority under international law."<sup>8</sup>

Immediately following discussion of the dualist position the Commentary points out that some dualists would ". . . modify the stringency of the rule in cases where the other state is actually aware of the failure to comply with internal law or where the lack of constitutional authority is so manifest that the other state must be deemed to have been aware of it. As the basic principle . . . is that a state is entitled to assume the regularity of what is done within the authority possessed by an agent under international law, it is logical enough that the state should not be able to do so when it knows, or must in law be assumed to know, that in the particular case the authority does not exist."<sup>9</sup> This is really so substantial a variation that it constitutes a different logical approach.

Another major variant not discussed in the Commentary is the position set forth in the Harvard Draft Convention on the Law of Treaties as Article 21:

"A State is not bound by a treaty made on its behalf by an organ or authority not competent under its law to conclude the treaty; however, a State may be responsible for an injury resulting to another State from reasonable reliance by the latter upon a representation that such organ or authority was competent to conclude the treaty."<sup>10</sup>

The Commentary to Article 21 of the Harvard Draft reviewed to a limited extent legal writings, state practice and jurisprudence regarding the constitutional issue, and reached the conclusion that the preponderance of authority at that stage supported the position regarding lack of competence to conclude a treaty in the face of a direct constitutional inhibition.

The basis for the clause regarding responsibility for injury due to reliance upon a representation of competence to conclude a treaty is not discussed in detail or supported by reference to any substantial array of authority. The only citations are in support of the requirement that there

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<sup>8</sup>*Id.* at 396.

<sup>9</sup>*Id.* at 396.

<sup>10</sup>II Harvard Draft Convention, 992.

must be "reasonable reliance." The Commentary suggests the circumstances in which international responsibility would arise by the following quotation from Lord McNair's introductory essay to Arnold's Treaty-Making Procedure:

"It seems more reasonable to adopt the latter view [that is, "State B is only bound to know those matters of common knowledge, and, in the absence of specific notice, cannot be deemed to have notice of other and less obvious provisions"], and to say that in concluding it if one party produces an instrument "complete and regular on the face of it" (to borrow an expression from another department of law) though in fact constitutionally defective, the other party, if it is ignorant and reasonably ignorant of the defect, is entitled to assume that the instrument is in order, and to hold the former to the obligations of the treaty. If that view is correct, then the repudiation of such a treaty constitutes an international wrong."<sup>11</sup>

If this is the proper explanation of the effect of Harvard Draft Article 21 (and it appears to be the most reasonable conclusion) then the collective authors of the Harvard Draft and the collective authors of the International Law Commission draft Article 43 have reached, from different premises and by different routes, nearly the same end result. The difference is more one of style, negative formulation versus positive formulation, than content.

Article 43, of course, is not concerned with the question of state responsibility—a subject expressly excluded from the reach of the Commission's draft by Article 69. It deals with the acceptability of a claim that a treaty is invalid. It provides, under certain circumstances, a basis for relief from the obligation of performance. The requirements of the Harvard Draft and the Commission's draft are substantially identical. If there has been reasonable reliance upon a representation of competence, the constitutional violation is not an adequate excuse for non-performance of the treaty obligation. Non-performance under these conditions would be a breach of agreement and the solution moves from the ambit of treaty law to the yet uncertain perimeters of state responsibility.

The existence of these four or five contending schools occasioned for many years a good deal more heat than light. A variety of eminent scholars took very firm positions upon the basis of rather sparse knowledge. Nothing is more illustrative of the difficulties in dealing with a subject so open to differences than the fact that each of the four Special Rapporteurs for the Law of Treaties took a substantially different view of the proper rule. A process of investigation, inquiry, argument and refinement, both in and out

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<sup>11</sup>61 AM. J. INT'L L. 1009.

of the Commission over a fifteen-year period, developed a position which is in harmony with the requirements of the present-day world, and which is recognized as such by the vast majority of those concerned with the effects of draft Article 43.

The first expression of position by the Commission appears not in the context of the Law of Treaties, but in the major product of the first session in 1949, the *Draft Declaration on Rights and Duties of States*. Article 13 of the *Declaration* provides:

"Every State has the duty to carry out in good faith its obligations arising from treaties and other sources of international law, and it may not invoke provisions in its constitution or its laws as an excuse for failure to perform this duty."<sup>12</sup>

The language employed contains an element of ambiguity, as it does not distinguish between constitutional limitations on the power to conclude as distinguished from the power to execute treaties. The discussion in the Commission on Articles 11 and 12 (subsequently combined into Article 13) supports the view that both aspects were under consideration:

"7. The CHAIRMAN recalled that the provision in the second part of Article 12 had been taken from an advisory opinion of the Permanent Court of International Justice,<sup>1</sup> the authority of which could not be challenged. He advocated the inclusion of that provision in Article 11 concerning the observation of treaties. He recalled, however, that there was a theory according to which obligations arising from treaties concluded contrary to the constitution of a State did not bind the Contracting State. Anzilotti opposed that theory and regarded treaties as binding upon their signatories in every case. That had been expressly stated in the Eastern Greenland affair.

"8. At all events, the CHAIRMAN considered that if the first theory were admitted it would be necessary to add after the word "obligations" in article 12, the words "apart from treaties" to avoid repeating what had already been included in article 11.

"9. Mr. CORDOVA thought that since treaties were theoretically always concluded in accordance with the constitutional laws of the Contracting State, they were necessarily binding upon those States.

"10. Mr. SPIROPOULOS went further and considered that every treaty, even if not in accordance with domestic constitutional law, was binding on the parties according to international law.

"<sup>1</sup>*Treatment of Polish nationals and other persons of Polish origin or speech in the Danzig territory*. Advisory Opinion No. 23, February 4, 1932."<sup>13</sup>

In light of this 1949 position it is somewhat surprising that the first draft article on the issue, approved tentatively by the Commission in 1951,

<sup>12</sup>ILC REPORT (1949) 8.

<sup>13</sup>ILC YEARBOOK (1949) 105.

apparently accepted the strict monist position. In 1950, the Special Rapporteur, Professor J. L. Brierly, had proposed a formula in Article 4(1) that "the capacity of a State or international organization to make treaties may be exercised by whatever organ or organs of that State or organization its constitution may provide."<sup>14</sup> Professor Brierly's discussion of the theory was succinct. He concluded:

"In view of the division of opinion as to the international legal effect of restriction of capacity to make treaties or of regulation of its exercise in the constitutions of States, it is open to the draftsman of a code of the law of treaties to take up any one of three attitudes on the matter."<sup>15</sup>

The three choices were (a) strict monist, (b) strict dualist, or (c) "implied warranty." This last was excluded on the ground that it could not "... be applied to international organizations without serious modifications."

In the discussion of Article 4, Judge Manley O. Hudson gave a classic summing up of the difficulties that surround the problem of constitutionality in international law:

"Mr. HUDSON admitted that the exercise of the capacity to make treaties was a knotty problem. To illustrate the difficulty, he cited a hypothetical case of the Chairman going to the United States to negotiate a treaty with the United States on behalf of France. One fine day he might wonder what person or what organ in the United States had the power to negotiate and conclude such a treaty. If the Chairman asked him personally who or what was that person or organ, he would hand him the American Constitution of 1787, asking him to read it, as it determined what persons or organs were invested with the power to negotiate or conclude treaties. But he must not merely read the Constitution; he must read it in the light of the 340 volumes containing the judgments of the Supreme Court, and in the light of agreements concluded over a period of nearly 170 years. The Chairman would go back home and study all that documentation. He would be obliged to do so, since he would be unable to form a clear opinion on the point in question until he had digested the documents. It was a question which Mr. Hudson had been engaged in studying for a long time; and he had often been asked his opinion on the subject. He had also found that the question was settled quite differently in the various countries. According to one interpretation the constitutional provisions relating to treaty-making capacity were of concern to the State in question alone, and not to other States with which it negotiated treaties. At the moment he thought it would be impossible for the Commission to give an accurate and unanimous opinion on that point."<sup>16</sup>

The draft article was reviewed in the course of the third session of the Commission. The Commission tentatively adopted, without much discussion, the following Article 2:

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<sup>14</sup>II ILC YEARBOOK (1950) 230.

<sup>15</sup>*Id.* at 231.

<sup>16</sup>I ILC YEARBOOK (1950) 88.



"A treaty becomes binding in relation to a State by signature, ratification, accession or any other means of expressing the will of the State, in accordance with its constitutional law and practice through an organ competent for that purpose."<sup>17</sup>

Hersch Lauterpacht replaced Professor Brierly, both on the Commission and as Special Rapporteur for Treaties in 1952. In 1953 he submitted a revised set of articles "intended primarily as a formulation of existing law". In view of this objective, it is interesting that Article 11, *Constitutional limitations on the treaty-making power*, basically incorporates the Harvard Draft position:

"1. A treaty is voidable, at the option of the party concerned, if it has been entered in disregard of the limitations of its constitutional law and practice.

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"3. In cases in which a treaty is held to be invalid on account of disregard of the constitutional limitations imposed by the law or practice of a contracting party that party is responsible for any resulting damage to the other contracting party which cannot properly be held to have been affected with knowledge of the constitutional limitations in question."<sup>18</sup>

Lauterpacht accompanied draft Article 11 with a Commentary the length of which he defended as follows:

*"Note*

The length of the preceding comment is partly explained by the fact that the statement of the law in Article 11 departs from the view adopted by the Commission in article 4 as tentatively formulated by it. Apparently the Commission regarded treaties concluded in disregard of constitutional limitations as being invalid *tout court*. The comment of the Commission on that article states that the view adopted therein is held by the majority of writers. This, in the opinion of the Rapporteur, is not the case. The article as provisionally adopted by the Commission has the apparent merit of clarity and precision. It would be, to some extent, acceptable if constitutional limitations of the treaty-making power in various countries were precise, well known, and easily ascertainable. However, the contrary is the case. In view of this any solution which treats, without any qualifications, non-observance of constitutional limitations as the decisive and the only factor may result in introducing into the field of the law of treaties an element of arbitrariness and abuse. This might also be the result of a rule which would make it possible for Governments to avoid their treaties, on the ground of unconstitutionality, regardless of their conduct prior and subsequent to their conclusion."<sup>19</sup>

In the Commentary itself, Lauterpacht expresses the view that, despite the substantial variations in theoretical position which divided legal schol-

<sup>17</sup>I ILC YEARBOOK (1957) 153-55.

<sup>18</sup>II ILC YEARBOOK (1953) 141.

<sup>19</sup>*Id.* at 146.

ars, draft Article 11 was supported both "by the bulk of practice" and "by the majority of writers."<sup>20</sup>

With all due respect to the eminence of the Special Rapporteur, there was no majority support for the liability feature of the article, either among scholars or in State practice. The practical utility of determining legal issues through balancing the number of legal pundits on one side as against the number on the other side appears somewhat suspect. But, for what it is worth, the school of writers supporting the "sufficiently notorious" doctrine certainly counterbalanced the Harvard Draft school among the monists, and the adherents of dualism were no inconsequential group.

Insofar as practice is concerned, Lauterpacht's Commentary itself negates support for his position. "It is also probably for some such reasons that the practice of Governments shows relatively few instances of attempts to avoid a treaty by reference to alleged disregard of constitutional limitations."<sup>21</sup> The same holds true for jurisprudence. "The paucity and the inconclusiveness of the judicial and arbitral pronouncements on the subject make it difficult to deduce from them any rule of international law which is calculated to provide a practical solution of the problem involved."<sup>22</sup>

The Lauterpacht proposals were never seriously discussed by the Commission. In 1954, the sixth session was engaged primarily with the Law of the Sea and the Law of Treaties was not taken up. Lauterpacht was then wafted to the ICJ, and succeeded in the seventh session by Sir Gerald Fitzmaurice, who also inherited the post of Special Rapporteur for the Law of Treaties.

This same period marked the first efforts of the United Nations to verify the actual practice and position of States. In January 1951 the Secretary General sent a letter to all member governments requesting information regarding their treaty-making powers and practices. Based on the replies to this letter and other research the volume *LAWS AND PRACTICES CONCERNING THE CONCLUSION OF TREATIES* was published in 1953 (ST/LEG/SER.B/3). While the replies from governments were incomplete, the Commentaries of a number of governments provided valuable evidence that things are not always what they seem, and that the existence of quite specific constitutional limitations on governmental authority to enter into various types of agreement is not considered by the governments subject to the limitations as a barrier to the assumption of binding international obligations.

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<sup>20</sup>II ILC YEARBOOK (1953) 142.

<sup>21</sup>*Id.* at 143.

<sup>22</sup>*Id.* at 144.

A striking example is Article 68 of the Belgian Constitution of 7 February 1831. This article was the prototype of a variety of constitutional limitations on the treaty-making power of sovereigns.

"Article 68: — Le Roi fait les traités de paix, d'alliance et de commerce. Il en donne connaissance aux Chambres aussitôt que l'intérêt et la sûreté de l'Etat le permettent, en y joignant les communications convenables.

Les traités de commerce et ceux qui pourraient grever l'Etat ou lier individuellement des Belges, n'ont d'effet qu'après avoir reçu l'assentiment des Chambres.

Nul cession, nul échange, nulle adjonction de territoire ne peut avoir lieu qu'en vertu d'une loi. Dans aucun cas, les articles secret d'un traité ne peuvent être destructifs des articles patents."<sup>23</sup>

This is a considerably more precise rule, for example, than Article II, Section 2, Clause 2 of the United States Constitution. A substantial number of jurists have considered it to be the type of requirement which would bring into play the "sufficiently notorious principle."

The Belgian jurist, Charles de Visscher, in *THEORY AND REALITY IN PUBLIC INTERNATIONAL LAW* (1957), p. 248, describes this principle in words that could have been chosen with the Belgian constitutional requirement in mind. "... an international treaty concluded by the Head of State without observing the rules of procedure for formulating the State's will (extrinsic constitutionality) is not binding upon the State, provided those rules, set out in a text, are sufficiently notorious." It might be noted that de VISSERIANA, p. 98). This is not, however, the position taken by the Belgian government in its submission to the United Nations:

"Lorsque l'assentiment des Chambres est requis pour que la convention sorte ses effets, la ratification du Chef de l'Etat n'intervient généralement que lorsque cet assentiment est acquis. Cette précaution est prise pour éviter l'impasse où conduirait le refus des Chambres d'approuver une convention qui lierait la Belgique vis-à-vis d'autres Etats; elle n'est cependant pas nécessaire en droit international, et en certains cas urgents la ratification a été donnée avant l'approbation des Chambres."<sup>24</sup>

The juridical basis for this somewhat pragmatic statement of position is developed by Paul de Visscher in *DE LA CONCLUSION DES TRAITÉS INTERNATIONAUX*, Brussels, 1943, p. 42 et seq.

The draft articles submitted by Fitzmaurice represented a complete reversion to the dualist approach. In his first report, submitted in 1956, Article 9 laid out the position in quite unambiguous language:

<sup>23</sup>UNITED NATIONS, *Laws and Practices Concerning the Conclusion of Treaties*, 1953, 14.

<sup>24</sup>*Id.* at 16.

"1. Treaty-making and all other acts connected with treaties are, *on the international plane*, executive acts, and the function of the executive authority. Whatever legislative processes have to be gone through in order to make such acts effective on the domestic plane, on the international plane they are authentic.

"2. On the international plane, therefore, the treaty-making power is exercised:

(a) In the case of a State, by the competent executive authority (Head of State, government): it is for each State to determine for itself what constitutional processes are necessary in order to place the executive authority in a position, on the domestic plane, to exercise this power; but, on the international plane, its exercise is the act of the executive authority; . . .

"3. No State is obliged, or, strictly speaking, entitled, to accept as internationally authentic the acts of another State in relation to a treaty, unless they are the acts of the executive authority; but because a State is bound to accept them if they are of this character, they necessarily bind the State whence they emanate, which, having performed them through its executive authority, may not then deny their international authenticity."<sup>25</sup>

In his Commentary Fitzmaurice relies on no authority except his ipse dixit. It represented, of course, long-held views, expressed as early as 1934 in *Do Treaties Need Ratification*?<sup>26</sup>

There had been a growing concern with the monist position during the 1950s, which undoubtedly had been fertilized by the results of the UN Secretariat inquiries. Another inquiry under UN auspices was carried out by the International Committee of Comparative Law with Paul Guggenheim as Rapporteur. This *Survey on the Ways in Which States Interpret Their International Obligations* reached the following conclusion on the constitutionality issue:

"2. Constitutional provisions limiting the State's competence to accept international obligations are only of relative value with regard to obligations resulting from international law. It is, in fact, generally admitted that a State is also internationally responsible for damage caused by acts contrary to international obligations, performed by organs of the said State acting outside the field of their competence but in their official capacity, provided that their incompetence is not manifest."<sup>27</sup>

The same thesis is expressed with somewhat greater clarity in the body of the report.

"... Consequently, if an organ habitually functioning as an authorized representative of the State concludes an international convention outside the sphere of its competence—provided that its incompetence is not manifest—the other

<sup>25</sup>11 ILC YEARBOOK (1956) 105-09.

<sup>26</sup>15 BRITISH YEARBOOK OF INTERNATIONAL LAW.

<sup>27</sup>UNESCO Report and Papers on the Social Sciences No. 1, (1955) 18.

States concerned are entitled to regard it as competent to conclude the said convention."<sup>28</sup>

The summary of discussion outlines the concerns which led the participants to move toward a formula of "manifest incompetence."

"(2) During the symposium, *Mr. Green*, who incidentally, showed that this problem is non-existent in countries without a written constitution, such as the United Kingdom, raised the question of the interpretation to be placed on "manifest incompetence" and asked whether it was incumbent on government representatives to make a study of the constitutional law of the other contracting State. He quoted examples where interpretation was difficult—particularly in the case of ignorance of the language in which the constitution of the other States was written... The Rapporteur declined to give an interpretation of the word "manifest" and quoted the empirical procedure of constitutional practice in this connexion. Messrs. *Ago* and *Paul de Visscher* drew attention to the difference between the formation of the will of the State—a question which comes under municipal and not under international law—and the manifestation of that will which, on the contrary, does fall within the sphere of international law, even though municipal law may have to be consulted in order to determine the conditions of its validity. They therefore stressed that international responsibility exists—except in cases of *manifest* incompetence—when the expression of a country's will is valid, conforming to the criteria adopted by international law, even though that will has not been formed in accordance with the principles of municipal law."<sup>29</sup>

The conclusion of the Committee is very close to the formula eventually adopted by the International Law Commission.

Due to concentration by the International Law Commission on Law of the Sea and Diplomatic and Consular Privileges and Immunities, the draft submitted by Fitzmaurice was not taken up before his election to the International Court of Justice in 1960.

That same year saw the publication of a most thorough and penetrating investigation of the entire subject of the relationship between treaties and internal law—*TREATY-MAKING POWER* by Hans Blix. This volume reviewed in depth not only the constitutional issue but also the closely allied problems of the authority of revolutionary governments, of governments-in-exile and of transitional governments. The bulk of the book, however, concentrates upon the question of the effect of constitutional limitations. The material in the UN compilation *LAWS AND PRACTICES* is examined at length in order to determine what interrelationships actually exist. This examination resulted in the following conclusion:

"The fundamental fact emerges from the examination of the whole material, that of some eighty-five provisions reproduced and practices described in the

<sup>28</sup>*Id.* at 8.

<sup>29</sup>*Id.* at 8.

cited collection, the vast majority—some seventy—merely prescribe the procedure to be followed in the conclusion of treaties, and lay down the division of duties between the various organs of states, without expressly dealing with the situation which arises when the regulations are violated.”<sup>30</sup>

Blix develops the material to illustrate that the conclusions drawn by writers of the monist school, in particular Chailley, as to the effect of constitutional limitations on international validity are not in many cases in accord with governmental and judicial authority. Of the constitutions reviewed, he concludes that only the Irish and the Norwegian clearly show an intent that “certain unconstitutional features make treaties invalid internationally.”<sup>31</sup> In addition he lists three probables, Denmark, Costa Rica and Greece, and a possibility, Lebanon. Blix summarizes his factual findings as follows:

“It is submitted, on the basis of the foregoing examination of international practice, that the evidence of a practice treating constitutional provisions as not directly relevant in international law is both quantitatively and qualitatively more significant than that pointing to the direct relevance of municipal provisions.

“The fact is conspicuous that no treaty has been found that has been admitted to be invalid or held by an international tribunal to be invalid, because concluded by a constitutionally incompetent authority or in an unconstitutional manner, either by an individual government in bilateral relations, or by an international organization, like the League of Nations. Furthermore, there is no lack of treaties made in violation of constitutions, or by constitutionally incompetent authorities, and yet admitted to be valid under international law. Some such cases have been recorded above.”<sup>32</sup>

In summing up, Blix surveys the various theoretical approaches, and remarks that “it would be an exaggeration to maintain that any unmistakable conclusion has emerged . . . It is obvious that the rule regulating the question is not a settled one . . .” Blix then suggests that what practice does support is a “criterion of apparent ability.”

“The authorities whose consent to treaties are sought and accepted as sufficient to bind a state are, in practice, invariably those that appear actually able to secure performance of treaty obligations without, at the same time, necessarily being those that are constitutionally authorized to act as they do. Thus, reliance seems normally to be placed on pledges given on the authority of a cabinet, by a president, a prime minister, or a foreign minister, and the cases and incidents and other evidence examined lend support to the position that such reliance is warranted under international law, even where constitutional precepts and provisions have been violated.”<sup>33</sup>

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<sup>30</sup>Blix, *Treaty-Making Power*, 233.

<sup>31</sup>*Id.* at 246.

<sup>32</sup>*Id.* at 373.

<sup>33</sup>*Id.* at 392.

This "criterion of apparent ability" is in accord with positions which the government of the United States had taken over a long period. The position taken regarding the Crichfield Protocol (U.S.-Venezuelan Claims Settlement of 1909),<sup>34</sup> and the position taken by Secretary Stimson in 1931 regarding the Bryan-Chamarro Nicaraguan Canal Treaty of 1914,<sup>35</sup> are clearly within the ambit of an apparent-authority rule.

A letter of January 24, 1950, from Adrian S. Fisher, then Legal Adviser of the State Department, to the Administrator of General Services, contains a frequently-quoted statement:

"This Department has taken the position that any agreement signed on behalf of a foreign government by a person whom that government officially designates as authorized to sign such an agreement is fully binding on such government. This Department accepts the advice of the duly recognized chiefs of the diplomatic missions of foreign governments and as to the extent of such authority. A chief of mission who signs an agreement is assumed to be acting within his authority. Even if, under the domestic law of his country, he, or a person whom he has certified as qualified to act, may have exceeded his authority, his government would not be excused from performing under the agreement."

The point at issue was a practice of some U. S. Government agencies querrying the authority of foreign officials and ambassadors to sign particular agreements (in this case a U. S.-French Surplus Property Credit Agreement).

Another important indication of a position is the fact that the Senate Judiciary Committee, in its report on the Bricker Amendment, made it crystal clear that the limiting effects of Section 1 of the proposed amendment were to apply only internally. Section 1 provided:

"Section 1. A provision of a treaty or other international agreement which conflicts with any provision of this Constitution shall not be of any force or effect."<sup>36</sup>

The Committee Report stated:

"... The words 'shall not be of any force or effect' mean that the agreement will be void insofar as the municipal or domestic aspects of the agreement are concerned. The committee wishes to point out that the international obligations of the treaty are not affected by this language for the external force and effect of such agreements are governed by international law and usage rather than by constitutional provisions."<sup>37</sup>

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<sup>34</sup>V HACKWORTH DIGEST 156.

<sup>35</sup>*Id.* at 155.

<sup>36</sup>84th Cong., 2d Sess., S.P. 1716, p. 1.

<sup>37</sup>*Id.* at 11.

This was as unambiguous a recognition by the Judiciary Committee of the need to preserve the international stability of treaties as could be found. And it was a recognition made under unusual conditions which militated against the adoption of such a position.

The conclusions reached by Blix were more limited, of course, than the Fitzmaurice approach. This completely dualist position was never formally considered by the International Law Commission. Some aspects of his reports were reviewed at the eleventh session in 1959 but the internal versus international law aspect was not taken up.

Sir Humphrey Waldock became the fourth, and final, Special Rapporteur for the Law of Treaties in 1961. His initial position regarding the constitutional limitations was set forth in Article 5 of his Second Report submitted to the International Law Commission in 1963. It was a meticulously drafted proposal that, reduced to its essentials, made failure to comply with constitutional limitations a defense only if resultant lack of authority was known or manifest.<sup>38</sup> Waldock's Commentary on the article contains an excellent summary of the contending schools of thought and a succinct explanation of their various failings. Thus, with regard to the "notorious" constitutional limitation he remarks:

"The notion that a distinction can readily be made between notorious and non-notorious constitutional limitations is to a large extent an illusion. Admittedly, there now exist collections of the texts of State constitutions and the United Nations has issued a volume of "Laws and Practices Concerning the Conclusion of Treaties" based on information, supplied by a considerable number of States. Unfortunately, however, neither the texts of constitutions nor the information made available by the United Nations are by any means sufficient to enable foreign States to appreciate with any degree of certainty whether or not a particular treaty falls within a constitutional provision. Some provisions are capable of subjective interpretation, such as a requirement that "political" treaties or treaties of "special importance" should be submitted to the legislature; some constitutions do not make clear on their face whether the limitation refers to the power to conclude the treaty or to its effectiveness within domestic law. But even when the constitutional provisions are apparently uncomplicated and precise, the superficial clarity and notoriety of the limitations may be quite deceptive, as in the case of the United States Constitution. In the majority of cases where the constitution itself contains apparently strict and precise limitations, it has nevertheless been found necessary to admit a wide freedom for the executive to conclude treaties in simplified form without following the strict procedures prescribed in the constitution; and this use of the treaty-making power is only reconciled with the letter of the constitution either by a process of interpretation or by the development of political understandings."<sup>39</sup>

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<sup>38</sup>11 ILC YEARBOOK (1963) 41.

<sup>39</sup>*Id.* at 42.



With respect to the monist approach generally, Waldock concludes:

"The majority of writers adopting the constitutional approach to the problem appear to have arrived at their conclusion rather upon the basis of theory than upon a close examination of international jurisprudence and State practice. If the evidence from these sources is not entirely decisive, the weight of it seems to point to a solution based upon the position taken by the third group."<sup>40</sup>

The third group referred to is the dualist school.

Undoubtedly Waldock is motivated in some part by his conclusion that:

"The majority of the diplomatic incidents in which States have invoked their constitutional requirements as a ground of invalidity have been cases in which for quite other reasons they have desired to escape from their obligations under the treaty. Furthermore, in most of these cases the other party to the dispute has contested the view that non-compliance with constitutional provisions could afterwards be made a ground for invalidating a treaty which had been concluded by representatives ostensibly possessing the authority of the State to conclude it. Where a Government has genuinely found itself in constitutional difficulties after concluding a treaty and has raised the matter promptly, it appears normally to be able to get the constitutional obstacle removed by internal action and to obtain any necessary indulgence in the meanwhile from other parties."<sup>41</sup>

Article 5 was the first of the draft articles discussed in the fifteenth session of the Commission. Three meetings, the 674th through 676th, were devoted to thorough debate of the varying approaches to the problem. There was an overwhelming majority in favor of the "internationalist" point of view. The view was expressed repeatedly that paragraph 4 was an unnecessary complication and involved only extremely rare cases.

André Gros, the Legal Adviser of the French Foreign Office, summed up the practical aspects of the opposition to paragraph 4:

"Article 5, as conceived by the Special Rapporteur, dealt with treaties improperly concluded or ratified by reason of the fact that the representation of one of the parties had been only ostensibly valid. There were now so many general, multilateral and bilateral treaties that it was doubtful whether, juridically and in practice, any other rule could be followed than that of trust in appearances, for obvious reasons connected with the maintenance of good international relations in accordance with the principle of non-intervention in the domestic affairs of States and for convenience in negotiation; the opposite rule would mean verifying not only that the powers of all negotiators were in order, but also that they were constitutional."<sup>42</sup>

Marcel Cadieux of Canada provided an interesting footnote to this aspect.

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<sup>40</sup>*Id.* at 43.

<sup>41</sup>*Id.* at 45.

<sup>42</sup>I ILC YEARBOOK (1963) 9.

"... His own country's constitution was so complex that there were always some provisions it could invoke if it wished to elude its obligations. But the rule of law should be fostered and governments encouraged to act with prudence, to accept the responsibilities for their decisions and to refrain from trying to shift them onto their partners in international negotiations or onto the international community."<sup>43</sup>

The only members of the Commission who urged unqualified adherence to the monist position were Yasseen of Iraq and Paredes of Ecuador. The example cited by Paredes in support of his position is illuminating.

"There was, moreover, serious danger in drawing a distinction between the international validity and the internal validity of a treaty. For example, a loan agreement might be entered into by a head of State, without consulting the competent constitutional organs. If it was desired to obtain repayment of the loan and a claim was brought before the courts of the State concerned, it would inevitably be rejected; the courts would say that the loan agreement was void and had no effect in municipal law."<sup>44</sup>

Article 5 was shortened in the drafting committee. The discussion of the revised draft in the Commission emphasized that the article was a compromise of opposing viewpoints. There were a number of complaints about the drafting and the Commission accepted the text subject to further redrafting by a vote of eighteen to none with three abstentions.

The redrafted text was considered at the 716th meeting and the following was adopted unanimously:

"When the consent of a State to be bound by a treaty has been expressed by a representative considered under the provisions of article 4 of Part I to be furnished with the necessary authority, the fact that a provision of the internal law of the State regarding the procedures for entering into treaties has not been complied with shall not invalidate the consent expressed by its representative, unless the violation of its internal law was manifest. Except in the latter case, a State may not withdraw the consent expressed by its representative unless the other parties to the treaty so agree."<sup>45</sup>

In the Commission's report to the General Assembly, Article 5 became Article 31. The draft articles were submitted to member governments for an expression of opinion and national positions were also expressed in the Sixth Committee of the General Assembly. The reactions to Article 31 were discussed by the Special Rapporteur in his fourth report.

"Seventeen of the Governments and delegations which have commented on the present article express themselves in favour of the rule proposed by the Commission while making suggestions for improving its formulation. Seven

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<sup>43</sup>*Id.* at 5.

<sup>44</sup>*Id.* at 11.

<sup>45</sup>*Id.* at 298.

Governments and delegations, on the other hand, appear to be opposed to that rule, considering that greater importance should be given to the role of constitutional law as an element in the formation of a State's consent to be bound by a treaty. Three delegations do not make their position plain on the central question of principle. In these circumstances the Special Rapporteur thinks that his proper course is to assume the maintenance of the rule adopted in 1962 but to try to improve its formulation in the light of the points made in the comments of Governments and delegations."<sup>46</sup>

The seven States which expressed opposition were Burma, Uganda, Iraq, Italy, Thailand, the United Arab Republic and Yugoslavia. The presence of Italy is somewhat surprising in light of the eminent Italian jurists, headed by Anzilotti, who supported the "internationalist" position.

After reviewing the suggestions for redrafting the article, Waldock proposed a somewhat shorter text. This revision was considered at the 823rd session on January 4, 1966, and found general acceptance.<sup>47</sup> The article was referred to the drafting committee. When it reappeared, it had reassumed the outlines of the 1963 draft. There was a brief discussion, followed by adoption, sixteen votes to none, with two abstentions, of the text set forth in the Commission's final report on the Law of Treaties as Article 43, which will be repeated to refresh the reader's recollection:

"A State may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent unless that violation of its internal law was manifest."

The Commentary on the article is an abbreviated version of the earlier explanations of the Special Rapporteur with certain addenda. One of these in commenting on government positions is of special interest:

"Some Governments suggested that the text should indicate, on the one hand, to whom the violation must be manifest for the purpose of bringing the exception into play, and, on the other, what constitutes a "manifest violation". The Commission considered, however, that it is unnecessary to specify further to whom the violation must be manifest. The rule embodied in the article is that, when the violation of internal law regarding competence to conclude treaties would be *objectively evident to any State dealing with the matter normally and in good faith*, the consent to the treaty purported to be given on behalf of the State may be repudiated."<sup>48</sup>

The comments received from governments regarding Article 43, and the statements of delegates in the Sixth Committee, paralleled the positions which had been taken on the earlier draft. There was again a heavy

<sup>46</sup>II ILC YEARBOOK (1965) 70.

<sup>47</sup>I ILC YEARBOOK (1966) Part I, 124.

<sup>48</sup>61 AM. J. INTER'L L. 399.

majority in support of the view that international commitments should be subject only exceptionally to internal limitations, mixed with expressions of concern regarding clarity and, in particular, the difficulty of determining when a violation would be "manifest."

The major published Commentary on the Commission's Article 43 appeared in the special edition of the Max Planck Institute's *Zeitschrift für Ausländisches Öffentliches Recht und Völkerrecht* of October 1967 (Vol. 27, No. 3). The paper is by Dr. Wilhelm Karl Geck, who had in 1963 published a volume *Die Völkerrechtlichen Wirkungen Verfassungswidriger Verträge* which supported the "internationalist" position and, in many respects, coincided with the views put forward by Blix. In the article, Geck concentrates on the need to distinguish between rules on "the international formation of will (Willensbildung)" and those of internal law "on the authority to express consent (Erklärungsbefugnis)." He concludes that the manifest violation principle of the International Law Commission is not a sufficient distinction. He remarks:

"It is not surprising that, in the disputes which have arisen in international practice, the States which have asserted the invalidity of a treaty on the grounds of a violation of their constitutional law, have done so mostly not out of an abstract concern for the protection of their laws, but rather because of a concrete political or economic interest to be rid of a treaty obligation which has become inconvenient to them. Nor can one rely on the argument that international disputes of this nature have not been very numerous. The number of international treaties has grown enormously with the increase in the number of States (the United Nations Treaty Series contains at the moment some 8,600 treaties in 548 volumes). The constitutional and political situation in many countries is neither clear nor stable. In a world where national sovereignty is sometimes regarded as a justification for evading political or economic treaty obligations, there is a danger that States will, by relying on their national law, seek to rid themselves of treaty bonds which no longer suit them."<sup>49</sup>

His proposed redraft of the article basically relies on the authority of heads of state and on full powers issued by heads of state. This and similar proposals increase certainty but only by ignoring the facts of contemporary treaty practice regarding agreements in simplified form.

At the Treaties Conference the line-up which the International Law Commission had displayed in microcosm now appeared in a world-wide context. A series of amendments was proposed. Japan and Pakistan supported deletion of the manifest violation requirement (A/Conf.39/C.1/L.184 and Add.1). This proposal received a substantial amount of support, especially from Blix, who, as head of the Swedish

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<sup>49</sup>27 ZEITSCHRIFT 445.

delegation, argued strongly in its favor. There was no amendment submitted that took the position that internal law should govern. Venezuela proposed an amendment to reverse the negative implication of the article and give positive expression to the claim of invalidity. There was practically no support for this proposal and it was withdrawn (A/Conf.39/C.1/10). Iran put forward an amendment based on the head of state theory which likewise was withdrawn in the face of negative reaction (A/Conf.39/C.1/L.252), as were amendments to require prompt notification of any claim based on constitutional objections (Philippines, A/Conf.39/C.1/L.239). Australia (A/Conf.39/C.1/L.271/Rev.1) proposed a year's statute of limitations which lost 44 to 20 with 27 abstentions.

Two amendments put forward by Peru (A/Conf.39/C.1/L.228), joined subsequently by the Ukrainian S.S.R., and one by the United Kingdom (A/Conf.39/C.1/L.274) were designed to clarify the meaning of Article 43. The Peruvian proposals were intended to make clear that the internal law violated must be a "constitutional provision of fundamental importance." (Prov.Summary Record A/Conf.39/C.1/SR.43,p.5)

Norway, one of the few States cited by Blix in *Treaty-Making Power* as having a constitutional limitation on the international validity of treaties, announced its intention to abstain "as adoption of the article would require a revision of the Constitution or at least a reconsideration of the prevailing interpretation of Norwegian constitutional law." (Prov.Summary Record A/Conf.39/C.1/SR.43,p.17) This was the only real objection made to the principle underlying Article 43. Many of the delegates were concerned with broadening that principle through acceptance of the Japanese-Pakistani proposal. Australia, the United Kingdom, Sweden, Cambodia, Cyprus, France, Switzerland, and Brazil spoke in favor of that position. The amendment was, however, defeated 56 to 25 with 7 abstentions. A considerably larger number of delegates stressed the need for greater clarity in the article. This sentiment was reflected in the adoption of the Peruvian and United Kingdom amendments (Prov.Summary Record,p.25).

At the 78th meeting of the Committee of the Whole, the following text of Article 43 was adopted unanimously:

"1. A State may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of its internal law of fundamental importance.

"2. A violation is manifest if it would be objectively evident to any State conducting itself in the matter in accordance with normal practice and in good faith."<sup>50</sup>

The article was adopted without change in the second session of the conference by a vote of 93 in favor, none against, and 3 abstentions.

The history of Article 43 demonstrates that the text finally chosen was the culmination of an extended review of all possible courses of action. Is the solution that has been finally worked out the best available solution? It is certainly not the rule that would have the greatest appeal to either the fervid nationalist or the perfervid internationalist. But the all-or-nothing approach of true believers rarely supplies a workable formula for a workaday world. When the desirable aim of upholding the stability of the international treaty structure collides with the laudable end of placing some domestic checks and balances upon the making of international commitments, the reasonable solution should be a compromise that protects both sets of interests to the maximum extent.

The essential decision in reaching such a compromise is allocation of the burden of proceeding. Should the weight of making the argument fall upon the State that relies on its internal law to defeat a commitment or upon the State that relies upon the latter's appearance of authority to undertake the commitment?

The decision underlying Article 43 is to accord *prima facie* validity to the appearance of authority subject to the limitation of an objectively evident violation of a fundamentally important internal law. The review of the problem has demonstrated above all that this solution is amply supported, not only by legal theory, but by consideration of practical consequences.

Article 43 is designed for a world in which the coup d'état and the suspension of constitutions are endemic, but also where international business cannot be suspended until constitutional rule is restored. It is designed for a world in which assaults upon international commitments are a standard weapon in the armory of aspiring politicians. Given the facts of contemporary international existence, Article 43 represents the most reasonable rule for a world in which reason is not yet supreme.

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<sup>50</sup>VII INTERNATIONAL LEGAL MATERIALS 791 (1968).