Reporter) [7] and might well be considered by the International Conference which will consider the International Law Commission's draft.

QUINCY WRIGHT

### TREATIES AND INTERNATIONAL LEGISLATION

The vast bulk of relations or relationships among individuals is regulated, even in the most advanced states, by contract or quasi-contract rather than by state legislation, constitutional or statutory. Similarly the vast majority of relations among states in the international community are regulated by treaty agreement or diplomatic arrangements rather than by international legislation in the strict sense of that term, namely, laws made by less than unanimous consent. For this reason it is quite proper to include treaties and treaty-making in a consideration of the general field of international organization, in spite of the doubts and objections of some who feel that such elements are not sufficiently structural or institutional in character to be ranked with international conferences, courts, commissions and federal unions.

It is therefore not entirely surprising that there appear practically no traces of a theory of legislation in the Draft Articles on the Law of Treaties produced by the International Law Commission of the United Nations at its Eighteenth Session (May 4–July 19, 1966).[1] It also appears from the record that the Commission has never planned to consider the problem of international legislation proper, in spite of some indirect intimations in the Commentaries on the articles.[2] Nevertheless, the problem is too important and too pressing to be ignored or neglected in any effort to develop the contemporary juridical framework of international relations, international legislation constituting, as it does, one of the three or four major elements in potential international organization and government.[3] And the relations between treaty-making and international legislation must constitute the starting point for any such inquiry.

[7] "Art. 27. *Violation of Treaty Obligations.* (a) If a State fails to carry out in good faith its obligations under a treaty, any other party to the treaty, acting within a reasonable time after the failure, may seek from a competent international tribunal or authority a declaration to the effect that the treaty has ceased to be binding upon it in the sense of calling for further performance with respect to such State.

"(b) Pending agreement by the parties upon and decision by a competent international tribunal or authority, the party which seeks such a declaration may provisionally suspend performance of its obligations under the treaty *vis-à-vis* the State charged with failure.

"(c) A provisional suspension of performance by the party seeking such a declaration will not be justified definitively until a decision to this effect has been rendered by the competent international tribunal or authority." 29 A.J.I.L. Supp. 662 (1935); and elaborate commentary setting forth practice and opinion on the subject, *ibid.* 1077–1096.

[1] General Assembly, 21st Sess., Official Records, Supp. No. 9 (A/3609/Rev. 1), p. 10; 61 A.J.I.L. 263 (1967). [2] See Commentary on Art. 8.

[3] See editorial comment in 55 A.J.I.L. 122 (1961).

As just suggested, the formula "international legislation" should, it appears, be confined to the making of international law by some degree of majority vote, presumably in an international conference. This might exclude the development of international law by practice, although it was long ago held that unanimous explicit consent is not needed to establish a norm of "customary" international law.[4] It would also exclude multipartite conventions depending for their authority on consent by all of the parties to be bound thereby, although the latter are at times referred to as international legislation or international statutes (against the objections of the purists). It is, of course, true that a few international conferences or assemblies (including the General Assembly of the United Nations) have been given limited powers of legislation by some degree of majority vote beyond the use of the treaty form; such cases are as yet not too numerous, however, and still relate largely to procedural matters, although at times to substantive matters, as in the European Economic Community, at least in the form of administration if not true legislation.

It is therefore probably not entirely surprising that the International Law Commission failed to make any reference to this problem in the Draft Articles. On the other hand, the relationship between the two forms of international action is so close and the question of relative values so important that students of the situation are amply justified in raising the question.

In the first place the development of international legislation through or from the multipartite treaty is so very gradual and natural that any sharp differentiation between the two forms of action, such as is implied in the Draft Articles, seems unrealistic and defective. Short of equating multipartite conventions with constitutions or statutes in the strict sense of those terms as employed in political science, which would indeed be improper, it does appear justifiable and desirable to recognize the relationship in question.

This is not, perhaps, the proper place in which to argue the relative values of treaty-making and international legislation. The student of political science might be tempted to argue in favor of the latter and to regard treaty-making an an archaic and mechanically defective form of action when applied to general international problems, in spite of the empirical evidence of the continuing value of such activity. Also the dangers of legislation by some degree of majority vote are well known and are rendered still greater in the international sphere today with the changing composition of the international community. The only conclusion to be drawn, probably, is that full and adequate attention should be given to this problem—both the development of international legislation in the strict sense of the term and the evolutionary relationship between this higher form of action on the one hand and treaties and treaty-making

[4] See line of cases from Exchange *v.* McFaddon (7 Cranch 116) and United States *v.* La Jeune Eugénie (2 Mason 409), to West Rand Central Gold Mining Co. *v.* the King ([1905] 2 K. B. 391), in J. B. Scott, Cases on International Law (1922), and M. O. Hudson, Cases and Other Materials on International Law (1929).

on the other. Some benefits for both forms of activity might well be reaped from such analysis.

PITMAN B. POTTER

TREATY INTERPRETATION AND THE UNITED STATES—ITALY AIR TRANSPORT ARBITRATION

Paul B. Larsen's article on the *U.S.-Italy Air Transport Arbitration*[1] in the April, 1967, issue of this JOURNAL devoted four pages (pp. 511–514) to the interpretative methods used by the majority decision in arriving at its conclusion, with which he agrees, compared with those methods which he would have preferred. Using dramatic license, he portrayed the majority decision as an illustration of the "narrow textual analysis" interpretative method, as contrasted with the "broad contextual analysis" which he deemed preferable.

His misjudgment of the interpretative method of the majority decision is most baffling. It is explicable only in terms of an apparent desire to publicize a different and novel method which can often be unwieldy and unhelpful.

The issue and the decision in the arbitration can be restated quickly: "Does the Air Transport Agreement between the United States of America and Italy of February 6, 1948, as amended, grant the right to a designated airline of either party to operate scheduled flights carrying cargo only?" The majority decision by the German and American arbitrators (the Italian arbitrator dissented) answered in the affirmative.

Under one section (III) of the 1948 Agreement's Annex, designated air carriers of the United States and Italy, respectively, were granted "rights of transit and of stops for non-traffic purposes, as well as the right of commercial entry and departure for international traffic in passengers, cargo *and* mail at the points enumerated on each of the routes specified in the Schedules attached." Other sections of the Annex (I and II), however, referred to transport of "passengers, mail *or* cargo." The two countries had treated "all cargo" flights since 1948 as being covered by the Agreement, along with "mixed" flights. This was consistent with the predecessor Chicago Convention, and the Bermuda Agreement between the United States and the United Kingdom, which were intended to regulate all scheduled commercial air services, not to be confined to a particular kind of service.

Whether all-cargo flights were "covered" by the 1948 Agreement was important not only to the United States and Italy, but to all countries bound by similar agreements, amounting to 50 or 60: if "covered," frequencies could be added in the commercial judgment of the airlines without advance approval of the host government; if not "covered," they could not. Pan American and TWA, possessing jet cargo planes, in 1963 filed schedules adding to frequencies. Since Alitalia had no jet cargo planes

[1] 61 A.J.I.L. 496 (1967). The text of the majority and minority opinions has been reproduced in 4 Int. Legal Materials 974 (1965), and digested in 60 A.J.I.L. 413 (1966).