Article 18 of the 1969 and 1986 Vienna Conventions on the Law of Treaties

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1969 Vienna Convention

Article 18

Obligation not to defeat the object and purpose of a treaty prior to its entry into force

A State is obliged to refrain from acts which would defeat the object and purpose of a treaty when:

(a) it has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, acceptance or approval,

(b) it has expressed its consent to be bound by the treaty, pending the entry into force of the treaty and provided that such entry into force is not unduly delayed.

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Part II Conclusion and entry into force of treaties


A. General characteristics

Object and purpose

1. The Vienna Convention on the Law of Treaties of 1969 is a rich source for reflection on the issue of international treaties. Article 18 is indicative of the rebellious and complex nature of the Vienna Convention due to the different interactions and interrelations between the political and the legal brought to bear by the treaties. Apart from this, Article 18 also attests to the innovative nature of the Vienna Convention. In fact, it is part of the body of norms which prove that the work of the ILC did not simply consist in making the 'Treaty of Treaties' a 'holy book' codifying sacrosanct rules or principles of treaty practice between States, but also a sort of receptacle and renovator of principles which could effectively contribute to the modern development of international law. Article 18 of the Vienna Convention is located halfway between the concern for codification and the concern for legal innovation. Precisely this feature means that, although its general aims are clear, when its legal elements are dissected numerous difficulties arise. First and foremost, Article 18 of the Vienna Convention pursues the objective of legal security necessary for the stability and viability of international treaties. For this reason, States are able better to assess all the legal implications of the different steps of the conclusion of an international treaty. The further objective of legal legitimacy demands that States refrain from acts contrary to an international treaty even before it has begun to apply. A multilateral or bilateral treaty should translate the common aspirations of the States which partook in its negotiation. In order to guarantee a minimum of legitimacy for the process of transforming these aspirations into legal norms, States must in return be required to comply with a minimum standard of conduct in relation to the treaty.

2. Legal transparency is another general objective of the Article commented on here. Article 18 offers true scope for reflection on the mechanisms to be developed for promoting and guaranteeing information on the position of States in respect of an international treaty. The obligation contained in this clause is embedded within a context of transparency, a quality representative of good faith in contractual relations. However, international law does not enable effective and efficient objectification of the legal channels through which States can express their opinions or establish their official positions in respect of the effects a treaty creates, or does not create, for them. Yet, certain international systems offer paths to follow in this direction. For instance, in the case of the International Labour Organization (ILO) the statutes of which were included in the Peace Treaty of Versailles, it is interesting to take into account the reporting obligations with which States have to comply even before the ratification of international labour conventions. From the moment the International Labour Conference (plenary organ of the organization) adopts a convention, every member State has the obligation to submit
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it to the competent authorities 'for the enactment of legislation or other action'. The member States are also obliged to report to the Director General of the organization on the said measures. If the State obtains consent with a view to ratification it has to communicate it to the Director General and take all the measures necessary to render its provisions effective. In the case in which a State does not wish to be bound by the obligations contained in an international labour convention, it still remains under a transparency obligation. This transparency requirement is established by requiring States to submit at adequate intervals information to the Director General on the position of its law and practice in regard to the matters dealt with in the Convention, showing the extent to which effect has been given, or is proposed to be given, to any of the provisions of the Convention by legislation, administrative action, collective agreement or otherwise and stating the difficulties which prevent or delay the ratification of such Convention.

3. Furthermore, specifying the obligation contained in Article 18 makes it in the same way possible to capture and structure the presumption of good faith. Article 18 allows the legal framing of the particular relation that binds a State to a treaty. In other words, the obligation implicitly arises for every State to make its future behaviour in relation to a treaty public and objective instead of taking advantage of the inviolable prerogative of State. In other words, the fact of refraining from acts that would defeat the object and purpose of a treaty turns out to be a manifestation of the principle of good faith. In the case of ratified treaties, it strengthens the rule pacta sunt servanda. The parties of a treaty oblige themselves to act in good faith in the context of the agreement they have concluded. This conception of the principle of good faith finds its legal expression in Article 18(b) of the Vienna Convention in respect of States having expressed their consent to be bound being from this moment parties to the treaty in question. In general terms, the principle of good faith is also a principle that States have to respect even if they are not contractually bound. Acting in good faith means to conform to: 'l'esprit de loyauté, de respect du droit, de fidélité aux engagements [et s'abstenir] de dissimulation, de tromperie, de dol dans les relations avec autre'.

4. The legal effect of the principle of good faith binding all subjects of international law in all legal transactions, notably before the creation of the contractual bond, finds its expression in Article 18(a) of the Vienna Convention, which creates an obligation for the signatory State (outside the contractual link) to refrain from acts contrary to the object and purpose of a treaty as long as it has not expressed its intention not to be bound by it. The importance of the principle of good faith in Article 18 of the Vienna Convention had therefore led the ILC explicitly to introduce the principle in Article 17 of its draft on the law of treaties:

A State which takes part in the negotiation, drawing up or adoption of a treaty, or which has signed a treaty subject to ratification, acceptance or approval, is under an obligation of good faith, unless and until it shall have signified that it does not intend to become a party to the treaty, to refrain from acts calculated to frustrate the objects of the treaty, if and when it should come into force.

2 Ibid, sub-para. (d).
3 Ibid sub-para. (e).
Later, at the Vienna Conference on the Law of Treaties, some States considered it necessary to introduce an explicit reference to the principle of good faith in Article 18 of the Vienna Convention. The Netherlands presented an amendment highlighting that it is 'under the principle of good faith' that a State is obliged to refrain from acts tending to frustrate the object of a treaty. In the end, although Article 18 of the Vienna Convention does not comprise an explicit reference to the principle of good faith, the preparatory work nevertheless reveals that it has to be considered one of its applications.

Customary status: an ambiguous position

5. Although the ILC's concern in the process of producing Articles on the law of treaties was essentially the codification of State practice in the field of international agreements it is not established that, in all cases, the rules enunciated constitute ipso facto customary rules of international law. Article 18 of the Vienna Convention perfectly illustrates this situation, at least with respect to the effect of a State's signature of a treaty (para. (a)).

6. Taken as a whole, legal scholars' positions differ on the matter of the existence of this obligation under customary law. Professor Fernand Dehousse wrote on the issue:

Indisputable moral reasons evidently militate in favour of a similar attitude of the State in the interval that lies between signature and ratification. But it must be emphasised that these are only moral reasons: legally, there is no obligation before ratification.

Other authors deny the existence of this moral obligation either by basing their argument on a State's liberty not to ratify or because they consider that such an obligation does not correspond to international practice. Some are very careful when it comes to asserting the existence of the obligation. In Jones' opinion, it depends on the circumstances of each case, in Oppenheim's and Lauterpacht's view, the principle probably exists. Basdevant noted:

6 See also the amendment put forward by the Swiss delegation explicitly citing the requirement of good faith in the period of a treaty's negotiation: A/CONF.39/C.1/L.112.


It now remains to investigate whether, and if so to what extent, the convention itself may generate rules which will be accepted and recognised as customary rules of international law; notwithstanding that they do not have all the characteristics of such customary rules.

9 Unofficial translation by the editor. Original text:

D'incontestables raisons morales militent, évidemment, en faveur d'une pareille attitude de l'Etat dans l'intervalle qui sépare la signature de la ratification. Mais il faut souligner que ce sont uniquement des raisons morales: juridiquement, il n'y a pas d'engagement avant la ratification. (F. Dehousse, La ratification des traités (Paris: Sirey, 1935), p 67)


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The conclusion of a treaty in reality entails two distinct operations: one is the negotiation that is terminated by the signature, the object of which is to fix the content of the will of the contracting States, the other is ratification, which is the only step that will create a legal bond between these States or an obligatory rule for them.\textsuperscript{14}

Nevertheless, it should be noted that for a large part of legal scholarship, an obligation of good faith exists in the period following the signature of a treaty and preceding its entry into force according to which a party cannot put itself into a position such that it can no longer respect the conditions existing at the moment of signature.\textsuperscript{15}

7. The analysis of treaties and international jurisprudence underlines the importance of a nuanced reasoning that should be cautious. International treaties are incapable of providing a probative answer and this despite the fact that some conventions contain a clause on the issue. This is the case for Article 38 of the final act of the Berlin Conference of 1885 concerning the freedom of navigation on the Congo River which stipulated that until ratification: 'the Signatory Powers of the present General Act bind themselves not to take any steps contrary to its provisions'.\textsuperscript{16} A similar provision can be found in the protocol annexed to the Convention for the Control of the Trade in Arms and Ammunition of 1919:\textsuperscript{17}

At the moment of signing the Convention..., the undersigned Plenipotentiaries declare in the name of their respective governments that they would regard it as contrary to the intention of the High Contracting Parties and to the spirit of the Convention, if a Contracting Party should adopt any measure which is contrary to its provision.

\textsuperscript{14} Unofficial translation by the editor. Original text:

La conclusion d'un traité comprenant en réalité deux opérations distinctes: l'une est la négociation terminée par la signature, et dont l'objet est de fixer le contenu de la volonté des États contractants, l'autre est la ratification qui seule va créer un lien de droit entre ces États ou une règle obligatoire pour eux. (J. Basdevant, 'La conclusion et la rédaction des traités et des instruments diplomatiques autres que les traités', RCADI, 1926-V, vol. 15, p 574)


\textsuperscript{16} Jules Hopf, Recueil général de traités et autres acts relatifs aux rapports de droit international, 2nd series, Book X (Göttingen: Librairie de Dieterich, 1885), pp 416–18.


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This could lead to the conclusion that such treaty provisions show that before the Vienna Convention, a general obligation in international law had existed neither de facto nor de jure. Otherwise, such provisions would be unnecessary.\(^\text{18}\)

8. An examination of international jurisprudence on this issue also leaves one confused as to whether the obligation contained in Article 18(a) of the Vienna Convention has customary status. As an indication of recognition, an arbitral tribunal seized of a dispute between Mexico and the United States declared in 1871 that the consequences of a treaty in times of peace arise from the moment of the treaty’s signature rather than from the moment of its ratification.\(^\text{19}\) This declaration was taken up by arbitrator Lieber in the Ignacio Torres case, decided the same year, and relating to the damages caused to the plaintiff by US troops after the signature but before the ratification of the Peace Treaty of Guadalupe-Hidalgo between Mexico and the United States.\(^\text{20}\) In 1875, in the Revilla case, originating from the same context as the preceding case, the arbitrator pointed out that:

In the opinion of the Umpire the claim comes under the 13th Article of the Convention for the suspension of hostilities...If the treaty had not been ratified and the war had continued the Convention might also have fallen to the ground...but the ratification of the treaty confirmed instead of annulling the provisions of the Convention as far as the interval between the signature and the ratification of the treaty was concerned.\(^\text{21}\)

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\(^{18}\) P. Cahien, supra n 10, p 33.

\(^{19}\) 'If a peace-treaty were signed with a moral certainty of its ratification and one of the belligerents were, after this, making grants of land in a province which was to be ceded, before the final ratification, it would certainly be considered by every honest jurist a fraudulent and invalid transaction' (J. B. Moore, History and Digest of the International Arbitrations to Which the United States has been a Party (Washington DC: Government Printing Office, 1898), vol. IV, p 3801.

\(^{20}\) Ibid, pp 3798-801. The Tacna-Arica case contains similar passages. According to the arbitrator for that case:

it follows from what has been said that the provisions in question of the Treaty of Ancon must be regarded as still in effect unless the course of Chile in the administration of Tacna and Arica has been of such a character as to frustrate the purposes of these provisions and hence to deprive them of force...The Arbitrator finds the conclusion inescapable that the territory continued 'subject to Chilean laws and authority' pending the negotiations for the special protocol. The question is whether this authority has been used in such a way as to frustrate the purpose of the agreement for the plebiscite. (Protocol of Arbitration between Chile and Peru, with Supplementary Act (Tacna-Arica Question (Chile/Peru)), RIAA, vol. II, pp 934-5)

\(^{21}\) Ibid, pp 3805–6. Other examples can be found in arbitral decisions. In the case A. Kemeny v Yugoslav State of 1928, the arbitral tribunal considered that:

the Hungarian authorities were entitled to grant to the claimant the mining rights in question. The Armistice Agreement did not have the effect of transferring sovereignty to the Yugoslav Government over the occupied territories. The Hungarian authorities in question, i.e. the Department of Mines in Budapest, continued, until the entry into force of the Treaty, to exercise the relevant rights of sovereignty over these territories. On the other hand, according to a generally recognised rule of international law, the Yugoslav Government was authorised to replace the Hungarian authorities in the occupied territory by its own officials, and even to create new organs in so far as this was necessary for safeguarding public order and the economic well-being of the territory. (Annual Digest 1927–28, vol. 4, p 550)

In the case of Anaya (1868), the arbitrator considered that:

upon the negotiation of a treaty of peace it is customary to agree upon a suspension of hostilities, and even without it the good feeling of the belligerents would impress them with the expediency of suspending hostilities; but the treaty itself, unless it should expressly so declare it, does not necessarily and of right involve a suspension of hostilities. (J. B. Moore, supra n 19, p 3804)

Some authors consider these two cases salient for the discussion of the legal significance of the signature (W. Morway, supra n 11, p 456, fn 13; L. Oppenheim, supra n 15, p 1239, fn 7).

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9. The delicate issue of the obligation produced by the signature of a treaty arose later in 1921 in the German Reparations case. Article 260 of the Treaty of Versailles stipulated that Germany was required to cede to the Reparation Commission certain rights and interests which it possessed by virtue of various concessions and public utility companies. The problem was how to determine the date which had to be taken into consideration in order to find out which concessions and enterprises Article 260 was aimed at. Was it the date of signature, the date of ratification, or the date of entry into force of the Treaty of Versailles? The Reparation Commission was of the opinion that it was the date of signature because otherwise the German government would have been able, in the period between the signature and the entry into force of the treaty, to encourage the alienation of rights which it would have been required to hand over. The Commission justified its position by arguing that the ratification had retroactive effect. In the view of the German government, the obligations contained in the treaty could only arise at the moment of its entry into force. The arbitrator, agreeing with the latter point of view, underlined, however, that:

...the German government has recognised that it would be contrary to good faith if it had taken any measures after signature to enforce German rights or interests in the hand of non-Germans, before the entry into force of the treaty.\(^\text{22}\)

10. Another award, handed down in 1926 by a mixed arbitral tribunal seized of a dispute between Greece and Turkey and relating to acts carried out by the Turkish government in the period between the signature and the ratification of the Peace Treaty of Lausanne, indicated that:

...it is a principle that already with the signature of a treaty and before its entry into force, there exists for the contracting parties an obligation not to do anything that could harm the treaty by diminishing the scope of its clauses...This principle—which only amounts to a manifestation of good faith which is the basis of any law and any convention—has been applied a certain number of times in various treaties...\(^\text{23}\)

11. In 1926, the Permanent Court of International Justice (PCIJ) had to pronounce on the issue in the Case concerning certain German interests in Polish Upper Silesia. The case dealt with the selling of goods situated in a territory before this territory fell under Polish sovereignty, transfers which took place before the entry into force of the Treaty of Versailles. From the point of view of the Polish government:

...as from the signature of the treaty, the German government had to abstain from any act that would make the execution of the treaty impossible;...through its signature, it was already held not

\(^{22}\) Unofficial translation by the editor. Original text: 'le Gouvernement allemand a reconnu que ce serait contraire à la bonne foi si après la signature, il avait pris des mesures quelconques pour faire passer des droits ou intérêts allemands en des mains non allemandes avant la mise en vigueur du traité', RIAA, vol. I, p 523.

\(^{23}\) Unofficial translation by the editor. Original text: 'il est de principe que déjà avec la signature d'un traité et avant sa mise en vigueur, il existe pour les parties contractantes une obligation de ne rien faire qui puisse nuire au traité en diminuant la portée de ses clauses... Ce principe—lequel en somme n'est qu'une manifestation de la bonne foi qui est à la base de toute loi et de toute convention—a reçu un certain nombre d'applications dans divers traités...[A. A. Megalidis v Turkey, Judgment of 26 July 1926, Annual Digest 1927–28, p 395]'

For a summary in English of the judgment, see Annual Digest 1927–28, Case no. 272, p 395.
to transfer the property immediately, but to keep it in order to transmit it after the entry into force of the treaty.24

According to Poland, Germany could still carry out administrative acts but: ‘could no longer interfere with the substance itself of the goods that had been given up...the principle of good faith in the carrying out of obligations clearly prevents this’.25 The Court did not share the Polish position26 but nevertheless declared: ‘Germany undoubtedly retained until the actual transfer of sovereignty the right to dispose of her property, and only a misuse of this right could endow an act of alienation with the character of a breach of the Treaty’.27 Thereby, the PCIJ implicitly recognized the existence and the reality of an obligation attached to the signature of a treaty.28 However, the threshold that must be met in order to prove the violation or non-execution of the said obligation, being set through the use of the criteria 'abus de droit' or 'lack of bona fides', is very high. The signatory State enjoys a fairly large margin of discretion in terms of compliance with the treaty in question before the moment of ratification. The only possible way to claim a violation of a signed treaty is by having recourse to the theory of abuse of rights or to the disregard of the principle of good faith. These two requirements—notably abus de droit—need to be assessed to a large extent in concreto taking into account circumstances varying from one situation to another and not easily established.

12. As for the International Court of Justice (ICJ), it too was confronted with the issue of the effect of a State's signature of a treaty in the North Sea Continental Shelf Cases of 1969.29

24 Unofficial translation by the editor. Original text:
à partir de la signature du traité, le Gouvernement allemand devait s'abstenir de tout acte qui devait rendre impossible l'exécution du traité...par sa signature, il était déjà tenu non pas à transférer les biens immédiatement, mais à les garder afin de les transmettre après la mise en vigueur du traité.


26 According to the Court, there was no obligation not to dispose of certain property 'In these circumstances', the Permanent Court held, 'the Court 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'; PCIJ, Series A, no. 7, pp 39–40.

27 Ibid., p 36.

28 According to R. Kolb:
C'est un autre aspect de cet arrêt qui mérite d'être relevé. Suivant en cela l'argumentation allemande, la Cour a reconnu que des actes étratiques quelconques, y compris les actes ayant influence sur les contenus du traité signé, restent soumis à l'interdiction générale de l'abus de droit. On peut déduire de cet arrêt que les obligations spécifiques de ne pas priver un traité signé de son objet et de son but (sur lesquelles la Cour évite de prendre position) se doublent d'une obligation générale, non proprement préconventionnelle, d'agir de bonne foi, en l'occurrence de ne pas abuser d'un droit ou d'une liberté. Le rapport entre les deux obligations relève du principe de spécialité, il n'est pas pourtant pas exclu qu'elles puissent s'appliquer simultanément afin de se renforcer et de pallier d'éventuelles lacunes. (La bonne foi en droit international public—Contribution à l'étude des principes généraux de droit (Paris: PUF, 2000), p 193)


Certainly, in the Certain German Interests in Polish Upper Silesia case, the Permanent Court of International Justice appears to have recognized that, if ratification takes place, a signatory State's misuse of its rights in the interval preceding ratification may amount to a violation of its obligations in respect of the treaty.

29 Before this date, the issue of signature was raised before the ICJ by counsel for the parties in the case of the Arbitral Award Made by the King of Spain on 23 December 1906 (Honduras v Nicaragua); see pleading of P de Visscher (Honduras), ICJ, Statements of Claims, Pleadings and Documents (1960), vol. II, pp 161–2. The opposing party, Nicaragua, maintained that:

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Indeed, the issue incidentally arose of whether the Federal Republic of Germany, which had signed the Geneva Convention on the Continental Shelf and which had explicitly expressed its intention to ratify it, was bound by the provisions of the said treaty, notably with respect to the principle of equidistance. The Court summarizing the parties' positions declared:

The Federal Republic was one of the signatories of the Convention, but has never ratified it, and is consequently not a party. It is admitted on behalf of Denmark and the Netherlands that in these circumstances the Convention cannot, as such, be binding on the Federal Republic, in the sense of the Republic being contractually bound by it. But it is contended that the Convention, or the régime of the Convention...has become binding on the Federal Republic in another way, namely because, by conduct, by public statements and proclamations, and in other ways, the Republic has unilaterally assumed the obligations of the Convention; or has manifested its acceptance of the conventional régime; or has recognized it as being generally applicable to the delimitation of continental shelf areas.30

Toning down the position expressed by Denmark and the Netherlands, the Court carried on:

As regards these contentions, it is clear that only a very definite, very consistent course of conduct on the part of a State in the situation of the Federal Republic could justify the Court in upholding them; and, if this had existed—that is to say if there had been a real intention to manifest acceptance or recognition of the applicability of the conventional régime—then it must be asked why it was that the Federal Republic did not take the obvious step of giving expression to this readiness by simply ratifying the Convention.31

And with respect to the general scope of the ratification, the Court warned:

In principle, when a number of States, including the one whose conduct is invoked, and those invoking it, have drawn up a convention specifically providing for a particular method by which the intention to become bound by the régime of the convention is to be manifested—namely by the carrying out of certain prescribed formalities (ratification, accession), it is not lightly to be presumed that a State which has not carried out these formalities, though at all times fully able and entitled to do so, has nevertheless somehow become bound in another way. Indeed if it were a question not of obligation but of rights, if, that is to say, a State which, though entitled to do so, had not ratified or acceded, attempted to claim rights under the convention, on the basis of a declared willingness to be bound by it, or of conduct evincing acceptance of the conventional régime, it would simply be told that, not having become a party to the convention it could not claim any rights under it until the professed willingness and acceptance had been manifested in the prescribed form....The dangers of the doctrine here advanced by Denmark and the Netherlands, if it had to be given general application in the international law field, hardly need stressing.32

In his Dissenting Opinion, Judge Morelli held contrary to the Court that Germany's signature of the Geneva Convention on the Continental Shelf of 1958 meant that, to a certain extent, it recognized the legal nature of its provisions.33

la bonne foi s'oppose à ce qu'entre la signature d'un traité et son entrée en vigueur l'Etat cédant diminue la valeur du bien cédé...Le traité produit donc dès sa signature certains effets, encore qu'on puisse les considérer comme affectés d'une condition suspensive... (Rejoinder of Nicaragua, ICJ, Statements of Claim, Pleadings and Documents (1960) vol. I, p 793)

31 Ibid, para. 28.
33 Ibid, p 198. According to Judge Morelli:

In connection with the Convention it may be observed that it was signed by the Federal Republic. This means that the Federal Republic participated in a technical operation which, to the extent of the Convention's avowed
13. Some judgments in national courts confirm the existence in general international law of the obligation formulated in Article 18(a) of the Vienna Convention. In the case *Polish State Treasury v Von Bismarck* of 1923, the Polish Supreme Court held that the transfer of property between the signature and the ratification of the Treaty of Versailles was legally inadmissible. According to the Polish court:

The transfer of property to the defendant having taken place after the signing of the Peace Treaty of Versailles, such an action is contrary to the stipulations and the spirit of the said Treaty, and the act transferring the property was therefore void. 34

The same court was also confronted with a problem in relation to a treaty between Poland and Czechoslovakia regulating legal and financial questions between the two countries. According to the court:

It would not be in accordance with the principles of equity…if a Czech national in the period during which only the exchange of ratifications is being awaited were denied the advantage of the valorisation stipulations under the rules of the Convention… 35

Furthermore, in 1956 the Supreme Court of Austria had to deal with a dispute related to a directive issued by the Authority of the Soviet Government between the signature and the ratification of the Austrian-Soviet Peace Treaty. 36 According to the Austrian court, there was a violation of the principle of good faith and the directive was therefore invalid. The precise object of the peace treaty was the restoration of Austria's autonomy and the end of Soviet power. Recognition of the Soviet directive's legality in the time between signature and ratification would have been contrary to the treaty's object. 37 Two decades later, a Dutch tribunal also had to deal with the legal effect of the signature on a public authority. In this case, a woman was refused the right to be registered as someone seeking accommodation according to a municipal law, whereas her husband was not. The tribunal's president, referring to the International Covenants on Economic, Social and Cultural as well as on Civil and Political Rights, signed but not ratified by the Netherlands, declared:

Although the Netherlands has not, as yet, ratified the Covenants, we are of the opinion that current legal views in the Netherlands suggest that in establishing directives implementing statutory purpose of codification, consisted in the establishment of general international law. By its signature the Federal Republic expressed an opinion which, within the limits indicated supra, may be qualified as an *opinio juris*. But it was a mere opinion and not a statement of will, which could only be expressed by ratification. For it is only by ratification that the States signatories to a Convention express their will either to accept new rules or, in the case of a codification convention, to recognize pre-existing rules as binding.

See further, the Dissenting Opinion of Judge Lachs, *ibid*, pp 219–40.


35 *Schrager v Workmen’s Accident Insurance Institute for Moavic and Silesia* in *Annual Digest* 1927–28, vol. 4, p 399.

36 According to the facts of this case:
in July 1955, some two months after the conclusion of the Peace Treaty with Austria, one G., a person appointed manager of the defendants’ business by one of the Occupying Powers, issued a directive, by agreement with the members of the works’ council of the defendants, that no person in the employment of the defendants could henceforth be dismissed without the consent of the works’ council. The effect of this directive was that for all practical purposes the defendants were precluded from terminating any contract of employment of their own accord. When the directive was issued the defendants’ business was still subject to the control of the occupation authorities, but it was well known that within a very short time, within two months from the coming into operation of the Peace Treaty with Austria, the defendants’ business would be freed from control… (*Termination of Employment (Austria) Case*, ILR, 1956, vol. 23, pp 470–1)

37 *ibid*, pp 470–1.
regulations, the public authority may not place impediments in the way of the citizen on the sole ground of his or her sex.\(^3\)

Upon reading that last decision, one could be tempted to conclude that, from the moment of the signature, a 'legitimate expectation' arises in favour of the addressees of future legislative, administrative, or judicial acts of authorities that these acts will be in conformity with the treaty signed but not yet ratified by a State.

14. Nonetheless, any conclusion at this stage would be premature. The decoding of the preparatory work within the ILC and the conference of the plenipotentiaries reveals other ways of assessing the customary or non-customary nature of Article 18. Even if, at the start of its work, the ILC showed a certain degree of hostility towards the introduction of such an obligation, it later showed greater openness to it. Briefly, first Special Rapporteur on the matter, had in 1951 envisaged a draft Article stipulating that:

> Under some circumstances...good faith may require that pending the entry into force of the treaty, the State shall, for a reasonable time after signature, refrain from taking action which would render performance by any party of the obligations stipulated impossible or more difficult.\(^3\)

However, it was important to him to note that it was much more a moral than a legal obligation and that it was consequently not necessary to mention it in a provision of the draft. Despite the opposition of some members of the ILC who were of the opinion that there was a veritable rule of international law, the majority voted in favour of the deletion of the clause.

15. The following work on Article 18(a) reflected a gradual change in position. In his draft of 1953, Sir Hersch Lauterpacht, second Special Rapporteur, reintroduced in somewhat different terms the deleted clause. According to his draft, the State was obliged 'to refrain, prior to ratification, from any act intended substantially to impair the value of the undertaking as signed'.\(^4\) The third Special Rapporteur, Sir Gerald Fitzmaurice, followed the same logic, though his proposal was put in more cautious terms:

> Signature may involve an obligation for the government of the signatory state, pending a final decision about ratification, or during a reasonable period, not to take any action calculated to impair or prejudice the objects of the treaty.\(^4\)

16. Nevertheless, only after the report of Sir Humphrey Waldock did the ILC begin to study the problem seriously. Waldock's draft Article stipulated:

> The signatory state, during the period before it shall have notified to the other States concerned its decision in regard to the ratification or acceptance of the treaty or, failing any of such notification, during a reasonable period, shall be under an obligation in good faith to refrain from any action calculated to frustrate the objects of the treaty or to impair its eventual performance.\(^4\)

The ILC was, as a whole, favourable to this proposal. It underlined the importance of good faith at the conclusion of a treaty. Moreover, in response to a counter-proposal of Castrén, according to which the State's responsibility would only have been able to arise after the ratification of the treaty, it was argued that the obligation to refrain did not result

\(^{38}\) *X v Mayor and Aldermen of Haarlem, NYIL*, 1978, p 474.


from the treaty itself but from general international law, which attributes this legal effect to signature independently of any ratification. Likewise, the comments made by some States did not reveal any real reluctance regarding the obligation resulting from Article 18(a). To the contrary, some governments, such as that of the United States, even went so far as to state in their comments to the ILC draft provisions containing the obligation that they regarded them as 'reflecting generally accepted norms of international law' and considered them a 'desirable improvement in the law'. The main point of disagreement between the governments and the Commission concerned the obligation to refrain from acts capable of defeating the object of a treaty during its negotiation.

17. This issue came up again during the Vienna Conference. Only a small number of States were in favour of the provision's deletion in its entirety. The majority of States intervening in the debates did not mention the inapplicability or the inexpedience of Article 18 with respect to the legal effect and the opposability of the signature of a treaty. Indeed, on the contrary, a number of States recalled, as during the discussion of the ILC draft, that this provision 'conformed to general rules of international law', or that it constituted 'progressive development of international law', or even that it 'stated rules of law'. Although different, these formulations recognize a certain operative and compulsory nature in Article 18. The other comments centred on editorial issues.

18. It follows from the preparatory work that Article 18(a) of the Vienna Convention did not find its way into the corpus of the law of treaties out of nowhere. Despite the fact that international practice and jurisprudence have often confined its application to the specific area of peace treaties and that legal scholarship is not unanimous on the scope of the rule, it was considered worthy of inclusion in the Vienna Convention. In this context, Article 18 could not be assimilated to a simple rule 'dérogatoire au droit commun', and even less be considered an 'error' in the Vienna Convention. The preparatory work of the Vienna Convention of 1986 on the Law of Treaties between States and International Organizations or between International Organizations was characterized, as much at the ILC as at the conference of the United Nations, by the absence of comments and even of a thoroughgoing examination of Article 18. Moreover, this Article was adopted without voting. This transposition of the rule of 1969 into the Convention of 1986 indicates a repetition of the rule. Thus, although the rule was taken up only in a limited number of conventions—but, for that matter, which provisions of the Vienna Convention could boast about being cited often and explicitly in international agreements?—an a priori case can be made that the first constituent element of international custom has been satisfied.

43 P. Cahier, supra n 10, p 35.
46 See the interventions of Turkey, Lebanon, Korea, and Iran: Conference, 1st session, 1968, Official Documents CRA, 1st session, 19th meeting, pp 109–11. The amendment proposed by the United Kingdom directed at the deletion of Art. 18 only received 14 votes for and 74 against: A/CONF.39/C.1/L.135, Conference Records, 1st session, 20th meeting, p 105.
47 See the comments of Switzerland: ibid, 19th meeting, p 97.
48 See the comments of Greece: ibid, 19th meeting, p 98.
49 See the comments of Italy: ibid, 19th meeting, p 99.
50 J. Nisot, supra n 10, p 503.
51 P. Cahier, supra n 10, p 37.
19. What about an *opinio juris* for this rule? The absence of a thorough examination and even the absence of objections from States at Conference indicate an acceptance of the obligation set down in Article 18(a) of the Vienna Convention as an integral part of the law of treaties.

20. State behaviour following the adoption and the entry into force of the Vienna Convention confirms in many regards the legal relevance of Article 18(a). In 1977, the legal department of the Canadian government considered with respect to the Reciprocal Fisheries Agreement of 24 February 1977, signed but not ratified by the United States:

> It should be remembered that in any case a State which has signed a treaty is obliged to refrain from acts which would defeat the object and purpose of the treaty until it shall have made its intentions clear not to become party to the treaty.\(^{52}\)

Likewise, the Dutch government, responding to a written inquiry by members of parliament on the issue of the relation between signature and parliamentary acceptance of a treaty, argued that:

> Considering the generally recognised principle of international law, that by signing an agreement a State undertakes to refrain from any act contrary to it...the Government wishes to assess the consequences of participation before signing the agreement.\(^{53}\)

The Department of International Public Law of the Swiss government similarly declared:

> The period that runs from the conclusion and the entry into force of the treaty has legal significance in the sense that the State that has signed the treaty...must abstain from acts that would deprive a treaty from its object and purpose.\(^{54}\)

Other declarations, notably made by the United States\(^{55}\) and the former USSR,\(^{56}\) confirmed the existence of an obligation under general international law to refrain from acts that would defeat the object and purpose of a treaty between signature and ratification.

Yet, the actual position of States often varies from one case to another. For instance, the

\(^{52}\) *Canadian Yearbook of Int'l L*, 1978, p 366.

\(^{53}\) NYIL, 1975, pp 283-4.

\(^{54}\) Unofficial translation by the editor. Original text:

> La période qui s'écoule entre la conclusion et l'entrée en vigueur du traité a une signification juridique en ce sens que l'État qui a signé le traité...doit s'abstenir d'actes qui priveraient un traité de son objet et de son but. (ASDI, 1977, pp 150-1)

\(^{55}\) On 4 January 1980, the State Department published a declaration according to which ‘the U.S. and the Soviet Union share the view that under international law a State should refrain from taking action which could defeat the object and the purpose of a treaty it has signed subject to ratification’ in M. Nash Leich (ed.), *Digest of United States Practice in International Law*, 1980 (Washington DC: Office of the Legal Adviser, Department of State, 1985), p 398; see the letter of Elliot Richardson, Special Representative of the President at the Law of Sea Conference for the Member of Congress Gerry Studds dealing with the potential legal effect of the US signature of UNCLOS:

> Signature...under customary international law imposes no obligation other than refraining from acts which would defeat the object and purpose of the treaty. This very general obligation continues only until such time as it becomes clear that the State no longer intends to become a party to the treaty...[quoted by P. V. McDade, 'The Interim Obligation Between Signature and Ratification of a Treaty: Issues Raised by the Recent Actions of Signatories to the Law of the Sea Convention with Respect to the Mining of the Deep Seabed', *NYIL*, 1985, p 13)

> See also the responses of the Legal Counsel of the State Department with regard to the provisional application of treaties:

> In the majority of cases the obligation not to defeat the object and purpose of the treaty means a duty to refrain from taking steps that would render impossible future application of the treaty when ratified...[this is]...
United Nations Convention on the Law of the Sea (UNCLOS), particularly in its Part XI, illustrates the limits that Article 18 of the Vienna Convention can be faced with. In fact, certain signatory States, notably France, the former USSR, and Japan, adopted laws on the exploitation of the seabed which came very close to the ones of States that were not signatories, in this case the United States, Great Britain, and the Federal Republic of Germany. The problem was that the laws that the signatory States had adopted ran partially counter to the object and purpose of UNCLOS and its Part XI. Yet, after the revision in 1994 of Part XI of UNCLOS by an agreement contained in Resolution 48/263 of the UN General Assembly, the obligation in Article 18 of the Vienna Convention was taken up in paragraph 6 of the resolution requiring States 'which consent to the adoption of the Agreement to refrain from any act which would defeat its object and purpose'. This being so, the frequency of signatory States' compliance or non-compliance with the obligation to refrain in Article 18 in no way prejudices the existence of the obligation. If not, what can be said on the ratification of treaties that is rarely—if ever—accompanied by the application of the said treaties and which does not, despite this, taint in any way the existence of the legal obligation that it implies?

21. The analysis shows that Article 18 reflects a principle of international law to which States consider themselves bound either by an obligation following from the signature of a treaty or by an existing obligation in general international law independently of any


See further Robert Owen, Legal Counsel of State Department, Memorandum, 21 February 1980 according to which:

Moreover the growing body of case law which regards the Vienna Convention as evidence of contemporary customary international law makes clear that whatever doubt may have existed in the past, the rule expressed in Article 18 of the Vienna Convention has become a legal obligation binding upon all States. (quoted by P. V. McDade, supra this note, p 13)

As regards the Agreement Governing the Activities of States on the Moon and Other Celestial Bodies of 5 December 1979, Research Services of the US Congress considered that:

According to Article 18 of the Vienna Convention on Treaties, a signatory would be obligated to refrain from acts which would defeat the object and purpose of the agreement until it makes its intention clear not to become a party to the agreement. (M. Nash Leich (ed.), supra this note, p 701)

56 The USSR made several references, during and after the Vienna Conference on the Law of Treaties, to the fact that Art. 18 or its predecessor, Art. 15 of the ILC draft, represented customary international law. Various Soviet declarations regarding the SALT II Treaty maintain the customary nature of the obligation contained in Art. 18: see in this regard, R. F. Turner, 'Legal Implications of Deferring Ratification of SALT II', VAJIL, 1981, pp 766–7.

57 According to Senator Muskie intervening in the debate on the deep sea-bed:

the affixing of the mere signature of any executive branch official on the Law of the Sea Treaty or any other treaty will not bind this body from taking any actions which anyone claims would defeat the object and purpose of the treaty. (M. Nash Leich (ed.), supra n 55, p 691)

In his reply of 21 December 1979, Ambassador Richardson took a contrary view of the matter:

International law imposes no obligation upon a signatory to a treaty to comply with its terms prior to entry into force with respect to that signatory, other than the obligation in good faith to refrain from acts which could defeat the object and purpose of the treaty. (M. Nash Leich (ed.), supra n 55, p 692)

58 It must be specified that these States have clearly expressed their intention never to ratify UNCLOS as adopted in 1982. It is clear that in such a case, Art. 18 of Vienna Convention does not apply.

59 See, for complete analysis of this situation, P. V. McDade, supra n 55, pp 28–47.

60 The General Assembly...calls upon States which consent to the adoption of the Agreement to refrain from any act which would defeat its object and purpose, A/RES/48/263.
signature or ratification of a legal instrument. It is, however, true that the outlines of the principle are not yet well-defined.

B. Problems of interpretation

22. The content of Article 18 of the Vienna Convention reveals the conceptual subtleties in the notions upon which the normative architecture of this provision is built. Even though the lexical and semantic matrix of Article 18 seems to provide prima facie a clear description of the provision, these subtleties actually lead to a blurring of the contours of the notions used. This is true for: (1) the notion of the object and purpose of a treaty and also for (2) the notion of the signature mentioned in paragraph (a) of Article 18.

The notions of ‘object’ and ‘purpose’ of a treaty

23. The obligations contained in Article 18 of the Vienna Convention apply ratione materiae to the object and purpose of a treaty. In fact, the Article provides: ‘A State is obliged to refrain from acts which would defeat the object and purpose of a treaty’. The obligation to refrain lasts from the time of signature until the time of ratification as well as from the time of ratification until the entry into force of the treaty.

Relevant acts

24. Which acts are concretely referred to? Some examples of potential acts that could be taken before the entry into force of a treaty and affect or vitiate the purpose of the regime have been formulated. Sir Humphrey Waldock gave the example of:

...a State which, during negotiations concerning the limit of territorial waters, undertaken in connexion with the exploitation of mineral resources, exhausted the reserves whose existence had been the original reason for the negotiations.61

With respect to the Statute of the International Criminal Court (ICC), it was underscored that it would be contrary to the object and purpose of the Statute if signatory States concluded bilateral agreements with the United States in order to prevent US military staff being pursued under ICC jurisdiction.62

The [European] Commission has concluded that the signatories to the ICC would violate the treaty if they signed bilateral accords with Washington exempting US personnel from being handed over to the court for prosecution over alleged war crimes.63

The scope of the expression ‘object and purpose’

25. The notions of object and purpose constitute a fundamental basis of the law of treaties. They can be found in several provisions of the Vienna Convention which notably deal with the issues of reservations and interpretation.64 International jurisprudence also

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61 Conference Records, 1st session, 20th meeting, p 104. See also R. Kolb, *supra* n 28, p 183.
63 Ibid.
64 See Arts 19(c), 20(2), 31(1), 33(4), 41(1), 58(1), 60(3) of the Convention. In truth, the expression ‘object and purpose’ stems from an Advisory Opinion of the PCIJ of 1926 regarding the Competence of the ILO to Regulate Incidentally the Personal Work of the Employer (PCIJ, 1926, Series B, no. 13, p 18). In this Opinion,
refers to these two notions when interpreting treaties in conformity with the ‘spirit’, the object, or the purpose of the treaties. It is in this context that the obligation set out in Article 18 of the Vienna Convention finds all its meaning. In fact, it is logical to require that, on the one hand, the formulation of reservations or the interpretation of a treaty be compatible with the object and the purpose of a treaty and that, on the other hand, a State having signed or ratified a treaty should not defeat its object and purpose. Article 18 of the Vienna Convention also steps in before the procedure of implementation and the interpretation of a treaty. In a way, it corresponds a priori with a sort of control on the scope, the nature, and the content of the object and purpose of a treaty. Determining the limits of the object and the purpose of a treaty in this way for the application of Article 18 could a posteriori facilitate the determination of the scope of compatibility or validity of reservations and of interpretations of a treaty. However, the complexity inherent in the notions of object and purpose makes the control of a State’s compliance with Article 18 delicate. Therefore, the complementarity between Article 18 and the rules of the Vienna Convention with respect to reservations appears to be fundamental.

the Court spoke of the aim and the scope of a treaty. Subsequent Advisory Opinions used this expression but with subtle variations: in the Advisory Opinion on the Greco-Bulgarian ‘Communities’ [PCIJ, 1938, Series B, no. 17, p 21], we find the expression ‘the aim and the object’; in the Opinion on the Interpretation of the Convention of 1919 concerning Employment of Women during the Night [PCIJ, 1932, Series A/B, no. 50, Dissenting Opinion of Judge Anzilotti, pp 383–9], ‘the subject and aim’ is spoken of in the Opinion on Access to German Minority Schools in Upper Silesia [PCIJ, 1935, Series A/B, no. 64, p 15], where one finds ‘meaning and spirit of the treaties’.


67 See the Dissenting Opinion of Gavan Griffith in the Arbitral Award of 2 July 2003, Dispute Concerning Article 9 of the OSPAR Convention (Ireland v United Kingdom of Great Britain and Northern Ireland), Permanent Court of Arbitration, p 70, para. 13:

at the least, Article 18 of the Vienna Convention applies to require the United Kingdom as a signatory State to the Aarhus Convention, to refrain from acts that would defeat its objects and purposes. Hence, to a limited extent it may be said that the Vienna Convention has the effect that the United Kingdom is bound by its object and purpose pending ratification.

Available at: <http://www.pca-cpa.org/PDF/OSPAR%20Award.pdf>.

68 This idea of an a priori control is justified through regard to the fact that a reservation formulated at the moment of a treaty’s signature could be confirmed or declared void at the moment of the expression of consent to be bound depending on whether or not the reservation is compatible with the object and purpose of the treaty. Moreover, the draft guidelines of the ILC on reservations to treaties include the possibility of confirmation/voiding of a reserve formulated at the moment of signature. In fact, draft guideline 2.2.1 (Formal confirmation of reservations formulated when signing a treaty) states that:

If formulated when signing a treaty subject to ratification, act of formal confirmation, acceptance or approval, a reservation must be formally confirmed by the reserving State or international organization when expressing its consent to be bound by the treaty. In such a case the reservation shall be considered as having been made on the date of its confirmation.


69 See Judgment of 16 March 2001, Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v Bahrain) (2001), ICJ Reports 2001, para. 89:

The Court observes that signed but unratified treaties may constitute an accurate expression of the understanding of the parties at the time of signature. In the circumstances of this case the Court has come to the conclusion that the Anglo-Ottoman Convention does represent evidence of the views of Great Britain and the Ottoman Empire as to the factual extent of the authority of the Al-Thani Ruler in Qatar up to 1913.

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26. One should bear in mind that in the ILC draft on the law of treaties, the notion of purpose was not explicitly included in the wording of Article 18. Article 15 (the equivalent of Art. 18 according to the former numbering) of the ILC draft submitted to the United Nations Conference on the Law of Treaties simply stated: 'A State is obliged to refrain from acts tending to frustrate the object of a proposed treaty'.

27. At the Conference, some States placed emphasis on this editorial problem. The threshold set by this formulation for a violation was judged too high. The expression borrowed from English law ('acts tending to frustrate the object of a proposed treaty') meant according to Sir Humphrey Waldock that 'the treaty was rendered meaningless by such acts and lost its object'. Several States favoured a formulation that would prevent any risk of frustration, as minimal as such an impact might be, of the object and purpose of a treaty. The Republic of Vietnam brought forward an amendment in this sense: 'States [are] under an obligation not to frustrate, distort or restrict the object of a treaty prior to its entry into force'. Finally, the formulation retained in Article 18 is the one according to which States have to refrain from acts that would 'defeat' the object and purpose of a treaty.

28. The introduction of the notion of purpose in Article 18 was therefore not simply a 'stylistic tool' or phraseology designed to be legally elegant. In addition to preserving unity of form in the drafting of the Vienna Convention, the inclusion of purpose principally aims at demarcating the difference between the notions of purpose and object—a difference that must not be interpreted in the sense of autonomy or in the sense of indifference between the two notions, but rather in the sense of complementarity in the assessment of the compliance with the obligation imposed by Article 18. In other words, the term 'and' between the two notions is not superfluous and

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71 A/CONF.39/C.1/L.129.

72 Conference Records, 1st session, 20th meeting, p 104.

73 Conference Records, 1st session, 19th meeting, p 97. See also A/CONF.39/C.1/L.124.

74 Furthermore, it should be noted that at the Vienna Conference on the Law of Treaties there was a debate on whether the element of intention should be taken into account in the examination of compliance with the obligation not to defeat the object and purpose of a treaty. The concept that was retained is that the examination of compliance with the obligation should be conducted exclusively in an objective way in order to avoid difficulties. See further in this respect: T. Hassan, supra n 15, p 458.

75 Nevertheless according to Mr Yasseen, President of the Drafting Committee, the adjunct of the notion of purpose 'in no way affected the substance of the provisions and did not widen the obligation imposed on States by Article 15. It was nothing but a purely drafting change, made in the interests of clarity'. See A/CONF.39/11, p 361.

76 A certain number of scholars consider that the expression 'object and purpose' creates an umbilical link between the two elements of the expression. Also, these two notions could not be separated in an absolute way even if a treaty could possess several 'objects and purposes'. They have to be identified with respect to each other. See eg Sir I. Sinclair, supra n 8, p 130. Along the same lines, M. E. Villiger, supra n 15, p 321; D. W. Greig, 'Reciprocité, Proportionnalité, and the Law of Treaties', VajIL, 1994, p 295.

77 It should be specified that Anglo-Saxon and French scholars do not have the same understanding of the distinction which must be made between the notion of object and the notion of purpose. For example, Jennings uses the expressions 'object' and 'purpose' as a unique expression, that is without distinguishing between the two concepts: see R. Y. Jennings, 'Treaties' in M. Bedjaoui (ed.), International Law: Achievements and Prospects (Paris: UNESCO, 1991), vol. I, p 145. On the other hand, French scholars generally consider the object and purpose as two completely distinct notions. In this vein, Rousseau makes a distinction between the 'objet ou effet direct et immédiat de l'acte' and the 'but ou résultat de l'effet juridique produit par l'acte': C. Rousseau, Droit international public (Paris: Sirey, 1970), vol. 1, p 272. See also S. Suz, L'interprétation en droit international public (Paris: LGDJ, 1974), pp 227-31. However, French scholarship is far from being unanimous with
legally stands for the obligation of a State both to comply with the object and with the purpose of a treaty.  

29. Given that they are often confused, the difficulty resides in the precise characterization of what constitutes each of the notions. The expression ‘object and purpose’ was used by the ICJ in its Advisory Opinion on the Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide. According to the Court, the expression seems to mean ‘what is essential to the object of the Convention’, in the sense that, if this purpose was not met, ‘the Convention itself would be impaired both in its principle and its application’.  

30. Likewise, it is interesting to note one of the claims made by Guinea-Bissau in the case on the Delimitation of the Maritime Boundary between Guinea and Guinea-Bissau. According to Guinea-Bissau, the object had to be distinguished from the purpose in the interpretation of the French-Portuguese Agreement of 1886. In that State’s opinion, the purpose of the agreement was delimitation and its object was the respective possessions of the two States.  

31. In spite of its utility, this way of reading object and purpose provides neither notion with sufficient substance. The obligation in Article 18 of the Vienna Convention finds itself confronted by the difficulty of how to objectify the notions of object and purpose.  


78 The ICJ had to distinguish explicitly between the two notions in the examination of obligations resting on States that were parties to disputes submitted to it. For example, in the case of Border and Transborder Armed Actions (Nicaragua v Honduras), Judgment of 20 December 1988, ICJ Reports 1988, p 89, para. 46, the Court held: ‘Such a solution would be clearly contrary to both the object and the purpose of the Pact’. This view can also be found in the case of the Oil Platform (Islamic Republic of Iran v United States of America), Judgment of 12 December 1996, ICJ Reports 1996, p 810, para. 16 and p 813, para. 27, in which the Court examined potential violations of the purpose and the object of the treaty at issue separately. In the Asylum case (Colombia v Peru), Judgment of 20 November 1950, ICJ Reports 1950, p 282, the Court separately examined the object of the Havana Convention (‘The object of the Havana Convention... was, as indicated in its preamble, to fix the rules which the signatory States must observe for the granting of asylum in their mutual relations’).

79 ICJ Reports 1951, p 27.

80 Delimitation of the Maritime Boundary between Guinea and Guinea-Bissau, Award of 14 February 1985, ILR, vol. 77, p 636. The flexible nature of the notion was explicitly recognized by the ILC during the presentation of the draft on the succession of States to the General Assembly of the UN:

the Commission intends to lay down an international objective legal test of compatibility which, if applied in good faith, should provide a reasonable, flexible and practical rule. The ‘incompatibility with the object and purpose of the treaty’ and the ‘radical change in the conditions for the operation of the treaty’, used in other contexts by the Vienna Convention on the Law of Treaties, in the Commission’s view, are the appropriate criteria in the present case to take account of the interests of all the States concerned and to cover all possible situations and all kinds of treaties. (YILC 1972, vol. II, p 292)

81 The ILC comments are of no help in this respect. See eg Sir G. Fitzmaurice, Report on the Law of Treaties, YILC, 1956, vol. II, p 104, draft Arts 30(1)(a) and 33(2). See also, Sir H. Waldock, First Report on the Law of Treaties, YILC, 1962, vol. II, pp 46–61, draft Arts 9(3)(b) and 12(3)(b). According to P. Reuter, it would have been interesting to adopt a wording in the sense of ‘s’abstenir d’actes de nature à porter atteinte à la légitime attente de ses partenaires’:

the Commission would show that the question of a breach of good faith must be considered in each individual case in the light of the statements made, the object of the treaty and the circumstances as a whole. For instance, in the very common case of an economic treaty comprising undertakings concerning tariffs, if a State made heavy imports or exports before the treaty entered into force, so as to suffer less when fulfilling its undertakings, that action might or might not be incompatible with good faith: it would depend on the circumstances. Such a formula might perhaps be too loose, but it would seem to have the advantage of better respecting the
This difficulty can reduce the effectiveness and efficiency of Article 18 and consequently exacerbate arguments between signatory States.  

32. A look at the general theory of the law of obligations helps to refine the contours of this definition. According to this theory, the purpose or the "reason" of an agreement designates the objective or the end pursued by that agreement. The object of an agreement is defined as "l'ensemble des droits et des obligations que le contrat [ou la convention] est destiné à faire naître", or more precisely, "l'opération juridique que les parties à une convention cherchent à réaliser".

33. From these two definitions it seems clear that the notions of object and purpose require different criteria. The purpose reflects a "functional criterion" in the sense that it emphasizes the finality pursued by a treaty. The object appeals to a "material criterion" centred on the body of norms that has to be established in order to realize the objective pursued by a treaty. Therefore, the object and the purpose of a treaty are two complementary and independent elements. As explained by Jean-Paul Jacqué:

The object of an act lies in the rights and obligations to which it gives rise. The object of an act is thus the norm that it creates. When the Court wants to define the object of a treaty, it analyses its content, that is to say the obligations that it creates that the parties have, and the rights that it confers on them. If the object of an act is always a norm, then every act is characterised by the content of the norm that it creates. Nevertheless, the rights and obligations created by the act do not constitute an aim in themselves. They are only the means to achieve a given result. And it is the result that forms, for the author or authors of the act, the purpose that is sought.

34. An objective approach has been proposed in order to specify more clearly the object and purpose of a treaty. This essentially consists in identifying the object and independence of the principle of good faith and better separating the observance of that principle from the actual execution of the treaty (YILC, 1965, vol. I, 788th meeting, p 91).

35. For the purpose of illustration, it is interesting to identify the different conceptions of States with respect to the notion of object and purpose depending on the circumstances. See eg the Statement of Claim of the US government, Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), ICJ, Statements of claim, pleadings and documents (1971), vol. I, pp 843 ff, and esp. pp 863-4. See also the case regarding the International Air Transport Service Agreement of 27 March 1946 between the United States and France, RIAA, vol. 18, pp 417 ff, esp. p 428. Lastly, see the Opinion on the Legality of the Threat or Use of Nuclear Weapons (ICJ Reports 1996), esp. paras 60 and 61 which provide evidence for the divergent interpretations of States regarding the object and purpose of the treaties on the limitation or elimination of nuclear weapons.

64 Unofficial translation by the editor. Original text:

L'objet d'un acte réside dans les droits et obligations auxquels il donne naissance. L'objet d'un acte c'est donc la norme qu'il crée. Lorsque la Cour veut définir l'objet d'un traité, elle analyse le contenu de celui-ci, c'est-à-dire les obligations qu'il crée à la charge des parties et les droits qu'ils leur confèrent. Si l'objet d'un acte est toujours une norme, chaque acte se caractérise par le contenu de la norme qu'il crée. Cependant, les droits et obligations créés par l'acte ne constituent pas une fin en eux-mêmes. Ils ne sont que le moyen d'atteindre un résultat donné. Et c'est le résultat qui forme, pour le ou les auteurs de l'acte, le but recherché. (J. Jacqué, Éléments pour une théorie de l'acte juridique en droit international public (Paris: LGDJ, 1972), p 142)

16 This objective approach could consist in a teleological interpretation of the relevant international agreement. In this regard, the jurisprudence of the International Criminal Tribunal for the Former Yugoslavia is of interest: see the case Đukan Tadić, case no. IT/94/1 (14 October 1995). See also in the same case and from the same point of view the Separate Opinion of Judge Abi-Saab.
17 J. Dehaussy and M. Salem, Sources du droit international. Les traités. Interprétation. Principes, règles et méthodes applicables à l'interprétation, Juris-Classeurs 1995, fasc. 12-6, 24. According to the authors, the notion of object and purpose of a treaty is objective:

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the purpose in the preamble of a treaty,\textsuperscript{88} in its title,\textsuperscript{89} and in the preparatory work as well as in the provisions of a treaty.\textsuperscript{90} These different elements of assessment should be added together in order to guarantee that the object and purpose are objectified in the most perfect way. As it is demonstrated by Isabelle Buffard and Karl Zemanek:

If one wishes to escape the vicious circle, a two-stage procedure may help. In a first stage, a \textit{prima facie} assumption of the object and purpose of a treaty must be formed by having recourse to the title, preamble and, if available, programmatic Articles of the treaty.\textsuperscript{91} This assumption must then be tested in a second stage against the text of the treaty and all other available material and, if necessary,

Ce sur quoi porte le traité—c'est-à-dire la matière (ou les matières) que les parties sont convenues de régir—résulte en effet objectivement de l'instrument lui-même... De là, enfin, l'appel au but du traité pour déterminer l'étendue de son objet : ce qui justifie la liaison entre les deux notions.

88 See eg the Opinion on the Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, supra n 79, p 23. See further the case Diversion of Water from the River Nile (PCJ, 1937, Series A, no. 70, p 13), where the PCJ had recourse to the preamble of a German-Belgian treaty of 1863 in order to establish its purpose. In the Opinion on the Interpretation of the Convention of 1919 concerning Employment of Women during the Night (supra n 64, p 383), Judge Anzalotti in his Dissenting Opinion referred extensively to the preamble to Section XIII of the Versailles Treaty in order to identify the scope of competence of the ILO. Other examples for the recourse to the preamble for the identification of the object and purpose of a treaty can be found in the judgment of the ICJ regarding the case Rights of Nationals of the United States of America in Morocco (France v United States of America), Judgment of 27 August 1952, ICJ Reports 1952, pp 196–7 and in the judgment of the ICJ regarding Territorial Dispute (Libyan Arab Jamahiriya/ Chad), Judgment of 3 February 1994, ICJ Reports 1994, pp 25–6, para. 52. See also Practices for the Preparation of International Labour Conventions: Handbook on Good Drafting Practices, ILO, Governing Body, 292nd Session, March 2005, Doc. GB.292/LILS/3.

89 J. Klabbers, 'Some Problems Regarding The Object and Purpose of Treaties', Finnish Yearbook of Int'l L, 1997, p 158:

it is submitted, that recourse to the title of a treaty may often offer a convenient shortcut in the process of identifying a treaty's object and purpose. Especially where the preamble and the text of a treaty indicate several possible object and purposes, recourse to the treaty's title may be of some help. Thus, while one of the objectives of the Chemical Weapons Convention, as listed in its preamble, is the desire to 'promote free trade in chemicals as well as international cooperation and exchange of scientific and technical information...in order to enhance the economic and technological development of all States parties', it can hardly be maintained that this particular objective should qualify as the object and purpose of a treaty bearing the title Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their destruction. Of course, the title of a treaty will only offer a presumption regarding the treaty's object and purpose, which will have to be substantiated by closer analysis of other factors, but it does not appear to be a presumption which will often be rebutted in practice. And where it will be rebutted, the treaty has been seriously misnamed.

90 See the case on Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America), Judgment of 27 June 1986, ICJ Reports 1986, p 136, para. 272:

In the view of the Court, an act cannot be said to be one calculated to deprive a treaty of its object and purpose, or to impede its due performance, if the possibility of that act has been foreseen in the treaty itself, and it has been expressly agreed that the treaty 'shall not preclude' the act, so that it will not constitute a breach of the express terms of the treaty.

Furthermore, it must be remembered that courts can have recourse to different texts of the relevant treaty in order to examine its object and purpose; see eg the case \textit{Gelder} in which the European Court of Human Rights referred to statutes of the Council of Europe in order to identify the scope of application of Art. 6(1) of the European Convention on Human Rights (Judgment of 21 February 1975, Series A, no. 18).

91 These scholars justify their position by referring to the example of the Charter of the United Nations. Its object and purpose are defined in its preamble as well as in its Arts 1, 2, and 55. See I. Buffard and K. Zemanek, "The Object and Purpose of a Treaty: An Enigma?", Austrian Rev of Int'l and European L, 1998, pp 334–5.
adjusted in the light of that test.\textsuperscript{92} The result of that process can then be used as a guideline in the interpretation of other treaty provisions or for assessing compliance with them.\textsuperscript{93}

35. In certain areas of international law, one can picture an objective approach when investigating the object and the purpose of a treaty by referring to other agreements. In international environmental law, for instance, one of the techniques used is the negotiation of framework conventions. This type of convention aims at establishing guiding principles on the matter of environmental protection and at creating institutions. The principles are designed to be addressed subsequently by more detailed rules in protocols and sometimes even in annexes to these instruments.\textsuperscript{94} A State having ratified a framework convention would oblige itself by virtue of Article 18 not to defeat the object and purpose not only of the said convention but also of the protocols and other instruments attached to the convention. In fact, the latter instruments aim at reinforcing and guaranteeing the continuity of the object and the purpose emerging from the framework convention. Such a conclusion is, for example, supported by the Vienna Convention for the Protection of the Ozone Layer of 22 March 1985 pursuant to which "[a] State or a regional economic integration organization may not become a party to a protocol unless it is, or becomes at the same time, a Party to the convention".\textsuperscript{95} It follows from this provision that the expression of consent to be bound by a protocol of the Vienna Convention for the Protection of the Ozone Layer itself already obliges the State concerned to be likewise bound by the said convention. If the convention has not yet entered into force, one should consider that by virtue of Article 18(b) of the Vienna Convention, a State can defeat the object and purpose of neither the framework convention nor an additional protocol because these different instruments form a legal unity.

36. Likewise, in international labour law the adoption by the ILO of conventions according to the constitution aim at building up within member States 'truly human labor systems' on which social justice essential for universal and durable peace is based. In order to achieve such an objective—that is the implementation of these conventions on the national level—the system developed prevents any step backwards. In this sense, the constitution of the ILO provides that it is not allowed to interpret the purpose and object of an international convention as giving member States the right—at the moment of the adoption of the convention by the ILO or at the moment of its ratification by a State—to diminish or impinge upon more favourable provisions that already exist with respect to

\textsuperscript{92} Ibid, pp 336–7. In this regard, commentators suggest the example of the Vienna Convention on Diplomatic Relations. If the purpose is clearly specified in the preamble to the Convention in order to identify its object, it must, as a second step, be referred to in the substantial provisions as a whole.

\textsuperscript{93} Ibid, p 333. See also Maritime Delimitation between Guinea-Bissau and Senegal (Guinea-Bissau v Senegal) (ICJ Reports 1991, p 72, paras 55–6), in which the ICJ used a similar method when it refused to let the preamble to the arbitration agreement prevail over the wording of Art. 2 of the same agreement in identifying its object and purpose.

\textsuperscript{94} On this type of instrument, see A. Kiss, 'Les traités-cadres : Une technique juridique caractéristique du droit international de l'environnement', APDI, 1993, p 792; see also, L Boisson de Chazournes, 'La gestion de l'intérêt commun à l'épreuve des enjeux économiques—Le protocole de Kyoto sur les changements climatiques', APDI, 1997, pp 700–15.

\textsuperscript{95} Article 16. Also see Art. 14 of the Montreal Protocol of 1987 with regard to substances that diminish the ozone layer according to which: 'Except as otherwise provided in this Protocol, the provisions of the Convention relating to its protocols shall apply to this Protocol'. For the text of the instruments, see P. Sands and P. Galizzi, Documents in international environmental law (Cambridge: Cambridge University Press, 2004), p. 82.
the law or the national practice. At least two observations can be made in relation to this provision. At first, it would seem that the provision does not oblige States to maintain a higher level of protection than the one stipulated in the convention. Nevertheless—and this is the second point—this provision has to be read in the light of a more general principle, ‘à savoir que les conventions internationales du travail fixent des normes minima’ and ‘les États peuvent à tout moment accorder des conditions plus favorables que celles qui sont prévues par les conventions qu’ils ont ratifiées’. In this respect, it was pointed out in the context of international labour conventions that:

once measures have been taken and a certain level of protection against discrimination has thus been achieved, the existing system of protection cannot be dismantled unless its repeal is accompanied by the adoption of an alternative system that increases, rather than reduces, the overall protection afforded. 100

37. It can, however, be observed in practice that the identification of the different elements used objectively to determine the purpose and the object of a treaty are not systematically followed. The ICJ itself does not clearly specify in its decisions how it has proceeded to identify the object and the purpose of the treaties in question. It seems that it leans on its intuition or a sort of inner conviction. It even accepted in certain circumstances the possibility that there may be a multitude of objects and purposes. 101

38. The legal difficulties posed by the interpretation of the notion of signature are not of the same magnitude as those posed by the notions of object and purpose of a treaty. However, the notion of signature also calls for conceptual clarification.

The concept of signature

39. The signature establishes the scope of application ratione temporis of Article 18 of the Vienna Convention. In other words, the act of signing a treaty indicates the instant at which the signatory State is in principle first obliged to refrain from acts that would defeat the object and purpose of the treaty. However, signing a treaty is not the only way for a State to show that it intends to become a party thereto. In the case of a multilateral treaty,

96 Article 19(8) of the ILO Constitution in fact states that:

In no case shall the adoption of any Convention or Recommendation by the Conference, or the ratification of any Convention by any Member, be deemed to affect any law, award, custom or agreement which ensures more favourable conditions to the workers concerned than those provided for in the Convention or Recommendation.


99 The Committee of Experts of the ILO, an independent organ responsible for the verification of the application of international labour conventions, supplied this specification: Report III (Part 4A), ILC, 70th Session, 1984, p 257 (observation of the Committee addressed to Canada regarding Convention (No. 111) Discrimination in Respect of Employment and Occupation).


101 See: Rights of Nationals of the United States of America in Morocco (France v United States of America), supra n 88, p 196.
an exchange of notes or other instruments can also signal such intent. The Conference modified Article 18 accordingly: ‘when: (a) it has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, acceptance or approval’.102

40. ‘Signature’, as it is understood in the legal sense in Article 18 of the Vienna Convention, calls for conceptual clarification. Because the term refers to closely related mechanisms that may be difficult to distinguish from each other, it appears to be ‘monochromatic’. First, signature has a different effect depending on whether the treaty is multilateral or bilateral. Multilateral treaties are signed after the text has been voted on and adopted by the diplomatic conference or international organization plenary body.103 Bilateral treaties, on the other hand, tend to be approved and authenticated by a single act: signature.104

41. Furthermore, Article 18 sets signature apart from the other forms of consent to be bound provided for in the Vienna Convention. Under Article 10 of the Convention, ‘initialling’ and ‘signature ad referendum’ (deferred signature) may also be used. ‘Initialling’ consists in affixing the negotiators’ initials, and ‘signature ad referendum’ is conditional on confirmation by the competent authorities. Both techniques, like ‘signature’, serve definitively to establish the text of the treaty ne varietur and to authenticate it.

42. The question is whether the obligation to refrain from acts that would defeat the object and purpose of the treaty is binding on a State that has merely initialled the treaty or signed it ad referendum. Under the terms of Article 10 of the Vienna Convention, the two techniques have a provisional effect and are subject to subsequent confirmation. The signature referred to in Article 18 is a final signature. The final character of such signature is defined ratione personae or in accordance with an organic criterion in that it depends on the capacity of an authority (a person) to engage the State by virtue of the powers conferred on it (him or her).105 Initials and deferred signature are useful specifically because the negotiator or plenipotentiary is not authorized to sign but can lend the treaty special solemnity while reserving final signature for a hierarchically superior political authority.

43. Another difficulty is that today, in the case of many multilateral international treaties, States sign the final act and the treaty remains open for signature and ratification by a certain deadline. Once the deadline has passed, States can accede to the treaty. Thus, a State is obliged to refrain from acts that would defeat the object and purpose of the treaty if it signs the treaty but not if it does not sign the treaty and reserves the right to accede to it at a later date.106

44. In some cases, however, States will sign a treaty because in so doing they obtain the right to participate in other deliberations liable to affect its object and purpose. Such was the case, for example, of the Statute of the ICC, which was adopted in Rome in July 1998. The Final Act of the Conference that produced the Statute provided for the establishment of a preparatory commission, one of the tasks of which was to draw up tangible


103 Signature is sometimes replaced by the signature of the President and Secretary-General of the Conference. This procedure is used in the ILO.


106 P. Cahier, supra n 10, p 36.
proposals on the practical steps that had to be taken before the Court could be established and become operational.\footnote{107} Those steps included the preparation of draft rules of procedure and evidence and the definition of the elements of the crimes falling under the Court’s jurisdiction. The preparatory committee was made up inter alia of representatives of the States that had signed the Final Act.\footnote{108} Obviously, its deliberations were liable to affect (or at the very least to help to specify) the object and purpose of the Court and consequently the Court’s future work. This technique could be used both to encourage States to sign the treaty and thus be able to contribute to the system’s configuration and to prevent them from acting to defeat the object and purpose of the treaty without incurring international responsibility.

Clarification of the system for accepting treaties

The variability of acceptance

45. Article 18 of the Vienna Convention is of interest chiefly because it offers States a two-step process for accepting treaties. Paragraph (a) refers to temporary or ‘provisional’\footnote{109} acceptance by signature. This does not mean that the signatory State undertakes to apply the treaty domestically but rather presumes its willingness objectively to analyse the conditions under which it could commit itself and to gauge its capacity to do so. This, as explained supra, is the system used by ILO when it asks its member States to submit to their competent authorities the texts of adopted conventions with a view to engaging in a national debate on whether it would be appropriate to ratify them.\footnote{110} Article 18(a) of the Vienna Convention obliges the signatory State to refrain from acts that would defeat the object and purpose of the treaty during this period of consultation. What is not certain is who can require performance of this obligation. Any party to the Vienna Convention? States with whom separate treaties will subsequently be concluded? In the latter hypothesis, are the States concerned those that have also signed pending acceptance, ratification, or approval, or those that have already ratified, accepted, or approved the treaty?\footnote{111} The Vienna Convention does not specifically answer these questions.

46. Article 18(b) of the Vienna Convention provides for final acceptance in the form of expression of consent to be bound. Once such consent has been given, the State becomes a party to the treaty. It is obliged to refrain from defeating the object and purpose of the treaty until such time as the treaty enters into force. This situation is entirely different from that of provisional acceptance because the State has consented to be bound. More and more multilateral treaties do not enter into force until a certain number of ratifications and accessions has been obtained. It therefore seems normal for States that have expressed consent to be bound by the treaty to refrain from acts that could defeat its object and purpose before it enters into force. When the members of the ILC discussed this rule, following Sir H. Waldock’s report that ratification made the State a ‘virtual party to the treaty’, they did not question the existence of this obligation.\footnote{112} Some authors

\footnote{107} A/CONF.183/10, Annexe I, Resolution E, para. 5.
\footnote{108} Ibid, para. 2. Other states can be invited to join.
\footnote{109} In the case of the Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide (supra n 79, p 28), the ICJ stressed that signature establishes a ‘provisional status’.
\footnote{110} See supra para. 36.
\footnote{111} J. Nisor, supra n 10, p 501.

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considered the possibility that the State would engage in acts to defeat the object and purpose of the treaty during the period between its expression of consent to be bound and the treaty’s entry into force as so remote that they did not think it needed to be mentioned in the Vienna Convention. Yet the Vienna Convention does not seem to have covered all possible contingencies in this respect. Indeed, Article 18(b) raises a major issue: the possibility of withdrawing consent to be bound. The issue is particularly acute when the treaty can be denounced. As Mr Yasseen pointed out to the ILC, if a State can withdraw after entry into force, it should a fortiori be able to do so before. The ILC did not dwell on the matter, however. The situation creates a de facto legal vacuum that is one of the advantages (or liabilities) of Article 18 of the Vienna Convention.

The limits ratione temporis of acceptance

47. Article 18 of the Vienna Convention does not make the obligation to refrain an obligation ad infinitum. The right of the State to withdraw is expressly provided for both after signature and after expression of consent to be bound.

Withdrawal after signature

48. Under the terms of Article 18(a), the State is obliged to refrain ‘until it shall have made its intention clear not to become a party to the treaty’. This limit raises two points of legal uncertainty.

49. The first results from a hypothesis put forward by the French delegation at the Vienna Conference in support of its concerns about the wording of Article 18(a), namely that ‘[t]he most obvious way for a State to make clear its intention not to become a party to the treaty was for it to frustrate the object of the treaty’. That position appears, a priori, to ignore the principle of good faith in international relations and could be contrary to the general principle of law according to which ‘no one may invoke his own turpitude’.

50. The second point of uncertainty is that Article 18(a) does not specify how the signatory State is to show that it does not intend to be bound by the treaty. Would a diplomatic note or a declaration by the minister of foreign affairs to parliament suffice? In addition, it has been said that: ‘des raisons politiques très légitimes peuvent interdire [à l’Etat] une manifestation d’intention autre que discrète, lui commander de se borner à garder le silence’. Article 18 is silent on this point, indicating that how such intent is manifested is determined on a case-by-case basis and in the light of each State’s circumstances.

51. In his Dissenting Opinion in the North Sea Continental Shelf Cases, Judge Lachs—unlike the Court, which remained silent on that point—was adamant that ‘demonstrating the intent not to be bound by a treaty’ was a condition that, if not met, implied obligations for the signatory State. According to him:

The Federal Republic of Germany signed the Convention on the Continental Shelf...This fact...cannot remain without influence on that State’s relationship to the Convention. Admittedly it does

113 P. Cahier, supra n 10, p 37.
116 See infra paras 56 ff.
117 P. Cahier, supra n 10, p 36.
118 J. Nisot, supra n 10, p 502.
not imply an obligation to ratify the instrument, nor is it in itself sufficient to bind the Federal Republic to observance of its provisions. However, it certainly implies a link between the State concerned and the treaty to which it is not as yet a Party....[A]t no time did the Federal Republic make a statement which could be interpreted as a repudiation of the Convention or the abandonment of its intention to ratify it.... As long as this ratification has not been forthcoming, the Federal Republic cannot be considered as a party to the Convention. The Government may have changed its view, as governments do; parliament may eventually refuse ratification. However, the act of signature has to be viewed in the context of other voluntary and positive acts of the Federal Republic in this domain.119

Judge Lachs then proceeded to describe and analyse German government acts that, according to him, expressed its intent to be bound by the Convention on the Continental Shelf once it had been signed. One of those acts was the proclamation of 22 January 1964 in which the Federal Republic of Germany declared inter alia that:

...will shortly submit to the Legislature an Accession Bill on this Convention in order to create the constitutional basis for ratification by the Federal Republic of Germany... In order to eliminate legal uncertainties that might arise in the present situation until the Geneva Convention on the Continental Shelf comes into force and until its ratification by the Federal Republic of Germany, the Federal Government deems it necessary to affirm the following now: 1. In virtue of the development of general international law, as expressed in recent State practice and in particular in the signing of the Geneva Convention on the Continental Shelf, the Federal Government regards the exploration and exploitation of the natural resources of the seabed and subsoil of the submarine areas adjacent to the German Coast but outside the German territorial sea, to a depth of 200 metres and also—so far as the depth of the superjacent waters admits of the exploitation of the natural resources—beyond that, as an exclusive sovereign right of the Federal Republic of Germany.120

Judge Lach's interpretation of the acts of the German Federal Government and their effect on the legal value of the signature of the Convention on the Continental Shelf is irrefutable:

The Proclamation of the Federal Government of 22 January 1964 refers, then, to 'the development of general international law, as expressed in recent State practice and in particular in the signing of the Geneva Convention on the Continental Shelf'. Here an opinion is expressed as to the character and scope of the law on the continental shelf. It constitutes in fact a value-judgment on the state of the law on the subject. Indeed it is emphatically implied that the mere signing of that instrument, at a time when it had not yet entered into force, was evidence of general international law. The Federal Republic viewed its own signature as a constituent element of that evidence, thus attaching to it far more importance than is normal in the case of signatures to instruments requiring ratification. If words have any meaning, these could be understood solely as the recognition by the Federal Republic that the Geneva Convention reflected general international law.121

Declarations could therefore constitute a perfect means of demonstrating intent to be or not to be bound by a treaty122 or to recognize norms that are not just part of the treaty but

121 Ibid, p 235.
122 See the Dissenting Opinion of Gavan Griffith in the award of 2 July 2003, Dispute Concerning Article 9 of the OSPAR Convention (Ireland v United Kingdom of Great Britain and Northern Ireland), Permanent Court of Arbitration, p 71 (paras 17–18). With respect to the Convention of Aarhus on the access to information, public participation in the decision-making process and access to legal processes in environmental matters that the United Kingdom had signed but not ratified, arbitrator Griffith considered that:
in fact also express general international law. However, a State that would like its declaration to be accepted as expressing its intent not to be bound must in turn and in good faith concede that a declaration expressing intent to be bound subjects it to the obligation not to defeat the object and purpose of the treaty prior to ratification. The convincing probative strength of such documents is hard to contest. As Judge Lachs also recalled:

States may obviously change their intentions, conduct and policy, but it would seriously undermine a nature were disregarded or held not to be accepted as expressing its intent not to be bound must in turn and in good faith consideration that it is no longer bound by the obligation set out in Article 18 and practice has shown that signatory express evidence of the contrary: the declaration of the intent not to ratify a signed treaty, and that presumption can only be reversed by presumption acceptance of a signed treaty, and that presumption can only be reversed by accepting silence is tantamount to creating a loophole in fact also express general international law. However, the convincing probative strength of such documents is hard to contest. As Judge Lachs also recalled:

Before him, the ICJ, ruling in the **Fisheries** case, had considered that '[l]anguage of this kind [declarations] can only be considered as the considered expression of a legal conception'.

52. In no case is silence deemed to signal rejection of the treaty in question. Article 18 presumes acceptance of a signed treaty, and that presumption can only be reversed by express evidence of the contrary: the declaration of the intent not to ratify the treaty in question. Accepting silence is tantamount to creating a loophole *ratione temporis*. Indeed, time should not serve as an excuse for a signatory State to impugn the object and purpose of a treaty. It is difficult objectively to decide when the signatory State can start to consider that it is no longer bound by the obligation set out in Article 18 and practice has shown that signatory States can take a long time to ratify a treaty. 

53. This point of view is reflected in the position adopted by the United States on the Rome Statute of the ICC. On 6 May 2002, the United States announced that it did not intend to be bound by the Rome Statute, which it had signed on 31 December 2000. The Bush Administration, in the person of the Assistant Secretary of State for Arms Control and International Affairs, sent a letter to the UN Secretary-General stating that the United States had no intention of becoming party to the Statute and therefore

[The] United Kingdom has maintained its intention to be bound by, and to implement, the obligations of the Aarhus Convention. Most recently, in its Proposal for a Revised Regime for Public Access to Environmental Information, the Department of the Environment, Food and Rural Affairs ('DEFRA') reiterated that 'The UK is committed to ratifying the Aarhus Convention as soon as possible'...Hence, although the formal act of ratification that would establish on the international plane the consent of the United Kingdom to be bound by the Aarhus Convention has not yet occurred, the United Kingdom's intention to treat the Aarhus Convention as a binding instrument is unequivocally confirmed (original emphasis).

Available at: <http://www.pca-cpa.org/PDF/OSPAR%20Award.pdf>.  

125 North Sea Continental Shelf Cases (Federal Republic of Germany/Netherlands) (Federal Republic of Germany/ Denmark), supra n 30, p 236.  


123 This is especially the case for the United States with the Convention on the Prevention and Punishment of the Crime of Genocide that it signed in 1948 but only ratified in 1988.

122 See the text of the letter available at: <http://www.state.gov/r/pa/prs/ps/2002/9968.htm>. See also the declaration of the Secretary of Defense, Donald Rumsfeld, on the statute of the Court:

Earlier today, this administration announced the President's decision to formally notify the United Nations that the United States will not become a party to the International Criminal Court treaty. The U.S. declaration, which was delivered to the Secretary General this morning, effectively reverses the previous U.S. government decision to become a signatory. The ICC's entry into force on July 1st means that our men and women in uniform—as well as current and future U.S. officials—could be at risk of prosecution by the ICC. We intend to make clear, in several ways, that the United States rejects the jurisdictional claims of the ICC. The United States will regard as illegitimate any attempt by the Court or State parties to the treaty to assert the ICC's jurisdiction over American citizens. The U.S. has a number of serious objections to the ICC—among them, the lack of adequate checks and balances on powers of the ICC prosecutors and judges; the dilution of

...
considered that no legal obligation had arisen from its signature of over one year earlier. That declaration may reflect US fears that silence might make it possible to charge that some of the steps it had taken since the date of signature defeated the object and purpose of the Statute and therefore contravened the obligation set out in Article 18(a) of the Vienna Convention.

Withdrawal of consent to be bound once expressed

54. Regarding consent to be bound by a treaty, Article 18(b) provides that the State is obliged to refrain from acts which would defeat the object and purpose of a treaty when it has expressed its consent to be bound by the treaty, 'pending the entry into force of the treaty and provided that such entry into force is not unduly delayed'. Here, legal uncertainty resides chiefly in the duration of the obligation to refrain. This is why, during the Vienna Conference, an amendment sponsored jointly by Argentina, Ecuador, and Uruguay proposed to set a limit of 12 months.127 The ILC, for its part, proposed a period of ten months before agreeing that a 'reasonable time' should be allowed to elapse before the obligation to refrain was extinguished. Others were strongly critical of the criterion of delay in Article 18(b). According to Mr Nisot:

It is not extraordinary that more than a year goes by between the close of negotiations of a treaty and its entry into force. In the meantime, the State that has ratified, accepted or approved finds itself under an obligation the real extent and duration of which it does not know because of paragraph b) of Article 18. It suffers from its zeal.128

the U.N. Security Council's authority over international criminal prosecutions; and the lack of an effective mechanism to prevent politicized prosecutions of American service members and officials. These flaws would be of concern at any time, but they are particularly troubling in the midst of a difficult, dangerous war on terrorism. There is the risk that the ICC could attempt to assert jurisdiction over U.S. service members, as well as civilians, involved in counter-terrorist and other military operations—something we cannot allow. Notwithstanding these objections to the treaty, the United States respects the decision of those nations that have chosen to join the ICC. But they, in turn, will need to respect our decision not to join the ICC or to place our citizens under the jurisdiction of the Court. Unfortunately, the ICC will not respect the U.S. decision to stay out of the treaty. To the contrary, the ICC provisions claim the authority to detain and try American citizens—U.S. soldiers, sailors, airmen and Marines, as well as current and future officials—even though the United States has not given its consent to be bound by the treaty. When the ICC treaty enters into force this summer, U.S. citizens will be exposed to the risk of prosecution by a court that is unaccountable to the American people, and that has no obligation to respect the constitutional rights of our citizens. The United States understandably finds that troubling and unacceptable. Clearly the existence of an International Criminal Court, which attempts to claim jurisdiction over our men and women in uniform stationed around the world, will necessarily complicate U.S. military cooperation with countries that are parties to the ICC treaty—because those countries may now incur a treaty obligation to hand over U.S. nationals to the court, even over U.S. objections. The United States would consider any such action to be illegitimate. We obviously intend to avoid such actions. Fortunately there may be mechanisms within the treaty by which we can work bilaterally with friends and allies, to the extent they are willing, to prevent the jurisdiction of the treaty and thus avoid complications in our military cooperation. Obviously, countries that have not ratified the treaty would be under no such obligation to cooperate with the court. By putting U.S. men and women in uniform at risk of politicized prosecutions, the ICC could well create a powerful disincentive for U.S. military engagement in the world. If so, it could be a recipe for isolationism—something that would be unfortunate for the world, given that our country is committed to engagement in the world and to contributing to a more peaceful and stable world. For a strong deterrent, it is critical that the U.S. be leaning forward, not back. We must be ready to defend our people, our interests, and our way of life. We have an obligation to protect our men and women in uniform from this court and to preserve America's ability to remain engaged in the world. And we intend to do so.


128 Unofficial translation by the editor. Original text:

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The uncertainty characterizing Article 18(b) appears to indicate that assessing the undue nature of the delay falls for the most part to each State.

C. Legal effects of Article 18(a)

55. Article 18(b) of the Vienna Convention is seen in some quarters as a legal tautology. Indeed, who would dare contest the validity of the obligation not to defeat the purpose and object of a treaty, or its character as a rule of international customary law, once consent to be bound by said treaty has been expressed. Some authors therefore considered it pointless to include such a provision in the Vienna Convention. Their opinion must be seen in the light of the legal problems relating to the question of definitive acceptance of a treaty, but it is in many respects true that it is the interpretation of Article 18(a) of the Convention that poses problems. Both the value of the ensuing obligation and the sanctions for violations of Article 18(a) stumble at any attempt at legal systematization.

On the reality of the obligation

56. Article 18(a) of the Vienna Convention is not a lawless tending to deprive the Article of meaning. Even less is it an area of counter-law that roils or 'distances itself from common international law' on treaties. It expresses a genuine concern: that the principle of good faith in international relations be well established. The obligation set forth in Article 18(a) cannot be legally isolated from the principle of good faith. In other words, recognition of good faith as a general principle of law naturally entails recognition of the rules required for its effective and efficient implementation. Article 18(a) is one of the means of implementing the principle of good faith in treaty-based relations. The introduction of that principle into the Vienna Convention makes it a genuine legal obligation as opposed to a mere moral obligation. 130

57. Previously under international law, treaties were binding on the parties as soon as they were signed, because ratification was a duty and not an option. 131 The following is an oft-cited example of the former doctrine relating to the effect of signature: in 1903, Colombia refused to ratify the Hay-Herran Treaty granting the United States the right to build a canal through Panama, which was then part of Colombia. The US Secretary of State Hay wrote as follows to General Reyes:

The two Governments, in agreeing to the treaty through their duly authorized representatives, bind themselves, pending its ratification, not only not to oppose its consummation, but also to do nothing in contravention of its terms. 132

Il n'est pas extraordinaire que plus d'une année s'écoule entre la clôture des négociations dont est issu un traité et son entrée en vigueur. Entre-temps, l’État qui a ratifié, accepté ou approuvé se trouve, du fait de l’alinéa b) de l’Article 18, sous le coup d’une obligation dont il ne connaît ni l’étendue réelle ni la durée. Il pâtit de son zèle. (J. Nisot, supra n 10, p 502).

129 As was affirmed by some, such as Harvard Research in International Law which in its commentary on the draft convention on treaties held that the obligation of a signatory state cannot be considered 'a legal duty, e.g., a duty under international law...but an obligation 'of good faith merely, for which there is no legal sanction'. See AJIL, vol. 29(4) Suppl., pp 781 and 787.

131 As R. Kolb puts it: 'la ratification n’est qu’un acte subordonné ayant effet rétroactif', supra n 28, p 185.

132 Papers on the Foreign Relations of the United States, vol. 44, 1903, p 299 as quoted by R. Kolb, supra n 28, p 185. The author quotes, with the same view, the report of the Attorney-General and of the Queen's Advocate

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58. This concept was based on two dominant theories: on the one hand, the theory of the private law mandate that postulated the obligation to ratify; \(^{133}\) on the other hand, the theory of the retroactive effect of ratification by virtue of which signature was an ordinary source of obligations in the sense that 'the treaty was binding as soon as it had been signed because of a kind of resolutive condition that was tantamount to ratification'. \(^{134}\)

59. Article 18 of the Vienna Convention clearly distinguishes between signature and ratification. *De jure* and *de facto*, signature is independent and gives rise to one or more specific obligations.

60. Signing a treaty gives rise to a legal obligation to act under the terms of Article 18 of the Vienna Convention. At the level of international relations, it is true, the scope of the obligation is harder to define. Under the terms of Article 18, the 'State is obliged to refrain'. As Jean-Pierre Cot puts it, 'governments are not asked to take positive action'. \(^{135}\)

61. This obligation to refrain had been highlighted in the Iloilo case. Between the time the treaty by which Spain ceded the Philippines to the United States was signed on 10 December 1898 and its ratification, Filipino insurgents committed numerous acts harmful to British interests. US troops occupied Iloilo well after the Spanish troops had been evacuated, and were unable to stop the insurgents from burning the town to the ground. The joint Anglo-American commission told Great Britain, which accused the US government of culpable negligence, that 'there was no duty upon the United States under the terms of the Protocol, or of the then unratified treaty, or otherwise, to assume control at Iloilo'. \(^{136}\)

62. This is the theory reflected in Article 18 of the Vienna Convention, which only provides for an obligation to refrain. This is regrettable in that good faith should sometimes prompt the States to act positively to uphold the object and purpose of the treaty concerned.

63. There are three major questions relating to the limits and scope of the obligation to refrain. First, is the obligation to refrain antinomic to the treaty's 'anticipated or provisional implementation'? It would seem that by virtue of the principle of free will, the parties can decide to apply a convention before its ratification, under terms agreed by them. \(^{137}\) International practice contains examples of situations in which a treaty that has been signed but has not yet entered into force is provisionally implemented in order to uphold its object and purpose. The United States acted thus in respect of UNCLOS.

According to the Foreign Affairs Division:

of the United Kingdom on 15 May 1857, drafted with regard to a treaty imposing a constitution on the Bay Islands which had not yet been ratified by Honduras. According to R. Kolb:

les auteurs s'inspirent d'une doctrine d'effet rétroactif de la ratification: 'That Altho' the Convention between Her Majesty and the Republic of Honduras has not yet been ratified, yet the ratifications, when exchanged, will relate back to, and confirm the Convention...No act can in the meantime be properly done by Her Majesty, whilst the ratification of the Treaty is under consideration, which may at all affect any of the stipulations of the treaty...'(supra n 28, p 185)

\(^{133}\) See Harvard Draft, pp 770 ff; see also R. Kolb, supra n 28, p 185.

\(^{134}\) See J. M. Jones, supra n 12, pp 66 ff; reference may also be made to the pleading of P. de Visscher in *Arbitral Award Made by the King of Spain on 23 December 1906 (Honduras v Nicaragua)*, supra n 28, pp 161–2. bbb

\(^{135}\) J.-P. Cot, supra n 15, p 155.

\(^{136}\) A. D. McNair, supra n 15, p 202.

Three years of preparatory meetings were required before the Conference could convene, and it may be necessary to hold more than one substantive negotiating session before final agreement is reached. Beyond that time, the process of national ratifications could delay implementation of the treaty even further. In the meantime, the need increases for an internationally accepted system for orderly use of the oceans...[there is a] call for the establishment of a new international order in the oceans at the earliest possible date. Accordingly, the United States has proposed that the treaty Articles on the deep seabeds and fisheries be applied provisionally without waiting until completion of the national ratification process for the ocean treaty as a whole. If the Law of the Sea Conference produces a treaty that accommodates the interests involved, provisional application could serve to settle current and incipient disputes among nations, enable international law to keep up with deep sea mining technology, and alleviate the plight of fishermen.138

US practice reflects other examples of anticipated application, such as the GATT or the agreement relating to the United Nations conference on wheat.139

64. These examples, which are drawn from international practice, show that Article 18 of the Vienna Convention could develop a purely preventive function tending to enable the States signatory to an international treaty, either unilaterally or as a group, to implement certain fundamental provisions thereof pending its entry into force, with a view to upholding its object and purpose. Anticipated or provisional implementation of those provisions makes it impossible to defeat the object and purpose of the treaty in question and obliges the State that does not wish to apply it provisionally clearly to demonstrate its intent not to be bound by the treaty. Far from being contradictory, Articles 18 and 25 of the Vienna Convention—the latter deals with provisional application—are in fact complementary.140

65. The second question concerns the obligation to refrain. Is that obligation compatible with the obligation to take positive measures in favour of the treaty concerned? According to R. Kolb, 'la bonne foi n’interdit que la mise en échec de la substance d’un traité. Elle ne peut commander une action alors qu’on ne sait pas si le traité entrera jamais en vigueur'. This point of view resembles the old jurisprudence establishing the 'abstentionist' nature of the obligations set forth in Article 18 of the Vienna Convention. The States are thus only bound not to do anything, not to take any action. This is clear from the case of the German Reparations, in which the arbitrator approved the German position on the disposal of certain assets:

138 ILM, 1974, p 455.
140 We do not share the opinion of the Deputy Legal Counsel of the US State Department, Mark B. Feldman, who in response to the question of a senator interrogating him on the links between provisional application and the obligation of a State not to take action contrary to the object and purpose of a treaty before the ratification, considered that there were no links between the two:

There is no direct relationship between provisional application and the obligation of treaty partners not to take actions prior to ratification that would defeat the object and purpose of the treaty. Provisional application means that treaty terms are applied temporarily pending final ratification. The obligation not to defeat the object and purpose of the treaty prior to ratification could, in theory, necessitate pre-ratification application of provisions, if any, where non-application from the date of signature would defeat the object and purpose of the treaty. Such provisions are rare. In the majority of cases the obligation not to defeat the object and purposes of the treaty means a duty to refrain from taking steps that would render impossible future application of the treaty when ratified. Both provisional application of treaties and the obligation not to defeat the object and purpose of treaties prior to ratification are recognized in customary international law, in the Vienna Convention on the Law of Treaties. (AJIL, 1980, p 933)
The German government recognises that it would be contrary to good faith if after the signature, it had taken any measures to enforce German rights and interests in the hands of non-Germans. But it contests that it was obliged before the entry into force of the Treaty...to prevent and and seize the rights and interests in question.141

Diplomatic practice followed the same reasoning, as illustrated in this statement by Ambassador Richardson of the United States:

International Law imposes no obligation upon a signatory to a treaty to comply with its terms prior to entry into force with respect to that signatory, other than the obligation in good faith to refrain from acts which would defeat the object and purpose of the treaty.142

66. While the principle is that, in some cases in international law, under Article 18 signature essentially gives rise to an obligation to refrain, in others it may generate an obligation to adopt positive measures in favour of the treaty concerned, if for no other reason than to guarantee the status quo in respect of the conditions that prevailed at the time the treaty was negotiated.143 The case law and diplomatic doctrine and practice cited supra in this respect appear out of sync with the developments and new challenges confronting international law, in particular as concerns the requirement of anticipation. International environmental law provides us with another example because in this field the challenge is irreversibility. Imagine, for example, a treaty that protects threatened species and combats trade in them, such as the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES).144 Would a State that has signed such a treaty be justified, in the name of the obligation to refrain, in allowing the continued capture, hunting, and trade of threatened species on its national territory? In our view, no, because, by so refraining, the State signatory that has not yet manifested its intent not to be bound by the treaty de facto defeats the object and purpose thereof, which is to safeguard threatened species. If the State allows such practices to continue unchecked until the treaty is ratified, certain species may disappear and could never be restored or ‘resuscitated’ by the treaty’s future entry into force. The purpose and object of the treaty would thus have been basically defeated in the name of the ‘right to refrain’. The phenomenon of irreversibility requires the State signing an international treaty to anticipate, not by applying the treaty provisionally—although that can be a solution—but rather by implementing it as such under the terms of Article 18. Refraining can require a positive action, i.e. the adoption of measures aimed at ensuring the treaty's

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141 Unofficial translation by the editor. Original text:
Le Gouvernement allemand reconnaît que ce serait contraire à la bonne foi si, après la signature, il avait pris des mesures quelconques pour faire passer les droits et intérêts allemands en mains non allemandes. Mais il conteste qu’il fût obligé de l’empêcher et de saisir, avant l’entrée en vigueur du Traité...les droits et intérêts en question. (RLIA, vol. I, p 522)

142 M. Nash Leich, supra n 55, p 692.

143 M. Lachs had some concerns along similar lines:
An example of the kind of question that would need to be considered was the situation in which ten States signed a disarmament treaty in 1965 and entered into an obligation to reduce their armies by one third, the treaty to enter into force on 1 January 1966. Meanwhile one of the parties increased its army during the remaining months of 1965. Was it enough to say that the State had to refrain from any action calculated to frustrate the treaty? Was not the position that, if there was no specific provision on the subject, signatory States were under an obligation to maintain the status quo, so as not to invalidate the basic presumption of the agreement? (YLC, 1965, vol. I, 789th session, p 97)

144 See the text of the Convention at: <http://www.cites.org/eng/disc/text.shtml>.
fundamental object and purpose are not defeated, without the State having to apply the obligations set out in the treaty to the letter.

67. Clearly, Article 18 could imply, both *de lege lata* and *de lege ferenda*, that signatory States are bound to take positive steps in favour of the treaty concerned. This orientation could be derived from the object and purpose of the treaty on signature.

68. The third question concerns whether the obligation to refrain goes hand in hand with the obligation to submit the signed instrument to the authorities with constitutional competence to ratify it.\(^{145}\) In this respect, according to the theory of Oppenheim and Lauterpacht, the obligation set forth in Article 18 obliges the State signatory at least to submit the agreement to the competent national authorities for ratification.\(^{146}\) The ILO Constitution predates the Vienna Convention on the Law on Treaties, but it nevertheless constitutes an interesting example of this, in that it provides a legal means of materializing the obligation for the State signatory not to defeat the object and purpose of the treaty. According to the ILO Constitution, as we have seen, the member States undertake that they will, within a specified period, bring the conventions adopted by the ILO before the authorities within whose competence the matter lies, for the enactment of legislation or other action.\(^{147}\) The Article of the ILO Constitution mentioned *supra* is clearly based on the principle of good faith, in that each member government is bound to submit the instrument in question to the competent domestic bodies for ratification. In addition, a deadline is set for informing the ILO about the outcome of that internal consultation. No member State could defeat the object and purpose of the international labour convention concerned unless it has manifested its intent not to be bound. The scope of the obligation is in fact broader in the ILO Constitution than in Article 18.

69. As soon as the ILO adopts a convention, all the member States, whether they voted in favour or not, are bound to submit it to the competent domestic authorities. The ILO Constitution and Article 18 of the Vienna Convention interact in the relationship between the obligation not to defeat the purpose or object of an international labour convention (as provides for Art. 18) and the obligation to manifest the intention to ratify or not to ratify said convention at the end of a given period (as set out in the ILO Constitution). The legal vacuum created by Article 18 of the Vienna Convention on how to express intent not to become a party to the treaty and on the period during which such intent should be expressed for the purposes of legal transparency is clearly filled by the ILO Constitution. However, the ILO Constitution reveals another limit to Article 18(a) of the Vienna Convention: the fact that its scope of application is limited to the signatory

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\(^{145}\) In the draft regarding the law of treaties that was submitted to the ILC, Sir Hersch Lauterpacht added to the obligation not to deprive a treaty of its object and purpose the obligation to submit the signed instruments to the competent national authorities. Article 5(2) of the draft anticipated that signature of a treaty entailed the obligation of good faith 'to cause the treaty thus signed to be examined by the competent constitutional authorities with the view to determining whether the signature ought to be confirmed', see the Report on the Law of Treaties by Sir H. Lauterpacht, *YILC*, 1953, vol. II., pp 109 ff. The main reasons that led Lauterpacht to develop such an idea were that 'the mere fact of signature confers upon the signatory certain rights [...] it is proper that there should exist some obligation in consideration of those rights' (at 110) 'and that what States cannot do is sign a treaty and subsequently conduct themselves as if they had no concern with it' (at 109). Lauterpacht added that 'all these considerations prompt the conclusion that signature, although not implying an obligation of ratification implies the duty to take some action showing a deliberate acknowledgment of the principle that eventual ratification is the natural outcome and purpose of the signature' (at 110).


\(^{147}\) Article 19(5)(b) of the ILO Constitution (available at: <http://www.ilo.org/public/english/about/iloconst.htm>).
States or to States that have exchanged instruments constituting a treaty. The interpretation of the terms of Article 18(a) hint that the mere adoption of a convention by an international conference does not give rise to a legal obligation for the State, whereas at the ILO, the adoption of a convention creates a minimal obligation for all member States. It would be reasonable to think that Article 18(a) applies de lege ferenda to all the States that voted to adopt a convention, and not only to its signatories, so as not to exclude from the Article’s scope of application other forms of provisional acceptance, in particular a vote in favour at an international conference. This would also make it possible to consolidate the principle of good faith in international relations. The idea would be for the process of rationalization of the law of treaties to culminate in confirmation that the obligation not to defeat the object and purpose of a treaty exists as soon as the negotiations have been concluded and the treaty initialled, and to specify the form and substance of the obligation’s implementing conditions. At present, this is not an impromptu but rather a lasting development of international law.

Sanctions for breach of the obligation

70. According to general international law, a violation of the obligation contained in Article 18(a) must be able to trigger the responsibility of the signatory State of a treaty. The line between a moral obligation—based on the assumption that Article 18(a) is a moral rule—and a legal rule is not easily drawn. However, the inclusion of a moral rule in positive national or international law confers upon this rule all characteristics and consequences of a legal rule.

71. In truth, this is not the real source of contention. One of the concerns of the ILC was, in addition to codification, the ‘progressive development of international law’. By creating a symbiotic relationship between ‘the existing’ and ‘the desirable’, between ‘the traditional’ and ‘the modern’ as these exist in the law of treaties, the goal of Article 18 clearly appears to have been the consolidation of international law.

72. With regard to sanctions for the violation of Article 18, it can be difficult to establish the responsibility of a signatory State or of a State having expressed its consent to be bound. Do acts tending to defeat the object and purpose of a treaty have to be analysed in concreto, that is, do they have to be characterized by a subjective element, intention, or bad faith? Or, on the contrary, is it sufficient to characterize the result objectively (in abstracto)?

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146 See the opinion of S. Rosenne:

the Special Rapporteur had perhaps been mistaken in taking signature as the starting point for bringing the obligation into play, since provision was often made in multilateral conventions for the original parties to choose between signature followed by ratification and accession without signature, the two being treated on an equal footing....[T]he obligation should be made to attach to States which had declared themselves positively in favour of supporting the adoption of the treaty. While a multilateral convention was being negotiated States could, and did, vote against individual clauses or Articles, but at the close of the proceedings it was rare for participants to vote against the text as a whole; the more usual practice was to abstain and, unless a rollcall vote was taken, it might not always be possible to determine which States had done so. In view of the growing practice of accession without signature, there seemed no justification for basing the Article on the classical procedure of signature followed by ratification....Another objection to giving such prominence to signature and its consequences was that some treaties were not signed at all, but only authenticated; that was true of the international labour conventions, and the recent Convention on Settlement of Investment Disputes between States and Nationals of Other States drawn up by the International Bank for Reconstruction and Development. (YILC, 1965, vol. I, 788th meeting, p 101)
73. Article 18 could enable legal uncertainties in international law applicable to treaties to be eliminated. In fact, one could explicitly—or even implicitly—refer to this provision in order to produce preventive effects, either by inducing States to sign treaties and, consequently, to oblige them not to defeat the object and purpose of these instruments, or by providing for their provisional application. Besides, one could certainly use this Article to require from States that they take specific measures between the moment of signature and the moment of ratification. These measures could notably include the presentation of the adopted texts to the competent national authorities in order to provoke a thorough debate on the possibility of their ratification and on the obligation to report on these measures. In this way, the ground could be prepared for the obligation in Article 18. These aspects do not exhaust examination of the issue. Article 18 clearly offers, in the context of the progressive development of international law, unexplored terrain upon which the effectiveness and efficiency of international treaties may be enhanced.

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1986 Vienna Convention

Article 18
Obligation not to defeat the object and purpose of a treaty prior to its entry into force

A State or an international organization is obliged to refrain from acts which would defeat the object and purpose of a treaty when:

(a) that State or that organization has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, act of formal confirmation, acceptance or approval, until that State or that organization shall have made its intention clear not to become a party to the treaty; or

(b) that State or that organization has expressed its consent to be bound by the treaty, pending the entry into force of the treaty and provided that such entry into force is not unduly delayed.

1. Article 18 of the Vienna Convention of 1986 takes up the content of its homonym, the Convention of 1969, taking into account the situation of international organizations as signatories or potential parties to an international treaty.

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