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Unratified Treaties and Other Unperfected Acts in International Law: Constitutional Functions

*W. Michael Reisman**

In E.M. Forster's remarkable novel, *A Passage to India*, there is, if my memory serves me, a brief but memorable scene. A businessman presents his card, which states his name and then his degree as "B.A. Oxford (Failed)." Like the businessman in Forster's wonderful cameo, there is a fascinating tendency in modern international law to cite, as authoritative and even "binding," acts that have not been legally completed, despite the fact that the formalities of completion are explicit requisites for their legality. I am not speaking of the wide variety of essentially non-authoritative material that counsel and idealistic law students increasingly rummage through and then assemble as proof that, thanks to the sheer quantity they amass, a customary rule of law has formed.¹ I

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1. Professor Brownlie has provided an extraordinarily generous road map that is frequently followed in this regard. "The material sources of custom," Professor Brownlie writes,

are very numerous and include the following: diplomatic correspondence, policy statements, press releases, the opinions of official legal advisers, official manuals on legal questions, e.g. manuals of military law, executive decisions and practices, orders to naval forces etc., comments by governments on drafts produced by the International Law Commission, state legislation, international and national judicial decisions, recitals in treaties and other international instruments, a pattern of treaties in the same form, the practice of international organs, and resolutions relating to legal questions in the United Nations General Assembly.

am speaking instead of the—to me equally curious—practice of international actors relying on acts that have manifestly and intentionally not been made legal and binding according to the procedures that have been prescribed for this purpose, as if they were, nonetheless, legal and binding. In short, I am speaking of the intentional use of, and the ascription of legal value to, a class of unperfected legal acts by international tribunals and the international constitutional implications of this practice.

Let me start with a non-judicial example that is still painful to Americans. At 10:30 A.M. on November 4, 1979, Iranian militants entered the Embassy and Consulate in Teheran and took the U.S. diplomatic personnel hostage.² The United States rediscovered, as it had many times before and since, that although it had the capacity to destroy utterly an adversary, it did not have the capacity to make it change its behavior. The U.S. Government quite simply could not secure the release of its diplomats.

On December 31, 1979, the Security Council, on a U.S. initiative, called on Iran to secure the release of the hostages, adding that it would reconvene on January 7, 1980, to review the situation and, in case of non-compliance, to “adopt effective measures under . . . the Charter.”³ As the hostages had not been released, the United States submitted a draft resolution detailing a sanctions program.⁴ Ten members voted for the Resolution, but the Soviet Union vetoed it.⁵ S/13735, like other vetoed resolutions, was dead.

Or was it? On April 7, 1980, with the hostage crisis going into its fifth month, President Carter announced, among other actions against Iran, the imposition of economic sanctions.⁶ Part of the basis of authority for his action was the vetoed resolution. The President said: “[T]he Secretary of the Treasury will put into effect official sanctions prohibiting exports from the United States to Iran, in accordance with the sanctions approved by 10 members of the United Nations Security Council on January 13 in the resolution which was

IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 5 (5th ed. 1998) (footnotes omitted).

Such an open-ended formula is an alchemist's delight. For much like changing lead into gold, this formula allows the juridical alchemist to take a lot of material, almost none of which by itself creates legal obligations, and to heap it up in enormous, heavily footnoted piles, until a magical Hegelian “nodal point” is reached whereupon what was legal nothing becomes legal something, be it custom, a general principle or “soft” law.

2. GARY SICK, *ALL FALL DOWN: AMERICA'S TRAGIC ENCOUNTER WITH IRAN* 228-30 (1986).

3. S.C. Res. 461, U.N. SCOR, 2184th mtg., Supp. Oct.-Dec. 1979, at 25, U.N. Doc. S/13671.

4. SICK, *supra* note 2, at 291-92.

5. *Id.* at 292.

6. W. Michael Reisman, Editorial Comment, *The Legal Effect of Vetoed Resolutions*, 74 AM. J. INT'L L. 904, 905 (1980).

vetoed by the Soviet Union.”⁷ The European Common Market Foreign Ministers followed suit. On April 22, 1980, they issued a dispatch that said, in relevant part,

The Foreign Ministers of the Nine, deeply concerned that a continuation of this situation may endanger international peace and security, have decided to request their national Parliaments immediately to take any necessary measures to impose sanctions against Iran in accordance with the Security Council resolution on Iran of 10 January 1980, which was vetoed, and in accordance with international law.⁸

A legal act that was unperfected—according to the rules of decision-making in that forum—was being given a certain legal value.

Of course, the President’s announcement and the communique of the Common Market Ministers were political statements that by their nature, try to maximize their authority by the use of whatever symbols seem to promise effectiveness. No one seriously expects a high degree of legal precision in such statements. One would expect, however, that an international court or tribunal would be more precise. Yet, there are circumstances in which the International Court of Justice has found it convenient to ascribe full legal value to a manifestly unperfected legal act.

I

Let us consider three examples from the jurisprudence of the International Court of Justice in which the Court relied explicitly on an unperfected legal act. The first example is the recent decision of the International Court in the “Case concerning Maritime Delimitation and Territorial Questions between Qatar and Bahrain,” in which final judgment was rendered in 2001.⁹ The territorial side of this long-running dispute—which was also the longest before the court—concerned a Qatari claim to an archipelago, known as the Hawar Islands, that lies just off the east coast of the Qatar peninsula, and a Bahraini claim to a region, known as Zubarah, on the east coast of the Qatar peninsula just opposite Bahrain.¹⁰ Bahrain had held the Hawars at least since 1939, when a decision by the British Government based on authority assigned to it by separate treaties with Qatar and Bahrain had confirmed Bahraini title on the basis of

7. *Id.*

8. *Id.*

9. Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahr.), 2001 I.C.J. ___ (Mar. 16), available at <http://www.icj-cij.org/icjwww/idocket/iqb/iqbframe.htm>.

10. *Id.* ¶ 35.

long-term possession.¹¹ For its part, Qatar had held Zubarah at least since 1937 when it expelled the Bahraini inhabitants in a military action.¹²

It seemed clear to observers of the Court that, consistent with much recent international jurisprudence, the Court would not disturb this long-standing territorial disposition, but would, most likely, confirm Bahrain's title to the Hawars and Qatar's title to Zubarah.¹³ Finding a set of persuasive reasons for both legs of this decision, however, proved difficult. Bahrain's title to the Hawars could easily and persuasively be established by virtue of the authorized British decision of 1939, which the Court confirmed.¹⁴ The Court, however, had more difficulty with regard to Zubarah. Bahrain adduced evidence to show that the ruling family of Bahrain, the Al-Khalifa, had originally come from Zubarah, and that even after they had established themselves on the islands of Bahrain, they continued to live on the peninsula, in Zubarah, for certain seasons.¹⁵ Moreover, the permanent inhabitants of Zubarah, members of the Naim tribe, remained part of the Bahraini political system.¹⁶ In 1937, the ruling family of Qatar, which had been steadily expanding its control over the peninsula from its base in the then-village of Doha on the west coast of the peninsula, raided Zubarah, killing many of the inhabitants and destroying the settlement.¹⁷ While this effectively ended Bahrain's presence on the peninsula, Bahrain contended that the clear use of force by Qatar could not serve as the basis of territorial title, the legal argument being that by 1937 international law had disallowed conquest as a means of securing title to territory.¹⁸ Qatar argued, as against this, that its *de jure* control of all of the peninsula had been recognized since 1913, pursuant to a "Convention relating to the Persian Gulf and Surrounding Territories," concluded between the United Kingdom and the Ottoman Empire.¹⁹ The Convention established, in Article 11, a line separating the Ottoman Sanjak of Nejd from the "peninsula of al-Qatar,"²⁰ then stating:

The Imperial Ottoman Government having renounced all its claims to the peninsula of al-Qatar, it is agreed between the two Governments

11. *Id.* ¶ 57.

12. *Id.* ¶ 55.

13. *Id.* ¶ 147.

14. *Id.* ¶¶ 128, 147.

15. Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahr.) 2001 I.C.J. ____ (Mar. 16) ¶¶ 73-74, available at <http://www.icj-cij.org/icjwww/idocket/iqb/iqbframe.htm>.

16. *Id.*

17. *Id.* ¶ 75.

18. *Id.* ¶ 76.

19. *Id.* ¶ 80.

20. *Id.* ¶ 87.

that the said peninsula will, as in the past, be governed by the Sheikh Jasim-bin-Sani and his successors. The Government of His Britannic Majesty declares that it will not permit the Sheikh of Bahrain to interfere in the internal affairs of Qatar, to violate the autonomy of that country or to annex it.²¹

But the treaty was never ratified, so its evidentiary value was not immediately apparent. Qatar argued that the treaty had never been ratified because of the outbreak of the First World War and, not entirely consistent with that argument, that Article 11 had been incorporated in a treaty between the United Kingdom and the Ottoman Empire in 1914 that was ratified—despite the First World War.²² Bahrain argued that the treaty was not ratified because a “complex set of interdependent proposals . . . ultimately fell apart.”²³ Shortly after the negotiation of the first treaty, Ibn Saud had expelled the Ottomans from the eastern coast of Arabia and the Al-Thani, who had allied themselves with the Turks, had lost control over Doha, while the Ruler of Bahrain had retained control over the northern part of the Qatar peninsula.²⁴ In any case, the language of the 1914 treaty did not track that of the 1913 treaty.

The shortest distance between two points is a straight line. The straight line in this case would have been to acknowledge that the 1937 seizure of the territory of Zubarah by the Al-Thani rulers of Qatar and the expulsion of the Bahrainis had created Qatari title, because at that time conquest was still a lawful means of acquiring title to territory. Because these events transpired before the United Nations Charter and because prohibitions on conquest then were neither universal nor customary, this would not have been a startling proposition. But it would have required a statement bordering on the politically incorrect: that late in the days of the League of Nations, title could still be acquired by conquest.

Instead of taking this course, the Court decided to rely on the 1913 Convention:

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 1913.²⁵

21. Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahr.) 2001 I.C.J. ___ (Mar. 16) ¶ 87, available at <http://www.icj-cij.org/icjwww/idocket/iqb/iqbframe.htm>.

22. *Id.* ¶ 46.

23. *Id.* ¶ 47.

24. *Id.*

25. *Id.* ¶ 89.

The reasons for the Court's conclusion were, first, the clarity of the text,²⁶ hardly a compelling reason when the question is lack of ratification, and, second, the reference in the 1914 treaty, which was ratified, to the line in Article 11 in the 1913 treaty.²⁷ The function of the 1914 treaty, however, was different from its predecessor, and, in context, the only point in the 1913 treaty that would have been relevant to the 1914 treaty was the boundary of the Kingdom of Najd, now Saudi Arabia, not the question of who was to have political control on the Qatari peninsula.

Thanks to the validation of the unratified treaty, the court could avoid the thorny question of whether acquisition of territory by armed force in the period before the United Nations Charter could give rise to good title *jure gentium*. "The actions of the Sheikh of Qatar in Zubarah that year," said the Court, "were an exercise of his authority on his territory and, contrary to what Bahrain has alleged, were not an unlawful use of force against Bahrain."²⁸

The majority opinion may be contrasted with the approach suggested by Judge *ad hoc* Fortier, who was, incidentally, appointed by Bahrain but voted against Bahrain on this point. Judge Fortier wrote that

the events of July 1937 can only be characterized as acts of conquest by Qatar. Bahrain has never acquiesced in the seizure by Qatar of Zubarah. . . .²⁹

If the seizure of Zubarah, in 1937, by an act of force, were to occur today, there would be no doubt that it would be unlawful and ineffective to deprive Bahrain of its title. The position now prevailing and fully accepted in international law is that the use of force is unlawful and, by itself, ineffective to bring about a change of title.³⁰

In 1937, however, the law was in a process of evolution and the situation was not so clear.³¹

During the oral pleadings, the Court was referred to the Fifth Edition of Oppenheim's *International Law*, published in 1957, and the Ninth Edition, published in 1992 (CR 2000/11, pp. 3941). In this last edition, the authors, Sir Robert Jennings and Sir Robert Zatts, opined that it should not be assumed that forcible takings of territories in the pre-United Nations Charter days can be protested today.³²

The authors of the Ninth Edition conclude their comments with the following observation. "This conclusion is fortified by the principle of

26. *Id.* ¶ 90.

27. Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahr.) 2001 I.C.J. ___ (Mar. 16) ¶ 91, available at <http://www.icj-cij.org/icjwww/idocket/iqb/iqbframe.htm>.

28. *Id.* ¶ 96.

29. *Id.* ¶ 35.

30. *Id.* ¶ 36.

31. *Id.* ¶ 37.

32. *Id.* ¶ 38.

stability which must be at least a significant factor in questions concerning territorial sovereignty." I agree.³³

Accordingly, Judge Fortier concluded that Qatar had sovereignty over Zubarah without having to rely on an unratified treaty.³⁴

My second example of the Court treating an unperfected legal act as if it were legal is to be found in the *Nuclear Tests Cases* between Australia and New Zealand, on the one hand, and France, on the other.³⁵ France had begun to develop its own nuclear *force de frappe* after the then nuclear powers, the United States, the United Kingdom, and the then Soviet Union, had agreed, among themselves, to stop other states from developing nuclear arsenals while grandfathering their own.³⁶ At that time, developing nuclear weapons capability required atmospheric testing.³⁷ This requirement forced democratic states to move their tests from their own territory to the Pacific Ocean, as they appreciated that their own citizens who were paying the costs of the tests would hardly do so if they knew that they and their children were being irradiated in the process. To keep their monopoly after they had concluded their own atmospheric tests, the states that were the charter members of the nuclear club concluded the Treaty Banning Nuclear Weapon Tests in the Atmosphere in Outer Space and Under Water.³⁸ This Convention prohibited its parties from testing nuclear weapons over the oceans.³⁹ The idea was that if a nation could not test over the oceans, it could not become nuclear.

The treaty won wide subscription, but France, which had been able to test in the Sahara as long as it had controlled Algeria, did not become a party. After Algerian independence, France shifted its testing to Muroroa atoll in the Pacific.⁴⁰ When Australia and New Zealand, with wide Asian support, petitioned the court to enjoin French atmospheric tests, the court issued a rather soft injunction—an "indication of interim measures," as it is called—on rather doubtful jurisdictional grounds.⁴¹ France ignored the injunction and tested, only to find that it was being widely condemned, both within

33. *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahr.)* 2001 I.C.J. ____ (Mar. 16) ¶ 39, available at <http://www.icj-cij.org/icjwww/idocket/iqb/iqbframe.htm>.

34. *Id.* ¶ 41.

35. *Nuclear Tests (Austl. v. Fr.)*, 1974 I.C.J. 253 (Dec. 20).

36. *See Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and Under Water*, Aug. 8, 1963, U.S.-U.K.-U.S.S.R., 2 I.L.M. 889, 889 [hereinafter *Tests Treaty*].

37. *Nuclear Tests (Austl. v. Fr.)*, 1974 I.C.J. 253, 258 (Dec. 20).

38. *See Tests Treaty, supra* note 36, at 889.

39. *Id.* art. 1, § 1(a).

40. *Nuclear Tests (Austl. v. Fr.)*, 1974 I.C.J. 253, 258 (Dec. 20).

41. *Id.* at 259-60.

and outside France.⁴² The French government was increasingly desperate for a way out of a situation that had become diplomatically awkward and politically costly.

France found its escape hatch by repeatedly signaling that, after this series of tests, it would no longer test in the atmosphere over the oceans. On June 8, 1974, shortly before the annual tests series, the Office of the President of the French Republic announced that "France will be in a position to pass on to the stage of underground explosions as soon as the series of tests planned for this summer is completed."⁴³ On June 10, 1974, the French Embassy in Wellington, after referring to the President's statement, stated:

France, at the point which has been reached in the execution of its programme of defence by nuclear means, will be in a position to move to the stage of underground tests, as soon as the test series planned for this summer is completed.

Thus the atmospheric tests which are soon to be carried out will, in the normal course of events, be the last of this type.⁴⁴

Just in case the message had not been received *en clair*, the President of the French Republic, in response to a convenient and probably not coincidental question at a press conference on July 25, 1974, said:

[O]n this question of nuclear tests, you know that the Prime Minister had publicly expressed himself in the National Assembly in his speech introducing the Government's programme. He had indicated that French nuclear testing would continue. I had myself made it clear that this round of atmospheric tests would be the last, and so the members of the Government were completely informed of our intentions in this respect . . .⁴⁵

The Minister of Defense followed on August 16, during an interview on French television, with a statement that the 1974 nuclear tests would be the last in the atmosphere.⁴⁶ On September 25, 1974, the Foreign Minister said the same thing in a speech to the General Assembly.⁴⁷ Finally, on October 11, 1974, the Minister of Defense held a press conference in which he reiterated the policy but dropped the words "in the normal course of events" as a qualifier of the French intention not to resume atmospheric tests.⁴⁸ A journalist in the audience, who was either acutely observant or had been forewarned, noted that the Minister had not used the qualifying formula that had

42. Nuclear Tests (Austl. v. Fr.), 1974 I.C.J. 253, 266 (Dec. 20).

43. *Id.* at 265.

44. *Id.* at 265-66.

45. *Id.* at 266.

46. *Id.*

47. Nuclear Tests (Austl. v. Fr.), 1974 I.C.J. 253, 266 (Dec. 20).

48. *Id.*

been inserted in some of the other unilateral statements, and the Minister agreed that he had not.⁴⁹

Now, the message was clear. France was willing to stop the atmospheric tests in the Pacific, in return for which it wanted the case in The Hague stopped too. But what was the legal value of unilateral declarations, especially if France were later to decide that its national security required it to resume nuclear tests? Could a unilateral declaration create an obligation, akin to an obligation created by a treaty? The Court thought so:

It is well recognized that declarations made by way of unilateral acts, concerning legal or factual situations, may have the effect of creating legal obligations. Declarations of this kind may be, and often are, very specific. When it is the intention of the State making the declaration that it should become bound according to its terms, that intention confers on the declaration the character of a legal undertaking, the State being thenceforth legally required to follow a course of conduct consistent with the declaration. An undertaking of this kind, if given publicly, and with an intent to be bound, even though not made within the context of international negotiations, is binding

Of course, not all unilateral acts imply obligation; . . . the intention is to be ascertained by interpretation of the act. . . .

Whether a statement is made orally or in writing makes no essential difference, for such statements made in particular circumstances may create commitments in international law

[I]nterested States may take cognizance of unilateral declarations and place confidence in them, and are entitled to require that the obligation thus created be respected.⁵⁰

It is from the actual substance of these statements, and from the circumstances attending their making, that the legal implications of the unilateral act must be deduced.⁵¹

On the basis of these theoretical statements about the effect of unilateral declarations in international law, the Court concluded with respect to the French declarations that “the Court holds that they constitute an undertaking possessing legal effect.”⁵² Hence the Court held, to the relief of France but to the disappointment of Australia and New Zealand, that the Australian and New Zealand claims had become moot.⁵³ The Court’s judgment was crafted so skillfully that readers may not have appreciated how revolutionary it was for international law to state that oral statements by government officials⁵⁴—until then unperfected legal acts—could henceforth be deemed binding.

49. *Id.*

50. *Id.* at 267-68.

51. *Id.* at 269.

52. *Id.*

53. Nuclear Tests (Austl. v. Fr.), 1974 I.C.J. 253, 269 (Dec. 20).

54. The Permanent Court of International Justice, in an obiter dictum in the Eastern Greenland case, expressed the view that a short handwritten note that the

My third example of the International Court's reliance on an unperfected legal act as nonetheless generative of legal rights is the interesting maritime boundary dispute between Libya and Tunisia, decided by the Court in 1982.⁵⁵ Each party developed a host of arguments, but the Court was particularly interested in what it called a tacit *modus vivendi* between France and Italy, when they ruled, respectively, Tunisia and Libya.⁵⁶ The *modus vivendi*, which ran along a forty-five degree angle to the section of the coast where the land boundary began, had, as its initial function, to obviate incompatible fishing claims that had been generating disputes and incidents between the two colonial powers.⁵⁷

Now, a *modus vivendi* is a quintessential unperfected international legal act. It is, as Satow put it, "the title given to a temporary or provisional agreement, usually intended to be replaced later on. . . ."⁵⁸ It is genetically non-binding; indeed, its whole function is to suspend conflict over whatever is the subject of the *modus vivendi* in order to permit the parties to interact peacefully and productively, pending the settlement of the matter.

The International Court, itself, had acknowledged the difference between a binding agreement and a *modus vivendi*. In *Iceland Fisheries*, the court had said that:

The interim agreement of 1973, unlike the 1961 Exchange of Notes, does not describe itself as a 'settlement' of the dispute, and, apart from being of limited duration, clearly possesses the character of a provisional arrangement adopted without prejudice to the rights of the Parties, nor does it provide for the waiver of claims by either Party in respect of the matters in dispute.⁵⁹

"[A] *modus vivendi* arrangement," Judge Evensen wrote, "basically implies two elements, namely, that the *modus vivendi* arrangement is *provisional* pending a solution of the disagreement and that the arrangement is *non-prejudicial* for the two Parties."⁶⁰ It is, in short, an unperfected legal act.

Yet in *Libya/Tunisia*, the Court ascribed a legal value to this unperfected legal act. On the one hand, the Court said:

Norwegian Foreign Minister, Count Ihlen, wrote in the course of negotiations and passed across the table to his Danish counterpart, created a binding obligation on Norway.

55. Concerning the Continental Shelf (Tunis./Libyan Arab Jamahiriya), 1982 I.C.J. 18 (Feb. 24).

56. *Id.* at 56-57.

57. *Id.*

58. SATOW'S GUIDE TO DIPLOMATIC PRACTICE 262 (Lord Gore-Booth ed., 5th ed. 1979).

59. Fisheries Jurisdiction (U.K. v. Ice.), 1974 I.C.J. 3, 18 (July 25).

60. Concerning the Continental Shelf (Tunis./Libya), 1982 I.C.J. 18, 306 (Feb. 24) (Evensen, J., dissenting).

The Court considers that the evidence of the existence of such a *modus vivendi*, resting only on the silence and lack of protest on the side of the French authorities responsible for the external relations of Tunisia, falls short of proving the existence of a recognized maritime boundary between the two Parties. Indeed, it appears that Libya is not in fact contending that it had that status, but rather that the evidence that such a line was employed or respected to a certain extent is such as to deprive the ZV 45_ line of credibility.⁶¹

The Court, however, went on to say:

But in view of the absence of agreed and clearly specified maritime boundaries, the respect for the tacit *modus vivendi*, which was never formally contested by either side throughout a long period of time, could warrant its acceptance as a historical justification for the choice of the method for the delimitation of the continental shelf between the two States, to the extent that the historic rights claimed by Tunisia could not in any event be opposable to Libya east of the *modus vivendi* line.⁶²

Thus, the Court ascribed a legal value to an act that was, by its nature, unperfected.

II

Let me return to Forster's little cameo in *A Passage to India* with which I opened this lecture. We were all amused by the businessman whose card announced that he had failed to win his degree at Oxford. But consider the beam in our own eyes. The number of *curricula vitae* of prominent people that recite, as an achievement, nomination for a Nobel Peace Prize. In Forster's language, that would read "Nobel Peace Prize (not awarded)." The number of book advertisements that announce proudly that the book being hyped was nominated for a Pulitzer Prize or the number of cinema advertisements that recite that the film being extolled received three nominations for Academy Awards. In Forster-speak, these would read "Pulitzer Prize (denied)" or "Academy Award (bestowed on a better film)."

We do not smile when we encounter these quotidian examples, because we appreciate that even a nomination in an intense competition is a distinction in its own right, tells us something about the relative worth of a person or an entry, and distinguishes them from the many others who did not achieve even this "also-ran" status. Indeed, in his context, Forster's businessman had an achievement worth advertising: he had been able to study enough to be admitted to Oxford, to study there, and to progress far enough to sit for the exams. He or his family had been able to afford that considerable

61. *Id.* at 70.

62. *Id.* at 70-71.

expense. In his personal calculus, all that seemed, on balance, worthy of publicizing rather than concealing, even though the price of doing so was to acknowledge that he finally flunked.

Unperfected acts in international law resemble these examples but are also different from them in important ways. An unperfected act may have important political, historical, or geographical information in it. It may, as with the abortive Iran sanctions resolution, testify that all but one member of the Security Council, the executive committee of the international community, had concluded that the gravity of the Iranian action that had precipitated the initiative warranted the imposition of the sorts of sanctions that the United States had proposed. It may, as the International Court said in *Qatar v. Bahrain*, "constitute an accurate expression of the understanding of the parties at the time of signature."⁶³ A genetically unperfected act such as a *modus vivendi* may, as the court said in *Libya/Tunisia*, be a "relevant circumstance" in validating a maritime boundary line.⁶⁴ A hitherto unperfected act such as a unilateral statement by a government official, which has not been made into an international agreement or undergone internal ratification procedures, may nonetheless indicate the firm policy of the state whose representative has made it.

In this respect, unperfected international legal acts are worth the attention of historians and legal scholars. For those legal scholars who view law not as a body of rules but as a set of expectations shared by politically relevant actors—and I include myself in that group of scholars—unperfected acts may, indeed, contain data that are useful if not indispensable to determining what those expectations are, especially if they have not been confirmed in formal legal instruments. All these uses certainly enrich our conception of the legal process even as—or perhaps precisely because—they blur, smudge, and even erase the line between perfected and unperfected acts in international law.

There is a price to be paid for this blurring and smudging, however, when international courts and tribunals engage in it. Lines and boundaries that demarcate perfected—and hence binding—acts from unperfected—and hence non-binding—acts are, I submit, as important in law as those that demarcate the sacred from the profane in religion. In international law, an unperfected act is not a pathological feature that is to be repaired or perfected as quickly as a court seized of the case can. It is part of a class of quite specific tools, designed to secure important policies that are served by the very

63. Maritime Delimitation and Territorial Questions between Qatar and Bahrain (*Qatar v. Bahr.*), 2001 I.C.J. ___ (Mar. 16), available at <http://www.icj-cji.org/icjwww/idocket/iqb/iqbframe.htm>.

64. Concerning the Continental Shelf (*Tunis./Libyan Arab Jamahirya*), 1982 I.C.J. 18, 56-57 (Feb. 24).

unperfected quality of the acts concerned. Take the *modus vivendi*. A *modus vivendi* is an agreement that is not binding, and even though it may be inconsistent with the claims of one or both of the states, it does not prejudice those claims. It operates for a period of time, and then lapses, or it may be denounced on short notice by either party. It is thus a type of genetically unperfected act that allows the diplomat and government official to stabilize a difficult issue dividing two states without having to decide it. When President Reagan and Prime Minister Mulroney were trying to conclude the Canada-U.S. Free Trade Agreement (FTA), the precursor to NAFTA, among the issues that they found most difficult to resolve was that of subsidies for softwood lumber.⁶⁵ So, in a memorandum of understanding, they created a short-term *modus vivendi*—without prejudice to either of their claims on the softwood lumber issue—that permitted the CFTA to be concluded and to begin to generate its anticipated benefits.⁶⁶ They hoped and assumed that the benefits would be large enough to reduce the softwood lumber issue from what had been a “deal-breaker” to an item that had to be resolved, lest all the benefits now flowing from the agreement be lost. In many situations, disputes that are not immediately soluble, but whose continuation jeopardizes many other collaborative activities, can be managed by means of the *modus vivendi*—but only insofar and as long as there is a consensus at the international constitutive level that a *modus vivendi* does not prejudice claims, generate rights, nor serve as the basis for a claim of estoppel or preclusion.

When the International Court of Justice assigned an evidentiary value to the Franco-Italian *modus vivendi* by treating it as a “relevant circumstance,” it was not per se unreasonable, in the context of that case.⁶⁷ Certainly, a scholar or historian studying the diplomatic relations between France and Italy in North Africa and then between the successor states of Libya and Tunisia would have included the *modus vivendi* as one of the factors contributing to the stable and peaceful relations in the maritime area between the governments over more than half a century. In making this seemingly innocent inference, however, the International Court, as a court, undermined, at the international constitutive level, the essential and indispensable characteristic of the *modus vivendi* and

65. See Herbert H. Denton, *Outlook Gloomy in Trade Talks With Canada*, WASH. POST, Nov. 21, 1986, at D13, available at 1986 WL 2010547.

66. See U.S., *Canada Settle Dispute Over Lumber: 15 Pct. Export Tax May Boost Price of Domestic Housing*, WASH. POST., Jan. 1, 1987, at D1, available at 1987 WL 2072784. See also Lou Canon & Herbert H. Denton, *Reagan-Mulroney Session In Canada to Be Low-Key: Acid Rain, Trade Top Points of Contention*, WASH. POST, Apr. 5, 1987, at A1, available at 1987 WL 2055207.

67. Concerning the Continental Shelf (Tunis/Libyan Arab Jamahirya), 1982 I.C.J. 18, 56-57 (Feb. 24).

thus removed an extremely valuable tool from the tool box of diplomats and international decision makers. Prior to 1982, any of us, as legal advisers to governments, could have explained to our political counterparts the utility of a *modus vivendi* in a particular dispute. We could have assured our clients that there was no danger of an international legal tribunal interpreting the *modus vivendi* as a waiver of rights. I am not sure we can do so any longer.

The International Court was faced with another unperfected act in *Qatar v. Bahrain*, in this instance an unratified treaty.⁶⁸ It is always difficult to craft a majority judgment in a cameral tribunal, especially one containing seventeen judges. Different judges have different perspectives, held with differing degrees of intensity; the person charged with drafting the judgment must somehow accommodate them, lest they withdraw their support and write a dissent. This sometimes constrains the drafter to narrow and not necessarily especially plausible reasoning, a judicial species of finding the lowest common denominator. For this reason, majority decisions rarely attain the coherence and internal logical force of dissenting opinions. In *Qatar v. Bahrain*, one would assume that a significant number of judges who were disposed to join the majority would not state that as late as 1937 conquest was still a perfectly valid way of securing title *jure gentium*. So I assume that the drafter of the judgment had to search for an alternative ground for decision that would be acceptable to the provisionally-assembled majority. Reliance on an unratified treaty seemed to fill the bill.

Historically, the constitutive rules of international law viewed unratified treaties as unperfected acts that generate no rights or obligations. The only function of the signatures of the negotiators was to authenticate the text that had been agreed upon. The Vienna Convention on the Law of Treaties purported to “progressively develop” this dimension of treaty practice by going beyond customary international law and imposing an obligation on a signatory to act in such a way as not to frustrate the object of the treaty until such time as the signatory had decided not to ratify the treaty.⁶⁹ Otherwise, the Vienna Convention affirmed the need for ratification for a treaty to enter into force when the instrument itself indicated that ratification was necessary.⁷⁰

The International Court did not say anything unreasonable when it observed “that signed but unratified treaties may constitute an accurate expression of the understanding of the parties at the time

68. See *Maritime Delimitation and Territorial Questions between Qatar and Bahrain* (Qatar v. Bahr.), 2001 I.C.J. ___ (Mar. 16), available at <http://www.icj-cij.org/ijcwww/idoocket/iqb/iqbframe.htm>.

69. Vienna Convention on the Law of Treaties, May 23, 1969, art. 18(a), 1155 U.N.T.S. 331.

70. *Id.* art. 14(1)(a).

of signature.”⁷¹ They may indeed, and diplomatic historians may certainly examine them for that purpose. When an international tribunal assigns them legal value despite their non-ratification, however, there is a prospective constitutive consequence. The flexibility that a negotiator enjoys in experimenting with different packages of concessions in order to strike a consensus with the other party is reduced, for henceforth the negotiator must assume that whatever he or she writes *ad referendum* may be used against his or her state, even without subsequent ratification. Nor are the adverse consequences limited to the international sphere. Ratification of treaties in republican systems such as that found in the United States is a critical bulwark of separation of powers and checks and balances. If the international legal system henceforth assigns legal validity to unratified treaties, that bulwark will be breached.

Nor did the International Court of Justice rule unreasonably when it held in *Nuclear Tests* that “declarations made by way of unilateral acts, concerning legal or factual situations, may have the effect of creating legal obligations.”⁷² It was clear that France was signaling—one might say desperately—that it would desist from the atmospheric tests if the court would desist from proceeding to a judgment condemning it.⁷³ For different reasons, the Court’s own situation was no less desperate, for it had issued an order that had been ignored. Therefore, a judgment that treated the French statements as binding was as convenient for the Court as it was for France. But because whatever a court does is perforce precedential, the scholar must question the constitutive effect of transforming unilateral statements by heads of state into potentially binding obligations and assigning the constitutional competence to make such a determination, on a case-by-case basis, to the International Court of Justice.

On the one hand, the judgment seems to be a triumph of substance over form. After all, what is important, as the Court said, is the intention to be bound. In early English law, a contract could not be concluded until a peppercorn was exchanged between the parties. At a later stage, some manifest form of consideration was required or the putative agreement required a seal. At a still later, and we like to believe higher, stage of development, these tangible manifestations of intention to be bound were shed in favor of a sophisticated examination of the intentions of the parties. Was not international law merely catching up here?

71. See *Maritime Delimitation and Territorial Questions between Qatar and Bahrain* (Qatar v. Bahr.), 2001 I.C.J. ___ ¶ 84 (Mar. 16), available at <http://www.icj-cij.org/iccjwww/idocket/iqb/iqbframe.htm>.

72. *Nuclear Tests* (Austl. v. Fr.), 1974 I.C.J. 253, 267 (Dec. 20).

73. *Id.*

In a sense, international law was. But the abandonment of highly standardized and ritualized forms for indicating when—and precisely when—states have locked themselves into binding international legal obligations has the potential of chilling the freedom of negotiation, the use of trial balloons, the testing of experimental language, and the many other techniques that government officials use to interact with their counterparts in other governments and to move cautiously toward commitment. The Court's planned obsolescence of binding formalities and its substitution of itself as the judge of states' intentions may well have fit in France's case. If one believes, however, that the systemic capacity that allows actors to talk without danger of commitment as a way of exploring alternatives is important for international politics, the constitutional change necessary to accommodate the French case could carry a steep price tag in many, many others.

Nor were the United States and the European Foreign Ministers saying something unreasonable or unethical when they noted that a majority of the Security Council—and probably a majority of the General Assembly—agreed that the Iranian action was so grave a threat to peace that effective measures should be taken. There are, however, rather far-reaching constitutive consequences to saying that a majority per se carries a binding legal authority, even if, under the formal rules of the arena, that actual majority was not sufficient to have created a binding resolution. Imagine a chairman saying, "A two-thirds majority is required. Because we are just short of a two-thirds majority, the measure passes." In the Iranian case, an even more important policy may have been compromised. The contextual function of the *liberum veto* was to maintain a congruence between the authoritative decisions of the Security Council and the realities of the world power process. While it may have seemed useful to give a special authority to that particular vetoed resolution, the systemic consequences of a constitutional change could have been grave, especially when the prospective change was neither identified nor debated in terms of its constitutional implications.

Some of the classic policies that are reflected in demands for a sharp distinction between perfected and unperfected legal acts go to the very heart of international law. Consider the issue of sovereignty. The fact that states, in fashioning the international legal system over many centuries, have been extremely careful and restrictive about how they will be bound legislatively is frequently characterized as an "obsession" with sovereignty. That is mistaken. There is a fundamental ethical and moral basis to the international requirement that a state and its people are bound only by the treaties to which they consent and the rules of customary international law followed widely and out of sense of legal obligation. As in any democratic system, members of the community are not to be subjected to law, in the form of legislation of which they have not participated or to which

they have not consented. This is why states, and especially democratic states, are so careful about these essentially constitutional rules about international law-making and why treaties and state practice have to be studied so carefully before concluding that a new customary rule exists.

It is also why it is so inappropriate, if not morally offensive, in international law to purport to "discover" new rules of customary international law by innovative joiners of provisions of dissimilar instruments, elaborate exercises of logical derivation, and feats of deconstruction that could leave the likes of Jacques Derrida green with envy, and why it is so inappropriate to collect and heap up a mass of scholarly statements of aspiration as if they were law, on the naive assumption, of many children and some adults, that if you repeat a wish enough, it will become true. These gimmicks are particularly disturbing when they are used in the growing area of international criminal law. This is not to say that I, as a citizen, would not approve of the passage of some of the policies pursued in such entrepreneurial law-making exercises. As a jurist, expected to focus on the abiding constitutional structures of the community, however, I am troubled and even offended by these entrepreneurial law-making efforts.

The point common to all of these examples is that the requirements for perfecting a legal act, whether in international law or in a domestic legal system, are not empty technicalities but are, themselves, based upon important policies. When they are not or when the policies are obsolete, then, of course, the formalities should be discarded. *Cessat ratio, cessat ipse lex.*⁷⁴ To insist upon retaining the technicalities when they no longer serve a purpose would transform international law from a rational and purposive system for achieving optimum social goals within minimum world order into an obsessional neurosis. But when policies served by the technicalities are still important for the community concerned, to dismiss them to satisfy some other urgent issue will not be without cost. So let us remember: the technicalities of perfected law-making ensure the certainty as to what is and is not law. These technicalities reduce the possibility of applying law *ex post facto*, which undermines one of the struts of the legitimacy of law and when it is applied in a criminal law setting, breaches one of the fundamental moral compacts integral to a Rule of Law system. The technicalities of perfected law-making also prevent harassment of citizens by the legal apparatus, a technique dear to fascism.

74. When the reason of the law ceases, the law itself ceases.

III

I have expressed concern at the increasing reliance on unperfected legal acts in adjudicative settings. I am not, however, suggesting that the baby be thrown out with the bathwater. The fact remains that important information—possibly vital legal information—is often to be found in unperfected legal acts, much as vital information for medical research may be found in stem cells. The international legal system, like the legal and ethical systems of advanced science-based and technological civilizations confronting stem cell research, will have to develop a hermeneutic both to optimize the values of formalities while allowing examination of unperfected legal acts for information about the formation of new international law. For though I contend that the formalities that signify the perfection of a legal act have important ethical and efficiency values, I am not arguing for a return to a strict formalism that insists upon a sharp distinction between perfected and unperfected legal acts.

One of the features of the international social process is, on the one hand, its extraordinary complexity and rapid change, characteristics that underline, wherever they manifest themselves, a constant need for law. On the other hand, a complementary feature is the rather primitive level of articulation and development of the institutions and practices for making and changing law and terminating legal arrangements that have become obsolete. In these circumstances, an insistence on strict formalism would disserve and could even undermine public order, which is the *sine qua non* of law. Many of the efforts to ignore formal requirements and to rely upon manifestly unperfected acts, including the rise of so-called “soft law,” are both symptoms of international law’s structural problem of law-making and efforts to solve or circumvent it. Those who care deeply about values become frustrated with the often glacial pace of international legal response and seek short-cuts.⁷⁵ I confess that, at times, I have proposed some possible solutions that themselves blur the classical distinction between perfected and unperfected

75. Consider, for example, codification treaties. Codification treaties are treaties that purport to codify, in treaty form, a body of theretofore customary international law. If particular rules of customary international law were already binding on all states, then the act of their codification in the form of a treaty which is then to be ratified should not deprive the rules in question of their binding character even though the treaty in question never comes into force or, if it does, even though a particular state never adheres to it. In theory, this form of unperfected act does not seem problematic, but the impression is misleading, for codification exercises often incorporate some so-called “progressive development,” one of international law’s euphemisms for legislation.

international legal acts.⁷⁶ But the search for solutions to a persistent structural problem of international law should bear in mind the policies that underpin the requirements of formality in law and the costs of disregarding them. Proposed solutions that seek to address the need for a more rapid and flexible international law-making should accommodate those enduring policies as much as possible, insofar as those values are still important for the world community.

In international law's sociology of knowledge, unperfected legal acts are routinely examined and assigned some legal valence. Scholars quite properly use such material to assess incipient changes, and treatise and monograph writers are expected to determine whether some unperfected legal material is, or is in the process of becoming, customary international law. This is a perfectly proper use of unperfected legal material, because one of the functions of the scholar is to anticipate trends and to appraise incipient developments in terms of the impacts they may have on the most important goals of the international system. The most acute problem with unperfected legal material occurs when judges and arbitrators purport to rely upon it. It is vital that they appreciate that when they are performing the role of judge or arbitrator, there are constitutive implications to their actions that transcend the case they are deciding. Hence they must use a different set of legal tools. Scholars may cautiously reconstruct unperfected legal acts in international law. Judges and arbitrators, I submit, should not.

76. See generally W. Michael Reisman, *International Lawmaking: A Process of Communication*, Lasswell Memorial Lecture, American Society of International Law (Apr. 24, 1981) in 75 AM. SOC'Y INT'L L. PROC. 101 (1981).

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