I. INTRODUCTION

Recorded instances in which errors of substance have been invoked as affecting the essential validity of a treaty are few, and almost all of them concern geographical errors. The following illustrations of such errors were cited by the Harvard Law School research group on the law of treaties in their draft (The Harvard Draft): (1) The Treaty of August 5th, 1772, between Russia and Austria for the first partition of Poland and the treaty of cession of September 18, 1773, between Poland and Austria, both provided that the new frontier of Poland should follow a petty stream, which was later found to have no existence. (2) The Treaty of September 3rd, 1783, between the U.K. and U.S. referred to the Northwest angle of Nova Scotia as being formed by a line drawn due North from the source of the St. Croix river. The map used by the negotiators correctly represented the existence of a river, but it did not designate its true course or position, nor was there any river in the region commonly known by that name. (3) The Treaty of February 22nd, 1819, between the United States and Spain described the United States frontier (West of the Mississippi River) as following in part the Rio Roto westward to 100th degree of longitude as laid down in Melish’s map published in Philadelphia in 1818. This map, however, located the 100th meridian far east of its true site.1

The above instances have one thing in common; the source of error was insufficient geographical knowledge. With more extensive geographical knowledge such errors are likely to be eliminated, thereby deleting the major source of error in international agreements. Considering, furthermore, that the whole process of treaty making is very deliberate and subject to numerous checks, the chance of error in international agreements becomes rather remote. That errors in international agreements are unlikely to occur does not, however, render all discussion of it obsolete. The special reporter on the Law of Treaties, Mr. Fitzmaurice, stated in his third report to the I.L.C.:

“Even if certain situations occur but seldom, international law can not entirely neglect to provide for them. There are clearly dangers in failing to define concepts which if left undefined might be made the basis of process that could be detrimental to the stability and certainty of treaty obligations.”2

Mr. Fitzmaurice included in his draft proposal the possibility of invoking error as

invalidating state consent to be bound by a treaty. This proposal was accepted by the commission and by the Vienna Conference. Art. 48 of the Convention deals with error and reads:

"1. A State may invoke an error in a treaty as invalidating its consent to be bound by the treaty if the error relates to a fact or situation which was assumed by that State to exist at the time when the treaty was concluded and formed an essential basis of its consent to be bound by the treaty.

2. Paragraph 1 shall not apply "if the State in question contributed by its own conduct to the error" or "if the circumstances were such as to put that State on notice of a possible error."

3. An error relating only to the wording of the text of a treaty does not affect its validity; article 79 then applies."

The purpose of this paper is to analyze this article in light of its legislative history and with references to examples taken from judicial practice. If, as close examination of the article will suggest, it is to be presumed that Article 48 is a codification of customary international law, the article applies to all international agreements including those entered into by states that are not party to the Convention. The I.C.J. has on several occasions used different articles of the Convention without qualifications to settle disputes between states that were at the time not parties to the Convention. The rules of Articles 48 would moreover apply to international agreements concluded between other subjects of international law. It must be kept in mind, however, when applying customary international law binding upon states to other subjects of international law, that the rules must be modified to take into account the difference in legal capacities.

Different procedural rules for invoking error are applicable to States parties to the Convention than other international entities. These procedures are examined in Part VI of this paper.

II. EXAMPLES TAKEN FROM JUDICIAL PRACTICE

A. The Mavromatis Jerusalem Concession Case

(P.C.I.J., Series A, No. 5)

This case, brought by Greece against the United Kingdom in its capacity as Mandatory Power for Palestine, arose out of a refusal on the part of the Palestine Govern-

3. See for instance, The Namibia Case, the IACO Council Jurisdiction Case and the Fisheries Jurisdiction Cases, infra p. 100–103.

4. Article 3(b) of the Convention states:
The fact that the present Convention does not apply to international agreements concluded between States and other subjects of international law or between such other subjects of international law, shall not affect the application to them of any of the rules set forth in the present Convention to which they would be subject under international law independently of the Convention.