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**Fourth report on the Law of Treaties by Mr. G. G. Fitzmaurice, Special Rapporteur**

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# LAW OF TREATIES

## [Agenda item 3]

### DOCUMENT A/CN.4/120

#### Fourth report by Sir Gerald Fitzmaurice, Special Rapporteur

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#### CONTENTS

	<i>Page</i>
INTRODUCTION . . . . .	39
 <b>I. Text of articles</b>  	
SECOND CHAPTER. THE EFFECTS OF TREATIES	
<i>Part I. The effects of treaties as between the parties (operation, execution and enforcement)</i>	
Article 1. Scope of part I . . . . .	41
Division A. Operation and execution of treaties	
Section 1. Character, extent and limits of the treaty obligation	
Article 2. Fundamental principles governing the treaty obligation . . . . .	42
Sub-section i. Nature and extent of the treaty obligation	
Article 3. Obligatory character of treaties : <i>ex consensu advenit vinculum</i> . . . . .	42
Article 4. Obligatory character of treaties : <i>pacta sunt servanda</i> . . . . .	42
Article 5. Obligatory character of treaties : relationship of obligations to rights . . . . .	42
Article 6. Obligatory character of treaties : the principle of the unity and continuity of the State . . . . .	43
Article 7. Obligatory character of treaties : the principle of the supremacy of international law over domestic law . . . . .	43
Article 8. Obligatory character of treaties : the case of conflicting treaty obligations . . . . .	43
Sub-section ii. Limits of the treaty obligation (circumstances justifying non-performance)	
Rubric (a) General principles and classification	
Article 9. General definition of non-performance justified by operation of law . . . . .	43
Article 10. Scope of the present subsection . . . . .	44
Article 11. Classification . . . . .	44
Article 12. Certain general considerations applicable in all cases where a right of non-performance by operation of law is invoked . . . . .	44
Rubric (b) Non-performance justified <i>ab extra</i> by operation of a general rule of international law	
Article 13. Acceptance of non-performance by the other party or parties . . . . .	44
Article 14. Impossibility of performance . . . . .	44
Article 15. Legitimate military self-defence . . . . .	45
Article 16. Civil disturbances . . . . .	45
Article 17. Certain other emergency conditions . . . . .	45
Article 17A. Previous non-performance by another party . . . . .	45
Article 18. Non-performance by way of legitimate reprisals . . . . .	45
Rubric (c) Non-performance justified <i>ab intra</i> by virtue of a condition of the treaty implied in it by international law	
Article 19. Scope of the present rubric . . . . .	46
Article 20. Conditions implied in the case of all treaties : condition of reciprocity or continued performance by the other party or parties . . . . .	46
Article 21. Conditions implied in the case of all treaties : condition of continued compatibility with international law . . . . .	46
Article 22. Conditions implied in the case of all treaties : condition of unchanged status of the parties . . . . .	46

	<i>Page</i>
Article 23. Conditions implied in the case of particular classes of treaties . . . .	47
Section 2. Particular questions of treaty application	
Sub-section i. Temporal and territorial application of treaties	
Rubric (a) Temporal application	
Article 24. Beginning and duration of the treaty obligation . . . . .	47
Rubric (b) Territorial application	
Article 25. General principles . . . . .	47
Article 26. Application to metropolitan territory . . . . .	48
Article 27. Application to dependent territories . . . . .	48
Article 28. Determination of the status of metropolitan and dependent territories . .	48
Sub-section ii. Effect of the treaty on the internal plane	
Rubric (a) Effect of treaties on and respecting the institutions of the State	
Article 29. Relevance of the domestic aspects of treaty application . . . . .	48
Article 30. Duties of States in relation to their laws and constitutions . . . . .	49
Article 31. Position and duties of particular organs of the State . . . . .	49
Rubric (b) Effects of treaties on and in respect of private individuals and juristic entities within the State	
Article 32. Treaties involving obligations for private individuals or juristic entities	49
Article 33. Treaties involving benefits for private individuals or juristic entities . .	49
Sub-section iii. Miscellaneous particular questions of treaty application . . . . .	49
Division B. Consequences of and redress for breach of treaty	
Section 1. Consequences of breach of treaty	
Article 34. Basic principles . . . . .	49
Article 35. Method of discharging the responsibility arising from breach of treaty	50
Article 36. Consequences of breaches of treaties involving benefits for individuals	50
Section 2. Modalities of redress for breaches of treaty	
Sub-section i. General statement of available remedies	
Article 37. Action by way of redress open to the parties . . . . .	50
Sub-section ii. Special procedural considerations affecting certain means of redress	
Article 38. Case (c) of Article 37 . . . . .	51
Article 39. Cases (e) and (f) of Article 37 . . . . .	51

## II. Commentary on the articles

### SECOND CHAPTER. THE EFFECTS OF TREATIES

#### *Part I. The effects of treaties as between the parties (operation, execution and enforcement)*

Article 1. Scope of part I . . . . .	51
Division A. Operation and execution of treaties	
Section 1. Character, extent and limits of the treaty obligation	
Article 2. Fundamental principles governing the treaty obligation . . . . .	52
Sub-section i. Nature and extent of the treaty obligation	
Article 3. Obligatory character of treaties: <i>ex consensu advenit vinculum</i> . . . .	53
Article 4. Obligatory character of treaties: <i>pacta sunt servanda</i> . . . . .	53
Article 5. Obligatory character of treaties: relationship of obligations to rights . .	54
Article 6. Obligatory character of treaties: the principle of the unity and continuity of the State . . . . .	54
Article 7. Obligatory character of treaties: the principle of the supremacy of international law over domestic law . . . . .	58
Article 8. Obligatory character of treaties: the case of conflicting treaty obligations	61
Sub-section ii. Limits of the treaty obligation (circumstances justifying non-performance)	
Rubric (a) General principles and classification	
Article 9. General definition of non-performance justified by operation of law . .	62
Article 10. Scope of the present sub-section . . . . .	62
Article 11. Classification . . . . .	63
Article 12. Certain general considerations applicable in all cases where a right of non-performance by operation of law is invoked . . . . .	63
Rubric (b) Non-performance justified <i>ab extra</i> by operation of a general rule of international law	
Article 13. Acceptance of non-performance by the other party or parties . . . .	63
Article 14. Impossibility of performance . . . . .	64
Article 15. Legitimate military self-defence . . . . .	64
Article 16. Civil disturbances . . . . .	65
Article 17. Certain other emergency conditions . . . . .	66
Article 17A. Previous non-performance by another party . . . . .	66
Article 18. Non-performance by way of legitimate reprisals . . . . .	66

	<i>Page</i>
Rubric (c) Non-performance justified <i>ab intra</i> by virtue of a condition of the treaty implied in it by international law	
Article 19. Scope of the present rubric . . . . .	70
Article 20. Conditions implied in the case of all treaties: condition of reciprocity or continued performance by the other party or parties . . . . .	70
Article 21. Conditions implied in the case of all treaties: condition of continued compatibility with international law . . . . .	71
Article 22. Conditions implied in the case of all treaties: condition of unchanged status of the parties . . . . .	72
Article 23. Conditions implied in the case of particular classes of treaties . . . . .	73
Section 2. Particular questions of treaty application	
Sub-section i. Temporal and territorial application of treaties	
Rubric (a) Temporal application	
Article 24. Beginning and duration of the treaty obligation . . . . .	74
Rubric (b) Territorial application	
Article 25. General principles . . . . .	74
Article 26. Application to metropolitan territory . . . . .	74
Article 27. Application to dependent territories . . . . .	75
Article 28. Determination of the status of metropolitan and dependent territories . . . . .	76
Sub-section ii. Effect of the treaty on the internal plane	
Rubric (a) Effect of treaties on and respecting the institutions of the State	
Article 29. Relevance of the domestic aspects of treaty application . . . . .	76
Article 30. Duties of States in relation to their laws and constitutions . . . . .	76
Article 31. Position and duties of particular organs of the State . . . . .	78
Rubric (b) Effects of treaties on and in respect of private individuals and juristic entities within the State	
Article 32. Treaties involving obligations for private individuals or juristic entities . . . . .	78
Article 33. Treaties involving benefits for private individuals or juristic entities . . . . .	79
Sub-section iii. Miscellaneous particular questions of treaty application . . . . .	79
Division B. Consequences of and redress for breach of treaty	
Section 1. Consequences of breach of treaty	
Article 34. Basic principles . . . . .	80
Article 35. Method of discharging the responsibility arising from breach of treaty . . . . .	80
Article 36. Consequences of breaches of treaties involving benefits for individuals . . . . .	81
Section 2. Modalities of redress for breaches of treaty	
Sub-section i. General statement of available remedies	
Article 37. Action by way of redress open to the parties . . . . .	81
Sub-section ii. Special procedural considerations affecting certain means of redress	
Article 38. Case (c) of Article 37 . . . . .	81
Article 39. Cases (d), (e) and (f) of Article 37 . . . . .	81

## Introduction

1. In his three previous reports,<sup>1</sup> the Rapporteur covered the subjects of the conclusion and termination of treaties (formal and temporal validity), and also that of essential validity; and although he may wish to suggest modifications in some of the articles proposed and the views expressed in those reports, they complete a chapter on the general topic of validity for a Code on the Law of Treaties. It remains to deal with the rest of the subject. Having considered what brings a treaty into existence, what makes it valid, and what brings it to an end, it then becomes necessary to consider what effects it has during the period of its existence.

<sup>1</sup> Document A/CN.4/101 in *Yearbook of the International Law Commission, 1956*, vol. II (United Nations publication, Sales No.: 1956.V.3, vol. II), p. 104; document A/CN.4/107 in *Yearbook of the International Law Commission, 1957*, vol. II (United Nations publication, Sales No.: 1957.V.5, vol. II), p. 16; document A/CN.4/115 in *Yearbook of the International Law Commission, 1958*, vol. II (United Nations publication, Sales No.: 58.V.1, vol. II), p. 20.

2. This is obviously a matter that depends primarily on the terms of the treaty itself, and which, in that sense, is peculiar to each individual treaty—or, up to a point, class of treaties. In that sense, no general rules can be formulated on the subject other than the rules of treaty interpretation—and these do not consist so much of rules as to what the effects of treaties in fact are, but rather of rules for (so to speak) deciding how to decide what is the effect of a particular treaty or treaty provision, or class of either. In short, rules of (or for) interpretation represent adjectival rather than substantive law. Moreover, such rules are necessary for determining not only the effect of a given treaty, but also questions relating to its conclusion and entry into force, its essential validity and its termination. In other words, the rules of treaty interpretation qualify the whole subject, and not merely that part of it that relates to the topic of the effects of treaties. Therefore, despite the fact that “interpretation” and “effects” are often coupled together—witness such phrases as “The interpretation and application of treaties”—the Rapporteur

considers that they are separate, and must be separately dealt with. The subject of interpretation would accordingly form a separate and later chapter of the Code, the provisions of which would, so far as requisite, be relevant to and capable of use in connexion with all other parts of the Code.

3. But if the subject of interpretation must be treated separately from that of effects, and if also the effects of any given treaty depend primarily on the individual terms of that treaty, and to that extent cannot therefore be determined on an *a priori* basis, what then is left for a chapter on the "Effects of Treaties"? Clearly what will be left, and what will be comprised in such a chapter, will be all those rules which combine the two following characteristics, namely:

(a) Of depending not on the interpretation of the particular treaty, but on objective rules of general international law outside the treaty—rules that apply to treaties but do not derive from them;

(b) Of being applicable generally and indifferently, either to *all* treaties irrespective of their particular content; or, in some cases, only to certain well-defined classes of treaties—but again, irrespective of the particular content of the treaty within its class. Under these heads would come, first of all, an important set of general rules governing the juridical nature of the treaty obligation—its extent (i.e., in what circumstances and despite what conflicts or impediments it must always be performed or responsibility be incurred for non-performance); and its limits (i.e., in what circumstances non-performance will be justified and will not give rise to responsibility). Next there are rules governing more particular questions of application (but questions still common to all or most treaties) such as territorial application, application to and in respect of the individual organs or institutions of the State on the domestic plane, and application to and in respect of private individuals or entities within the State. Finally, there is the topic of the consequences of breach of a treaty obligation, and of redress for such breach (sometimes, though not very appropriately, known as "enforcement"). It can be maintained that this last topic is not really part of the subject of treaty "effects". Nevertheless, as will be seen, it is so closely linked to it as not in practice to be separable.

4. The topics just mentioned arise principally in the application of the treaty for, or as between, the actual parties to it. They are treated of in the present report as part I of a chapter on "The Effects of Treaties". There is, however, also the subject of the effects of treaties for and in relation to "third States", not parties to the treaty concerned. This will constitute part II of the chapter and will be covered by a later report.

5. The subject-matter of the present report has presented the Rapporteur with various difficulties. One of these (probably precisely because the effects of a treaty depend primarily on its particular terms, rather than on general rules of law) is that most authorities devote extremely little space to it, and few make any attempt to deal with it systematically—still fewer to treat of it comprehensively. Rousseau<sup>2</sup> is systematic

and more comprehensive than most writers. The Harvard Volume on Treaties<sup>3</sup> deals fairly exhaustively with the positive aspects of the character of the treaty obligation, but hardly goes beyond that. Arnold D. McNair's Law of Treaties,<sup>4</sup> based on the opinions of the English Law Officers of the Crown, deals illuminatingly with a large number of miscellaneous points. Some of the private codes (Field, Fiore, Bluntschli, Bustamante, and others)<sup>5</sup> contain a number of provisions on the subject. Many writers, however, hardly touch on it, or do so only as part of the subject of treaty interpretation. The Rapporteur has therefore had to rely somewhat heavily on his own experience or inclinations for filling up gaps or dealing with obscurities.

6. Another difficulty is that, while the Rapporteur has tried to make the draft as comprehensive as possible, it is probable that further study of the matter might bring to light a considerable number of points which, if by no means pertinent to the subject of the effects of "all" treaties, might be relevant to a sufficiently large number (or to sufficiently prominent classes) of treaties, to warrant inclusion. But to take this further would require not only a systematic study of a great many individual treaties, but also, in all probability, information from Governments as to their practice in relation to these treaties or classes of treaties. The Rapporteur has not yet been able to make such a study; and further, although reference is made to the matter in the body of the report,<sup>6</sup> he doubts whether, for the immediate purposes of the present report, it is necessary to do so. It will be better to establish the more general principles first. If later it is thought desirable and practical to do so, it will always be possible to add one or more sections dealing with matters of detail arising with reference to the application of certain kinds or classes of treaties.

7. Then there are the usual difficulties of classification, arrangement and overlapping. These are, so to speak, both "internal" and "external". "Internally", parts of the present draft could be differently classified or arranged, and tend to overlap with others. For instance, the whole subject of the consequences of breach of treaty is closely linked to that of what justification there may be in certain cases for the non-observance of a treaty. Again, the more detailed aspects of the topic of the effect of a treaty on the domestic plane, in relation to its organs and governmental institutions, is really part of, and derives from, such general principles concerning the juridical character of the treaty obligation, as that of the supremacy of international over domestic law with reference to the discharge by a State of its international obligations. Yet again, there must be some doubt under precisely which head to classify the reciprocity principle in the application of treaties. All

<sup>3</sup> Harvard Law School, *Research in International Law*, III. *Law of Treaties*, Supplement to the *American Journal of International Law*, vol. 29, 1935, Washington, D.C., The American Society of International Law, ed., pp. 707-710.

<sup>4</sup> Oxford, Clarendon Press, 1938.

<sup>5</sup> The texts of some of these figure in the annexes to the Harvard Volume.

<sup>6</sup> See article 23, and paragraphs 113 and 162 of the commentary.

<sup>2</sup> Charles Rousseau, *Principes généraux du droit international public* (Paris, Editions A. Pedone, 1944), vol. I, pp. 355-451.

these matters are further discussed in the body of the report.<sup>7</sup> In general, the Rapporteur has, in matters of classification and arrangement, followed in the present report the system of Rousseau but is not satisfied that he (i.e., the Rapporteur) has made the best use of it. It may be possible to suggest improvements later, before the time when the Commission comes to deal with this part of the subject.

8. "Externally", there is inevitably some overlapping with previous reports. The whole subject of treaties is one that is rather specially susceptible to the possibility that theoretically distinct portions of it have strong practical affinities or relationships with others. Several of the general principles considered in the present report have already proved relevant in connexion with the subject-matter of previous reports. Again some of the grounds justifying non-performance of a particular treaty obligation are identical with some of those causing or justifying the *termination* of a treaty. Yet, for reasons fully explained in the body of the report,<sup>8</sup> the two subjects are quite distinct, if only because in the case of termination (considered in the Rapporteur's second report) the treaty ends altogether, while in the other (considered in the present report) it does not in general do so, and (if a paradox is permissible) the non-performance is not only justified, but "looks towards" a resumption of performance so soon as the factors causing and justifying the non-performance are no longer present, or have ceased to exist. It may eventually be possible to "marry" certain elements at present treated of in different reports, but for the moment this must await further consideration.

9. Finally, there are difficulties inherent in the whole subject, of a kind that has been mentioned in the introductions to previous reports—for instance, that of finding formulae or principles that really are applicable to all treaties, and the necessity for some purposes of distinguishing certain categories from others. Similarly, general phrases such as "breach of treaty" are constantly employed; but not all breaches or infractions are of the same order. Infractions may take such diverse forms as (a) failure by a party to perform some positive obligation which it is itself under a duty to perform; (b)—a subdivision or other aspect of (a)—failure or refusal to grant the other party treatment to which that party is entitled under the treaty; (c) failure or refusal to allow the other party to perform some act, or to exercise some right or licence, which, under the treaty, it is entitled to perform or exercise; (d) the taking of any action by one party which is subject to a treaty *prohibition*. At least for the purpose of dealing with the consequences of breach of treaty, it is necessary to distinguish between these different cases; a closer study might well show that this should also be done for certain other purposes.

10. In conclusion, the Rapporteur would like to say that he has followed the precedents of his previous reports in three respects: first, in drafting the articles not in the precise and rather tight language appropriate to such an instrument as an international convention, intended to be signed and ratified by States, but rather

in the more colloquial and less formal language that (within certain limits, of course) is permissible, and up to a point desirable, in a code; secondly, in putting as much into the articles themselves as is reasonably possible without overloading them, so that they are relatively self-explanatory and could stand without a commentary, though the latter is in fact provided; and thirdly, in not shirking or minimizing, but rather attempting to bring out, the difficulties of the subject, which are often glossed over, or completely ignored.

11. With reference to the last of these points, the Rapporteur feels that it is only in the light of a full appreciation of the difficulties involved that the Commission will eventually be able to devise a satisfactory and probably simplified and much improved text. He has, therefore, in the present report as in previous ones, regarded it as part of his duty as Rapporteur to try and draw attention to all the relevant factors and aspects of the subject.

## I. TEXT OF ARTICLES

### Second Chapter. The effects of treaties

[1. The present report starts a second chapter of a draft Code on treaties, covering the effects of treaties. The Rapporteur's previous three reports (dated 1956-1958 inclusive) completed a first chapter on validity (formal, temporal and essential; or the conclusion, termination and essential validity of treaties).

2. Subject to possible modification later, the present (second) chapter, which is to be followed in due course by a third chapter on the interpretation of treaties, will consist of two main parts:

*Part I. The effects of treaties as between the parties (operation, execution and enforcement), which is the subject of the present report.*

*Part II. The effects of treaties as regards third States, to form the subject of a subsequent (1960 report.)*

*Part I. The effects of treaties as between the parties (operation, execution and enforcement)<sup>9</sup>*

#### Article 1. Scope of part I

1. The effect of a treaty as between the parties thereto depends primarily on the substantive content and terms of the treaty, as correctly interpreted and determined according to the principles of interpretation

<sup>9</sup> The present part I has two main divisions:

A. Operation and execution of treaties.

B. Consequences of and redress for breach of treaty (enforcement).

These divisions are subdivided as follows:

Division A:

Section 1. Character, extent and limits of the treaty obligation.

Sub-section i. Nature and extent of the treaty obligation.

Sub-section ii. Limits of the treaty obligation (circumstances justifying non-performance).

<sup>7</sup> See paragraphs 172, 142 and 101 of the commentary.

<sup>8</sup> See paras. 55-57 and 67 of the commentary.

set out in chapter 3 of the present Code (which will form the subject of a later report). In consequence, the present chapter purports to contain only those general principles and rules relating to the effects of treaties which are applicable to all treaty instruments indifferently, and irrespective of the particular character of their content.

2. Except as regards the fundamental principles of treaty law set out in article 2 below, and further developed in certain subsequent articles, the application of any provision of this part of the present chapter may be negated or modified by an express term of the treaty excluding it.

## DIVISION A. OPERATION AND EXECUTION OF TREATIES

### SECTION 1 : CHARACTER, EXTENT AND LIMITS OF THE TREATY OBLIGATION

#### *Article 2. Fundamental principles governing the treaty obligation*

1. In general, and subject to the specific provisions of this part of the present chapter, the effects of treaties (apart from such as are derived from the actual content of the treaty) depend on the application of, and on appropriate inferences to be drawn from, the following principles of general international law, namely:

- (a) The principle of consent (*ex consensu advenit vinculum*);
- (b) The principle *pacta sunt servanda*;
- (c) The principle of the unity and continuity of the State;
- (d) The principle of the supremacy of international law over domestic law;
- (e) The principle *pacta tertiis nec nocent nec prosunt*.

virtue of a condition of the treaty implied in it by international law.

#### Section 2. Particular questions of treaty application.

Sub-section i. Temporal and territorial application of treaties.

Rubric (a). Temporal application.

Rubric (b). Territorial application.

Sub-section ii. Effect of the treaty on the internal plane.

Rubric (a). Effect of treaties on and respecting the institutions of the State.

Rubric (b). Effects of treaties on and in respect of private individuals and juristic entities within the State.

#### Division B :

Section 1. Consequences of breach of treaty.

Section 2. Modalities of redress for breaches of treaty.

Sub-section i. General statement of available remedies.

Sub-section ii. Special procedural considerations affecting certain means of redress.

Rubric (a). General principles and classification.

Rubric (b). Non-performance justified *ab extra* by operation of a general rule of international law.

Rubric (c). Non-performance justified *ab intra* by

### SUB-SECTION I. NATURE AND EXTENT OF THE TREATY OBLIGATION

#### *Article 3. Obligatory character of treaties : ex consensu advenit vinculum*

1. The immediate foundation of the treaty obligation is the consent given to it by the parties, it being an antecedent principle of international law that consent finally and validly given creates a legally binding obligation.

2. The foundation of treaty rights is equally the consent given to the enjoyment of those rights, and the undertaking to accord them.

#### *Article 4. Obligatory character of treaties : pacta sunt servanda*

1. A treaty being an instrument containing binding undertakings and creative of vested rights, the parties are under a legal obligation to carry it out.

2. A treaty must be carried out in good faith, and so as to give it a reasonable and equitable effect according to the correct interpretation of its terms.

3. In relation to any particular treaty, the application of the foregoing provisions is conditional on the treaty possessing the necessary validity under chapter 1 of the present Code—that is to say, on its having been regularly concluded and come into force in accordance with the provisions of part I of that chapter; on its possessing essential validity under part II; and on its being still in force and not validly terminated in accordance with part III. In the case of multilateral treaties, these conditions must obtain not only in respect of the treaty itself, but also in respect of the participation of the particular party whose rights or obligations are in question.

4. It follows from the foregoing provisions of the present article that the existence of circumstances falling within one of the two following classes of cases cannot of itself justify non-performance of the treaty obligation:

(a) That there is a dispute or disagreement between the parties, or a state of strained relations, or that diplomatic relations have been broken off;

(b) That the treaty obligation has become difficult or onerous of execution for the party concerned, or is felt by that party to have become inequitable or prejudicial to its interests.

#### *Article 5. Obligatory character of treaties : relationship of obligations to rights*

1. In general, though with particular reference to the case of multilateral treaties:

(a) A party to a treaty has a duty towards the other party or parties to carry it out, irrespective of whether any direct benefits to such other party or parties will accrue therefrom; and correspondingly, any party to a treaty has, as the counterpart of its own obligation, the right to require due performance by any other party of its obligations under the treaty, irrespective of any such factor;

(b) Each party is under an obligation to refrain from applying a treaty in such a way, from taking such action in relation to it, or from otherwise so conducting itself, as may be calculated to impair the authority of the treaty as a whole, to diminish the force of the treaty obligation, or to prejudice the enjoyment of the rights or benefits the treaty provides for, whether on the part of the other party or parties as such, or of individual persons or entities.

*Article 6. Obligatory character of treaties: the principle of the unity and continuity of the State*

1. The rights and obligations provided for in the treaty attach to the parties to it as States, irrespective of the particular form or method of its conclusion. The Government or administration of the State for the time being, irrespective of the character of its origin, or of whether it came into power before or after the conclusion of the treaty, acts as the agent of a State to carry the treaty out, or to claim rights and benefits under it, as the case may be, and is bound or entitled accordingly.

2. In consequence, the treaty obligation, once assumed by or on behalf of the State, is not affected, in respect of its international validity or operative force, by any of the following circumstances:

(a) That there has been a change of government or régime in any State party to the treaty;

(b) That some particular organ of the State (whether executive, administrative, legislative or judicial) is responsible for any breach of the treaty;

(c) That a diminution in the assets of the State, or territorial changes affecting the extent of the area of the State by loss or transfer of territory (but not affecting its existence or identity as a State), have occurred, unless the treaty itself specifically relates to the particular assets or territory concerned.

In all such cases, the treaty obligation remains internationally valid, and the State will incur responsibility for any failure to carry it out.

*Article 7. Obligatory character of treaties: the principle of the supremacy of international law over domestic law*

1. In case of conflict, obligations arising under a treaty take precedence of, and prevail internationally over the provisions of the internal law or constitution of any party to it.

2. Accordingly, the treaty obligation, once assumed, is not affected in respect of its international validity and operative force by the existence of inconsistencies between it and the provisions of the internal law or constitution of the party concerned, whether these have been enacted previously or subsequently to the coming into force of the treaty; not by deficiencies or *lacunae*, or special features or peculiarities of the law or constitution or governmental organization of that party which may affect the performance of the obligation on the internal plane. In all such cases, the obligation remains internationally valid, and the State will incur responsibility for any failure to carry it out.

3. The foregoing provisions of the present article apply where any provision of the local law or constitution has the effect of defeating or preventing the performance of the treaty obligation, or of justifying its non-performance on the internal plane—irrespective of the particular subject-matter of that provision, and of whether it does or does not purport to relate specifically to the treaty or the class of matter covered by the treaty, or is said to have an object or purpose different from that of the treaty.

*Article 8. Obligatory character of treaties: the case of conflicting treaty obligations*

1. Except as provided in paragraph 3 below, a conflict between two treaties, both of them validly concluded, can in principle only be resolved on the basis that both have equal force and effect, in the sense that the parties incur international responsibility under each of them. In such a case, the question which of the two treaties is actually to be carried out, and which, by reason of the fact that it cannot be or is not carried out, gives rise to a liability to pay damages or make other suitable reparation for a breach thereof, is governed by the provisions of articles 18 and 19 of part II of chapter 1 of the present Code.

2. Accordingly, the mere fact that a treaty obligation is incompatible with obligations under another treaty is not in itself a ground justifying non-performance.

3. The foregoing provisions of the present article do not apply:

(a) Where an obligation under one treaty is superseded, cancelled, or replaced by an obligation under a later treaty between identical parties;

(b) As between States parties to both treaties, and having intended, as between themselves, to supersede, cancel, or replace the earlier obligation;

(c) Where, according to the provisions of article 18 of part II of chapter 1 of the present Code, one of the treaties or treaty obligations concerned is rendered null and void by reason of conflict with the other;

(d) By reason of Article 103 of the Charter of the United Nations:

(i) As between Member States of the United Nations, in respect of any treaty obligation in conflict with the obligations of the Charter;

(ii) As between a Member and a non-member State, as respects the performance of any such conflicting obligation, but not as respects international responsibility and liability for the resulting non-performance.

SUB-SECTION II. LIMITS OF THE TREATY OBLIGATION  
(CIRCUMSTANCES JUSTIFYING NON-PERFORMANCE)

RUBRIC (a). GENERAL PRINCIPLES AND CLASSIFICATION

*Article 9. General definition of non-performance justified by operation of law*

1. In certain special cases, international law operates to confer a right of non-performance where this would not otherwise have existed according to the actual terms, express or implied, of the treaty itself.



2. In such cases, international law necessarily operates independently of the terms of the treaty, or of any special agreement between the parties as to non-performance, in the sense that it provides grounds of non-performance that may operate even though they are not specifically contemplated by the treaty or by the agreement of the parties.

#### *Article 10. Scope of the present sub-section*

1. The present sub-section relates to the circumstances justifying *ad hoc* non-performance, either in whole, or as to a particular provision of the treaty—the latter being itself, and remaining, in full force. The separate, though related, question of the circumstances causing or justifying termination or indefinite suspension of a treaty, in whole or in part, is dealt with in part III of chapter 1 of the present Code.

2. It follows that, except in cases where the nature of the circumstances otherwise indicates (as may for instance happen under articles 21, 23 and 24), the present sub-section contemplates cases in which performance can and must be resumed so soon as the circumstances justifying non-performance have ceased to exist.

#### *Article 11. Classification*

1. Non-performance may take place only under the treaty itself or by operation of law. It will therefore be justified if and only if:

(a) It occurs in circumstances specifically contemplated and specified by the treaty, or necessarily to be implied from its terms;

(b) The circumstances are such as to give rise to one of the situations provided for in articles 13 to 23 below.

2. It follows that, except where non-performance is contemplated by an express or implied term of the treaty, it can only be justified by operation of law, that is to say:

(a) Either *ab extra*, by the operation of a general rule of international law permitting non-performance in certain circumstances;

(b) Or *ab intra*, by the operation of a condition which, whether it is actually expressed in a treaty or not, is deemed by international law to be implied, either in all treaties, or in the particular class to which the treaty concerned belongs.

#### *Article 12. Certain general considerations applicable in all cases where a right of non-performance by operation of law is invoked*

1. Where the provisions of the treaty specifically exclude any grounds of non-performance, such provisions will prevail, notwithstanding the fact that non-performance on these grounds would otherwise be justified by operation of law. The same applies where a treaty obligation is specifically entered into with reference (and is intended to apply) to a state of affairs that might otherwise give rise to a right of non-performance.

2. In those cases where the operation of international law gives a faculty of non-performance, such faculty must be exercised within a reasonable time after it is alleged to have arisen. Failure to do this will entitle the

other party or parties to claim execution of the treaty in full, provided that the treaty is being duly executed by such party or parties.

3. Where the event, occurrence or circumstances giving rise to the ground of non-performance by operation of law has been directly caused or contributed to by the act or omission of the party invoking it (unless this act or omission was itself both necessary and legally justified), such party will either be precluded from invoking the ground in question, or (if the event, occurrence or circumstances nevertheless in their nature entail non-performance) will incur responsibility for any resulting damage or prejudice, and will be liable to make reparation therefor.

4. *Mutatis mutandis*, the case of non-performance of a treaty obligation by operation of law is subject to the same considerations and to the same rules as are set out in paragraph 5 of article 16 in part III of chapter 1 of the present Code for the case of the termination or suspension of a treaty by operation of law.

RUBRIC (b). NON-PERFORMANCE JUSTIFIED *ab extra* BY OPERATION OF A GENERAL RULE OF INTERNATIONAL LAW

#### *Article 13. Acceptance of non-performance by the other party or parties*

1. Non-performance, or partial non-performance, of a treaty obligation will not, or will cease to constitute a breach of the treaty, if, either by express agreement, or else tacitly (e.g., by acquiescence or non-objection), the non-performance is accepted by the other party to the treaty, or, in the case of multilateral treaties, is accepted by all the other parties (unless, in the latter case, the obligation is owed to one or more parties only, when acceptance by such party or parties will suffice).

2. The acceptance, even though it may be tacit, must be clear and unmistakable, and must in effect indicate or warrant an inference of actual agreement to non-performance. The mere fact that a party does not seek redress in respect of the non-performance, or avail itself of remedies afforded by the treaty or otherwise, or take counter-action, does not *per se* amount to acceptance of, or acquiescence in, the non-performance.

#### *Article 14. Impossibility of performance*

1. Temporary or *ad hoc* impossibility of performance<sup>10</sup> justifies non-performance of a treaty obligation provided that the impossibility is literal and actual, in the sense of imposing an insuperable obstacle or impediment to performance in the nature of *force majeure*, and not merely of rendering performance difficult, onerous or vexatious.

2. Performance of the treaty must be resumed immediately the obstacle to it is removed or performance otherwise becomes possible again.

<sup>10</sup> See article 10. A temporary or *ad hoc* impossibility is necessarily the only kind that can be relevant in the present context, since if it were permanent it would be a ground for the total termination, or at least the indefinite suspension of the treaty, or treaty obligation, and not merely for a particular non-performance. Impossibility leading to termination or indefinite suspension is dealt with in article 17 of part III of chapter 1 of the present Code.

3. Changed conditions falling short of rendering performance impossible do not in themselves justify non-performance. The principle *rebus sic stantibus* which may, in the circumstances and subject to the conditions stated in articles 21 to 23 of part III of chapter 1 of the present Code, justify the suspension and eventual termination of a treaty, has no application to the case of a particular non-performance of a treaty obligation.

#### Article 15. Legitimate military self-defence

1. The requirements of legitimate military self-defence<sup>11</sup> justify the non-performance of a treaty obligation on such particular occasions as give rise to these requirements, provided :

(a) That, subject to the provisions of paragraph 3 below, actual naval, military or air operations are taking place or are in immediate contemplation ;

(b) That the case is one of legitimate self-defence according to the recognized principles of international law and to any relevant conventional obligations ;

(c) That the non-performance is essential in the circumstances, in the sense that performance would be incompatible with the necessities of self-defence or would seriously prejudice the defence operations involved ;

(d) That the scope and area of non-performance are circumscribed as much as possible and confined to what is strictly necessary for the immediate purposes of self-defence.

2. Except in those cases where war or other hostilities justify the termination or permanent suspension of a treaty or treaty obligation, performance of it, or of any part of it which has not been performed, must be resumed as soon as the requirements of legitimate self-defence are met, or no longer necessitate non-performance, or if the circumstances giving rise to these requirements have ceased to exist.

3. A threat of war or other hostilities, or of the occurrence of events calling for the exercise of legitimate self-defence, will not justify non-performance of a treaty obligation except where the performance would itself directly contribute to such occurrence or to the materialization of the threat.

#### Article 16. Civil disturbances

The provisions of article 15 apply, *mutatis mutandis*, to the case of riots and other civil disturbances, or of civil war.

#### Article 17. Certain other emergency conditions

1. Under the same conditions, *mutatis mutandis*, as those specified in paragraph 1 (c) and (d) of article 15 above, non-performance of a treaty, or of some particular part of it, is justified if rendered absolutely necessary by a major emergency arising from natural

causes, such as storm devastation, floods, earthquakes, volcanic eruptions, wide-spread epidemics or plant diseases on a national or quasi-national scale.

2. In order to justify non-performance in these cases, the circumstances must be such that performance would aggravate the emergency, or would be incompatible with the steps necessary to deal with it, or would render these ineffective or unduly difficult to take.

3. Except in those cases where the emergency renders further performance totally impossible and results on that account in the termination of the whole obligation, performance must be resumed as soon as the emergency is over or conditions make resumption of performance possible.

4. In the absence of emergency conditions of a character clearly affecting the performance of the treaty obligation in the manner specified by paragraphs 1 and 2, the fact that there are circumstances rendering performance difficult or onerous is not a ground justifying non-performance.

#### Article 17A. Previous non-performance by another party

[See article 20 below. Although an article on this subject could figure there, it has seemed to the Rapporteur preferable, for the reasons given in paragraph 102 of the commentary, to place it in rubric (c).]

#### Article 18. Non-performance by way of legitimate reprisals

1. In those cases where a reciprocal, equivalent and corresponding non-observance of a treaty obligation, following on a previous non-observance by another party to the treaty, as provided in article 20 below, would not afford an adequate remedy, or would be impracticable, the non-observance of a different obligation under the same treaty or, according to circumstances, of a different treaty may, subject to the provisions of paragraphs 3 and 4 below, be justified on a basis of legitimate reprisals.

2. The principle of reprisals may also be invoked, subject to the provisions of paragraphs 3 and 4 below, in order to justify the non-observance of a treaty obligation because of the breach by another party to the treaty of a general rule of international law.

3. Whatever the circumstances, action by way of reprisals may only be resorted to :

(a) If, as stated in paragraph 1 of this article, the matter cannot be dealt with by means of the application of the reciprocity rule as provided by article 20 below ;

(b) If the breach of treaty or illegality against which the reprisals are directed has been established or is manifest ;

(c) If prior negotiations or exchanges between the parties have not led to any solution or settlement, or if requests for negotiations, or for a resumption of performance or cessation of the treaty infraction, have been rejected or not responded to ;

(d) If, in those cases where the counter-action does

<sup>11</sup> The case contemplated here is not the same as that of the termination or indefinite suspension of treaties or parts of treaties by reason of war or of hostilities amounting to war (see para. 70 of the commentary below).

not consist simply of a corresponding non-observance of the same obligation, it can be shown to be necessary in the circumstances, in order to provide adequate redress or avoid further prejudice;

(e) Provided that the treaty concerned is not a multilateral treaty of the "integral" type, as defined in article 19, head (b) of part II, and article 19, paragraph 1 (iv) of part III, of chapter 1 of the present Code, where the force of the obligation is self-existent, absolute and inherent for each party, irrespective and independently of performance by the others;<sup>12</sup>

(f) Provided the appropriate procedures set out in article 39 below have first been resorted to.

4. The particular reprisals resorted to must be appropriately related to the occasion giving rise to them, and must also be proportionate and commensurate in their effects to the prejudice caused by the previous non-observance of a treaty or international law obligation by the other State concerned, as well as limited to what is necessary in order to counter such non-observance. They must be conducted in accordance with the general rules of international law governing self-redress by way of reprisals.

5. Non-observance based on legitimate reprisals must cease so soon as occasion for it has ceased by reason of a resumption of performance by the other party or parties concerned.

RUBRIC (c). NON-PERFORMANCE JUSTIFIED *ab intra* BY VIRTUE OF A CONDITION OF THE TREATY IMPLIED IN IT BY INTERNATIONAL LAW

#### *Article 19. Scope of the present rubric*

1. Where a right not to perform a treaty obligation in certain particular circumstances can be derived, or is said to be derivable, by implication from one of the terms of the treaty, the existence and scope of the right depend on the correct interpretation of the treaty itself, and this is a matter governed by the general rules relating to the interpretation of treaties contained in chapter 3 of the present Code (which will form the subject of a later report). The present rubric relates only to the case of conditions implied in or attached to the treaty by operation of law.

2. Alternatively, it is implicit in the type of case treated of in the present rubric that, on the face of it, the treaty concerned creates a specific obligation, so that the question is whether international law implies a condition justifying the non-performance of that obligation in certain circumstances. Since the very issue, whether non-performance is justified, is one that assumes the existence of a *prima facie* or apparent obligation under the treaty, conditions expressed in or implied by the language of the treaty itself relate to the existence and scope of the obligation, not to the justification for its non-performance.

3. A condition implied by law as described in the preceding paragraphs may be implied in the case of all treaties or only of certain particular classes of treaties.

<sup>12</sup> An example of the type of treaty here contemplated would be those of the social or humanitarian kind, the principal object of which is the benefit of individuals.

#### *Article 20. Conditions implied in the case of all treaties of reciprocity or continued performance by the other party or parties*

1. By virtue of the principle of reciprocity, and except in the case of the class of treaties mentioned in paragraph 3 (e) of article 18, non-performance of a treaty obligation by one party to the treaty will, so long as such non-performance continues, justify an equivalent and corresponding non-performance by the other party or parties.

2. In the case of multilateral treaties, however, such non-performance will only be justified in relation to the particular party failing to observe the treaty.

3. Where a treaty provides for certain action to be taken by the parties jointly or in common, it does not follow that the failure or refusal of one party to take or co-operate in taking this action will entitle the other or others to take it alone. This is a matter depending on the interpretation of the particular treaty. However, a renunciation of or failure by a party to exercise a joint right does not affect the right of the other party or parties.

#### *Article 21. Conditions implied in the case of all treaties: condition of continued compatibility with international law*

1. A treaty obligation which, at the time of its conclusion, is incompatible with an existing rule or prohibition of general international law in the nature of *jus cogens*, lacks essential validity *ab initio*, with the consequences set out in articles 21 and 22 of part II of chapter 1 of the present Code. Accordingly, the case contemplated by the present article is that of supervening incompatibility with such a rule or prohibition of international law.

2. A treaty obligation the observance of which is incompatible with a new rule or prohibition of international law in the nature of *jus cogens* will justify (and require) non-observance of any treaty obligation involving such incompatibility, subject to the same conditions, *mutatis mutandis*, as are set out under case (vi) in article 17 of part III of chapter 1 of the present Code in respect of the termination or indefinite suspension of the treaty.

3. The same principle is applicable where circumstances arise subsequent to the conclusion of a treaty, bringing into play an existing rule of international law which was not relevant to the situation as it existed at the time of the conclusion of the treaty.

4. Where the circumstances do not involve incompatibility with a rule or prohibition in the nature of *jus cogens*, but merely a departure from, or variation by, the parties (for application *inter se*) of a rule in the nature of *jus dispositivum*, no ground for non-observance will exist.

#### *Article 22. Conditions implied in the case of all treaties: condition of unchanged status of the parties*

1. In those cases where one or both of the parties to a bilateral treaty lack treaty-making capacity, the treaty

will lack essential validity *ab initio*. In the case of multilateral treaties, the same principle applies to the validity of the participation in the treaty of any entity in this position. These cases are dealt with in article 8 of part II of chapter 1 of the present Code. The present article is accordingly confined to the case of supervening changes in the status of parties originally possessed of treaty-making capacity.

2. The case of an alteration in international status involving a change or total loss of identity of the party concerned, leading (subject to the rules of state succession) to the termination of the treaty as a whole, is governed by the provisions of case (i) in article 17 of part III of chapter 1 of the present Code.

3. Subject to the rules of state succession, a supervening change of international status not involving a complete loss or change of identity will justify non-performance of a treaty obligation in those cases where, as a result of the change, performance is no longer dependent on the sole will of the party concerned. In such circumstances, however, there may arise an obligation for another international entity to perform or ensure performance of the treaty obligation.

*Article 23. Conditions implied in the case of particular classes of treaties*

1. Certain classes of treaties or treaty obligations are to be regarded as being automatically subject to certain implied terms or conditions justifying their non-performance in appropriate circumstances, irrespective of their actual language, unless this language is such as expressly, or by necessary implication, to exclude any such term or condition.

2. The classes and the terms or conditions involved depend on the state of international law for the time being, and on the development of treaty practice and procedure, and cannot therefore be exhaustively enumerated. The following are given by way of example:<sup>13</sup>

(a) Treaties dealing with undertakings relating to topics of private international law are to be read as subject to the implied condition or exception of "*ordre public*"—i.e., that the parties are not obliged to implement the treaty in any case where to do so would be contrary to the juridical conceptions of "*ordre public*" as applied by their courts. No such term or condition is, in the absence of an express clause to that effect, to be read into treaties or treaty clauses not coming within this category.

(b) The establishment clauses of commercial treaties are normally to be read as subject to an implied condition to the effect that they do not prejudice the right of the local authorities to refuse admission to particular

individuals, either on grounds personal to themselves, or in pursuance of a general immigration policy, or policy respecting the taking of employment, applied to all foreigners without discrimination; and similarly to expel or deport individuals.

(c) Commercial treaty clauses relating to the admission or import or export of goods and cargoes are normally to be read as subject to an implied condition enabling the local authorities to prohibit entirely, or to institute special regulations for, the importation or exportation of certain categories of articles on grounds of public policy, health or quarantine, such as arms, gold bullion, narcotic drugs, works of art, pest-carrying plants, etc.; or to do so on particular occasions if rendered necessary by local circumstances (e.g., to prohibit the importation of cattle coming from infected areas).

(d) The operation of treaties of guarantee is subject to an implied condition of appropriate conduct on the part of the State in whose favour the guarantee operates. Accordingly, the obligation to act in accordance with the guarantee will not be effective if the State in whose favour it was instituted has itself been responsible for the occurrence bringing the guarantee into play, or has refused or failed to take action, legally open to it, and possible, which would have rendered the implementation of the guarantee unnecessary, or materially less onerous.

SECTION 2. PARTICULAR QUESTIONS OF TREATY APPLICATION

SUB-SECTION I. TEMPORAL AND TERRITORIAL APPLICATION OF TREATIES

RUBRIC (a). TEMPORAL APPLICATION

*Article 24. Beginning and duration of the treaty obligation*

1. Subject to the provisions of articles 41 and 42 of part I of chapter 1 of the present Code, and unless the treaty itself otherwise provides, the binding effect of a treaty arises immediately on, and the obligation to carry it out dates from, its coming into force. The same applies to the faculty to claim rights under a treaty.

2. In the case of multilateral treaties, the relevant date is the coming into force of the treaty in respect of the party whose rights and obligations are in question, as provided by paragraph 4 of article 41 in part I of chapter 1 of the present Code.

3. Subject to the provisions of articles 27 to 31, inclusive, of part III of chapter 1 of the present Code, the rights and obligations provided for by a treaty continue until valid termination in accordance with the provisions of that part.

4. Unless a treaty specifically so provides, or a necessary implication to that effect is to be drawn from its terms, it cannot give rise to retroactive rights or obligations, and there exists a presumption against retroactivity.

RUBRIC (b). TERRITORIAL APPLICATION

*Article 25. General principles*

1. The provisions of the present sub-section have no

<sup>13</sup> Numerous categories of treaties are involved; e.g., air traffic conventions, maritime conventions, labour conventions, extradition treaties, etc. An exhaustive consideration of the matter (which the Rapporteur does not think it necessary to undertake at the present juncture) would require a detailed study of a large number of treaties and conventions belonging to each of the different classes, and also an inquiry of Governments concerning their practice in relation to the application of these treaties. Such a study would probably have to be based on information provided or collected by the Secretariat.

relevance to the case of those classes of treaties or treaty clauses that do not normally involve any question of territorial application, such as treaties of alliance, guarantee, collective self-defence, peace and friendship, recognition, institution of diplomatic relations, etc.

2. In those cases where the question of territorial application is relevant, the matter is governed primarily by the terms of the treaty itself, or of any ancillary instruments accompanying it; or, where the treaty so permits, of any declarations made by a party at the time of signature, ratification or accession.

3. In all other cases, and unless the application of a treaty is, by its terms, specifically confined (or by its nature can only relate) to a certain particular part of the territory, or of certain particular territories, of one or more of the contracting parties, its territorial application will be governed by the provisions of the remaining articles of the present rubric.

#### *Article 26. Application to metropolitan territory*

1. Unless a treaty otherwise provides, it applies automatically to the whole of the metropolitan territory (or to all territories forming part of the metropolitan territory) of each contracting party.

2. Subject to the provisions of paragraph 3 below, the term "metropolitan territory" is to be understood as denoting all those territories of a contracting party which are administered directly by its central government under the basic constitution of the State, in such a manner that this government is not subject, either in the domestic or in the international field, to any other or ulterior authority.

3. The constituent states, provinces or parts of a federal union or federation, notwithstanding such local autonomy as they may possess under the constitution of the union or federation, are considered to be part of its metropolitan territory for treaty and other international purposes.

#### *Article 27. Application to dependent territories*

1. The term "dependent territories" denotes any territories of a State that are not metropolitan territories as defined in paragraph 2 of the preceding article.

2. Subject to the provisions of paragraph 3 below, a treaty extends automatically to all the dependent territories of the contracting parties unless it otherwise provides, or unless it contains a clause permitting the separate extension or application of the treaty to such territories.

3. However, unless a treaty specifically provides to the contrary, it will have no automatic extension to dependent territories coming within any of the following classes:

(a) Territories which, though dependent in respect of the conduct of their foreign relations, are internally fully self-governing;

(b) Territories which, though not fully self-governing internally, are so in respect of the subject-matter or field to which the treaty relates;

(c) Territories which, though not fully self-governing, either generally, or in relation to the subject-matter or field of the particular treaty, possess their own quasi-autonomous or responsible local legislative or administrative organs; and where, according to the constitutional relationship between these territories and the metropolitan government, such organs must be consulted in regard to the application of any treaty; or where action on the part of such organs will be necessary to implement the treaty locally, if it becomes applicable to the territory.

4. In the cases covered by the preceding paragraph, the fact that the metropolitan government may possess, and may in the last resort be able to exercise, ulterior powers which would enable it to effect the compulsory application of the treaty to the territory concerned, is not a ground on which the automatic application of the treaty can be predicated.

#### *Article 28. Determination of the status of metropolitan and dependent territories*

1. The determination of the status of any territory, whether as a metropolitan or a dependent territory, is a question of law and fact depending on the correct interpretation of the relevant constitutional provisions and international instruments.

2. Subject to any relevant treaty provisions, and to any international right of recourse that may exist,

(a) Such determination is, in the first instance, one for the metropolitan government to make;

(b) The metropolitan government may also indicate what is covered, or not covered, as the case may be, by any particular territorial appellation or geographical description.

3. Any such determination or indication, where it purports to depart from the apparent geographical or political position as it exists at the time, must, in order to be applicable for the purposes of any particular treaty, be made and declared at the time of the conclusion of the treaty, unless it has already been notified or published in advance.

4. Paragraph 3 of the present article does not, however, as such, relate to any determination or indication resulting from a genuine change in the status or constitutional position of the territory concerned, or in the relations between it and the metropolitan government. In such cases, the applicability of the treaty in respect of the territory will depend on its terms and on the rules of (or on rules analogous to those of) state succession.

#### SUB-SECTION II. EFFECT OF THE TREATY ON THE INTERNAL PLANE

##### RUBRIC (a). EFFECT OF TREATIES ON AND RESPECTING THE INSTITUTIONS OF THE STATE

#### *Article 29. Relevance of the domestic aspects of treaty application*

The treaty obligation produces its effects primarily in the international field, it being the duty of the parties

to carry it out in that field. The question of its effects in the domestic field is relevant only in so far as it may affect the capacity of the parties to discharge this duty.

*Article 30. Duties of States in relation to their laws and constitutions*

1. It is the duty of every State to order its law and constitution in such a way that it can, so far as that law and constitution are concerned, carry out any treaty it has entered into, and can give to any treaty obligation assumed by it such effect in its domestic field as the treaty or obligation may require.

2. From the international standpoint, the achievement of this object may result indifferently from the fact that the local law and constitution place no obstacles in the way of the due performance of the treaty obligation; or because, under the local law and constitution, treaties duly entered into are automatically applicable and self-executing domestically, without the intervention of any legislative or other specific internal action; or because the necessary legislative or other necessary steps have in fact been taken; or because the treaty is of such a character that it can be carried out without reference to the position under the domestic law or constitution concerned.

3. In those cases, however, where the treaty cannot be carried out without specific legislative, administrative or other action in the domestic field, a party to the treaty which finds itself in this position is under a duty to take such action.

4. A State having assumed a treaty obligation is equally under a duty not to take any legislative, administrative or other action, whether at the time of the entry into force of the treaty, or at any subsequent time while it remains in force, that would cause the obligation to cease to be capable of being carried out in the domestic field.

5. Provisions in treaties stating expressly that the parties undertake to take the necessary legislative and other measures necessary for the execution of the treaty are merely declaratory in their legal effect. The absence of such a provision from a particular treaty in no way absolves the parties to it from their obligations in this respect, which are inherent in the character of a treaty and in the general rules of international law applicable to treaties.

*Article 31. Position and duties of particular organs of the State*

1. Internationally, and irrespective of whether its domestic constitution is a unitary or a federal one, a State constitutes a single indivisible entity, and it is on this entity that the duty to carry out treaty obligations rests. The agency or organ of the State responsible on the internal plane for carrying out the treaty, or for any failure to carry it out, as the case may be, is a matter of purely domestic, not international, concern.

2. It follows that the State, as an international entity, is, in respect of any treaty obligation undertaken by it, both internationally bound to secure due performance

of the obligation on the part of its legislative, judicial and administrative or other organs, and also internationally responsible for any failure on their part to do so.

3. The fact that a particular organ of the State is, on the domestic plane, justified in not performing (and even possibly obliged not to perform) the treaty, in no way affects the international responsibility of the State.

RUBRIC (b). EFFECTS OF TREATIES ON AND IN RESPECT OF PRIVATE INDIVIDUALS AND JURISTIC ENTITIES WITHIN THE STATE

*Article 32. Treaties involving obligations for private individuals or juristic entities*

In those cases where a treaty provides for duties to be carried out in their individual capacity by nationals (including juristic entities) of the contracting States, or imposes prohibitions or restrictions on specified kinds of individual conduct, the contracting States are under an obligation to take such steps as may be necessary in order to ensure that their nationals and national entities are free under the relevant domestic laws to carry out these duties or to observe these prohibitions or restrictions; and also that, in so far as may be necessary, they are obliged under those laws to do so.

*Article 33. Treaties involving benefits for private individuals or juristic entities*

1. Subject to the provisions of paragraph 2 below, where a treaty provides for rights, interests or benefits to be enjoyed by private individuals (including juristic entities), or where the treaty otherwise redounds to their advantage, it is the duty of the contracting States to place no obstacle in the way of the enjoyment of these rights, interests, benefits or advantages by the individuals or juristic entities concerned, and to take all such steps as may be necessary to make them effective on the internal plane.

2. The provisions of the preceding paragraph do not affect the discretionary power of a State or Government to waive, compound or forgo rights, interests, benefits or advantages enjoyed by its nationals under a treaty to which it is a party. Private individuals and juristic entities may also, in so far as they are concerned, waive, compound or forgo rights, interests, benefits or advantages, reserved or accruing to them under or by reason of a treaty. Such action cannot, however, deprive their State or Government, as a party to the treaty, of the right to claim or insist on full performance of it.

SUB-SECTION III. MISCELLANEOUS PARTICULAR QUESTIONS OF TREATY APPLICATION

[Left blank for the time being for reasons stated in the commentary.]

DIVISION B. CONSEQUENCES OF AND REDRESS FOR BREACH OF TREATY

SECTION 1. CONSEQUENCES OF BREACH OF TREATY

*Article 34. Basic principles*

1. Failure to comply with the provisions of a treaty will constitute a breach of it, or alternatively involve an

illegality—i.e., breach of international law—unless this takes place in circumstances justifying non-performance as indicated in division A above.

2. Where there is a breach of a treaty, it gives rise to international responsibility, irrespective of its character or gravity. This responsibility must be discharged as soon as possible by such means as may be necessary or appropriate for the purpose, in accordance with the provisions of the present section.

3. A State which has committed a breach of treaty is itself responsible for taking the necessary steps for bringing about a cessation of the breach and for making any reparation due in respect of it, in accordance with the provisions of the present section.

4. A breach of treaty by one party, or a failure by it to take the necessary steps to discharge the responsibility arising from the breach, confers on the other party or parties a right of redress, and of taking remedial action, as indicated in section 2 below.

*Article 35. Method of discharging the responsibility arising from breach of treaty*

1. The method of discharging the responsibility arising from a breach of treaty, or of making the reparation due in respect of such a breach, depends in the first place on the provisions of the treaty, or, if these are silent on the matter, then, subject to the provisions of the present section, on the general rules of international law relating to state responsibility.

2. Breaches of treaty may assume various forms, and may in particular arise from:

- (a) Some action prohibited by the treaty;
- (b) A failure to carry out a specific requirement of the treaty (which may consist in the failure to perform some act, to grant certain treatment, or to allow the exercise of certain rights or performance of certain acts);
- (c) Action taken in a manner, or for a purpose, that is not in conformity with the treaty.

3. In the classes of cases indicated in the preceding paragraph, the measures appropriate to discharge the international responsibility of the State having committed the breach are as follows:

- (i) *In case (a)*: Immediate cessation of the action in violation of the treaty prohibition where this is still continuing, and the furnishing of suitable reparation, by way of damages or otherwise, in respect of the violation;
- (ii) *In case (b)*: Immediate execution of the requirements in question and the furnishing of suitable reparation for its previous non-execution; or, if execution is no longer possible, or would not be adequate in the circumstances, damages or other reparation for non-performance;
- (iii) *In case (c)*: Correction or cessation of the action in question, as may be appropriate, together with the furnishing of suitable reparation for any prejudice caused.

4. Subject to any specific provisions of the treaty itself, all such questions as those of the appropriate measure of damages, indirect damages, remoteness of damage, payments by way of interest, etc., are governed by the ordinary principles of international law applicable to the reparation of international injuries.

*Article 36. Consequences of breaches of treaties involving benefits for individuals*

Where there has been a breach of a treaty obligation involving benefits for individuals, the measure of damages or of other reparation due, apart from any obligation of specific performance, will *prima facie* be the prejudice caused to the individual concerned. Where, however, the breach involves a specific prejudice to the contracting State itself, over and above, or independently of, that caused to the individual, additional reparation will be due in respect of it.

SECTION 2. MODALITIES OF REDRESS FOR BREACHES OF TREATY

SUB-SECTION I. GENERAL STATEMENT OF AVAILABLE REMEDIES

*Article 37. Action by way of redress open to the parties*

In the event of a breach of treaty by one party or, as the case may be, of a failure by that party to take the necessary action by way of reparation as provided in section 1 above, the other party or parties will, subject to the provisions of the present section, be entitled:

(a) To take any step, or seek or apply any remedy or means of recourse, specifically provided for in the treaty itself;

(b) Resort to any other available means of recourse if none are provided in the treaty;

(c) Subject to the provisions of article 38 below, to regard the treaty obligation as finally and definitively terminated in those cases where the breach is of a fundamental character as defined in articles 18 to 20 of part III of chapter 1 of the present Code, and provided also that the treaty is not a multilateral treaty of the kind described in paragraph (3) (e) of article 18;

(d) Subject to the provisions of article 20 and of article 39, to have recourse to an equivalent and corresponding non-performance of the treaty;

(e) Subject to the provisions of article 39, to sequester, detain or place an embargo on any public property or assets of the party having committed the breach, and situated within the jurisdiction of the other party or parties, not being in the nature of diplomatic or consular property or assets;

(f) Subject to the provisions of article 18 and of article 39, to have recourse by way of reprisals to non-performance of some other provision of the treaty, or of another treaty with the party having committed the breach, or, in respect of that party, of some general rule



of international law which would otherwise require to be observed.

SUB-SECTION ii. SPECIAL PROCEDURAL CONSIDERATIONS  
AFFECTING CERTAIN MEANS OF REDRESS

*Article 38. Case (c) of Article 37*

In order to justify action under sub-paragraph (c) of article 37, the conditions and procedures specified in articles 18 to 20 of part III of chapter 1 of the present Code must be strictly complied with.

*Article 39. Cases (e) and (f) of Article 37*

1. In order to justify action under sub-paragraphs (e) and (f) of article 37, either:

- (i) The breach, unless admitted, must have been established by the finding of an appropriate international arbitral or judicial tribunal; or
- (ii) The counter-action must be accompanied by an offer to have recourse to arbitration or adjudication if the breach is denied, or by acceptance of a request for it, if made by the other party.

2. Where an offer of, or request for, arbitration or adjudication has been accepted under paragraph 1 (ii) above, any counter-measures instituted under sub-paragraph (e) of article 37 can only take the form of an embargo or *saisie conservatoire* pending the final decision of the tribunal on the substantive merits of the case. In the case of counter-measures instituted under sub-paragraph (f) of article 37, however, the tribunal may, if it thinks fit, order the suspension of any such counter-measures.

3. The counter-measures instituted must:

- (a) Be necessary in the circumstances, in order to provide adequate redress or avoid further prejudice;
- (b) Be proportionate to the breach justifying them;
- (c) Cease so soon as the occasion for them is past, by reason of resumed performance of the treaty obligation, or cessation of its infraction, provided, however, that reparation has been made in respect of the non-performance or infraction.

## II. COMMENTARY ON THE ARTICLES

*Note:* The texts of the articles are not repeated in the commentary. Their page numbers are given in the table of contents at the beginning of the report.<sup>14</sup>

*General observation.* For the purposes of the commentary, familiarity with the basic principles of treaty law is assumed, and only those points calling for special remark are commented on. In addition, in order not to overload an already full report, authorities have not been cited for principles that are familiar, or where these can be found in any standard textbook, but only on controversial points, or where otherwise specially called for.

## Second chapter. The effects of treaties

### Part I. The effects of treaties as between the parties (operation, execution and enforcement)

#### *Article 1. Scope of part I*

1. Part I of the present chapter deals with the effects of treaties as between the actual parties to the treaty concerned. The effects in relation to third States, and the position of the latter with reference to a treaty to which they are not parties, will be considered in part II, which will be the subject of a later report.

2. The terms "operation, execution and enforcement" in the title to part I are more or less traditional. Possibly, a better terminology would be "operative force, performance and redress for breach". "Enforcement", in particular, is of doubtful suitability, since in the present state of international organization, treaties cannot normally be directly enforced.

3. *Paragraph 1* reflects the fact that, when all is said and done, the effect of a treaty depends first and foremost on the text of the treaty itself. This fact has already been alluded to in the introduction to the present report, where it is pointed out that a chapter on the effects of treaties can only be of a very generalized character, setting out those effects which can be regarded as more or less common to all treaties, whatever their particular character or content.

4. More detailed provisions on the effects of treaties could only be formulated with respect to particular categories of treaties having a common element, and would require a very close preliminary study of a large number of such treaties, together with, in all probability, an inquiry from Governments as to their practice in relation to these treaties. It is not possible now, in connexion with the present chapter, to engage in such a study or inquiry, but if it were eventually thought desirable that a Code on the law of treaties should deal in a fairly detailed way with questions affecting particular classes of treaties (e.g., commercial treaties, maritime treaties, civil aviation conventions, trading agreements, and so on), a separate section dealing with these matters could be compiled later.

5. *Paragraph 2.* Although certain rules and principles of treaty execution and performance apply generally in respect of all treaties, it is normally open to the parties to any particular treaty to exclude or modify the application to that treaty of some particular rule of treaty law that would otherwise govern it. It would seem, however, that the more fundamental principles of treaty law could not be treated in this way. Such principles as *pacta sunt servanda*, the continuity of the State, the supremacy of international law over domestic law, etc. are juridical facts. They are unalterable, because without them no binding treaty could exist.

6. In this last respect, the Rapporteur finds it difficult to accept the view put forward in such a provision as article 23 of the Harvard Draft Convention on Treaties.<sup>15</sup> In that article, the statement of the rule that failure to perform a treaty obligation cannot be justified

<sup>14</sup> For the arrangement of the present chapter, see footnote 9.

<sup>15</sup> Harvard Law School, *Research in International Law*, III. *Law of Treaties*, Supplement to the *American Journal of International Law*, vol. 29, 1935. In the corresponding provision in



on the ground of municipal law deficiencies or constitutional difficulties, is prefaced by the phrase "Unless otherwise provided in the treaty itself". It is correctly pointed out in the Harvard Draft that although "such provisions in treaties... have been rare... they have not been entirely lacking"; and examples are cited of treaties containing a clause providing that "should either party be prevented by future action of its legislature from carrying out the terms of this arrangement, the obligations thereof shall thereupon lapse".

7. In the opinion of the Rapporteur, any such "arrangement" is not properly speaking a treaty, and does not involve legal, but at most moral obligations, or a sort of political or administrative understanding—perhaps a sort of "gentleman's agreement" between governments. The clauses quoted are based on the cardinal error of equating the party to the treaty (which is properly speaking the *State*, and the *whole* State) with what is only one organ or part of the State, namely, the government or administration. Treaties (considered as legal instruments) are binding on all the organs of the State, and a failure to carry out the treaty attributable to any of these organs (including the legislature) is a breach of it, and entails international responsibility. The existence in the instrument concerned of a provision on the lines above quoted simply means that the party to the treaty, the State, can at any time (through its legislature) legitimately fail to perform it, or cause the "obligation" to cease. This is no more, therefore, than a voluntary undertaking without ultimate legal continuity or force, and such a position has no place in the law of treaties proper.

8. The general question of treaties and the domestic laws of the parties is discussed in connexion with article 7 below; and exactly the same type of consideration applies *mutatis mutandis* to the suggestion made in article 24 of the Harvard Draft that parties to a treaty can equally "contract out" of the rule (deriving from the principle of the unity and continuity of the State) that changes of government in a State do not affect the treaty obligations of the State; as to this, see further below in connexion with article 6.

## DIVISION A. OPERATION AND EXECUTION OF TREATIES

### SECTION 1. CHARACTER, EXTENT AND LIMITS OF THE TREATY OBLIGATION

#### *Article 2. Fundamental principles governing the treaty obligation*

9. The present section deals with the general topic of the character and extent of the treaty obligation and of the limits of that obligation. A second main section of division A treats of certain particular questions of treaty application; while division B deals with the consequences of, and redress for breach of treaty (enforcement, so-called).

10. Article 2 sets out in very general form certain fundamental principles of treaty law which have already twice been referred to in previous reports presented by the Rapporteur. The first of these occasions was in the first (1956) report (A/CN.4/101, pp. 108 and 118). This report, which dealt primarily with the subject of the conclusion of treaties, contained a section entitled "Certain Fundamental Principles of Treaty Law", articles 4 to 6 of which covered some of the principles mentioned in article 2 of the present section. In his commentary to those articles, the Rapporteur expressly mentioned that these principles really appertain more to the subject of the operation and effect of treaties, but he posed the question whether, notwithstanding that fact, it might nevertheless be desirable to have some mention of these important principles at the beginning of the Code. At its eighth session in 1956, the Commission devoted two or three meetings to a very general discussion of the Rapporteur's first report, in the course of which this and certain other matters were mentioned. While no final conclusions were reached, the Rapporteur had the impression that the Commission did not think it necessary to deal with these principles at the beginning of the Code, and would prefer that they should appear in their logically correct position as part of the subject of treaty operation and effects. Therefore, there will be no difficulty in eventually omitting the articles on this subject which were included in the Rapporteur's first report.

11. In the meantime, however, these same principles have also shown themselves to be directly relevant to the subject of the termination of treaties which was dealt with in the Rapporteur's second (1957) report (A/CN.4/107, pp. 23 and 39-43). While it was perhaps not essential to do so, the Rapporteur thought it desirable to include in that section of the work an article (article 5 in part III of chapter 1 of the Code) stating a number of grounds which do *not* justify a party to a treaty in purporting to terminate it or to treat the obligation as being at an end.<sup>16</sup> As has already been explained in the introduction to the present report, the subject of the termination of treaties, considered in the 1957 report, has considerable affinities with part of the content of the present chapter, in so far as the latter deals with the question of the grounds that may, and those that will not, justify a party in failing to carry out a treaty obligation. Just as certain grounds may, according to circumstances, either justify the *ad hoc* non-performance of a particular treaty obligation (though without bringing the treaty itself, or the obligation, to an end), or else may justify the complete termination of the treaty as a whole, so also do some of the same grounds (although often put forward) *not* justify either non-performance of a particular treaty obligation or the termination of the treaty or obligation

<sup>16</sup> It was not strictly necessary to do so because, as this section of the work professed to state affirmatively what were the elements that would cause a treaty to come to an end or justify a party in regarding it as terminated, and to state these exhaustively, it could be said to follow automatically that any other ground was necessarily excluded. However, as was explained in the commentary to article 5 in the Rapporteur's second report, certain other grounds have so frequently been put forward by Governments, at one time or another, as justifying the termination of a treaty, that it seemed desirable in any Code to indicate them definitely as being insufficient.

a previous report, i.e., that on treaty termination (article 5 in the second (1957) report), the Rapporteur followed the Harvard draft without commenting on the matter. A revised view is now presented.

as a whole. In these circumstances, and without prejudice to the arrangement ultimately to be adopted for the present Code, it seems better to leave undisturbed the provisions on this subject, and the commentary thereto, which already figure in part III of chapter 1 of the Code (Rapporteur's second (1957) report), and refer to these as may be necessary in commenting on the corresponding articles of the present chapter.

12. It is clear that any really detailed commentary on the principles set out in article 2 of the present section would involve something like a treatise on the fundamental philosophy of international law, and this is not necessary for present purposes. As has already been stated, however, certain observations are contained in the commentary to article 5 in the Rapporteur's second report (1957), and reference is accordingly made to these, and also to the commentary to articles 3 to 8 below.

#### SUB-SECTION I. NATURE AND EXTENT OF THE TREATY OBLIGATION

##### *Article 3. Obligatory character of treaties : ex consensu advenit vinculum*

13. *Paragraph 1.* This is sufficiently covered by the remarks already made in connexion with article 2 above. The paragraph does, however, attempt to give effect to the important principle that the foundation of the treaty obligation does not really lie in the treaty itself, even if it may superficially appear to do so. No treaty would be binding if there were not already a rule of law to the effect that undertakings given in certain circumstances and in a particular form create binding obligations. Such a rule must necessarily lie outside the treaty, since no instrument can derive binding force from itself alone. The principle that consent given in due form creates a legal obligation is not a treaty rule of law, though it is a rule on which the whole of treaty law is founded. Such a rule could not be created by treaty because the very treaty purporting to do so would not itself be binding without such a rule already pre-existing independently, as a rule of general international law (and of course the rule that consent gives rise to obligation has applications far wider than those of the particular sphere of treaties).

14. *Paragraph 2.* The position regarding treaty rights is merely the converse of that relating to treaty obligations. It has nevertheless seemed desirable to include this paragraph, because perhaps too much emphasis tends to be laid on the role of treaties in creating obligations as opposed to their role in creating rights. It is true that some treaties involved only, or mainly, obligations;<sup>17</sup> but as regards the great majority of treaties, the intention is that the performance by one

party of its obligations will confer on the other party (or parties) a benefit which the latter can legally claim; and this is normally reciprocal. Even in those cases where a treaty appears to involve nothing but obligations for one or more, or all, the parties, nevertheless each party (although it may itself receive no direct benefit therefrom) has a right to claim the performance of the obligation by every other party.

##### *Article 4. Obligatory character of treaties : pacta sunt servanda*

15. *Paragraph 1.* This requires no special comment, apart from the general observations already made. There is no need for philosophical discussion when it is so obvious that treaties would lose their entire purpose and *raison d'être* as legal instruments, were it otherwise than as here provided.

16. *Paragraph 2.* The question of the—so to speak—spirit in which a treaty must be carried out perhaps belongs strictly to the sphere of treaty interpretation, which will be the subject of a later report. It seems nevertheless desirable to include some general statement of principle in the present chapter. The principles of good faith and of reasonableness (which are not quite identical) in the execution of treaties, are well recognized, and have been given effect to by international tribunals.<sup>18</sup> Indeed the very lack, internationally, of the same possibilities of enforcement as exist in the case of private law contracts, probably imposes on States and Governments something in the nature of a special duty under international law to use the utmost good faith in the execution of treaties.<sup>19</sup>

17. "...so as to give it a reasonable and equitable effect..." The question whether or not, and if so in what circumstances, a treaty ought to be given the "maximum" effect of which it is capable, is again really a question of interpretation. It is the familiar question of a restrictive *versus* a liberal interpretation of treaty obligations. As such, it does not fall to be dealt with here. It is, however, germane to the present chapter to give some indication as to the general spirit in which the treaty ought to be carried out, and for that purpose to try to give some element of precision to the rather vague term "good faith". Whether, in particular circumstances, some provision of a treaty ought to be interpreted restrictively or the reverse is a matter of the rules of interpretation; but within those limits it is

<sup>18</sup> See, for instance, as an example amongst modern cases, the dictum of the International Court of Justice in the Morocco case (*I.C.J. Reports 1952*, p. 212) when, speaking of the exercise of a certain right under a treaty, the Court said "The power... rests with the... authorities, but it is a power which must be exercised reasonably and in good faith." See also the four-judge minority opinion in the case of Admission of a State to the United Nations (Charter, Art. 4), Advisory Opinion: *I.C.J. Reports 1948*, pp. 82-93.

<sup>19</sup> It has been suggested (Schwarzenberger, *International Law as applied by International Courts and Tribunals*, vol. 1, 3rd ed. (1957), p. 448) that "treaties may be described as *bonae fidei negotia* as distinct from *stricti juris negotia*". The present Rapporteur also, in a course of lectures delivered at The Hague Academy of International Law in 1957, suggested that a doctrine corresponding to the private law doctrine of *action uberimae fidei* might be applicable generally in the discharge of international obligations.

<sup>17</sup> For instance, treaties of the social or humanitarian type engage the parties to conform to certain modes of conduct, mainly in the interest and for the benefit of individuals as such, irrespective of nationality, and with no direct material benefit for any of the States parties to the treaty, apart from such as they may indirectly derive from the good will and improvement in international and other relations that may be expected to result from the observance of such treaties. Treaties dealing with human rights afford a very good illustration of this type of treaty.

always possible for parties to adopt a reasonable and equitable approach to their duty of carrying out the treaty, so as to give it an adequate effect.

18. "...according to the correct interpretation of its terms..." The exact nature of the obligation, of course, always depends on the correct interpretation of the treaty according to its terms. The duty to apply it in good faith, and so as to give it a reasonable and equitable effect, can only exist within the scope of the treaty obligation itself, according to its correct interpretation. What paragraph 2 as a whole means is that the correct interpretation of a treaty having been ascertained, it *then* becomes the duty of the parties to carry it out reasonably, equitably and in good faith, accordingly.

19. *Paragraph 3.* This needs no particular comment. The obligation to carry out a treaty naturally presupposes that there *is* a valid treaty, which has been regularly concluded, is still in force, and which is not vitiated by any element affecting its essential validity; and, in the case of multilateral treaties, that the State concerned is and remains a party to it. Only on those assumptions can there be an obligation to carry out the treaty, because only on those assumptions is there a binding obligation. These matters have of course already been dealt with in chapter 1.

20. *Paragraph 4.* This draws the deduction, so to speak, from the positive aspect of the principle *pacta sunt servanda*, and from the remaining provisions of the article, especially those of paragraph 1. It will be sufficient, by way of comment, to refer to paragraphs 33 to 36 of the commentary to the corresponding provisions in the sections on termination of treaties (article 5 (iii) in the Rapporteur's second (1957) report).

*Article 5. Obligatory character of treaties :  
relationship of obligations to rights*

21. This article deals with one or two points which, while basically general, usually arise with reference to multilateral treaties; and *paragraph 1* refers in particular to a point already mentioned in paragraph 14 and footnote 17 above. As there explained, certain kinds of multilateral treaties do not involve direct benefits for *any* of the participating countries. The benefit is of a general character arising from participation in a common cause for the general good. What each party has a right to claim as the counterpart of its own performance of the treaty, is that it shall be duly performed by each of the other parties.

22. *Paragraph 2.* It is considered that as a statement of principle, the provision here suggested must be correct. It was stated in general terms by the International Court of Justice in the case of the Reservations to the Convention on Genocide,<sup>20</sup> when the Court said that none of the parties to an international convention "is entitled to frustrate or impair, by means of unilateral decisions or particular agreements, the purpose and *raison d'être* of the convention." Difficulties may nevertheless arise in applying this principle in particular cases.

Something was said under this head in connexion with the subject of "renunciation of rights" dealt with in article 15 of part III of chapter 1 of the present Code,<sup>21</sup> to which reference may be made. Clearly, and especially in the case of multilateral treaties, a failure by one or more parties to claim or enforce their rights under a treaty may very much weaken its force, and in practice render it impossible for the other parties to insist upon or obtain its execution. At the same time, it is difficult in principle to deny the right of a party to renounce its rights under a treaty or not to insist upon them. The conclusion must be that paragraph 2 of article 6 would require to be applied with particular regard to the circumstances of each case. Nevertheless, as a statement of principle it appears to be justified.

23. On the other hand, it is necessary to treat as a special case the situation that arises in connexion with multilateral treaties when the provisions of an earlier treaty are or may be affected by those of a later one concluded by some only of the parties to the earlier treaty. Even though the parties to the later treaty still remain technically bound towards those parties to the earlier who are not also parties to the later treaty, the position of these latter parties may be prejudiced in fact, if not in law. This case, to which exceptional considerations apply, in such a way that the later treaty is not necessarily invalidated, is fully dealt with in connexion with the subject of conflicting treaties in article 18 of part II of chapter 1 of the Code and the commentary thereto.<sup>22</sup>

*Article 6. Obligatory character of treaties :  
the principle of the unity and continuity of the State*

24. *Paragraph 1.* The first sentence of this article indicates that the treaty obligation always rests upon the State, since it is the State which is the international entity. A State has, however, always to act through agents, such as Heads of State, Governments, Ministers, etc. Provided the agency is a regular one, and the formal method of conclusion involved is one that binds the State in accordance with the provisions of part I of chapter 1 of the present Code,<sup>23</sup> it is immaterial what particular form or method, or what particular agency, is chosen to act on behalf of a State.

25. The principle embodied in the second sentence of the paragraph follows inevitably from the first. Governments are the agents of the State, and if a State is bound, the Government as the agent is obliged to carry out the treaty.

26. "...irrespective of the character of its origin, or of whether it came into power before or after the conclusion of the treaty..." The obligation of a Government, as the agent of a State, to carry out the State's treaty obligations is in no way affected by the fact that the treaty was not actually concluded by that particular Government but by some previous Govern-

<sup>21</sup> Rapporteur's second (1957) report (A/CN.4/107), paras. 82-85 of the commentary.

<sup>22</sup> See the Rapporteur's third (1958) report (A/CN.4/115), commentary, paras. 88-90.

<sup>23</sup> See Rapporteur's first (1956) report (A/CN.4/101).

<sup>20</sup> I.C.J. Reports 1951, p. 21.

ment or administration; for the change of Government has in no way affected the continuity of the State, and therefore at no point has the treaty obligation been terminated or diminished. Nor does it matter by what means the particular Government concerned has come into power, whether in the ordinary course of events or by some abnormal or "unconstitutional" means. If it purports to be and in fact is the Government of the State, it must carry out the State's international obligations.

27. Paragraph 2 states certain particular consequences of the general principle enunciated in paragraph 1. It is in relation to these matters that the principle of the unity and continuity of the State comes most frequently into play as respects treaty obligations. With reference to the general principle of the identity and continuity of the State, the following passage from Hall is cited because of its importance with reference to the far-reaching effects (*vide infra, passim*) of the fact that governments are only the agents of the State and not the State itself:<sup>24</sup>

"It flows necessarily from this principle that internal changes have no influence upon the identity of a State. A community is able to assert its right and to fulfil its duties equally well, whether it is presided over by one dynasty or another, and whether it is clothed with the form of a monarchy or a republic. It is unnecessary that governments, as such, shall have a place in international law, and they are consequently regarded merely as agents through whom the community expresses its will, and who, though duly authorized at a given moment, may be superseded at pleasure. This dissociation of the identity of a State from the continued existence of the particular kind of government which it may happen to possess is not only a necessary consequence of the nature of the state person; it is also essential both to its independence and to the stability of all international relations. If, in altering its constitution, a State were to abrogate its treaties with other countries, those countries in self-defence would place a veto upon change, and would meddle habitually in its internal politics. Conversely, a State would hesitate to bind itself by contracts intended to operate over periods of some length, which might at any moment be rescinded by the accidental results of an act done without reference to them. Even when internal change takes the form of temporary dissolution, so that the State, either from social anarchy or local disruption, is momentarily unable to fulfil its international duties, personal identity remains unaffected; it is only lost when the permanent dissolution of the State is proved by the erection of fresh States, or by the continuance of anarchy so prolonged as to render reconstitution impossible or in a very high degree improbable."

28. Sub-paragraph (a) of paragraph 2. No better statement of the *rationale* of this rule could be found than that contained in the commentary to article 24 of

the Harvard Draft Convention on Treaties,<sup>25</sup> which gives the following explanation:

"Forms of government and constitutional arrangements in these days are constantly being changed, and if the enjoyment of treaty rights and the duty of performance were dependent upon the continuance of the *status quo* in respect to the governmental organization or constitutional system of the parties, one State would never be able to count with certainty on rights which have been promised it by another—and promised, it may be, for a period of indefinite duration. If changes in the organization of a State's form of government or modifications of its constitutional system had the effect of terminating or altering its treaty obligations or of rendering them voidable, a State which desired to avoid or reduce its obligations would need only to introduce a change in the organization of its government or alter its constitutional system. If such changes produced that effect, States would hesitate to enter into treaties, because in that case one of the foundations of the treaty system, namely, the permanence of treaties, would cease to exist and treaty obligations would be terminable or impairable at the will of any party."

29. Of course, a particular treaty obligation may, by reason of its actual subject-matter, be such that it applies, and can only apply, on the basis that the particular form of government prevailing in the contracting States at the time of the treaty continues. Thus, to quote the Harvard Draft again:<sup>26</sup>

"...a treaty between two States having the monarchical form of government may provide for the mutual protection of their respective monarchs or relate to matters affecting their royal families or with other matters peculiar to the monarchical form of government."

The Harvard Draft continues:<sup>27</sup>

"Manifestly, the obligations of such a treaty would necessarily be affected by a transformation of one or both of these States into a republic."

However, as the Harvard Draft goes on to say,<sup>28</sup> such cases are and have always been rare, and no special provision is necessary for them. Furthermore, when they do occur, they are clearly covered by the principles either of impossibility of performance (see below, article 14, and also case (iv) in article 17 of part III of chapter 1 of the present Code<sup>29</sup>), or else by that of the complete failure of the *raison d'être* of the treaty or treaty obligation—a case which, as a ground of termination of a treaty, has already been considered as case (v) in part III of chapter 1 of the Code.<sup>30</sup> In all such cases, the justification for non-performance lies in the

<sup>25</sup> Harvard Law School, *Research in International Law*, III, *Law of Treaties*, Supplement to the *American Journal of International Law*, vol. 29, 1935, p. 1045.

<sup>26</sup> *Ibid.*

<sup>27</sup> *Ibid.*

<sup>28</sup> *Ibid.*, pp. 1045, 1046.

<sup>29</sup> Rapporteur's second (1957) report (A/CN.4/107). For comment, see paras. 98-100 of the commentary in that report.

<sup>30</sup> *Ibid.*, commentary, paras. 101-103.

<sup>24</sup> William Edward Hall, *A Treatise on International Law*, 8th ed., Pearce Higgins, 1924, p. 21.

particular circumstances and in the nature of the treaty, not in any general principle that a change of administration or régime is a ground for non-performance.

30. The Harvard Draft goes on to refer to the quasi-unanimity of the authorities in the above sense and cites a large number of them<sup>31</sup> from which it appears that they are "in complete agreement that, as a general principle, changes in the governmental organization or constitutional system of a country... have no effect on the treaty obligations of States which undergo such changes".<sup>32</sup> It may be of interest to cite some of the more striking passages from these authorities, as given in the Harvard Draft. Thus Vattel, as there quoted, says :<sup>33</sup>

"Since, therefore, a treaty... relates directly to the body of the State, it continues in force even though the State should change its republican form of government and should even adopt the monarchical form; for State and Nation are always the same, whatever changes take place in the form of government, and the treaty made with the Nation remains in force as long as the Nation exists."

The same principle was affirmed in Protocol No. 19 of the Conference on Belgian Affairs held in London in 1831 :<sup>34</sup>

"According to this higher principle, treaties do not lose their force by reason of any change in policy... the changes which have taken place in the status of a former State do not authorize it to consider itself released from its previous undertakings."

Similarly, in the Swiss case of *Lepeschkin v. Gosweiler*,<sup>35</sup> the Swiss Federal Tribunal said :

"It is a principle of international law, recognized and absolutely uncontested, that the modifications in the form of government and in the internal organization of a State have no effect on its rights and obligations under the general public law; in particular, they do not abolish rights and obligations derived from treaties concluded with other States."

Finally, Moore stated :<sup>36</sup>

"As a person invested with a will which is exerted through the government as the organ or instrument of society, it follows as a necessary consequence that mere internal changes which result in the displacement of any particular organ for the expression of this will, and the substitution of another, cannot alter the relations of the society to the other members of

the family of States as long as the State itself retains its personality. The State remains, although the government may change; and international relations, if they are to have any permanency or stability, can only be established between States, and would rest upon a shifting foundation of sand if accidental forms of government were substituted as their basis..."

"A State subject to periodical changes in the form of its government or in the persons of its rulers has a deeper interest, perhaps, in the maintenance of this doctrine than another more securely rooted in the principles of social order, but it is absolutely necessary to the whole family of States, as the only possible condition of intercourse between nations. If it was not the duty of a State to respect its international obligations, notwithstanding domestic changes, either in the form of the government or in the persons who exercise the governing power, it would be impossible for nations to deal with each other with any assurance that their agreements would be carried into effect, and the consequence would be disastrous on the peace and well-being of the world."

31. *Revolutionary changes of social and political orders*. While there is little difficulty, and an almost complete consensus of opinion as regards "ordinary" or constitutional changes of government, or even "normal", "unconstitutional" changes, it has been maintained in recent times that the same is not the case where the change goes beyond the sort of change of government or régime (whether regular or irregular) that is to be expected as one of the incidents of international life, the possibility of which States may be supposed to have taken into account in entering into treaties. According to this view, the position is different where the change goes beyond this and affects the whole social and political order of the State concerned. A good statement of this view was given by M. Korovin, Professor of International Law in the State University of Moscow, as follows :<sup>37</sup>

"Every international agreement is the expression of an established social order, with a certain balance of collective interests. So long as this social order endures, such treaties as remain in force, following the principle, *pacta sunt servanda*, must be scrupulously observed. But if in the storm of a social cataclysm one class replaces the other at the helm of the State, for the purpose of reorganization not only of economic ties but the governing principles of internal and external politics, the old agreements, in so far as they reflect the pre-existing order of things, destroyed by the revolution, become null and void. To demand of a people at last freed of the yoke of centuries the payment of debts contracted by their oppressors for the purpose of holding them in slavery would be contrary to those elementary principles of equity which are due all nations in their relations with each other. Thus in this sense the Soviet Doctrine appears to be an extension of the principle of *rebus sic stantibus*, while at the same time limiting its field of application by a single circumstance—the social revolution."

<sup>31</sup> *Op. cit.*, pp. 1046-1051.

<sup>32</sup> *Ibid.*, p. 1046.

<sup>33</sup> E. de Vattel, *Le droit des gens ou principes de la loi naturelle appliqués à la conduite et aux affaires des nations et des souverains*, vol. I, reproduction of books I and II of 1758 edition (Washington, D.C., Carnegie Institution of Washington, 1916), book II, chap. XII, para. 185.

<sup>34</sup> Jules de Clercq, *British and Foreign State Papers*, vol. 18, p. 780.

<sup>35</sup> *Journal des tribunaux et revue judiciaire*, 1923, p. 582.

<sup>36</sup> John Bassett Moore, *History and Digest of the International Arbitrations to which the United States has been a Party* (Washington, D.C., United States Government Printing Office, ed. 1898), p. 3552.

<sup>37</sup> "Soviet Treaties and International Law" in *American Journal of International Law*, 1928, p. 763.

Some of the reasoning in this passage is clearly unacceptable. But certain underlying ideas merit serious consideration. Commenting upon it, the Harvard Draft says:<sup>38</sup>

"It can hardly be denied that there is some foundation for the distinction which the Soviet jurists and the writers on international law cited above make between the effect on treaty obligations of ordinary governmental and constitutional changes, on the one hand, which occur normally in the process of the political and constitutional development of a State, and changes, on the other hand, which are the result of violent revolutions which involve not only an alteration of the governmental organization or constitutional régime of the State but also a complete transformation of the political and even the economic and social organization of the State, and which result in the establishment of a new order of things with which treaties concluded under preceding régimes are wholly or largely incompatible. But like other distinctions in law and political science which may be sound in principle, the lack of precise criteria by which the line of demarcation between the two types of changes can be drawn makes it difficult to lay down a rule which would be just and free from danger but which at the same time would recognize exceptions to the general principle that the obligations of a State are not affected by changes in its governmental organization or constitutional system. See as to this, Charles Calvo, *Le droit international théorique et pratique*, 5th ed. (Paris, Arthur Rousseau, 1896), vol. I, sect. 100."

The last sentence of this passage brings out very well the dangers of admitting an exception to the general rule in order to meet this type of case—dangers which could well be serious for the integrity and continuity of treaties. The Harvard Draft continues:<sup>39</sup>

"Under these circumstances, it would seem to be the safer course to adopt a rule which enunciates the general principle and to leave States whose governments and constitutional systems have undergone profound and far-reaching transformations, such as those referred to above, which result in a new order of things to which existing treaties are no longer applicable, to seek by negotiation a revision or abrogation of the treaties or to invoke the application of the rule *rebus sic stantibus* as a means of freeing themselves by an orderly and lawful procedure from the obligation of further performance."

The present Rapporteur is content to leave it at that—remarking only that it is somewhat doubtful if the doctrine of *rebus sic stantibus* in any way necessarily applies in such a case, according to the principles laid down in respect of that doctrine in the Rapporteur's second (1957) report.<sup>40</sup> Nevertheless, provided the State concerned is willing, in invoking the doctrine of *rebus sic stantibus*, to submit to the procedures provided by article 23 in part III of chapter 1 of the present

Code,<sup>41</sup> it would at least be entitled to argue the case and seek the application of that doctrine.

32. *Sub-paragraph (b) of paragraph 2.* The principle of the singleness—that is of the unity and continuity—of the State equally entails that, when a breach of treaty occurs, it is quite immaterial through what agency of the State it takes place, or what particular organ, whether by act of commission or omission, has caused, or is (*on the internal plane*) responsible for the breach. This is a purely domestic matter. Internationally, the result is the same: the treaty has been broken, and the State (which is an indivisible whole internationally) is responsible.

33. The most obvious and frequent application of this principle occurs in the field of legislation and of the acts or failures of the legislature in relation to the implementation of the treaty. This aspect of the matter will be more conveniently considered in connexion with article 7 below, under the head of the supremacy of international law over domestic law. A not less striking application of the rule is afforded by considering the position of the judiciary. As to this, the Harvard Draft says:<sup>42</sup>

"Under the jurisprudence or practice of many States the courts are obliged to apply, and the executive authorities to enforce, municipal legislation rather than treaty stipulations with which the legislation is inconsistent. If the enactment of legislation of this kind affords no such excuse, the action of the courts of the State which enacted it in upholding its infra-territorial validity, or of the executive authorities in enforcing it, when they are obliged under their own municipal law to do so, does not add anything to the legitimacy of the excuse for non-performance. The municipal law of the State which thus obliges its courts and executive authorities is itself inconsistent with the principle here asserted, namely, the obligation of a State to fulfil its treaty engagements regardless of what its municipal law may require."

Even in the United States, where Congress exercises such a marked influence on treaty implementation, writers of great authority express the same view. Thus Hyde says:<sup>43</sup>

"It must be clear that, while an American court may deem itself obliged to sustain an Act of Congress, however inconsistent with the terms of an existing treaty, its action in so doing serves to lessen in no degree the contractual obligation of the United States with respect to the other party or parties to the agreement. The right of the nation to free itself from the burdens of a compact must rest in each instance on a more solid basis than the declaration of the Constitution with respect to the supremacy of the laws as well as treaties of the United States."

All contrary views are based on the cardinal error of treating the State as a divisible entity for international purposes—an error which the government of the State

<sup>38</sup> *Op. cit.*, p. 1054.

<sup>39</sup> *Ibid.*, p. 1054.

<sup>40</sup> See A/CN.4/107, and in particular articles 21 and 22 together with paras. 141-179 of the commentary in that report.

<sup>41</sup> *Ibid.*, para. 180 of the commentary.

<sup>42</sup> *Op. cit.*, pp. 1035, 1036.

<sup>43</sup> *Ibid.*, p. 1036.

in breach of the treaty not infrequently itself commits. Thus governments have been known to disclaim responsibility on the ground that the breach was not their act, but that of the legislature or judiciary, over which, so they say (and this may be correct internally), they have, constitutionally, no control. Thus, they say, they are not responsible for what has occurred. On the internal plane, this may be true. But internationally, the exact attribution of responsibility internally is a domestic matter, and irrelevant. The responsibility or otherwise of the government as such—i.e., of the executive organ—simply does not arise, for the *State* is responsible. The government may be morally blameless, but it must, as the executive organ, accept responsibility for a failure of the statal system as a whole to carry out treaty obligations incurred, by and on behalf of the State as such. As good a statement as can be found of the error involved by any other view was given by Sir Eric Beckett in the following terms:<sup>44</sup>

“... this contention is based on an error—an error which consists in attributing international responsibility to the government alone (though the government is merely the executive organ of the entity internationally responsible) instead of attributing it to the State *itself*, which is an entity that comprises the legislative organ, the judicial organ, and even the people, as well as the executive organ, the government.”

34. *Sub-paragraph (c) of paragraph 2.* It is unnecessary to linger over this rule, which is well recognized, and equally derives from that of the continuing identity of the State which, according to Hall,<sup>45</sup> “is considered to subsist so long as a part of the territory which can be recognized as the essential portion through the preservation of the capital or of the original territorial nucleus, or which represents the State by continuity of government, remains either as an independent residuum or as the core of an enlarged organization”. Where identity is completely lost as a result of territorial changes (annexation, merger, division into two or more States, etc.), a case of state succession arises. The treaty obligation may or may not devolve on the new State or States concerned, but that is a matter of the law of state succession which does not affect the principle of the present sub-paragraph.

35. It may of course be that certain territorial changes render the further performance of the treaty literally *impossible*; but, in that case, the legal justification for non-performance would arise from the impossibility itself, not from the territorial change as such, which would merely be the cause of the impossibility.

36. Naturally, if the obligation relates specifically to territory lost as the result of the change, there will, as the sub-paragraph recognizes, no longer be any duty to carry out the obligation. But this is really simply a specific case of impossibility and need only be mentioned for the avoidance of doubts.

*Article 7. Obligatory character of treaties: the principle of the supremacy of international law over domestic law*

37. *Paragraph 1.* This states the principle in its traditional form in so far as it relates to treaties. In commenting, it is not necessary to go into philosophical issues concerning the precise relationship between international law on the one hand and domestic or national law on the other, or to discuss theories of monism, dualism, etc., especially since, despite the great theoretical divergencies between these doctrines, the practical result of them all, though arrived at by different means, is the same and is as stated in the article.<sup>46</sup>

38. “... take precedence of, and prevail *internationally*...” The article does not attempt to say that, in the event of a conflict between a treaty obligation and some domestic law, the treaty law will necessarily prevail *on the internal plane*, in the sense that the judge must give effect to the treaty obligation even if this involves contravening some provision of the domestic law which is otherwise binding upon him. The point is that, whatever happens, *the international obligations and responsibilities of the State are not affected*. If the judge in fact applies the treaty, there will be no breach of an international obligation. If he does not, then the responsibility of the State will be entailed, and this will not be affected by the fact that, purely as a matter of domestic law, he was justified in his act, for, in such a case, the domestic law itself is at fault, and responsibility exists on that ground. As to this, see the remarks already made in paragraphs 31 and 33 above.

39. *Paragraph 2.* This and the succeeding paragraph state the main practical deductions to be drawn from the general principle laid down by paragraph 1. The *rationale* of the principle, and of its consequences in the treaty field, was expressed by the United States Secretary of State with reference to the Cutting case, as follows:<sup>47</sup>

“... if a government could set up its own municipal laws as the final test of its international rights and obligations, then the rules of international law would be but the shadow of a name and would afford no protection either to States or to individuals. It has been constantly maintained and also admitted by the Government of the United States that a government cannot appeal to its municipal regulations as an answer to demands for the fulfilment of international duties. Such regulations may either exceed or fall short of the requirements of international law and in either case that law furnishes the test of the nation's liability and not its own municipal rules. This proposition seems now to be so well understood and so generally accepted, that it is not deemed necessary to make citations or to adduce precedents in its support.”

Attention may also be called, in illustration of the general principle, to the well-known case of the

<sup>44</sup> “Les questions d'intérêt général au point de vue juridique dans la jurisprudence de la Cour permanente de Justice internationale”, *Recueil des cours de la Haye*, vol. 39 (1932, I), p. 155. Sir Eric Beckett was Principal Legal Adviser to the Foreign Office, London, 1945-1953.

<sup>45</sup> Hall, *op. cit.* (see footnote 24).

<sup>46</sup> On this subject, see the Rapporteur's lectures given at The Hague Academy of International Law in 1957, sections 41-47 (to be published in due course in the *Recueil des cours*).

<sup>47</sup> *Papers relating to the Foreign Relations of the United States*, 1887, p. 751; Moore, *A Digest of International Law*, vol. 2, 1906, p. 235.



*Alabama*, in which the fact that United Kingdom legislation was deficient in provisions enabling the Government to prevent unneutral expeditions from being fitted out and leaving the country in time of war (the United Kingdom being neutral), was held not to afford any answer to a charge of a breach of the rules of neutrality.<sup>48</sup> The principle involved was stated as follows in the United States argument in the case:<sup>49</sup>

"It must be borne in mind, when considering the municipal laws of Great Britain, that, whether effective or deficient, they are but machinery to enable the Government to perform the international duties which they recognize, or which may be incumbent upon it from its position in the family of nations. The obligation of a neutral State to prevent the violation of the neutrality of its soil is independent of all interior or local law. The municipal law may and ought to recognize that obligation; but it can neither create nor destroy it, for it is an obligation resulting directly from international law, which forbids the use of neutral territory for hostile purpose."

40. That the same principle applies not merely to conflicts with ordinary provisions of municipal law, but also to conflicts with provisions of the constitution of the State concerned, was made clear by the Permanent Court of International Justice in the case of the *Treatment of Polish Nationals in Danzig*, when the Court said:<sup>50</sup>

"It should... be observed that... according to general principles of law... a State cannot adduce as against another State its own Constitution with a view to evading obligations incumbent on it under international law or treaties in force... it results that the question of the treatment of Polish nationals or other persons of Polish origin or speech must be settled exclusively on the basis of the rules of international law and the treaty provisions in force between Poland and Danzig."

The Permanent Court made the same affirmation in regard to municipal law in the *Graeco-Bulgarian Communities* case, as follows:<sup>51</sup>

"...it is a generally accepted principle of international law that in relations between Powers who are contracting Parties to a treaty, the provisions of municipal law cannot prevail over those of the treaty."

41. "...whether enacted previously or subsequently to the coming into force of the treaty...", "...nor by deficiencies or *lacunae*..." It is obviously immaterial (because the practical result is the same—namely, inability to perform the obligation) whether

the conflict arises from some positive provision, *a contrario*, of the local law or constitution; or negatively, by reason of a lack of such enabling provisions as may be required internally for the execution of the treaty; and similarly, whether these conflicts or deficiencies were in existence at the time when the treaty entered into force, or have been created, or have come about, subsequently.

42. "...or special features or peculiarities of the law or constitution..." This is taken from article 23 of the Harvard Draft, and by way of comment reference may be made to the discussion on pages 1039 to 1044 of the relevant volume.<sup>52</sup> The case is there considered mainly with reference to the special features of federal constitutions; but clearly the principle is of general application. The authors of the Harvard Draft evidently took the view that, although under a given federal constitution certain powers may be reserved to the component states of the Federation, so that the federal government cannot intervene in the matters thus regulated, this would not absolve the Federation from responsibility for a failure to carry out a treaty or other international obligation. In the last resort, the constitution can be amended, and, if it is not, the State must abide by the international consequences of an inherent inability to carry out its international obligations in certain respects. However, most federal constitutions vest in the federal authority the power to conduct the foreign relations of the State. This power involves a right for the federal legislature to legislate in such manner as may be required to control the action of the various component states (or withdraw from them certain powers) in relation to foreign affairs. Thus the Harvard Draft, citing a number of United States authorities, says<sup>53</sup> that

"...if, as a result of the governmental organization of a State, the execution of its treaty obligations is dependent in part upon the action of the local governments and it is within the power of the national government to remedy this situation by withdrawing from the local governments the authority which they have in respect to the execution of treaties and transferring it to the national government, and if it refuses to do this, it should likewise bear the responsibility for the non-performance of any treaty obligations which may result therefrom. This appears to have been admitted by Presidents Harrison, McKinley, and Roosevelt, who urged Congress to enact legislation of this kind which would enable the United States to enforce more effectively its treaty obligations in respect to the treatment of aliens."

By way of illustration, two cases are cited:<sup>54</sup>

"Switzerland acted on this principle when, after becoming a party to the Paris Convention of March 20, 1883, for the protection of industrial property, a matter to which the legislative competence of the Confederation did not extend, Article 64 of the Swiss Federal Constitution was amended to bring

<sup>48</sup> This case led directly to the passing of the so-called "Foreign Enlistment Act", 1870, in the United Kingdom, in order to prevent any such occurrence in the future.

<sup>49</sup> *Papers relating to the Treaty of Washington*, Geneva Arbitration, 1872, p. 47.

<sup>50</sup> Publications of the Permanent Court of International Justice, *Judgments, Orders and Advisory Opinions*, series A/B, No. 44, p. 24.

<sup>51</sup> *Ibid.*, series B, No. 17, p. 32.

<sup>52</sup> See footnote 15.

<sup>53</sup> *Ibid.*, p. 1043.

<sup>54</sup> *Ibid.*, pp. 1043, 1044.



the protection of industrial property within the competence of the national government and thus enable the State to execute the stipulations of the treaty... It may be assumed that the Congress of the United States acted on the same principle when, by the Act of August 29, 1842, passed as a result of the McLeod affair, it extended the jurisdiction of the federal courts to cover such cases, and thus removed the possibility of future conflicts with foreign countries arising out of incidents over which the local rather than the national courts formerly had jurisdiction."

43. *Paragraph 3.* This paragraph has been inserted because of the recent decision of the International Court of Justice in the *Guardianship of Infants* case (*Netherlands v. Sweden*)<sup>55</sup> which, although it certainly cannot have been intended by the Court to throw doubt on the principle of the prevalence of treaty obligations over domestic law provisions, appears to have implications dangerous to that principle, as was cogently brought out in the (on this point) dissenting views expressed by Sir Hersch Lauterpacht. Without attempting to go into all the facts of this case, the question it raises may be stated as follows. There may exist a treaty between two States about subject-matter (A)—e.g., "*Guardianship of Infants*", where the infant is a national of one of the parties resident in the territory of the other—and the specific laws of the parties respecting the guardianship of infants as such may be in perfect conformity with the treaty. However, there may be a law on another subject (B), which is technically distinct from (A)—e.g., "*Child Welfare*", "*Protection of Young People*" etc.—and the provisions of this law may be such that if applied they will, or may, result in consequences contrary to those apparently contemplated by the treaty. In such a case, the defendant party may seek to justify its action on the ground that the treaty cannot have been intended to prejudice the operation of general laws not directly concerned with the subject-matter of the treaty, and having a different primary object. In the *Guardianship of Infants* case before the International Court of Justice, this type of contention resulted in custody of the person of a minor, which (as the relevant treaty *prima facie* required) would, on "guardianship" grounds, have been conferred on a certain person, being conferred on someone else, on "child welfare" grounds.

44. It is clear that all such cases must depend very much on their own facts, and also on the interpretation of the particular treaty involved; and the Rapporteur is not concerned here to question the correctness of the decision of the Court as such, which, as the separate opinions showed, could also be based or explained on other grounds (see below, paras. 47 and 48; also footnotes 56 and 62). This type of contention nevertheless has disquieting implications. No doubt, in theory, a distinction can be drawn between, on the one hand, the case where a State clearly evades the application of a treaty by relying on provisions of its legislation that ostensibly relate to another subject, but nevertheless lead to non-performance of the treaty; and, on the other hand, cases where the treaty itself can be interpreted as having been intended by the parties

only to prevent (or compel) some particular action, on certain specific grounds—but not necessarily on others, if applicable. But the distinction is nevertheless a fine one, which in many cases it will be difficult to draw clearly or satisfactorily.

45. In his separate (but, on the main issue, concurrent)<sup>56</sup> opinion, Sir Hersch Lauterpacht stated the question as follows:<sup>57</sup>

"If a State enacts and applies legislation which, in effect, renders the treaty wholly or partly inoperative, can such legislation be deemed not to constitute a violation of the treaty for the reason that the legislation in question covers a subject-matter different from that covered by the treaty, that it is concerned with a different institution, and that it pursues a different purpose?"

Sir Hersch went on to point out that the difficulty was increased by the fact that the conflict between the treaty and the legislation in question may be concealed, or may be "made to be concealed"; by what might be "no more than a doctrinal or legislative difference of classification"; and he drew attention to the fact that an "identical provision which in the law of one country forms part of a law for the protection of children may, in another..., be included within the provisions relating to guardianship". "That," he said, "as will be seen, is no mere theoretical possibility."<sup>58</sup> He refused to admit that a valid distinction could be based on the mere fact that the treaty and the law had different objects, if in practice the substance was the same, and added that when a State concludes a treaty "it is entitled to expect that that treaty will not be mutilated or destroyed by legislative or other measures which pursue a different object but which, in effect, render impossible the operation of the treaty or of part thereof".<sup>59</sup> The correct view was, therefore, so he thought, that a treaty must be held to cover "every law and every provision of a law which impairs, which interferes with, the operation of the treaty".<sup>60</sup>

46. In giving practical illustrations of what might occur, Sir Hersch Lauterpacht said:<sup>61</sup>

"The following example will illustrate the problem and the consequences involved: States often conclude treaties of commerce and establishment providing for a measure of protection from restrictions with regard to importation or export of goods, admission and residence of aliens, their right to inherit property, functions of consuls, and the like. What is the position of a State which has concluded a treaty of that type and then finds that the other party

<sup>56</sup> Sir Hersch concurred in the *dispositif* of the decision, namely, the rejection of the Netherlands claim; but he did so on the *ordre public* point mentioned below (see paras. 48 and 115) which the parties had treated as the main issue in the case, although the Court itself thought it unnecessary to pronounce on it.

<sup>57</sup> *I.C.J. Reports* 1958, p. 80.

<sup>58</sup> *Ibid.*, pp. 80, 81.

<sup>59</sup> *Ibid.*, p. 81.

<sup>60</sup> *Ibid.*

<sup>61</sup> *Ibid.*, pp. 81, 82.

<sup>55</sup> *I.C.J. Reports* 1958, p. 55.

whittles down, or renders inoperative, one after another, the provisions of that treaty by enacting laws 'having a different subject-matter' such as reducing unemployment, social welfare, promotion of native craft and industry, protection of public morals in relation to admission of aliens, racial segregation, reform of civil procedure involving the abolition of customary rights of consular representation, reform of the civil code involving a change of inheritance laws in a way affecting the right of inheritance by aliens, a general law codifying the law relating to the jurisdiction of courts and involving the abolition of immunities, granted by the treaty, of public vessels engaged in commerce, or any other laws 'pursuing different objects'? It makes little or no difference to the other party that the treaty has become a dead letter as the result of laws which have so obviously affected its substance, but which pursue a different object."<sup>62</sup>

Sir Hersch eventually went on to make the following general statements of principle:<sup>63</sup>

"A State is not entitled to cut down its treaty obligations in relation to one institution by enacting in the sphere of another institution provisions whose effect is such as to frustrate the operation of a crucial aspect of the treaty. There is a disadvantage in accepting a principle of interpretation, coined for the purposes of a particular case, which, if acted upon generally, is bound to have serious repercussions on the authority of treaties."

"...

"Once we begin to base the interpretation of treaties on conceptual distinctions between actually conflicting legal rules lying on different planes and for that reason not being, somehow, inconsistent, it may be difficult to set a limit to the effects of these operations in the sphere of logic and classification."

47. It is on the views thus expressed by Sir Hersch Lauterpacht in this case that the Rapporteur has based paragraph 3 of article 7 of this section. As far as the principle of the thing goes, these views seem clearly correct. This is not to say that there may not be cases where, on the interpretation of the particular treaty, it appears that it did not purport to limit the freedom of action of the parties in certain respects, despite the fact that in some cases this could have consequences different from what would have resulted from the strict application of the treaty if no other considerations had existed. This indeed seems to have been the real basis on which the majority of the Court reached their con-

clusion.)<sup>64</sup> What is inadmissible is the *general proposition* that to recall Sir Hersch's language (see paragraph 46 above)—a State is entitled "to cut down its treaty obligations in relation to one institution by enacting in the sphere of another institution provisions whose effect is such as to frustrate the operation of a crucial aspect of the treaty".

48. Equally, there may be cases, or classes of treaties, where international law or custom implies a condition in the treaty, of such a nature as even to allow, on certain grounds, action that would otherwise be contrary to its *express terms*. The exception of *ordre public*, inherently to be implied in treaties dealing with private international law topics (on which a number of individual opinions in the Guardianship of Infants case—though not the decision of the Court itself—were based), is a case in point; and other cases are considered below in connexion with article 23. But this again is quite a different matter from a proposition of a general character permitting non-performance of a treaty merely because such non-performance can be based on the application of a law which, as a matter of classification, relates to some other field or institution.

#### *Article 8. Obligatory character of treaties : the case of conflicting treaty obligations*

49. *Paragraphs 1 and 2.* In principle, a State which becomes a party to two treaties that are in mutual conflict is nevertheless bound by both of them. This does not mean to say that it can in practice carry both of them out, but that it incurs international responsibility for the failure to perform whichever of them is not carried out. Which this is to be depends on considerations discussed in an earlier report.<sup>65</sup> Assuming (for otherwise there is no real conflict) that the two treaties were concluded with two different parties, then, for each of these two parties, the other treaty is *res inter alios acta*, and each of these parties is, by reason of the principle *pacta tertiis nec nocent nec prosunt*, entitled to insist on the due performance of the particular treaty concluded with itself, or on reparation for any failure to do so. It should perhaps be added that the Rapporteur has not felt it necessary to say any more here about the "effect" of a later treaty or treaty obligation on an earlier one than has already been said in his second and third reports, for two reasons. In the first place, the matter is primarily one of the interpretation of the two treaties or treaty obligations concerned. Secondly (apart of course from the cases coming within the scope of the

<sup>64</sup> See the Court's final conclusion reading as follows (*I.C.J. Reports 1958*, p. 71):

"It thus seems to the Court that, in spite of their points of contact and in spite, indeed, of the encroachments revealed in practice, the 1902 Convention on the guardianship of infants does not include within its scope the matter of the protection of children and of young persons as understood by the Swedish Law of June 6th, 1924. The 1902 Convention cannot therefore have given rise to obligations binding upon the signatory States in a field outside the matter with which it was concerned, and accordingly the Court does not in the present case find any failure to observe that Convention on the part of Sweden."

<sup>65</sup> See the Rapporteur's third (1958) report (A/CN.4/115), articles 18 and 19 and commentary thereto.

<sup>62</sup> Sir Hersch here pointed out that some of the laws he had just mentioned might be of such a nature as to come within the scope of certain exceptions always implied in treaties or in some classes of treaties—a matter considered below in connexion with article 23 of the present draft; but, he said, "the argument here summarized does not proceed on these lines. It is based on the allegation of a difference between the treaty and the law which impedes its operation".

<sup>63</sup> *I.C.J. Reports 1958*, p. 83.

present article), either the later obligation terminates the earlier (whether by actual cancellation or by replacing it with an amended version), or the existence of the earlier one has the effect of invalidating the later. These aspects of the effects of treaties on one another are therefore, or should be, fully covered by the sections on termination and essential validity. Where, on the other hand, neither of the two treaties or treaty obligations is either terminated or invalidated by the other, but yet they conflict, then and only then will the situation contemplated by the present article arise.

50. *Paragraph 2. Sub-paragraphs (a) and (b)* require no comment beyond what has already been made in an earlier report.<sup>66</sup> Strictly, in neither case is there any true conflict. In the one, the parties have by their own action eliminated one of the two sets of obligations concerned; and in the other, one set of obligations is rendered null and void.

51. *Sub-paragraph (c) of paragraph 3.* Article 103 of the Charter of the United Nations provides that "in the event of a conflict between the obligations of the Members of the United Nations under the Charter and their obligations under *any other* international agreement, their obligations under the Charter are to prevail." Since all Members of the United Nations, whether in relation to pre-existing or to subsequent treaties, have become Members on this basis, it must be assumed that they have also accepted the fact that if any treaty obligations owed to them by other Members conflict with the obligations of those Members under the Charter, the latter will prevail—with the result that performance of the treaty cannot be claimed, and no responsibility will be incurred *vis-à-vis* another Member State of the United Nations in respect of such non-performance.

52. In respect of non-member States, on the other hand, the position cannot be quite the same. It is clear that for the Member State, its Charter obligations will duly prevail over those of any other treaty, even though the other party to the treaty is not a Member of the United Nations. It is less easy, however, to hold that, in such circumstances, the Member State incurs no responsibility at all for the breach of the treaty, and that the non-member State, party to the treaty, has no valid international claim. On the basis of the principle *res inter alios acta* and *pacta tertiis nec nocent nec prosunt*, this provision of the Charter cannot be a ground *vis-à-vis* a non-member State for violating a treaty with such a State. The Charter obligation may prevail in the sense that the other treaty cannot be carried out because of the Charter obligation and of Article 103; but it would seem that the Member State will nevertheless be under an obligation to make due reparation to the non-member for the breach involved.<sup>67</sup>

#### SUB-SECTION ii. LIMITS OF THE TREATY OBLIGATION (CIRCUMSTANCES JUSTIFYING NON-PERFORMANCE)

53. The extent of the treaty obligation is not unlimited, nor does the obligation prevail in all circum-

stances. The object of this sub-section is to group together a statement of those circumstances in which non-performance of a treaty obligation would, in principle, be justified. This is considered under three heads:

- (a) General principles and classification;
- (b) Non-performance justified on general grounds of law;
- (c) Non-performance justified by virtue of a term or condition implied by law in the treaty.

#### RUBRIC (a). GENERAL PRINCIPLES AND CLASSIFICATION

##### *Article 9. General definition of non-performance justified by operation of law*

54. The point sought to be brought out in this article is that the grounds of non-performance mentioned in the present sub-section do not derive from (and therefore they necessarily operate independently of) any specific term of the treaty. It goes without saying that, if the treaty itself provides certain grounds of non-performance or permits of non-performance in certain circumstances, then non-performance on those grounds or in those circumstances will be justified; but that is a matter of the interpretation of the treaty, and not therefore within the scope of the present chapter.

##### *Article 10. Scope of the present sub-section*

55. The object of this article is to make it clear that the case dealt with in the present sub-section, though a related one, is distinct from that of the grounds upon which, by operation of law, a treaty as such, or a particular part of it, can be regarded as wholly terminated or indefinitely suspended. The latter case has been considered elsewhere.<sup>68</sup> The present sub-section assumes that the treaty itself remains in force, and considers the circumstances in which, despite this fact, its non-performance, either in whole or in part, may become justified. Consequently, whereas in the report on the termination of treaties (Rapporteur's second (1957) report) the grounds of termination there considered looked towards a permanent or semi-permanent outcome—namely, complete termination, or at least indefinite suspension, of the treaty, either as a whole or as regards some particular obligation under it—the present sub-section has in view mainly non-performances of a temporary or *ad hoc* character which, so far from having any element of permanence, look forward to a *resumption* of performance so soon as the occasion that justified the non-performance is past. It is in this that the real difference between the subject of "grounds of non-performance" and that of "grounds of termination" lies, and which calls for their separate treatment, despite the close analogy between them.

56. Notwithstanding these considerations, the Rapporteur has thought it desirable to include two cases in which, in the nature of things, the non-performance will

<sup>66</sup> *Ibid.*

<sup>67</sup> See the similar conclusion reached in paragraph 85 of the commentary in the Rapporteur's third (1958) report (A/CN.4/115).

<sup>68</sup> See the Rapporteur's second (1957) report (A/CN.4/107), articles 16-23 and commentary thereon.

be permanent and for all practical purposes the obligation will terminate or lapse (subject in one case to the rules of state succession). These cases form the subject of articles 21 and 22 below. They have already figured in the sections on termination (see footnote 68 hereto), although in one case perhaps not quite adequately. They are re-introduced here in order to take the opportunity of distinguishing them from the superficially similar cases arising with reference to the subject of Essential Validity which was considered in the Rapporteur's third (1958) report.<sup>69</sup> As to this, see below in the commentary to articles 21 and 22. (Some rearrangement of all this may eventually be desirable.)

57. Article 23, on the other hand, which may also give rise to semi-permanent situations of non-performance, involves considerations of a different order, and had to be included in the present sub-section.

#### Article 11. Classification

58. This article attempts to give a general statement, under main heads, of the circumstances in which non-performance of a treaty obligation may be justified. *Paragraph 1* is little more than a restatement in more analytical form of article 9, the commentary to which is contained in paragraph 54 above.

59. *Paragraph 2*. There is a certain ambiguity in the division in this paragraph between justifications for non-performance operating *ab extra* and *ab intra* the treaty. Strictly, both operate *ab extra*, inasmuch as neither derives from any specific term of the treaty permitting non-performance, or even from a term of the treaty which can be read by implication as permitting non-performance. The grounds in question are either general legal grounds justifying non-performance having nothing at all to do with the treaty, or else they can consist of conditions which, by general operation of law, are to be read into the treaty, even though they are not expressed or even implied by any actual term of it. All these grounds are considered under rubric (b) of the present sub-section.

*Article 12. Certain general considerations applicable in all cases where a right of non-performance by operation of law is invoked*

60. Whatever the ground of non-performance, and however it may arise, assuming it to be a ground provided for in the present sub-section, certain common considerations will govern its operation.

*Paragraph 1*. This paragraph is self-explanatory. Obviously no ground of non-performance, however much otherwise justified by general considerations of law, can be invoked if specifically excluded by the treaty itself. Moreover, just as in the case of war, some treaties are specifically concluded with a view to application in time of war or hostilities (Hague, Geneva Conventions, etc.)—and therefore obviously do *not* fall under what might otherwise be the terminative or suspensory effect of war on treaties—so equally may some treaty obliga-

tions be specifically intended to apply to some of the situations contemplated in the present sub-section.

61. *Paragraph 2*. Some grounds of non-performance, such as impossibility of performance, do not involve any choice; but in most cases, they involve circumstances affording a *faculty* of non-performance to the party concerned, and that party can elect whether to exercise this faculty or not. This being so, it would seem that such party must exercise the faculty within a reasonable time. If it does not do so, it will be taken to have accepted the situation that originally gave rise to the faculty as being one that does not affect its obligation to continue performance of the treaty in full. Naturally, this principle cannot be invoked by any other party to the treaty not itself performing its obligations under the treaty.

62. *Paragraph 3*. The principle involved here is the same, *mutatis mutandis*, as the one already discussed in an earlier report in relation to the grounds for the termination of treaties. For comment reference may be made to the Rapporteur's second (1957) report (A/CN.4/107), paragraph 91 of the commentary.

63. "... (unless this act or omission was both necessary and legally justified) ...". This deals with a rather difficult point, perhaps not altogether satisfactorily handled in the earlier report referred to. Some contributory acts might involve no illegality, yet be unnecessary and such as could have been avoided. *Per contra* no illegal act can be said to be "necessary". Therefore, only if the contributory act (where it exists) can be shown to have been both lawful *and* necessary, will it not preclude the party concerned from invoking the relevant ground of non-performance.

64. *Paragraph 4*. It is sufficient to refer to the commentary to article 16, paragraph 5, in the Rapporteur's second (1957) report (A/CN.4/107, para. 92 of the commentary).

RUBRIC (b). NON-PERFORMANCE JUSTIFIED *ab extra* BY OPERATION OF A GENERAL RULE OF INTERNATIONAL LAW

*Article 13. Acceptance of non-performance by the other party or parties*

65. This article and articles 14 to 19, inclusive, deal with the grounds of non-performance based on general legal considerations and having no reference to the particular treaty. Article 13 itself requires no explanation, since it is obvious that, even if a non-performance is not initially justified, its acceptance by the other party or parties concerned will suffice to legitimize it. As is stated in paragraph 2, however, to have this effect the acceptance must be clear and unmistakable, and must indicate that the other party does more than merely tolerate the non-performance in the sense of not seeking any redress for it and not taking counter-action or having recourse to any available remedies. All these things can occur without the other party having in any way given its consent to the non-performance. There must consequently be such an acceptance as amounts to an agreement by the other party that performance shall not take place.

<sup>69</sup> See footnote 22.

### Article 14. Impossibility of performance

66. *Paragraphs 1 and 2.* In connexion with these paragraphs, it will be sufficient *mutatis mutandis* to refer to paragraphs 98 to 100 of the commentary to the Rapporteur's second report, dealing with the case of impossibility as a ground for the termination of a treaty, except of course that, *ex hypothesi*, the requirement of the permanent and irremediable character of the impossibility—necessary as a ground of termination—will not apply in the present case.

67. "Temporary or *ad hoc* impossibility of performance..." A permanent impossibility would of course bring the treaty or the particular obligation to an end altogether. The case here contemplated is therefore necessarily that of a temporary impossibility justifying non-performance for the time being. This really applies to all the grounds of non-performance considered in this report—at least to all those coming under rubric (a) of the present sub-section (see paras. 55-57 above). The point (which, though made with reference to the question of *force majeure* (i.e., impossibility), really applies in respect of all the grounds of non-performance considered in the present rubric), is well brought out in the following passage from Rousseau:<sup>70</sup>

"The causes for the lapse of treaties should not be confused with *force majeure*, which may create an obstacle to the performance of a treaty. This distinction is made both in theory and in conventional law. On the one hand, Professor Scelle clearly distinguishes impossibility of fulfilment from desuetude (*Précis*, II, p. 419). On the other hand, the convention on treaties adopted at Havana on 20 February 1928 by the Sixth International Conference of American States deals in two separate articles with *force majeure* (art. 14) and the *rebus sic stantibus* clause (art. 15).

"In international law, the effect of *force majeure* will be to exonerate a State from the responsibility which would normally devolve upon it for non-performance of a treaty. When the *force majeure* disappears, the obligation of performance will reappear, this being proof that the treaty subsists."

68. *Paragraph 3.* The reasons for this paragraph arise out of the very nature of the plea of *rebus sic stantibus*. It is obvious that this plea is never likely (and certainly ought not) to be raised, in respect of any provision of a treaty that is not fundamental to the treaty. It follows that, if there are valid grounds for the plea of *rebus sic stantibus* at all, they will be grounds for terminating the treaty altogether. The principle that the plea of *rebus sic stantibus* can only be put forward on a basis fundamental to the continuation in force of the treaty has already been fully brought out and discussed in relation to articles 21 to 23 of part III of chapter 1 of the Code.<sup>71</sup> Change of circumstances having reference to a treaty obligation which is *not fundamental to the treaty* in question, can hardly itself be a fundamental change of circumstances of the kind required for the application of the principle of *rebus sic stantibus*; and it must be concluded therefore

that that principle has no application to the case of the non-performance of a particular treaty obligation except in those cases where the obligation is fundamental, so that the principle *rebus sic stantibus*, if applicable at all, would tend towards the termination of the treaty. It is no doubt true that minor obligations may become obsolete. Their termination or justified non-performance may occur through acquiescence or desuetude, and it seems unnecessary to provide specially for such cases.

69. The Rapporteur has also considered whether what figured as case (v) in article 17 of the sections on termination of treaties,<sup>72</sup> namely, complete disappearance of the *raison d'être* of the treaty or treaty obligation, ought to figure in the present sub-section also. It is of course perfectly possible that a treaty as a whole remains in force, but that certain of its provisions have become obsolescent or inapplicable. An example of the kind of case involved might be that already considered above in another connexion, in paragraph 29 of this commentary—i.e., where there are in a treaty certain provisions based on the existence of a monarchical system of government for the parties, but they have subsequently become republics. However, it would seem that such cases would normally both be covered by the principle of impossibility of performance, and, in any event, would involve the total extinction or termination of the obligation concerned rather than any mere non-performance as such, so that the question of simple non-performance would not arise or be relevant. It does not therefore seem necessary to deal with this case in the present context.

### Article 15. Legitimate military self-defence

70. The case here contemplated, namely, that of the temporary non-performance of a particular treaty obligation on grounds of legitimate military self-defence, is distinct from the case of the termination or suspension of a treaty as a whole by reason of war or hostilities, which falls to be dealt with as a separate matter.<sup>73</sup> War does not necessarily terminate or suspend all treaties or treaty obligations, but when it does do so, it effects either a complete termination or a suspension for the duration of the hostilities. What is contemplated in the present context is the case of a specific and more or less *ad hoc* non-performance of some particular obligation of an otherwise still subsisting treaty, on the ground of legitimate self-defence. The present case therefore assumes that the treaty remains in full force and, in principle, fully operative, and merely considers the circumstances in which, on grounds of legitimate self-defence, it may be permissible not to perform for the time being a particular obligation of the treaty, or possibly all the obligations of the treaty. It should perhaps also be mentioned that the case is, in principle, also distinct from that of impossibility of performance, although in practice impossibility might in fact well exist.

71. *Paragraph 1.* The Rapporteur does not consider that so-called "necessity", sometimes suggested as a general ground justifying non-performance of treaty

<sup>70</sup> Charles Rousseau, *Principes généraux du droit international public* (Paris, Editions A. Pédone, 1944), vol. I, p. 365.

<sup>71</sup> See A/CN.4/107, paras. 141-180 of the commentary.

<sup>72</sup> *Ibid.*, paras. 101-103 of the commentary.

<sup>73</sup> *Ibid.*, para. 106 of the commentary.

obligations, can (considered as a category) be regarded as being a valid ground of non-performance. To put the matter differently, *the only kind of necessity which entails that justification* is legitimate military self-defence. Again, the term "military" has been used advisedly in order to exclude other contexts in which the term "self-defence" has recently come to be used, such as "economic self-defence" or "ideological self-defence". Certain of these factors might be grounds upon which a party might seek to avail itself of any legitimate method of bringing the treaty to an end, or, in some cases, they might give rise to a situation of impossibility of performance, or of the application of the doctrine of *rebus sic stantibus*, which might cause or justify the termination of the treaty in accordance with principles set out in a previous report; but so long as the treaty subsists, they are not, in general, grounds for failing to perform its obligations. The case of military self-defence is different in principle, provided that the conditions specified by *sub-paragraphs (a) to (d)* are fulfilled.

72. These conditions are self-explanatory. The one contained in *sub-paragraph (b)* is necessary in order to avoid a pretext for the non-performance of treaty obligations in the course of an operation that does not properly consist of military self-defence being made.

73. *Paragraph 2* is self-explanatory. This, as already indicated in connexion with articles 10 and 14 (paras. 55-57 and 66-69 above), is of the essence of the type of non-performance not affecting the basic continuance of the obligation, which is contemplated in this part of the Code.

74. *Paragraph 3* is the corollary of paragraph 2 (*a*). Apart from the exception mentioned, it would seem that a mere threat, that may or may not materialize, is not a sufficient justification, and that nothing but actual operations, or an obvious and imminent threat of them ("in motion" so to speak) will justify non-performance of the obligation on this ground.

75. It should perhaps be mentioned here that the case chiefly contemplated by this article is where the other party to the treaty is not itself the author of, or concerned in, the military operations that have given rise to the need for non-performance. If the other party should be in that position, it would then become very probable that justification for non-performance would exist not merely on this but on certain of the other grounds mentioned in the sub-section (e.g., reprisals). Alternatively, the case is likely to come within the scope of the rules about the effect of "war" (including hostilities) on treaties—see paragraph 70 above, and footnote 73.

#### Article 16. Civil disturbances

76. This article requires no detailed comment beyond what has been furnished in connexion with article 15. Something must be said, however, about the principle involved. Little is contained in most of the authorities; but the [case is] recognized in Lord McNair's work on

treaties,<sup>74</sup> in which a number of opinions of the Law Officers of the Crown in England are quoted in illustration of it (as indeed also of the general principle of article 15 above). Thus, in an opinion given by the King's Advocate<sup>75</sup> (the well-known Court of Admiralty jurist and internationalist, John Dodson), dated 6 February 1835, the following view was expressed:<sup>76</sup>

"I must take leave, however, to add that under the special circumstances of a disputed succession to the Throne, and an internal Civil War, Spain may possibly be justified, by a necessary attention to her own security and preservation, in making prohibitory municipal regulations applicable to British Vessels in common with those of all other Foreign Friendly Nations, but which in case of certain Ports should not apply to her own vessels, since no Nation is bound to abide by a Treaty of Commerce under circumstances which render an adherence to it inconsistent with its own security."

In a footnote to this passage, Lord McNair expresses doubts about some of the possible implications of this view, as follows:<sup>77</sup>

"This language comes dangerously near that which is used by some writers stating the *rebus sic stantibus* doctrine. But the temporary suspension of a commercial treaty in order to cope with a rebellion belongs to a different order of ideas."

The present Rapporteur also would query the reference to "security" at the end of Dodson's opinion. Clearly, what was involved (it being only a civil war) was not the security of the State as such (the international entity and party to the treaty), but that of the Government, or of a particular régime. It is therefore scarcely on this that any right of non-performance of an otherwise applicable treaty can be founded. Lord McNair founds it on the idea of an implied condition which international law reads into all treaties, so as to cover this kind of case (i.e., he would place the case in effect amongst those covered by rubric (*b*) of the present sub-section). It can certainly be viewed in that light; but the Rapporteur feels there are grounds for giving this exception a more objective status, as an independent rule of law rather than as a condition implied by law (in the treaty). The case is closely analogous to that of self-defence (article 15 above). A government is not the

<sup>74</sup> Arnold Duncan McNair, *British practice and opinions* (Oxford, Clarendon Press, 1938).

<sup>75</sup> The King's (or Queen's) Advocate in England was a member of an institution known as "Doctors' Commons", the members of which were trained (and were doctors) in the civil rather than the common law. They were usually known as "the civilians" or "the doctors". Their special field was canon law, succession, and maritime and international law. Doctors' Commons was founded in the 16th century, and continued until it was abolished by Act of Parliament in 1857, its functions having then been integrated in the general legal system of the country. In the preface to his *International Law Opinions* (Cambridge, 1956, 3 vols.), and in his address to the Grotius Society, "The Debt of International Law in Britain to the Civil Law and the Civilians" (*Transactions of the Grotius Society*, vol. 39, 1953), Lord McNair has shown the extent of the recourse which, over several centuries, the Crown and its executive advisers had to Doctors' Commons for advice on international law questions.

<sup>76</sup> McNair, *op. cit.*, p. 236.

<sup>77</sup> *Ibid.*

State; but, if it is the legitimate government, it represents the State and alone has the right to do so. It has a right to maintain itself against unconstitutional attempts to overthrow it, and no government can govern without the right—and as of right—to deal with riots and civil disturbances. If therefore it proves unavoidable for the exercise of these rights, then treaty obligations must, it is conceived, temporarily (though only temporarily) and subject, *mutatis mutandis*, to the same conditions as are mentioned in article 15, take second place.

#### Article 17. Certain other emergency conditions

77. Paragraphs 1 and 2. Although, as already stated, the Rapporteur does not consider that any general doctrine of "necessity" can be included amongst the grounds justifying non-performance of a treaty obligation, it is generally considered that, in addition to the cases specified in articles 15 and 16, major emergencies arising from natural causes (or, in English legal terminology, from "acts of God") such as storm damage, earthquakes, volcanic eruptions, etc., may justify non-performance of a treaty obligation. In some of these cases a situation of impossibility, either permanent or temporary, may arise, and in all of them a situation of near impossibility, actual or moral, must exist in order to justify non-performance. Paragraph 2 is intended to afford the necessary tests.

78. This case also is considered by Lord McNair,<sup>78</sup> who quotes an opinion given by Lord Phillimore (then Sir Robert Phillimore) as Queen's Advocate, dated 29 August 1866, with regard to a prohibition of the export of cereals, under famine conditions, from the (at that time) Turkish principalities of Moldavia and Wallachia. The opinion stated: <sup>79</sup>

"That a Treaty of Commerce, such as that between Her Majesty and the Sultan (signed at Kanlidja 29th April, 1861), does not prevent one of the contracting States from prohibiting, in time of famine, the exportation of native produce necessary for the sustenance of the people—is a proposition of International Law, which may be said to be well established by the reason of the thing, and by the usage of States (Vattel L.2; c.12; s.179). Such a dearth appears, according to the letter of Mr. Consul Green (Bucharest 13th August, No. 24) actually to exist in these Principalities, so far as the Cereals, Maize, Barley, and Millet are concerned; upon the first of which crops the food of the people is said mainly to depend.

Assuming this to be the true state of the case, I am of opinion that it was competent to the Government of these Principalities to prohibit, during the continuance of this dearth, the exportation of these Cereals. I am further of opinion that Her Majesty's Government cannot be advised to claim, as a matter of right, that Contracts for these Cereals made by British Merchants with Traders in the Principalities, previously to the issue of the order, shall be exempted

from its operation, and that grain, thus already contracted for, shall be allowed to be exported."<sup>80</sup>

A somewhat similar opinion regarding a prohibition on the import of cattle, on grounds of public health, is also cited by Lord McNair as an illustration of the same principle. The present Rapporteur has, however, preferred to deal with this as a case illustrating the principle embodied in article 23, *sub-paragraph (c)* of this sub-section. The right to apply a country's normal quarantine regulations, despite what might appear to be the conflicting terms of a commercial treaty, has come to be regarded as an implied exception or condition to be read into commercial treaties as a class; whereas the case of emergency, due to famine conditions, seems rather to turn on objective principles of law outside the treaty. But no doubt the distinction may be a fine one.

79. Paragraph 3 requires no comment.

80. Paragraph 4 is intended to emphasize the fact that, despite the circumstances, mere difficulty in the performance of the treaty obligation is not in itself a ground justifying non-performance.

#### Article 17A. Previous non-performance by another party

81. The reasons why no article dealing with this matter is included at this point in rubric (b) of the present sub-section are given in paragraph 102 below in connexion with article 20 in rubric (c), which contains provisions on the subject.

#### Article 18. Non-performance by way of legitimate reprisals

82. Paragraph 1. This article involves an issue of considerable difficulty. Before discussing it, and in order to clear the ground, it should be mentioned that, as the opening paragraph of the article states, the case contemplated is not that of the application of the simple reciprocity condition normally to be read into all treaties, except such as fall within certain special categories,<sup>81</sup> and by reason of which if one party fails to carry out a treaty obligation of the "reciprocal" or "interdependent" type,<sup>82</sup> the other party is *pro tanto* absolved likewise from doing so in relation to that party—or, at any rate, the first party will have no legal ground of complaint if this consequence results from its own prior non-observance of the treaty. This case is covered by article 20 of this sub-section. It can of course also be regarded as a case of "reprisals", which in a certain sense it is. The right involved seems, however, to spring much less from the general international law principle of reprisals as such, and much more directly from the normal requirement of reciprocity implicit in the treaty relationship, and implied by law in all treaties involving reciprocal or mutually interdependent rights and obligations. Therefore, it seems best to deal with it

<sup>80</sup> Sir Robert Phillimore went on to say that compensation might be due in the latter class of case.

<sup>81</sup> See paragraph 3 (e) of article 18.

<sup>82</sup> These terms are explained in article 19, and the commentary thereto, in the Rapporteur's second (1957) report (A/CN.4/107).

<sup>78</sup> *Op. cit.* in footnote 74.

<sup>79</sup> McNair, *op. cit.*, p. 240.



in that way, leaving those cases that would not be covered by the reciprocity rule to be dealt with on a basis of reprisals.

83. "...where [the application of the reciprocity rule]... would not afford an adequate remedy, or would be impracticable..." Action on a "reciprocity" basis is only possible and effective in certain kinds of cases. It applies mainly in cases where the breach of treaty is negative in character, i.e., involves a simple non-performance of some requirement of the treaty. Thus, if State A withholds from State B certain mutual tariff concessions provided for by treaty, State B can proceed (and it will usually suffice for it to proceed) to an equivalent withholding of the same concessions from State A. But many breaches of treaty are not of this kind. For instance, if a treaty provides, *inter alia*, for the payment of certain sums of money, as compensation, by State A to State B, and A fails to pay, B may be unable to resort to like action because no specific payments are due from it to A, either under the treaty or otherwise, so that any counter-action, to be effective, must take another form. Again, if A, contrary to a treaty provision, nationalizes or expropriates property of B or its nationals in A's territory, it may be theoretically possible, but actually quite impracticable, for B to proceed to a like action in respect of the property of A or its nationals in B's territory—or perhaps there may be no such property, or only in amounts quite incommensurate with the B property existing in A territory.

84. It is clear, therefore, that—subject to the safeguards against abuse set out in paragraphs 3 and 4 of this article—effective self-redress<sup>83</sup> must include the possibility in certain cases of resorting to action that may involve not a precisely corresponding non-performance or infraction of the treaty in question, but a non-performance or infraction of some other provision of the treaty, or, it may be, of a different treaty.<sup>84</sup> This would have to be based on the principle of reprisals and this is the case contemplated by the present article.

85. Subject to the overriding rules of international law about the aggressive or otherwise illegal use of force, there can be no doubt about the general right of legitimate reprisals, i.e., reprisals within the limitations of such conditions as, for example, that the action taken must have some appropriate relationship to the act or omission provoking it, and must be proportionate or commensurate in its effects—or at any rate not manifestly the contrary—and also must be limited to what is necessary in order to obtain redress. Subject to these conditions, reprisals are, for instance, according to Oppenheim:<sup>85</sup>

"...admissible not only, as some writers maintain, in case of denial or delay of justice, or other ill-treatment of foreign citizens prohibited by Inter-

national Law, but in all other cases of an international delinquency for which the injured State cannot get reparation through negotiation or other amicable means, be it non-compliance with treaty obligations, violation of the dignity of a foreign State, violation of foreign territorial supremacy, or any other internationally illegal act."

Rousseau<sup>86</sup> equally recognizes the right of reprisals (subject to the same safeguards) as being specifically applicable to the case of breaches of treaty, but remits the study of the matter to a later volume dealing with the general subject of redress, use of force, etc.<sup>87</sup> Hyde<sup>88</sup> also admits the practice, though inclined on historical grounds to confine it to cases of the taking or withholding of foreign property by way of retaliation. Other authorities<sup>89</sup> recognize the doctrine of reprisals, while also, in certain cases, regarding it (correctly of course) as a consequence of the insufficiently organized condition of the international society. Thus Guggenheim<sup>90</sup> says:

"Since there is no differentiation of functions in customary international law, that is the only way in which the injured party can react against the wrong which has been done to it. Its only recourse is to acts which, if they did not constitute a sanction—that is, if they were not the expression of a means of legal protection—would have to be considered a violation of law."

In a footnote to this passage, Guggenheim adds: "Kelsen was the first to defend the precise theory in 'Unrecht und Unrechtsfolge im Völkerrecht', *Zeitschrift für öffentliches Recht*, 1932, 571/55." He continues:<sup>91</sup> "Reprisals may consist of any acts having *per se* the character of acts contrary to international law, with the exception of those constituting acts of war." By this, of course, is meant acts that would be illegal if they were not justified by way of reprisals for a prior illegality, and the author makes it clear that they can only legitimately take place subject to certain conditions. Spiropoulos equally, after citing the same conditions, says:<sup>92</sup> "Although the suspension of an international obligation by way of reprisal is certainly contrary to law, it nevertheless does not constitute an *unlawful* act in itself." Hall, in discussing the measures of redress "which it is permissible to take", instances reprisals, and in listing what they may consist in, states "...or, finally, in the suspension of the operation of treaties".<sup>93</sup> Similarly, Verdross<sup>94</sup> says:

<sup>86</sup> *Op. cit.* in footnote 70 above, p. 371.

<sup>87</sup> Oppenheim also classifies the matter in this way.

<sup>88</sup> Charles Cheney Hyde, *International Law, chiefly as interpreted and applied by the United States*, 2nd rev. ed. (Boston, Little, Brown and Company, 1947), vol. II, pp. 1660 *et seq.*

<sup>89</sup> Besides those cited or quoted from in the text, such authorities as Rivier, Heffter, Wheaton, etc. may be mentioned.

<sup>90</sup> Paul Guggenheim, *Traité de droit international public* (Geneva, Georg et Cie, S.A., 1953), vol. II, pp. 84, 85.

<sup>91</sup> *Ibid.*, p. 86.

<sup>92</sup> Jean Spiropoulos, *Traité théorique et pratique de droit international public* (Paris, Librairie générale de droit et de jurisprudence, 1933), p. 289.

<sup>93</sup> *Op. cit.* in footnote 24 above, p. 433.

<sup>94</sup> A. Verdross, *Völkerrecht* (Vienna, Springer Verlag, 1950), p. 328.

<sup>83</sup> Owing to the undeveloped condition of international institutions, international law must, for the present, continue to be a system which, subject to the rules about the use of force, admits of certain limited possibilities of what might be called peaceful self-redress.

<sup>84</sup> This is not of course intended to sanction gratuitous treaty-breaking.

<sup>85</sup> L. Oppenheim, *International Law: A Treatise*, vol. II, 8th ed., H. Lauterpacht (ed.) (London, Longmans, Green and Co., 1955), pp. 136, 137.



"By a reprisal is to be understood a derogation from [international] law on the part of a State which has suffered prejudice in its international law rights, with the sole juridical object of inducing the State which has taken up this illegal position against it, either to make reparation for the wrong done, or to cease from further prejudicial acts."

Verdross adds:<sup>95</sup>

"Reprisals have been recognized since the birth of modern international law, as a means of legal protection in inter-State relations."

Finally, Accioly and Kelsen may be cited together in the following quotation from Accioly<sup>96</sup> (Rapporteur's translation from the Portuguese):

"Kelsen maintains... that reprisals 'are not illegal, in so far as they take place as a reaction against an illegality'. Indeed, it would seem possible to attribute to such a reaction the character of legitimate [self] defence—which, as is known, is expressly admitted by the Charter [of the United Nations]."

"The eminent Austrian master elsewhere defines as reprisals... 'acts which, being normally illicit, are exceptionally permitted as the reaction of a State against a violation of its rights by another State'."

86. These citations from diverse authorities, both older and more modern, would appear to be sufficient to establish the following propositions:

(a) In certain circumstances, and subject to certain conditions and safeguards required by international law, there exists, at the least, a right of what might be termed "peaceful reprisals", not involving the aggressive or illegal use of force.

(b) Such reprisals may take the form of non-observance of what would otherwise be a treaty obligation, or of a breach of such an obligation.

(c) Such a derogation from a treaty obligation (provided it is appropriate to the circumstances and no lesser action will meet the case) may take place as a "reply" either to a derogation from the same obligation by the other party to the treaty, or from another obligation of that treaty or from an obligation under another treaty, or from a general international law obligation.

87. At this point, it becomes necessary to consider the doctrine of "election" which is not infrequently put forward, but which the Rapporteur considers—at any rate in the present context, and in the form it usually takes—to be erroneous. It is stated in the Harvard Research Volume on Treaties as follows:<sup>97</sup>

"...since the breach of a treaty by one of the parties thereto does not automatically terminate the treaty, it is evident that the innocent party may simply elect to regard the treaty as continuing in force between it and the party which committed the breach. In that case, the innocent party is itself relieved of none of its obligations under the treaty, for even if it had a right to abrogate unilaterally the

treaty relation existing between it and the party committing the breach thereof, failure to exercise that right leaves the treaty binding upon all parties in exactly the same manner as prior to the breach."

It is no doubt true that, as stated in the above-quoted passage, where a right exists to elect to regard a treaty as terminated, and this right is not exercised, the treaty remains in force for both parties. But it does not at all follow, as a necessary deduction from this, that one party must go on observing the treaty in all respects although the other party is not doing so, or is failing to observe some particular provision of it. This would be to ignore the fact that international law has always admitted the possibility not only that a treaty itself, and as such, may remain in force, although it is not in all respects being observed by one or more of the parties—indeed the whole of this sub-section is founded on that assumption—but also that the non-observance by one party may justify a corresponding, or (by way of reprisals) a different non-observance by the other. In short, what the Harvard system—if it may be so called—implies, is that there is no middle course, when a breach of treaty occurs, between complete termination of the treaty by the injured party, or a complete and integral observance of the treaty obligations by that party, despite non-observance of some or all of these by the other party. This is certainly not the true position.

88. Nor are the authorities cited in the Harvard Volume in support of the above-quoted proposition very convincing. Several of them<sup>98</sup> consist of citations from decisions of domestic tribunals, particularly in common-law countries. But analogies drawn from private law do not hold in this case, for private law has nothing corresponding to the international law doctrine of legitimate self-redress in certain circumstances, by way of counteraction or reprisals. It is no doubt true under many systems of private law that, if a contract is broken in certain ways, the other party has a right to treat it as being at an end; but that, if that party does not elect to exercise his right, it must continue to perform its part of the contract, subject to a right to seek damages or other redress *in the courts* for the non-performance by the other party. International law, on the other hand, has to take into account the absence in many cases of any sure right of redress through international tribunals, or of any sure means of securing enforcement of their decisions, if not carried out; and therefore, within limits, recognizes what is in effect a middle course, namely, the legitimacy of certain measures of self-redress taken as a means of meeting that situation.

89. The Harvard Volume also cites certain international authorities, but these do not seem really to support the deduction that because, in certain events, a treaty remains in force despite the fact that some obligation under it is not being carried out by one of the parties (and the other party has not contended that the treaty is at an end), such other party must nevertheless itself observe all the provisions of the treaty and cannot resort even to a corresponding—still less to any different—form of non-observance, i.e., to no *via media*

<sup>95</sup> *Ibid.*

<sup>96</sup> Hildebrando Accioly, *Tratado de Direito Internacional Público*, Rio de Janeiro, 1956-1957, vol. 3, p. 82. The quotations from Kelsen are given as coming from his *Principles of International Law*, pp. 23 and 24.

<sup>97</sup> *Op. cit.* in footnote 15, p. 1078.

<sup>98</sup> See *op. cit.*, pp. 1078 and 1079.

<sup>99</sup> See *op. cit.*, p. 1079.

between termination and integral observance. There is, for instance, a reference to Oppenheim; but the passage referred to<sup>100</sup> merely says that "Violation of a treaty by one of the contracting States does not *ipso facto* cancel the treaty; but it is within the discretion of the other party to cancel it on this ground."<sup>101</sup> This is true (subject to the requirement that the discretion exists only if the breach is a fundamental one—see footnote 101, below), but it in no way supports the further proposition that, if the other party elects *not to exercise this discretion*, it has no other means of redress for the breach except a (possibly or, at any rate, probably) non-existent faculty of bringing the matter before an international tribunal. Lord McNair is also cited by the Harvard Volume, in respect of a statement contained in his course delivered (in French) at The Hague Academy of International Law in 1933.<sup>102</sup> But again, the relevant passage does not support the Harvard deduction. It reads:<sup>103</sup>

"Violation of a treaty by one of the contracting States does not *ipso facto* cancel the treaty, but at the most, allows the other party to opt in favour of its cancellation (All violations are not, of course, serious enough to justify such action . . .)."

In this passage, the phrase "at the most" would seem to refer to the fate of the treaty as a *whole*, i.e., it means that in respect of termination, the most that exists is a *faculty* of abrogation for the injured party, not an automatic abrogation *ipso facto*, if a breach occurs. Again, it does not in any way follow that because this faculty is not exercised in a particular case (assuming that the breach were sufficiently fundamental to justify that), and the treaty consequently subsists, the injured party has no other or lesser rights, i.e., of counter-action by way of a corresponding, or of some different non-observance. Moreover, in those cases—which are the ones principally contemplated by the present sub-section—where the breach by the other party is not sufficiently fundamental to give rise to a faculty of termination for the other party at all, so that no such faculty exists, there can be no doubt about the right of corresponding or other non-observance under the conditions laid down in these articles. It may well be that, as a *matter of policy*, a State which wishes to preserve the existence of a treaty, despite infractions by the other party, would deem it expedient *not to avail itself of its right of retaliation* or counteraction; but that, of course, is another matter.

90. Crandall<sup>104</sup> also is cited in the Harvard Volume; but here again the position is that Crandall discusses the

matter with reference to the question of treaty termination, and largely on the basis of what kind of breach by one party will justify the other in denouncing the treaty; this is, of course, quite a different question.

91. For all these reasons, the present Rapporteur feels that, while the view put forward in the Harvard Volume is not implausible,<sup>105</sup> it is, in fact, not correct as a matter of international law, and is derived largely from private law doctrines that have no application in the international field. He considers the correct position on this particular matter to be as stated in article 18 of the present draft under discussion, and also in article 20, discussed below, to which much of the argument equally applies. No doubt, as regards the propriety of counter-action by way of reprisals, a good deal turns on the exact moment at which it is permissible to take such action. No one would suggest that the right arises immediately and before any attempt at settlement has been made. This is the reason for the inclusion in article 18 of such provisions as sub-paragraphs (c) and (f) of paragraph 3.

92. *Paragraph 2 of article 18.* This is amply supported by the authorities cited earlier.

93. *Paragraph 3, sub-paragraph (a).* This merely repeats, *ex abundanti cautela*, the qualification already mentioned in paragraph 1.

94. *Paragraph 3, sub-paragraphs (b), (c) and (d).* These state conditions which, as general safeguards, it is believed that international law normally attaches to the exercise of reprisals in any circumstances.

95. *Paragraph 3, sub-paragraph (e).* It follows automatically from the nature of the class of treaties

<sup>100</sup> An argument might be advanced as follows. It might be said that three cases must be distinguished:

*Case 1.* One of the parties to the treaty purports illegally to repudiate or put an end to it. In those circumstances, the other party may elect either to accept the repudiation or termination, subject to its right to seek redress or reparation for the illegality involved, or to decline to accept the repudiation or termination as being illegal and null, but, in that case, must continue to regard the treaty as remaining in full force. If so, however, that party has voluntarily and designedly waived its right to accept termination, and must therefore continue itself to carry out the treaty, although, of course, it will retain its right to seek redress or reparation for the non-performance by the other party.

*Case 2.* One party, without actually repudiating or purporting to terminate the treaty, commits a fundamental breach of it of a kind which, in accordance with the principles stated in the Rapporteur's second (1957) report, articles 18-20, will justify the other party in regarding the treaty as terminated, or in bringing it to an end. Here again, such other party has a right of election. If it does not elect to terminate the treaty, then it is bound itself to continue to observe the treaty while seeking redress or reparation for the non-performance by the other party.

Even if, however, it were accepted in the above cases that there is no middle course between absolute termination and absolute observance, the argument could not cover case 3.

*Case 3.* This is the case contemplated by articles 18 and 20, i.e., where one party neither repudiates the treaty nor commits such a fundamental breach of it as would justify the other party in bringing it to an end, but simply commits a breach of the treaty. In that case, the other party, not having a right to terminate it simply on the basis of that breach, has no direct remedy except to have recourse to a corresponding non-performance or, if that is insufficient, then, by way of reprisals, to a non-performance of some other obligation of that treaty, or of another treaty between it and the same party.

<sup>100</sup> In the 4th edition; it is also reproduced verbatim in the 8th (Lauterpacht) edition, vol. 1, p. 947.

<sup>101</sup> Earlier editions of Oppenheim took the view that to confer this faculty, the breach need not even be a fundamental one. In a footnote to the 4th edition, Lord McNair, as editor, queried the correctness of this view, which is in effect abandoned in the 8th (Lauterpacht) edition—see footnote 4 on p. 947 of vol. 1. See also the Rapporteur's second (1957) report (A/CN.4/107), articles 18-20 and commentary thereto.

<sup>102</sup> "L'application et l'interprétation des traités d'après la jurisprudence britannique", *Recueil des cours*, 1933, I.

<sup>103</sup> See *op cit.*, p. 282.

<sup>104</sup> Crandall, *Treaties, their Making and Enforcement*, 2nd ed., 1916, pp. 456, 462 *et seq.*

referred to in this paragraph that no violation of such a treaty will justify non-observance by another party. Still less would a party to such a treaty be justified in any non-observance of it by way of counter-action to the violation by another party to it of some other treaty, or of a general rule of international law. There is no room for "reprisals" in connexion with such treaties.

96. *Paragraph 3, sub-paragraph (f)*. Because of the difficulties that may arise in the application of this article and the uncertainties that may exist as to whether, on the grounds stated, a right of non-observance has accrued, it is considered that it should only be possible to invoke this ground of non-observance subject to the safeguards involved by following the appropriate procedures set out in article 39. The general reasons for this are of a very similar order as those which led the Rapporteur to think that safeguards and procedures of this character must be followed where it is a question of invoking the principle of *rebus sic stantibus*, or that of fundamental breach, as grounds for regarding a treaty as terminated (see second (1957) report, A/CN.4/107).

97. *Paragraph 4*. This states a general rule of international law invariably considered as governing the character of the reprisals that may legitimately be resorted to. It is also intended to subordinate the whole process to general international law. Reprisals taking the form of the non-observance of a treaty obligation are, after all, only one kind of reprisal, and not generically different in their legal characteristics from other kinds.

98. *Paragraph 5*. This states the rule normally applicable in cases coming under the present subsection (see paragraphs 55, 56 and 67, above).

RUBRIC (c). NON-PERFORMANCE JUSTIFIED *ab intra* BY VIRTUE OF A CONDITION OF THE TREATY IMPLIED IN IT BY INTERNATIONAL LAW

#### *Article 19. Scope of the present rubric*

99. *Paragraphs 1 and 2*. This rubric deals with the case of non-performance justified not by a general rule of international law wholly outside the treaty, but by a condition which, though not actually written into the treaty or to be implied from its terms, is nevertheless to be read into it by virtue of a rule of international law. With this comment, *paragraph 1* is self-explanatory. Where conditions are written into a treaty, or arise as a clear implication from its actual terms, the matter is one simply of the interpretation of the treaty, and does not call for the application of any external rules.

100. Another way of putting the point would be to say that it is implicit in the type of case treated of in the present rubric that, on the face of it, the treaty concerned creates a specific obligation, so that the question is whether international law implies a condition justifying the non-performance of that obligation in certain circumstances. Since the very issue of whether non-performance is justified is one that assumes the existence of a *prima facie* or apparent obligation under the treaty, conditions expressed in or implied by the language of the treaty itself, relate to the existence of

the obligation, not to justification for its non-performance, and this is a matter governed by the general rules relating to the interpretation of treaties to be contained in chapter 3 of the present Code.

101. *Paragraph 3*. The point of this paragraph may be seen by contrasting the ensuing articles 20 to 22, inclusive, with article 23.

#### *Article 20. Conditions implied in the case of all treaties: condition of reciprocity or continued performance by the other party or parties*

102. As is so often the case with regard to the law of treaties, it is possible to classify a given rule under more than one head. It is possible to take the view that (apart from treaty or other international obligations in the nature of *jus cogens*, release from which cannot result from any mere non-performances by another State) there is a general international law rule of reciprocity entailing that the failure of one State to perform its international obligations in a particular respect, will either entitle other States to proceed to a corresponding non-performance in relation to that State, or will at any rate disentitle that State from objecting to such corresponding non-performance. On the basis of this general principle, applied to treaties, the case dealt with by the present article 20 could figure as an article in rubric (b) above, in the space provided for article 17A. On the other hand, it is possible, and it is probably more appropriate, to regard the requirement of reciprocity in the light of a condition which is inevitably to be implied, and is by law to be read into all treaties of the "reciprocal" or "interdependent" types (see para. 82 above), i.e.—all treaties other than those of the absolute or self-existent kind, already referred to in article 18, paragraph 3 (e) above and paragraph 95 of the present commentary. It is upon this view of the matter that the present article 20 is based (see further comment in para. 82 above).

103. Hall, in discussing the difficult case which has already been considered in the commentary to article 18 (see paras. 82-91 above, much of which is applicable here also), clearly implies that whether the breach of the treaty affords ground for regarding it as wholly terminated or not, non-performance of a particular obligation will on the basis of an implied condition of reciprocity normally justify a corresponding non-performance by the other party. Hall, under the rubric "Implied Conditions under which a Treaty is made", says that it is "obviously an implied condition of the obligatory force of every international contract that it shall be observed by both of the parties to it."<sup>106</sup> He then goes on to discuss the subject of *fundamental* breaches giving rise to a right to terminate the treaty, and finally considers the case of lesser infractions that would not normally have that result. In discussing this latter case, Hall says<sup>107</sup> that "it would be seldom that the infraction of an article which is either disconnected from the main object, or is unimportant... could in fairness absolve the other party from performance of

<sup>106</sup> *Op. cit.* in footnote 24 above.

<sup>107</sup> *Ibid.*, p. 409.

*his share of the rest of the agreement...*" (italics added). The words italicized clearly imply that even if no case exists for the non-performance of the treaty as a whole or for regarding it as terminated, there is a case for the non-performance by the other party or parties of the particular provision which has been the subject of the infraction. To these considerations may be added almost the whole of the argument given in relation to article 18 in paragraphs 82-91, on the basis that the greater, wider or more drastic right must include the lesser.

104. *Paragraph 2.* This requires no explanation. A similar provision might perhaps have been added to article 18, but it would seem otiose to do so, since it must be clear that anything in the nature of reprisals can only be directed against the particular party culpable.

105. *Paragraph 3.* This paragraph has been included because of the advisory opinion given by the International Court of Justice in the second phase of the Peace Treaties case.<sup>108</sup> Certain treaties contained a provision for the settlement of disputes, according to which, if a dispute arose, each party was to appoint a member of a three-member Arbitral Commission, and the parties were to agree on the third member. If, however, they failed to do so within a month, either party could ask the Secretary-General of the United Nations to appoint the third member. It was not stated—nor probably could it have been—that the Secretary-General was bound to comply with the request. In the actual cases which were the subject of the request for an advisory opinion, not only had the parties not agreed on the third member of the Commission, but one of them denied there was a dispute, and refused to appoint its arbitrator or to co-operate in any way in the treaty procedure for the settlement of disputes. In these circumstances, the question arose whether the other party, if it had appointed its arbitrator, and if the time limit specified by the Treaty had expired, could call upon the Secretary-General to appoint the "third" member of the Commission; and whether in that case, and if the appointment was made, the resulting two-member Commission would be validly constituted under the Treaty, and could proceed to hear the case and render a legally binding decision. The Court answered these questions in the negative, on the ground that, however much one party might be (and was) in breach of the Treaty by refusing its co-operation in setting up the treaty tribunal, this situation could not, in the given case, be met by proceeding without it, since this would result in setting up a tribunal that was not the one contemplated by the treaty. In its opinion (three of the Peace Treaties were involved in the case), the Court said that

"The breach of a treaty obligation cannot be remedied by creating a Commission which is not the kind of Commission contemplated by the Treaties."<sup>109</sup>

The Court also said<sup>110</sup>

"The case envisaged in the Treaties is exclusively that of the failure of the parties to agree upon the selection of a third member and by no means the much more serious case of a complete refusal of co-operation by one of them, taking the form of refusing to appoint its own Commissioner. The power conferred upon the Secretary-General to help the parties out of the difficulty of agreeing upon a third member cannot be extended to the situation which now exists."

The Court did however indicate that in other circumstances the position might be different;<sup>111</sup>

"...the Secretary-General would be authorized to proceed to the appointment of a third member [only] if it were possible to constitute a Commission in conformity with the provisions of the Treaties."

In short, the matter is one for the interpretation of the particular treaty, and paragraph 3 of article 20 has been drafted accordingly; but it seemed desirable to make some reference to the matter, in view of this important pronouncement by the Court on what is a not uncommon type of case.

*Article 21. Conditions implied in the case of all treaties: condition of continued compatibility with international law*

106. *Paragraph 1.* The object of this paragraph is to bring out the difference between the case where incompatibility with a rule or prohibition of general international law in the nature of *jus cogens* affects the treaty at its very inception, thus rendering it lacking in essential validity in accordance with the articles of the Code referred to in this paragraph.<sup>112</sup> That is not the case dealt with here, which assumes the original validity of the treaty, and deals with the question of justification for non-performance of some obligation of the treaty by reason of a rule of international law which has gained general acceptance subsequent to the treaty, and which is incompatible with the performance of the obligation.

107. *Paragraph 2.* Since the conditions governing non-performance of a treaty obligation on the grounds contemplated by this article are broadly the same as those which will justify regarding a treaty as being wholly terminated, it will be sufficient for the present to refer to the commentary to case (vi) in article 17 of part III of chapter 1 of the Code.<sup>113</sup>

108. *Paragraph 3.* It is necessary to cover not only the case where, after the conclusion of the treaty, a new incompatible rule of international law in the nature of *jus cogens*, with which the treaty is in conflict, receives general acceptance, but also the case where circumstances not present at the time of the conclusion of the

<sup>110</sup> *Ibid.*, p. 227.

<sup>111</sup> *Ibid.*, p. 228.

<sup>112</sup> See Rapporteur's third (1958) report (A/CN.4/115), articles 21 and 22 and relevant commentary.

<sup>113</sup> See paras. 104 and 105 of the commentary in the Rapporteur's second (1957) report (A/CN.4/107).

<sup>108</sup> *I.C.J. Reports 1950*, p. 65.

<sup>109</sup> *Ibid.*, p. 229.

treaty have arisen subsequently, and have brought into play an existing rule of international law of this kind, which was not relevant to the circumstances as they were when the treaty entered into force. An obvious example of this type of case is that of a treaty concluded in time of peace, and primarily applicable under peace-time conditions, in the event of a war arising either between one of the parties and a third State, or between two third States, giving rise to circumstances in which questions of the law of neutrality may become material for one or other of the parties, in relation to the execution of the treaty. Some illustrations of this are given by Lord McNair in his work on *The Law of Treaties* based on the opinions of the Law Officers of the British Crown. Thus, in an opinion dated 17 August 1885,<sup>114</sup> the Law Officers approved of instructions being sent to the British Ambassador in Japan to the effect that a certain treaty between Great Britain and Japan "must be read subject to the obligations of international law in time of war, and that Great Britain could not claim, under the treaty, to commit any act which would involve Japan in a breach of neutrality...". Instructions were sent accordingly. The point at issue was the right which Great Britain might otherwise have been able to claim under the treaty to use certain naval yards and hospitals in Japan in the event of a war in which Great Britain might be involved, Japan being neutral. Again, in an earlier report dated 23 August 1870, given by the Queen's Advocate<sup>115</sup> (Mr. Travers Twiss, afterwards Sir Travers Twiss), the opinion was expressed that the International Telegraphic Conventions of 1865 and 1868 must, as between a belligerent and a neutral State, be construed as being subject to the duties imposed by general international law upon neutral States. The Queen's Advocate observed<sup>116</sup> that

"As a war between France and Prussia would impose upon the other contracting parties supervening duties incidental to a state of neutrality, they [i.e. the contracting parties] must..., in the absence of express words to the contrary, be taken [sc. only] to have become parties to the treaty subject to their obligation of fulfilling those duties."

109. *Paragraph 4.* The significance of this paragraph depends upon the distinction between *jus cogens* and *jus dispositivum*. This matter has already been sufficiently gone into in relation to the subject of the essential validity of treaties.<sup>117</sup>

*Article 22. Conditions implied in the case of all treaties : condition of unchanged status of the parties*

110. *Paragraph 1.* This paragraph is intended to bring out the distinction between the case of a lack of treaty-making capacity existing in one or more of the parties at the time when the "treaty" is concluded, thus entailing lack of essential validity for the instrument

concerned, considered as an international treaty. This subject has already been dealt with in article 8 of part II of chapter 1 of the Code, and a commentary on it will be found in paragraphs 19 to 30 of the Rapporteur's third (1958) report. The present article 22 deals with the case that arises where no such incapacity existed at the time when the treaty was made, but there has been a change in the status of one of the parties subsequently.

111. *Paragraph 2.* This refers to the case where the subsequent change of status involves a total loss of its previous identity on the part of the party concerned. This, subject to the rules of State succession, will normally lead to the termination of the whole treaty (if it is a bilateral treaty) or to the participation of that party in it (if it is a multilateral one). This case has already been considered as case (i) in article 17 of part III of chapter 1, and is commented on in paragraph 95 of the Rapporteur's second (1957) report.

112. *Paragraph 3.* This deals with the case to which the present article 22 is really intended to relate, namely where there has been a supervening change of status—not, however, being such as to involve a complete loss or change of identity for the party concerned. *Prima facie*, this will not in itself entail any diminution of the treaty obligation, or afford a ground for its non-performance. Where, however, as the result of the change, a situation arises in which the performance of the treaty obligation is no longer dependent on the sole will of the party concerned, that party must, considered as such, be regarded as absolved from further performance. Hall<sup>118</sup> states the principle involved as follows:

"It is also an implied condition of the continuing obligation of a treaty that the parties to it shall keep their freedom of will with respect to its subject-matter except in so far as the treaty is itself a restraint upon liberty, and the condition is one which holds good even when such freedom of will is voluntarily given up. If a State becomes subordinated to another State, or enters a confederation of which the constitution is inconsistent with liberty of action as to matters touched by the treaty, it is not bound to endeavour to carry out a previous agreement in defiance of the duties consequent upon its newly-formed relations."

However, although in accordance with what has just been said a change of status on the part of one of the original parties to the treaty may take out of the hands of that party the capacity to ensure the performance of the treaty, and thereby absolve it from performance, it does not follow that the obligation will wholly lapse. Thus, to take the cases cited by Hall, where one State comes under the protection of another, the rules of State succession may oblige the Protecting Power to take over the responsibility for carrying out the treaty obligation. It may be the same if a State becomes part of a federal union, and also in other circumstances. This, however, is a matter of the law of State succession, and therefore not further discussed here.

<sup>114</sup> McNair, *op. cit.* in footnote 74 above.

<sup>115</sup> See explanation given in footnote 75 above.

<sup>116</sup> McNair, *op. cit.*, p. 247.

<sup>117</sup> See the Rapporteur's third (1958) report (A/CN.4/115), para. 75 of the commentary.

<sup>118</sup> *Op. cit.* in footnote 24 above.

*Article 23. Conditions implied in the case of particular classes of treaties*

113. *Paragraph 1.* The conditions considered in the immediately preceding articles can fairly be regarded as being implied by international law in the case of all treaties. There are, however, a number of conditions which international law implies according to circumstances, in the case of particular classes of treaties.

114. *Paragraph 2.* It is not possible at present to deal exhaustively with this matter, partly because it depends on the development of treaty practice and procedure and is therefore not static, and partly for reasons which are given in a footnote to the article itself. The present paragraph 2 of the article, however, instances a certain number of prominent examples of this class of case.

115. *Sub-paragraph (a).* The question of an implied exception on grounds of *ordre public* in treaties relating to private international law topics came up for consideration recently before the International Court of Justice in the Guardianship of Infants case (Holland v. Sweden).<sup>119</sup> The Court, however, decided the case on another point, and while referring to the question of *ordre public*, did not consider it necessary to pronounce upon it. On the other hand, some of the judges delivering separate opinions,<sup>120</sup> laid great stress on the recognized existence of this exception as an implied condition of treaties dealing with questions of private international law and conflicts of laws. These opinions appear to the Rapporteur to be sufficiently cogent to warrant the inclusion of this exception in the present article, though of course only for this class of treaty.

116. *Sub-paragraph (b).* It is well known that, according to the common form of commercial treaties, articles of a very wide general character are included

which, on the face of them, confer national treatment upon foreigners in the matter of access to the country concerned, to carry on trade and commerce there, etc. These claims, read literally, might appear to confer something like absolute rights in the matter. Such treaties have, however, never been read as prejudicing the right of the local authorities of a country to prohibit entry to individual persons on grounds personal to themselves, or in pursuance of a general and non-discriminatory policy concerning immigration or the taking of employment. It is true that in some of the more modern commercial treaties the previous apparently absolute right tends to be specifically qualified by certain phrases. For instance, the subjects or citizens of the contracting parties are only to have rights of access etc. on the basis of national treatment "upon conforming themselves to the laws and regulations applicable generally to nationals". Such phrases do not always appear in earlier treaties. They have nevertheless clearly been regarded as implied, and their subsequent appearance in later treaties must probably be regarded as declaratory of an existing position, rather than as creating anything new. In the same way, the right of deportation has never been regarded as affected by these clauses.

117. *Sub-paragraph (c).* Very similar considerations apply here too, except that what is normally involved in the case of imports and exports of goods is not national but most-favoured-nation treatment. Nevertheless, the general right to trade conferred by many commercial treaties has never been regarded as prejudicing the right of the local authorities to prohibit altogether traffic in certain categories of goods or articles, or in certain particular circumstances as indicated in the article. Again, it is true that in many of the later treaties specific clauses are included referring to such a right of prohibition in terms; but as before, the effect of such provisions appears to be little more than declaratory. Lord McNair instances an opinion given by the English Law Officers of the Crown dated 18 March 1867,<sup>121</sup> in which the Law Officers considered the effect of an Anglo-Italian Commercial Treaty containing "the usual reciprocity clauses with respect to the free importation to any country of produce of one of the contracting parties into the country of the other". The question was whether this prevented the United Kingdom authorities from prohibiting the import of cattle on health grounds (e.g. suspected foot and mouth disease). The Law Officers said that in their view "no clauses of this description can be rightly considered as restraining the power of the Government to prohibit, when exceptional circumstances, as the present, exist, and for the sake of public health and well-being of the country, the importation of foreign cattle." That the Law Officers were not, however, postulating any general principle of so-called "necessity" as a ground justifying non-performance is clear from the following sentence: "It is a maxim of international law that cases of this kind are always considered as tacit and necessary exceptions from the treaty." In short, a condition covering this type of case is to be regarded as implied in commercial treaties.

<sup>119</sup> *I.C.J. Reports 1958*, p. 55.

<sup>120</sup> In particular Judges Badawi, Lauterpacht, and Moreno Quintana. The following passage from Sir Hersch Lauterpacht's opinion is quoted as giving the most comprehensive and forceful statement of the principle (Report, pp. 91, 92):

"In the first instance, the Convention now before the Court is a Convention of public international law in the sphere of what is generally described as private international law. This means: (a) that it must be interpreted, like any other treaty, in the light of the principles governing the interpretation of treaties in the field of public international law; (b) that that interpretation must take into account the special conditions and circumstances of the subject-matter of the treaty, which in the present case is a treaty in the sphere of private international law.

"Secondly, in the sphere of private international law the exception of *ordre public*, of public policy, as a reason for the exclusion of foreign law in a particular case is generally—or, rather, universally—recognized. It is recognized in various forms, with various degrees of emphasis, and, occasionally, with substantial differences in the manner of its application. Thus, in some matters, such as recognition of title to property acquired abroad, the courts of some countries are more reluctant than others to permit their conception of *ordre public*—their public policy—to interfere with title thus created. However, restraint in some directions is often offset by procedural or substantive rules in other spheres. On the whole, the result is the same in most countries—so much so that the recognition of the part of *ordre public* must be regarded as a general principle of law in the field of private international law."

<sup>121</sup> *Op. cit.* in footnote 74 above.

118. *Sub-paragraph (d)*. This deals with an implied term which has always, and in the nature of the case, been regarded as a condition of treaties of guarantee, and it needs no special comment.

## SECTION 2. PARTICULAR QUESTIONS OF TREATY APPLICATION

### SUB-SECTION I. TEMPORAL AND TERRITORIAL APPLICATION OF TREATIES

#### RUBRIC (a). TEMPORAL APPLICATION

#### *Article 24. Beginning and duration of the treaty obligation*

119. *Paragraphs 1-3*. These provisions are of a routine character, but nevertheless require to be included in a complete Code. They relate to the exact moment at which the treaty obligation begins and that at which it ends. The references to other parts of the Code are to those provisions which determine the coming into force and the termination of any treaty.<sup>122</sup>

120. *Paragraph 2*. In the case of multilateral treaties, as has already been seen from article 41, paragraph 4, in part I of chapter 1 of the Code,<sup>123</sup> the coming into force of a treaty, as such, only creates obligations for those States which at that date have taken the necessary steps, whether by signature, ratification or accession, to indicate their participation in it. For other parties, their obligation will arise subsequently, as and when they deposit their instruments of ratification or accession.

121. *Paragraph 4*. The principle embodied in this paragraph was recognized by the International Court of Justice in the first phase of the *Ambatielos* case, when the Court rejected a certain argument on the ground that it "...would mean giving retroactive effect to Article 29 of the Treaty of 1926, whereas Article 32 of this Treaty states that the Treaty, which must mean all the provisions of the treaty, comes into force... upon ratification."<sup>124</sup>

122. "Unless a treaty specifically so provides, or a necessary implication to that effect is to be drawn from its terms...". This exception to the rule of non-retroactivity was again recognized by the International Court in the same case, when it said<sup>125</sup> that the conclusion that a given article of the relevant treaty was not retroactive "...might have been rebutted if there had been any special clause or any special object necessitating retroactive interpretation." There is some danger of confusion about the subject of the retroactivity of treaties. In a certain sense, a treaty, whatever it may say, can never be retroactive, because it can never come into force previous to the date provided for according to its terms, or in default of clear terms on the subject, according to the principles already set out in part I of

chapter 1 of the Code.<sup>126</sup> But a treaty can of course perfectly well provide that, although it does not come into force until a certain date, it shall nevertheless, when it does come into force, be deemed to relate back in certain ways to events that have already occurred. Where a treaty has retroactive effect in this sense, the obligation to apply it, or any particular provision of it retroactively, can nevertheless not exist before a certain date, namely the date of the coming into force of the treaty; but that fact does not prevent the obligation that has to be applied retroactively, arising when this date is reached—on the contrary, it causes it to do so. It is clear that only express terms or an absolutely necessary inference can produce such a result. The presumption must always be against retroactivity.

#### RUBRIC (b). TERRITORIAL APPLICATION

#### *Article 25. General principles*

123. *Paragraph 1*. Questions of the territorial application of a treaty do not normally arise in those cases where the whole process of the operation and execution of the treaty can be carried out exclusively through the action of the central metropolitan Government of the State concerned, and in this category figure especially the classes of treaties mentioned in this paragraph, such as treaties of alliance, peace and friendship, recognition, institution of diplomatic relations, and so forth.

124. *Paragraph 2*. This reflects the obvious principle that the question of territorial application is governed primarily by the terms of the treaty itself, in all cases where the treaty, expressly or by implication, makes provision as to its territorial application.

125. *Paragraph 3*. Where the treaty is silent, or no clear implication can be drawn from it (or unless, though not silent, *its application is specifically confined* to a certain particular part or to parts of the territories—or to certain territories only—of the contracting parties), then the remaining provisions of this rubric will be applicable.

#### *Article 26. Application to metropolitan territory*

126. *Paragraph 1*. There can never be any doubt that, unless a treaty otherwise specifically provides, it must apply automatically at least to the whole of the metropolitan territory of any contracting party.

127. "...or to all territories forming part of the metropolitan territory of each contracting party". These words have been inserted because in the case of certain States, the whole of their metropolitan territory or territories is not necessarily situated within the confines of a single frontier, and these territories may either be separated from each other by intervening territory of another State, or may be situated overseas.

128. *Paragraph 2*. This attempts to supply a definition of the term "metropolitan territory", and is intended to establish what *prima facie* distinguishes a metropolitan from a dependent territory.

<sup>122</sup> Rapporteur's first (1956) and second (1957) reports (A/CN.4/101 and A/CN.4/107, respectively).

<sup>123</sup> First (1956) report.

<sup>124</sup> *I.C.J. Reports* 1952, p. 40.

<sup>125</sup> *Ibid.*

<sup>126</sup> See footnotes 122 and 123.



129. "Subject to the provisions of paragraph 3...". These words are inserted because it is necessary to deal specially with the case of federal unions and federations. This case forms the subject of *paragraph 3*. Under all federal constitutions, the constituent states, parts or provinces of the union or federation possess at least some degree of local autonomy; while in some cases, or at any rate in theory, they may have complete local autonomy in all matters not of necessity common to the union or federation as a whole and as a unit, such as defence and the conduct of foreign relations. Nevertheless, there can be no doubt that the constituent parts of a federal union or federation do form part of its metropolitan territory.

130. It naturally results from the words "Unless a treaty otherwise provides..." in paragraph 1 of this article, that it in no way prevents the insertion of the so-called "federal clause" in treaties, where there is agreement to do this.

#### *Article 27. Application to dependent territories*

131. *Paragraph 1*. If a satisfactory definition of a metropolitan territory can be established, then, in principle, it would be sufficient to define a dependent territory as any territory which was not by definition a metropolitan territory.

132. *Paragraph 2*. This states the basic rule that, in principle, and unless otherwise provided expressly or by clear implication, a treaty extends automatically to all the dependent territories of any contracting party.

133. "Subject to the provisions of paragraph 3...". The basic rule as thus stated was, however, instituted at a time (and primarily in relation to a state of affairs) when many or most dependent territories were more or less wholly dependent, and lacking in any form of self-government or autonomous local institutions. This situation is under modern conditions becoming increasingly rare, if indeed it is not near to disappearing. It is probably true to say that only a small number of the dependent territories still existing in the world are in this position, and they are progressively becoming fewer. This has led certain authorities, such as Rousseau, to propound a rule completely reversing the basic rule set out in paragraph 2 of the present article. He formulates the rule as follows:<sup>127</sup>

"Except in cases where a treaty, in view of its purpose, deals exclusively with colonies, treaties concluded by a State do not extend automatically to its colonies."

According to this view, therefore, a treaty would never apply to dependent territories unless it either related specifically to certain territories in this class or else, as Rousseau goes on to make clear, unless the treaty itself provided in terms for its application to the dependent territories of the contracting parties.

134. The Rapporteur, while in general agreement with the view propounded by Rousseau, does not think it necessary or desirable to make it so categorical. It

seems to him preferable to retain the basic rule as formulated in paragraph 2 of this article, but to create exceptions to it in favour of those cases where it is obvious that the constitutional position with reference to a dependent territory does not permit of any automatic application of a treaty to it without its consent, or without the completion of various formalities of such a kind that they are primarily a matter for the local institutions of the dependent territory concerned.

135. *Paragraph 3*. In this paragraph, the exceptions just referred to are set out. In the cases covered by *sub-paragraphs (a) and (b)*, it is clear that the government of the metropolitan territory of the State which is a party to the treaty has no constitutional power to enforce either the acceptance or the observance of the treaty by the dependent territory. In such circumstances, participation in the treaty by that State cannot of itself entail its application to the dependent territory.

136. *Sub-paragraph (c)*. This contemplates the not uncommon situation where, although the dependent territory is not fully self-governing internally even in the field covered by the treaty, the constitutional relationship between it and the metropolitan government is such that the active co-operation of the local authorities and of the local institutions would be necessary for the execution of the treaty in that territory, and would be materially impossible without it; or where, according to those constitutional relationships, treaties entered into by the metropolitan government are not to be applied to the dependent territory without at least prior consultation with it. Here equally, it would be difficult, and would indeed be contrary to the rights of the dependent territories themselves, if participation in the treaty by the metropolitan government were held automatically to entail its application to the dependent territory.

137. *Paragraph 4*. This is intended to bring out the point that the determining factor involved in the cases dealt with by paragraph 3 of the article is that of the *normal constitutional position* existing in relation to the dependent territories concerned, or existing as between them and the metropolitan government; and not the possibility that the metropolitan government may, in the last resort, possess legal or physical powers of coercion which would enable it to compel the dependent territory to carry out the treaty. Such powers may indeed in a number of cases exist or be held in reserve, but they are not intended to be used except under specifically defined circumstances or, most exceptionally, in case of emergency. They are certainly not intended to be used for the purpose of enforcing the application of a treaty to a dependent territory in circumstances other or contrary to those contemplated by the constitutional position respecting that territory;<sup>128</sup> and a metropolitan government ought not to be placed in a position in which it must either decline altogether itself to participate in the treaty, or else, in the last resort, employ measures of coercion to enforce the acceptance and

<sup>127</sup> Rousseau, *op. cit.* in footnote 70 above.

<sup>128</sup> Especially where, as will frequently be the case in this context, this constitutional position is part of a planned development towards self-government or complete independence.



application of the treaty by what may be constitutionally highly developed dependent territories which do not wish to accept the treaty, or to whose local interests such acceptance would be contrary.

*Article 28. Determination of the status of metropolitan and dependent territories*

138. *Paragraph 1.* This article has been included because difficulty often arises over the question of who has the right in the last resort to determine whether a given territory is a metropolitan or a dependent territory. An attempt to define a metropolitan territory and hence inferentially a dependent territory, has been made in articles 26 and 27. Subject to that, the question must be one that depends on the interpretation of the relevant constitutional provisions and international instruments.

139. *Paragraph 2.* The opening words of this paragraph "Subject to any relevant treaty provisions, and to any international right of recourse that may exist...", are intended to indicate that such determination may, in the last resort, not be exclusively a matter for the metropolitan government to carry out, in a final and conclusive way. Subject to that, however, it seems that the determination must and indeed can only be made in the first instance by the metropolitan government. This is indicated by *sub-paragraph (a)*. The point dealt with in *sub-paragraph (b)* is a connected but separate one. It is not a question of determining the status of a given territory, whether metropolitan or dependent, but of determining what is actually covered administratively or geographically by the territory concerned—in short, what are its boundaries, whether certain adjacent pieces of territory, enclaves or islands off its coasts, are included in it, etc.

140. *Paragraph 3.* It seems desirable to include a provision on these lines. States cannot, subsequent to the conclusion of a treaty, alter its territorial application by a mere *ipse dixit* to the effect that certain territories, apparently part of its metropolitan territories, are not so, or *vice versa*. Any such determination, dependent purely on a declaration by the government concerned, must either have been made and published in advance of the conclusion of the treaty, or else be specifically brought to the attention of the other parties at the time of the conclusion of the treaty.

141. *Paragraph 4.* On the other hand, a genuine alteration in the status or constitutional position of a particular territory, or in its relations with the metropolitan government, may have occurred subsequent to the conclusion of the treaty, and for this reason the words "resulting from a genuine change in the status or constitutional position, etc." are included. In such a case, this paragraph of the article would not, as such, be applicable. It would not, however, necessarily follow that the treaty itself would either become, or cease to be, applicable to the territory concerned. This would depend upon its terms and on the rules of (or on rules analogous to those of) State succession.

SUB-SECTION II. EFFECT OF THE TREATY  
ON THE INTERNAL PLANE

RUBRIC (a). EFFECT OF TREATIES ON AND RESPECTING  
THE INSTITUTIONS OF THE STATE

*Article 29. Relevance of the domestic aspects of treaty application*

142. Neither this article nor anything in this subsection is intended to raise philosophical issues as to the manner in which a treaty produces its effects on the domestic plane, i.e. whether directly or only through the intermediary of the local law and constitution. For reasons to be explained in connexion with a later article, it is considered that, from the purely practical point of view, this question has little importance. The article contents itself with propounding the incontrovertible fact that a treaty produces its effects primarily in the international field, in which it is the duty of the parties to carry it out, and that the question of its effects in the domestic field is only relevant because that question may, in practice, affect the capacity (though not the legal obligation) of the parties to discharge that duty.

*Article 30. Duties of States in relation to their laws and constitutions*

143. This and the next succeeding article both represent little more than a "spelling out" on the domestic plane of certain of the general principles already dealt with in earlier parts of the present report, and reference may be made to paragraphs 32 to 48 above. It is particularly important to bear in mind that however much, on the domestic plane, the administration, the legislature and the judiciary may be separate entities, and however much on that plane they may perhaps be in conflict with one another and similarly not amenable to control one by the other, nevertheless, from the international point of view, the State is one single indivisible entity. If a treaty becomes binding upon the State by conclusion in due form, it becomes binding upon the State as a whole, and, by derivation, upon each of its several organs and institutions, each of which becomes bound, as part of the State, to play whatever part is necessary in order to make the treaty effective. It can therefore never be accepted (for instance, as a ground excusing non-performance of a treaty) that, although the administrative organs of a State were ready and willing to carry it out, the legislative organs failed to pass the necessary legislation, or that the judicial organs failed to give effect to the treaty in the courts. The point is made over and over again by the authorities, and many useful examples of this are cited in the Harvard Draft Convention on Treaties.<sup>129</sup> For instance, as far back as 1833, Mr. Livingston, United States Secretary of State, in a passage quoted by Wharton,<sup>130</sup> said:

"The Government of the United States presumes that whenever a treaty has been duly concluded and

<sup>129</sup> *Op. cit.* in footnote 15 above; see commentary to articles 20 and 23 of the Harvard Draft, *passim*.

<sup>130</sup> Wharton, *A Digest of the International Law of the United States*, 1887, p. 67.

ratified by the acknowledged authorities competent for that purpose, an obligation is thereby imposed upon each and every department of the government to carry it into complete effect, according to its terms, and that on the performance of this obligation consists the due observance of good faith among nations."

About the same time (1839), the French Conseil d'Etat "affirmed that the *obligation to execute treaties rests not upon a single organ or authority but upon all those, legislative, executive and judicial, whose collaboration may be necessary*" — (Rapporteur's italics).<sup>131</sup> The same point is made in Dana's Wheaton<sup>132</sup> as follows:

"If a treaty requires the payment of money, or any other special act, which cannot be done without legislation, the treaty is still binding on the nation; and it is the duty of the nation to pass the necessary laws. If that duty is not performed, the result is a breach of the treaty by the nations, just as much as if the breach had been an affirmative act by any other department of the government. Each nation is responsible for the right working of the internal system, by which it distributes its sovereign functions."

144. *Rousseau equally formulates the same principle*, when he says<sup>133</sup> that *all the organs of the State* "being obligated to contribute towards the application of the treaty, the legislative organ—which is just as much an organ of the State as the executive and judicial organs—is thus bound to take the measures necessary... for bringing the treaty into force"; and he continues (citing the judgement of the Permanent Court of International Justice in the case of German Interests in Upper Silesia) to make the point about the lack of relevance from the international standpoint of domestic difficulties, conflicts etc., which are of interest only on the internal plane. In this passage he says:<sup>134</sup>

"International jurisprudence very clearly confirms the *superiority of treaties over domestic law* by providing that in case of conflict the former shall prevail over the latter irrespective of which of the two legal acts was the first to take effect. For the international judge, municipal laws are 'merely facts which express the will and constitute the activities of States'. (Permanent Court of International Justice, judgement of 25 May 1926, Case concerning certain German interests in Polish Upper Silesia (the merits), *Publications of the Court*, Series A, No. 7, p. 19)".

Equally, in the case of the Exchange of Greek and Turkish populations, the Permanent Court affirmed it as a "self-evident principle" that

"... a State which has contracted valid international obligations is bound to make in its legislation such

modifications as may be necessary to ensure the fulfilment of the obligations undertaken."<sup>135</sup>

Reference may also be made to the judgement of the Permanent Court in the case of the Jurisdiction of the Courts of Danzig.<sup>136</sup> In another form and context, having particular reference to the case of federal States, the same position was taken up by the tribunal in the Montijo case, in which a federal government denied responsibility for the acts of a component state in relation to a treaty. The Umpire said:

"For treaty purposes the separate States are non-existent; they have parted with a certain defined portion of their inherent sovereignty, and can only be dealt with through their accredited representative or delegate, the federal or general government. But, if it be admitted that such is the theory and the practice of the federal system, it is equally clear that the duty of addressing the general government carries with it the right to claim from the government, and from it alone, the fulfilment of the international pact."<sup>137</sup>

145. *Paragraph 1 of article 30*. The remarks made in paragraphs 141 to 143 above are relevant and sufficient as a commentary to this paragraph, which simply states the basic duty of every State (and by the term "State" is meant the whole State, including all of its organs) so to conduct itself in relation to its law and constitution that it is in a position to carry out its treaty obligations.

146. *Paragraph 2* is based on the view, supported by the authorities already cited, that provided the object contemplated by paragraph 1 is attained, it is immaterial by what means this is done, and it is a domestic matter for each State to decide for itself what method shall be employed. This paragraph has accordingly been expressly drafted so as to try to avoid the necessity for theoretical controversy about whether the treaty obligation operates on a monistic or dualistic basis, etc. There are in fact a number of possible positions theoretically, and, in practice, a number of possible ways in which a State can ensure that its domestic position allows it to carry out its treaty obligations, or places no obstacle in the way of their performance. Beyond that it seems unnecessary to go for present purposes.

147. *Paragraph 3*. However much it may be argued that, as a matter of principle, an international treaty ought to operate directly in the domestic field (i.e. ought to be "self-executing"), it is not possible in practice to compel States to adapt their laws and constitutions to conform with this position unless they in fact wish to do so. Moreover, even in countries where, in principle, treaties are self-executing, considerable difficulties arise in the practical application of the self-executing rule, and it is by no means always possible to avoid the necessity for some kind of special legislation or administrative or other action, as the case may be. *Paragraph 3* is merely intended to emphasize that where,

<sup>131</sup> Harvard Law School, *Research in International Law*, III, *Treaties*, p. 979, citing Dalloz, *Jurisprudence général, Répertoire*, vol. 42, I, No. 131, p. 555.

<sup>132</sup> Wheaton, *Elements of International Law*, 8th American edition by Dana, p. 715: Dana's Note, No. 250, citing Kent, 1, pp. 165-166.

<sup>133</sup> *Op. cit.* in footnote 70 above.

<sup>134</sup> *Ibid.*, p. 418.

<sup>135</sup> Publications of the Permanent Court of International Justice, *Collection of Advisory Opinions*, series B, No. 10, p. 20.

<sup>136</sup> *Ibid.*, No. 15, p. 26.

<sup>137</sup> Moore, *History and Digest of International Arbitrations*, 1898, pp. 1439, 1440.

on account of the domestic position such action is necessary in order that the treaty may be implemented, it must be taken.

148. *Paragraph 4.* This represents the negative counterpart of the affirmative rule laid down in paragraph 3, and also makes the point that the State has an obligation not merely to take such action as is necessary in order to make the treaty effective on the domestic plane, but is also under an obligation to keep this position intact so long as the treaty remains in force, i.e. not to take, subsequently to the conclusion of the treaty, any action, or pass any legislation which would prevent the continued implementation of the treaty.

149. *Paragraph 5.* A certain practice (though very far indeed from invariable) has sprung up of including in treaties specific clauses about the obligation of the parties to take any necessary legislative or other measures for the implementation of the treaty. But this is precisely because of the tendencies that have been manifested by governments from time to time to offer "*de fréquentes résistances*" (as Rousseau puts it)<sup>138</sup> to the logic of the principles here formulated. Such provisions are included *ex abundanti cautela*, and have a merely affirmatory or declaratory effect. Their absence—and in most cases they are absent—in no way implies their contrary.

#### *Article 31. Position and duties of particular organs of the State*

150. In general, the comments made in connexion with the immediately preceding articles (see especially paras. 141-143) apply, even more specifically, to the present article.

151. *Paragraph 1.* This propounds the principle that from the international point of view it is immaterial, and indeed, theoretically, need never even be the subject of inquiry or discussion, through what particular organ a State discharges its international treaty responsibilities. This is a purely domestic matter which is left to each State to decide for itself.

152. *Paragraph 2.* The converse of this, however, is that, while it is left to the State to take this decision, the State is correspondingly bound, in so far as it may be necessary, to take it and to secure that the organ charged with the responsibility for implementation on the internal plane duly plays its part.

153. *Paragraph 3.* This paragraph is directed to the type of case in which, for instance, a treaty is not implemented on the internal plane because when, in the course of legal proceedings, the question of implementing the treaty arises, the court decides that it is unable to give effect to the treaty for lack of the necessary domestic legislation directly binding upon it. It may be that in taking up this attitude the judge is, from the domestic point of view, fully justified. Indeed, it may be the only course which it is possible for him to follow, considered from that point of view. This, however, merely means that the State, considered as an international entity, has failed to take the steps necessary in order to secure the implementation of the treaty by its

tribunals; and for this omission the State is accordingly responsible if, as a result of it, the treaty fails to be carried out. It is not possible in such a case for the State to shelter behind the doctrine that the administration is not in a position to interfere with the decision of the courts, just as it cannot plead lack of the necessary control over the legislature. This is never, in law, the point, for the obligation is the (whole) State's, not that of the administration alone. Thus, in the example given, the decision of the courts would have been different if the necessary legislative steps had been taken.

154. The legal position would be just the same if the necessary legislation existed, but the courts had failed to apply it, or had misapplied it in such a way that the treaty was not implemented. It may be that, in such circumstances, the administration as such cannot interfere with or change the decision of the courts. Nevertheless, there is a failure to carry out the treaty arising from the action of one of the organs of the State and, accordingly, the State, considered as an international entity, is responsible.

#### RUBRIC (b). EFFECTS OF TREATIES ON AND IN RESPECT OF PRIVATE INDIVIDUALS AND JURISTIC ENTITIES WITHIN THE STATE

#### *Article 32. Treaties involving obligations for private individuals or juristic entities*

155. This and the succeeding article have been drafted in such a way as to try and avoid any theoretical controversy about the position of private individuals and juristic entities under international law, and how far they are directly *subjects* of it.<sup>139</sup> That, on the other

<sup>139</sup> A good statement of the position about this, in so far as treaties are concerned, was given by the Permanent Court in the Jurisdiction of the Danzig Courts case (series B, No. 15), when the Court said (Report, pp. 17-18):

"The point in dispute amounts therefore to this: Does the *Beamtenabkommen*, as it stands, form part of the series of provisions governing the legal relationship between the Polish Railways Administration and the Danzig officials who have passed into its service (contract of service)? The answer to this question depends upon the intention of the contracting Parties. It may be readily admitted that, according to a well established principle of international law, the *Beamtenabkommen*, being an international agreement, cannot, as such, create direct rights and obligations for private individuals. But it cannot be disputed that the very object of an international agreement, according to the intention of the contracting Parties, may be the adoption by the Parties of some definite rules creating individual rights and obligations and enforceable by the national courts. That there is such an intention in the present case can be established by reference to the terms of the *Beamtenabkommen*."

In commenting on this, Rousseau (*op. cit.* in footnote 70 above, pp. 438, 439) says:

"Our conclusion will quite naturally be based on this very important judicial precedent. It can indeed be said that an *international treaty is not in itself a source of national law*. It merely creates an obligation between States, a rule which States ought to follow. Individuals are not affected by rules of international law unless those rules reach them through the medium of national laws. That is the doctrine—of positivist origin—which is generally accepted today. And the Permanent Court of International Justice says that it is a 'well established principle of international law'."

"However, . . . it is always possible to stipulate the contrary and to decide that a treaty will constitute a direct source of rights and obligations for individuals. Here the intention

<sup>138</sup> *Loc. cit.* in footnote 70 above.

hand, they may be the *objects* of rules of international law or of treaty provisions, admits of no doubt.

156. With regard to treaties that may impose duties upon individuals (which term, to avoid repetition, will herein be used as comprising—*mutatis mutandis*—juristic entities), or prohibit them from certain courses of conduct, it has to be remembered that, whether as a matter of theory and principle, an individual is or is not a subject of international law, he can never be a subject of international law in the same way as a State, assuming it to possess full, treaty-making capacity. Such a State is subject to no authority but its own and is in a position to take the necessary steps to carry out any treaty to which it has become a party. In the case of the individual, the will and authority of his State and Government is normally interposed between him and the execution of any international obligations which may be incumbent upon him either generally or by reason of a treaty. Whatever the theoretical position, his State or Government can, in practice, prevent the performance of such obligations if they exist, or alternatively place him in a position in which he may have no reasonable alternative but to take action of a kind prohibited by the rule or treaty concerned.

157. For present purposes it is not intended, neither is it necessary, to go into the question of how far a situation of this kind will absolve the individual from personal responsibility. The point is that, whether or not he has a direct obligation, and whether or not he is directly responsible for any failure to implement it, his State and Government are certainly under a duty to ensure that so far as the position under the domestic laws of the State is concerned, their nationals are free to carry out such duties as may result from a treaty—for after all, it is the State which is the party to the treaty, not the individual as such; and but for the action of his State, the individual would not have the duty in question. In the same way, it is for the State, in the execution of the treaty, to take such steps as may be necessary to compel its nationals to observe it, where this is required for its due implementation.

*Article 33. Treaties involving benefits for private individuals or juristic entities*

158. *Paragraph 1.* This is an easier case than the one which has just been considered. Nevertheless, the fundamental principles applicable are precisely the same, and it will be sufficient to refer to the commentary contained in the immediately preceding paragraphs.

159. *Paragraph 2.* It is generally accepted, and indeed it must be the case, that the State being the party to the treaty, it can, acting through its normal agent, namely the Government, renounce its rights under the

treaty, even though these may redound to the benefit or advantage of individual persons being its nationals, or of national juristic entities. Whether, on the domestic plane, this is a proper thing for the State to do, is entirely a matter of the local law and constitution and is not of direct interest to international law. For any impropriety in this respect, the State would be answerable either administratively or judicially on the domestic, but not on the international, plane.<sup>140</sup>

160. The second and third sentences of paragraph 2 go together. It is obvious that an individual—including a juristic entity—can, so far as he personally is concerned, renounce any benefit or advantage accruing to him under a treaty; but this action cannot bind his State, or prevent the State from insisting on due performance, if it thinks fit. For instance, a general point of principle may be involved affecting other individuals besides the particular individual concerned, or affecting the State as a whole, and the State may consider it necessary to insist upon this in spite of the willingness of a particular individual to renounce his rights.

161. Some cases, on the other hand, have in their nature a two-fold aspect: there has been an injury not merely to some individual, but also separately to the State itself, apart from the prejudice caused to it in the person of its national. In a certain sense, a breach of treaty could be said always to have this double aspect in cases where individual rights are concerned. A good illustration (not necessarily confined to a case of treaties) is where, in reference to some maritime matter, a “flag” aspect is involved, concerning the State as such, in addition to injury caused to particular individuals, or failure to accord them the treatment provided for under some treaty. In cases of this kind, international tribunals have not infrequently awarded damages under the two separate heads of those relating to the individual concerned, and those relating to the flag and the State as such.<sup>141</sup>

SUB-SECTION iii. MISCELLANEOUS PARTICULAR QUESTIONS OF TREATY APPLICATION

162. This is left blank, partly because, as in the case of article 23, an exhaustive treatment of it would need a detailed study of a large number of treaty clauses of different kinds, and possibly information as to the practice of Governments respecting such clauses; partly also because many of the questions involved are likely to turn out to be governed by considerations of treaty interpretation pure and simple, and it seems best there-

<sup>140</sup> In a number of United Kingdom cases, it has been decided that the Crown not being an agent of the citizen in relation to a treaty, even where it involves benefits for individuals, the action of the executive in such a matter cannot normally be controlled by the domestic tribunals (see *Rustomjee v. the Queen* (1876) L.R., 1 Q.B.D. 487; 2 Q.B.D. 69; *Civilian War Claimants Association v. the King*, L.R. (1932) A.C. 14; *Administrator of German Property v. Knoop*, L.R. (1933) 1 Ch. 439).

<sup>141</sup> The case of the *I'm Alone* (*United States v. Canada*) is in point; see the present Rapporteur's article in the *British Year Book of International Law* for 1936, p. 82. The proceedings and decision of the Commissioners were published by the King's Printer, J. O. Patenaude, Ottawa, 1935.

of the parties is decisive as is evident from an examination of treaty practice as well as of arbitral and judicial practice.”

The Rapporteur does not dissent from this conclusion, although he thinks it tends to avoid the real issue that arises in such cases, namely that whatever the individual's rights before his own (or the other party's) domestic tribunals, has he a *direct international right* under the treaty, or is it the case that the international right is still vested solely in his State as the party to the treaty, which alone can take action on that plane if the right is denied?

fore to defer them until the chapter on that subject has been drafted.

## DIVISION B. CONSEQUENCES OF AND REDRESS FOR BREACH OF TREATY

### SECTION 1. CONSEQUENCES OF BREACH OF TREATY

#### *Article 34. Basic principles*

163. *Paragraph 1.* This requires no comment. A *justified non-performance* of a treaty obligation is clearly *not a breach of the treaty*. If, purely formally, it may be said to constitute one, no illegality in the sense of a breach of international law is thereby involved. Where international law itself excuses or justifies the breach, there can be no infraction of international law.

164. *Paragraph 2.* The second sentence is consequential upon the first and requires no comment. The first sentence itself reflects the finding of the Permanent Court of International Justice in the Chorzów Factory case (Claim for Indemnity) (Jurisdiction). In this case the Court said:

"It is a principle of international law that the breach of an engagement involves an obligation to make reparation in an adequate form. Reparation, therefore, is the indispensable complement of a failure to apply a convention, and there is no necessity for this to be stated in the convention itself."<sup>142</sup>

165. "...irrespective of its character or gravity". The character or gravity of the breach of treaty is only material on the question of the nature or extent of the reparation due. It cannot affect the question of responsibility which exists, at any rate in principle, for any breach, however trivial.

166. *Paragraph 3.* Because a breach of treaty gives rise immediately to international responsibility on the part of the State committing the breach, there arises at once an obligation for that State to discharge this responsibility. This obligation, in principle at any rate, arises forthwith and is not dependent upon the taking of any specific steps by the other party or parties, or by any international institution. There may, of course, be a question whether there has in fact been a breach, and whether the existence of the breach is duly established, but that is another matter. Once it is established, responsibility exists, and the responsibility for discharging that responsibility, so to speak, rests upon the State concerned, which then has the duty, if necessary, of taking the initiative in effecting the necessary reparation.

167. *Paragraph 4.* If the responsibility arising from the breach is not discharged, then a right at once arises for the other party or parties to take remedial action and to seek such redress as may be open to them.

#### *Article 35. Method of discharging the responsibility arising from breach of treaty*

168. *Paragraph 1.* In a number of cases, the penalties or the reparation due for breach of treaty is provided for in the treaty itself. If the treaty thus provides for penalties or reparation, then, subject to the correct interpretation of the treaty, it is probably a reasonable inference that the parties intended these particular penalties or means of reparation to exclude any others, so that in complying with the provisions concerned, the State which has committed the breach will fully discharge its responsibility.

169. In cases where the treaty is silent about the consequences of a breach, then, subject to the remaining provisions of this article, the general rules of international law relating to the method by which State responsibility must be discharged, will apply. A breach of treaty is simply one form of international wrong. In a certain sense, a breach of treaty is itself an infraction of a general rule of international law, namely the rule of law which enjoins that treaties regularly entered into must be carried out. Where there is no reason to apply any other rule, therefore, the general rules of international law concerning reparation, and the method of furnishing it, will be applicable.

170. *Paragraph 2.* Nevertheless, it seems desirable not to leave the matter entirely on this general footing and therefore to provide some specific rules for discharging responsibility arising from breach of treaty. They will vary according to the nature of the breach, and this paragraph lists the three main classes of cases into which breaches of treaty normally fall.

171. *Paragraph 3.* In this paragraph, an attempt is made, in relation to each of the three classes of cases mentioned in paragraph 2, to indicate what specific action is appropriate in order to discharge the resultant responsibility. The paragraph as a whole is based on the principle that reparation by way of payment of damages is not necessarily sufficient; and this view, which is of course well known in private law, also derives authority internationally from another part of the decision of the Permanent Court in the Chorzów Factory case, cited in paragraph 164 above. The Court said that reparation

"must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would in all probability have existed if that act had not been committed."<sup>143</sup>

The sub-heads of this paragraph attempt to work out the practical consequences of this principle in relation to each of the classes of cases mentioned in paragraph 2.

172. *Paragraph 4.* In connexion with reparation, and in particular with damages, a number of incidental questions are liable to arise, such as the question of "remoteness", of whether interest is due, etc. Subject to any specific provisions of the treaty itself, all such questions must be governed by the rules of the ordinary international law of claims.

<sup>142</sup> Publications of the Permanent Court of International Justice, *Collection of Judgments*, series A, No. 9, p. 21.

<sup>143</sup> *Ibid.*, p. 47.

*Article 36. Consequences of breaches of treaties involving benefits for individuals*

173. The rule stated in this article represents a further aspect of a position already discussed in paragraph 161 above in connexion with paragraph 2 of article 33. According to a very well-established principle of international law, it is of course always the case that an injury to the national of a State, whether resulting from a breach of a general rule of international law or of a treaty, constitutes by that very fact an injury to the State itself; and where the injury to the individual represents the sole material consequence of the breach of law or treaty, such injury will normally constitute the measure of the damages due to the State. This is, however, subject to the rule already referred to, that any additional and independent injury caused to the State as such, e.g. through violation of its jurisdictional rights or through an offence caused to its flag, must be the subject of separate compensation. Furthermore, the Permanent Court, in another phase of the Chorzów Factory case (Claim for Indemnity) (Merits), considered that even in those cases where, ostensibly, only injuries to individuals had occurred, a separate damage to the State must still be presumed to exist, the damage to the individual affording merely a convenient method of calculating the reparation due to the State in respect of the injury to its national. The text of the relevant passage is worth quoting in full:

"The reparation due by one State to another does not however change its character by reason of the fact that it takes the form of an indemnity for the calculation of which the damage suffered by a private person is taken as the measure. The rules of law governing the reparation are the rules of international law in force between the two States concerned, and not the law governing relations between the State which has committed a wrongful act and the individual who has suffered damage. Rights or interests of an individual the violation of which rights causes damage are always in a different plane to rights belonging to a State, which rights may also be infringed by the same act. The damage suffered by an individual is never therefore identical in kind with that which will be suffered by a State; it can only afford a convenient scale for the calculation of the reparation due to the State."<sup>144</sup>

SECTION 2. MODALITIES OF REDRESS FOR BREACHES OF TREATY

SUB-SECTION i. GENERAL STATEMENT OF AVAILABLE REMEDIES

*Article 37. Action by way of redress open to the parties*

174. The principal comment required on this article is to draw attention to the safeguards suggested in connexion with the taking of certain kinds of action by way of redress, and involving for the most part an offer of recourse to arbitration, or willingness to accept arbitration or judicial settlement as a condition of having

recourse to the redress in question. In this connexion, it is necessary to draw a distinction between, on the one hand, the question which has been dealt with in earlier parts of this chapter, whether a non-performance of a treaty obligation in certain circumstances is justified in law and, on the other hand, the existence of any procedural conditions under which, in the circumstances, the non-performance (however justified) ought to be carried out. There can be no doubt, for instance, that if one party definitely fails to perform a treaty obligation, the other party will, subject to what has been said earlier, be justified in a corresponding or perhaps some other non-performance; or rather, more accurately, that such action on its part will not amount to an infraction of international law. Nevertheless, it may be desirable to subject the right to take such action to certain procedural conditions. These are considered in articles 38 and 39.

SUB-SECTION ii. SPECIAL PROCEDURAL CONSIDERATIONS AFFECTING CERTAIN MEANS OF REDRESS

*Article 38. Case (c) of Article 37*

175. As this case contemplates the total termination of the treaty obligation on grounds of fundamental breach, it is sufficient to refer back to the articles dealing with that matter in the Rapporteur's second (1957) report, in particular article 20 and the commentary thereon, dealing with the question of arbitration or judicial settlement.

*Article 39. Cases (d), (e) and (f) of Article 37*

176. *Paragraph 1.* Since counter-measures, in order to be effective, may have to be taken at very short notice, it would not be possible to make them conditional upon a prior offer or acceptance of arbitration or judicial settlement, but it can be laid down that they must be accompanied by an offer to that effect, or that an offer made by the other party must be accepted, as a condition of their continued validity.

177. *Paragraph 2.* This confers a general right on the tribunal, in the event of arbitration or judicial settlement, to suspend, if it thinks fit, any countermeasures which may already have been instituted. The only exceptions to this are those measures contemplated by sub-paragraph (e) of article 37. Here it would seem sufficient to provide that the measures in question can only take a blocking character pending the final outcome of the case, since in that case, the measures would merely be provisional and precautionary.

178. *Paragraph 3.* Sub-paragraphs (a) and (b) impose some general limitations on the taking of any counter-measures at all. These are believed to reflect ordinary principles of international law, but in view of the detailed provisions of article 18, it may be unnecessary to include mention of them here.

179. Sub-paragraph (c) provides for the cessation of the counter-measures so soon as the occasion for them is past. The same observation applies here (see paras. 55-57 and 67 above).

<sup>144</sup> *Ibid.*, No. 17, p. 28.