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Second report on the law of treaties, by Sir Humphrey Waldock, Special Rapporteur

Topic:
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their intention in the part of the original proposal relating to the legal effects of the instruments of acceptance deposited.

36. Several representatives were against any restriction of the principle of universality by reserving the procedure to be followed to specific categories of States, while excluding others. It was pointed out that the use of the term "all States" in the subsequent revision of the draft resolution [A/C.6/L.504/Rev.2] would affirm the principle of universality and would raise no difficulties for anyone—the draft providing for the express consent of the parties to the convention—in the matter of the legal effects of the instruments of acceptance deposited. Every contracting State would thus be completely free to establish, or not to establish, treaty relations with any State wishing to accede to the convention or conventions in questions. This interpretation was, however, rejected by one of the co-sponsors of the draft resolution.

37. The relationship between this proposal [A/C.6/L.504/Rev.2] and the question of the succession of States aroused the concern of a number of representatives. In their view, the determination of the States now parties to the conventions in question involves a problem of the succession of States, since new States have been able to accede to old conventions under agreements made on their behalf by the States which formerly represented them in the international field. It was also pointed out that the proposal was meant to apply to situations in which there were no problems of succession of States.

38. With regard to the nature of the acceptance, some representatives felt that it should be made clear that such acceptances could not be accompanied by "reservations", since that was a practice which had been introduced since the conclusion of conventions under the auspices of the League of Nations.

39. Finally, most representatives considered that a more thorough study was needed of the possible implica-

tions of the question. A number of representatives submitted a draft resolution (A/C.6/L.508), which was subsequently revised (A/C.6/L.508/Rev.1), requesting the International Law Commission to study the problem further—with special reference to the debate in the General Assembly—and to inform the General Assembly of the result of its studies in the report on the work of its fifteenth session, and requesting the inclusion of the question on the agenda of the next session of the General Assembly. Although some representatives considered that the problem involved in the participation of new States in treaties concluded under the auspices of the League of Nations would be more appropriately resolved by the General Assembly and had doubts regarding the suitability of referring the question to the International Law Commission, the Sixth Committee adopted the proposal contained in the draft resolution (A/C.6/L.508/Rev.1).

157. On the recommendation of the Sixth Committee, the General Assembly adopted, at its 1171st meeting, held on 20 November 1962, resolution 1766 (XVII) on the question of extended participation in general multilateral treaties concluded under the auspices of the League of Nations. The text of this resolution is reproduced below:

The General Assembly,

Taking note of paragraph 10 of the commentary to articles 8 and 9 of the draft articles on the law of treaties contained in the report of the International Law Commission covering the work of its fourteenth session,

Desiring to give further consideration to this question,

1. *Requests* the International Law Commission to study further the question of extended participation in general multilateral treaties concluded under the auspices of the League of Nations, giving due consideration to the views expressed during the discussions at the seventeenth session of the General Assembly, and to include the results of the study in the report of the Commission covering the work of its fifteenth session;

2. *Decides* to place on the provisional agenda of its eighteenth session an item entitled "Question of extended participation in general multilateral treaties concluded under the auspices of the League of Nations".

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Introduction

A. The basis of the present report

1. At its fourteenth session the Commission provisionally adopted part I of its draft articles on the law of treaties, consisting of twenty-nine articles on the conclusion, entry into force and registration of treaties (A/5209, chapter II, paragraph 23). At the same time the Commission decided, in accordance with articles 16 and 21 of its Statute, to transmit this draft, through the Secretary-General, to Governments for their observations (*ibid.*, paragraph 19). The Commission further decided to continue its study of the law of treaties at its next session, to give the topic priority and to take up at that session the questions of the validity and duration of treaties (*ibid.*, chapter III, paragraph 32 and chapter IV, paragraph 65). The Special Rapporteur accordingly now submits to the Commission his second report, covering these two aspects of the law of treaties.

2. Both the "validity" and the "duration" of treaties have been the subject of reports by previous Special Rapporteurs. "Validity" was dealt with by Sir H. Lauterpacht in articles 10-16 of his first report on the law of treaties (A/CN.4/63); and in his revision of article 16 in his second report (A/CN.4/87); and by Sir G. Fitzmaurice in his third report (A/CN.4/115). "Duration" was not covered by Sir H. Lauterpacht in either of his two reports, but was dealt with at length in Sir G. Fitzmaurice's second report (A/CN.4/107). Owing to the pressure of other work none of these reports has been examined by the Commission; but the present Special Rapporteur has naturally made the fullest use of them in preparing his own report.

B. The scope and arrangement of the present group of draft articles

3. The present group of draft articles covers the broad topics of (a) "essential validity" and (b) "duration".

"Essential validity" has been interpreted as extending to all questions of the possible invalidity of treaties, including the effect of constitutional limitations upon the powers of State agents, but not to limitations upon the treaty-making capacity of States themselves. The latter question has contacts with the other grounds of invalidity, and is noticed in one or two places in the report, but capacity of parties has not been regarded as within the scope of the present articles. "Capacity to conclude treaties" was dealt with by the Commission at its fourteenth session in drafting article 3 of part I of the draft articles in the law of treaties; and, having regard to the position taken by the Commission concerning "capacity" in article 3, the Special Rapporteur has excluded the question of the possible "invalidity" of treaties for lack of capacity in one of the parties from the present group of articles. Nor has "impossibility of performance" been dealt with as a distinct ground of "invalidity", because impossibility of performance as a ground of invalidity *ab initio*, as distinct from supervening impossibility as a ground of termination of treaties, is really covered by error vitiating consent.

"Duration" has been interpreted as extending to the duration, termination, suspension and obsolescence of treaties, but not to their revision. The topic of revision,

though related in some ways to those of the termination and obsolescence of treaties, relates to a different legal process raising complicated problems of its own, and must therefore be left for separate treatment. State succession is another topic which has points of contact with termination and obsolescence of treaties; but here again, State succession is really a special process which the Commission has for that reason already decided to take up as a separate topic.

4. The present group of articles deals with a number of grounds upon which a State may claim that a treaty into which it has entered is not binding upon it. Some of these grounds, like the effect of constitutional limitations, conflict with prior treaties and the doctrine of *rebus sic stantibus*, are controversial and in addition give scope for subjective determinations by the interested States. These and other grounds (e.g. the right to terminate a treaty which arises from a breach by the other party), because they involve the risk of unilateral determinations by the interested States, represent a certain threat to the security of treaties. That being so, the procedural aspects of avoiding or denouncing a treaty assume particular importance and are dealt with in a separate section of the draft.

5. At its fourteenth session the Commission decided, provisionally and for the purpose of facilitating the work of drafting, to follow the method adopted for the law of the sea and to prepare a "series of self-contained though closely related groups of draft articles" (A/5209, chapter II, paragraph 18). Accordingly the present group of articles on the "essential validity, duration and termination of treaties" has been constructed in the form of a separate draft convention, with the title "Part II". The articles comprised in it have been arranged in five sections: (i) general provisions, (ii) principles governing the essential validity of treaties, (iii) principles governing the duration, termination, suspension and obsolescence of treaties, (iv) procedural requirements in regard to the avoidance, denunciation or suspension of a treaty; and (v) legal consequences of avoidance, denunciation or suspension of a treaty. In this part, as in part I, the Special Rapporteur has sought to codify the modern rules of international law on the topics with which the report deals. On some questions, however, the articles formulated in the report contain elements of progressive development as well as of codification of the law.

The Essential Validity, Duration and Termination of Treaties

SECTION I — GENERAL PROVISIONS

Article 1 — Definitions

1. The expression "part I" as used in the present articles means part I of the draft articles on the law of treaties.

2. The expressions defined in article 1 of part I shall have the same meanings in the present part as are assigned to them in that article.

3. For the purposes of the present articles, the following expressions shall have the meanings hereunder assigned to them:

(a) "*Enter into*" a treaty means to establish on the international plane the State's consent to be bound by a treaty by one of the procedures provided for in part I.

(b) "*Denounce*" a treaty means to declare that a State will no longer consider itself bound by the treaty either as from the date of the declaration or from some other date.

(c) "*Jus cogens*" means a peremptory norm of general international law from which no derogation is permitted except upon a ground specifically sanctioned by general international law, and which may be modified or annulled only by a subsequent norm of general international law.

Commentary

1. The question whether the various parts of the law of treaties are to be amalgamated in a single draft convention or are to remain separate, self-contained parts is for decision at a later date. But in any event it will be desirable that the use of technical terms should be uniform in the different parts. It may be that ultimately it will be found more convenient to place all the definitions for the law of treaties in a single article. Meanwhile, however, it seems appropriate to provide for the application in the present part of the definitions contained in part I. This is done in paragraph 2 of the article, while paragraph 1, for convenience of drafting, specifies that the term part I will always be used to designate the articles on the "Conclusion, entry into force and registration of treaties" dealt with by the Commission at its fourteenth session.

2. Paragraph 3 adds three new definitions for the purposes of the present part. Those in sub-paragraphs (a) and (b) do not appear to require comment; the definition of the two terms in question is thought useful in order to avoid circumlocution in other articles. The term "*jus cogens*" is defined in sub-paragraph (c) for the purposes of article 13. It is a term which is well enough understood, but it is not so easily defined with precision. The essence of the concept, it is thought, is that a *jus cogens* rule is a rule embodying a norm of general international law from which no derogation is permitted and which can only be modified or set aside by the creation of a further norm of general international law. On the other hand, it seems advisable to qualify the phrase "from which no derogation is permitted" by reference to grounds "specifically sanctioned by international law", in order to allow for such possible grounds as legitimate self-defence.

Article 2 — *The presumption in favour of the validity of a treaty*

Every treaty entered into and brought into force in accordance with the provisions of part I shall be presumed to be valid and binding upon the parties unless it —

- (a) lacks essential validity under the rules set out in section II of this part; or
- (b) has ceased to be in force under the rules set out in section III of this part.

Commentary

This part of the draft articles contains a series of provisions which formulate grounds upon which a treaty may either be set aside as lacking essential validity or

denounced as no longer retaining its former validity. Accordingly, it seems desirable to emphasize in section I that the *primary rule* is that any treaty concluded and brought into force in accordance with the rules set out in part I of the draft articles is presumed to be valid and binding. In other words, the onus is upon a party which asserts that a regularly concluded treaty is not binding upon it. Unilateral assertions of a right to avoid or denounce treaties on one or other of the grounds covered in this part, simply as a pretext to escape from inconvenient obligations, have always been a source of insecurity to treaties; and one of the most difficult problems in this part is to formulate the grounds of invalidity in terms which do not open the door too wide to unilateral avoidance or denunciation of treaties. It is therefore thought important to underline in the present article that the presumption is always in favour of the validity of a treaty concluded and brought into force under the procedures and rules laid down in part I.

Article 3 — *Procedural restrictions on the exercise of a right to avoid or denounce a treaty*

A right to avoid or denounce a treaty arising under any of the provisions of sections II and III of this part shall be exercisable only in conformity with procedures laid down in section IV.

Commentary

The purpose of this article, as of article 2, is to underline that the grounds for invalidating or terminating a treaty set out in this part may not be lightly asserted and may not be employed simply as a pretext for escaping from an inconvenient treaty. These grounds for invalidating or terminating a treaty, legitimate in themselves, do involve certain risks to the security of treaties owing to the possibility of a State's arbitrarily asserting the existence of such a ground and constituting itself the judge of the validity of its own assertion. Commentators upon this branch of the law of treaties have therefore nearly all sought to make the right to avoid or denounce a treaty dependent to some extent upon the fulfilment of procedural requirements. Delicate although the task is of formulating procedural requirements for the avoidance or denunciation of treaties which have any prospect of being accepted at a diplomatic conference, this approach to the problem seems correct and necessary. Section IV contains the Special Rapporteur's proposals for these requirements; it seems desirable in the present section to draw attention at once to the fact that the rights of avoidance and denunciation contained in this part are linked to the procedural requirements in section IV.

Article 4 — *Loss of a right to avoid or denounce a treaty through waiver or preclusion*

A right to avoid or denounce a treaty arising under any of the provisions of sections II and III of this part shall not be exercisable if, after becoming aware of the fact creating such right, the State concerned —

- (a) shall have waived the right;
- (b) shall have accepted benefits or enforced obligations under the treaty; or
- (c) shall otherwise, by its own acts or omissions, have precluded itself from asserting, as against any other

party or parties, that the treaty lacks essential validity or, as the case may be, that it is not still in force.

Commentary

1. The principle of *préclusion* (estoppel) is a general principle of law whose relevance in international law is generally admitted and has been expressly recognized by the International Court of Justice itself in two recent cases.¹ Under this principle a party is not permitted to take up a legal position that is in contradiction with its own previous representations or conduct, when another party has been led to assume obligations towards, or attribute rights to, the former party in reliance upon such representations or conduct.² If in some legal systems, such as the common law systems, the application of the principle may to some extent be dependent upon technical rules,³ the foundation of the principle is essentially good faith and fair dealing, which demand that a party shall not be able to gain advantage from its own inconsistencies (*allegans contraria non audiendus est*).

2. *Préclusion* (estoppel) is a principle of general application, which is not confined to the law of treaties, still less to this part of it.⁴ Nevertheless, it does have a particular importance in this branch of international law. As already mentioned in the two previous commentaries, the grounds upon which treaties may be invalidated under section II or terminated under section III involve certain risks of arbitrary avoidance or denunciation of treaties. Another risk is that a State, after becoming aware of an essential error in the conclusion of the treaty, of an excess of authority committed by its representative, of a breach by the other party etc., may continue with the treaty as if nothing had happened and only raise the matter at a much later date when it desires for quite other reasons to put an end to its obligations under the treaty. Indeed, it may seek in this way to resuscitate an alleged ground of invalidity or of termination long after the event upon the basis of arbitrary or controversial assertions of fact. The principle of *préclusion*, although it may not be able altogether to prevent the arbitrary assertion of claims to avoid or denounce treaties, does place a valuable limit upon the cases in which such claims can be asserted with any appearance of legitimacy. Such indeed was the role played by the principle in the *Temple* case and in the case of the *Arbitral Award of the King of Spain*. Accordingly, while appreciating the general character of the principle, the Special Rapporteur suggests that its particular operation in the sphere of the validity and termination of treaties should be given express recognition in this part. Moreover, although logically a case could be made out for placing this article in a later

section, there seems to be some advantage in including it amongst the "general provisions".

3. "Waiver" has been included in this article because, although not identical with *préclusion*, it is closely connected with it; indeed, many cases of *préclusion* can also be viewed as cases of implied waiver. Sub-paragraph (a), therefore, covers cases of express waiver of a right to avoid a treaty for lack of essential validity or to terminate a treaty by denunciation for breach, etc.

4. It has not been thought necessary or appropriate to attempt an exhaustive definition of cases of *préclusion* in the present article, since the principle is a general one also applicable outside the law of treaties. The most obvious and common case in the law of treaties is likely to be that where a State, notwithstanding its knowledge of a ground of invalidity or of termination, invokes the treaty either for the purpose of claiming rights or of enforcing obligations. Accordingly this is specially mentioned in sub-paragraph (b), while the general principle of *préclusion* is covered in sub-paragraph (c).

5. Sub-paragraphs (b) and (c) are based upon the pronouncements of the Court in the *Temple* case and in the case of the *Arbitral Award made by the King of Spain*, which make it clear that *préclusion* may arise both from acts and omissions. In the *Temple* case, which involved a claim to set aside an agreement on the ground of error, the Court said:

"Even if there were any doubt as to Siam's acceptance of the map in 1908, and hence of the frontier indicated thereon, the Court would consider, in the light of the subsequent course of events, that Thailand is now precluded by her conduct from asserting that she did not accept it. She has, for fifty years, enjoyed such benefits as the Treaty of 1904 conferred on her, if only the benefit of a stable frontier. France, and through her Cambodia, relied on Thailand's acceptance of the map. Since neither side can plead error, it is immaterial whether or not this reliance was based on a belief that the map was correct. It is not now open to Thailand, while continuing to claim and enjoy the benefits of the settlement, to deny that she was ever a consenting party to it."⁵

In the *Arbitral Award* case Nicaragua sought to set aside the Award on three grounds, one of which was that the arbitration treaty providing for the setting up of the Tribunal had expired before the designation of the King of Spain as Arbitrator. The Court, however, said:

"Nicaragua, by express declaration and by conduct, recognized the Award as valid and it is no longer open to Nicaragua to go back upon that recognition and to challenge the validity of the Award. Nicaragua's failure to raise any question with regard to the validity of the Award for several years after the full terms of the Award had become known to it further confirms the conclusion at which the Court has arrived."⁶

While the formulation of sub-paragraphs (b) and (c) is derived from the Court's jurisprudence in these two cases, the two sub-paragraphs are intended, in combination, to embrace the whole principle of *préclusion*.

¹ *The Arbitral Award made by the King of Spain, I.C.J. Reports, 1960*, pp. 213-214; *The Temple of Preah Vihear, I.C.J. Reports, 1962*, pp. 23-32.

² In Spanish systems of law the doctrine is known as "*la doctrina de los actos propios*".

³ See generally *Canadian and Dominion Sugar Co. v. Canadian National (West Indies) Steamships Ltd.* [1947] Law Reports Appeal Cases, at p. 55.

⁴ See generally D. W. Bowett, *British Yearbook of International Law*, 1957, pp. 176-202; Bin Cheng, *General Principles of Law*, pp. 141-149; Judges Alfaro and Fitzmaurice in *The Temple of Preah Vihear, I.C.J. Reports, 1962*, pp. 39-51, 61-65.

⁵ *The Temple of Preah Vihear, I.C.J. Reports, 1962*, p. 32.

⁶ *The Arbitral Award made by the King of Spain, I.C.J. Reports, 1960*, p. 213.

SECTION II — PRINCIPLES GOVERNING THE ESSENTIAL VALIDITY OF TREATIES

Article 5 — Constitutional limitations on the treaty-making power

1. Whenever the constitution of a State —

(a) prescribes that treaties, or particular classes of treaties, shall not be entered into without their first having been submitted to a particular organ of the State for confirmation or approval, or that they shall not be binding upon the State or shall not have effect within the State's internal law unless previously ratified or approved by a particular organ of the State, or

(b) contains any other provisions limiting either the exercise of the treaty-making power or the validity of treaties under internal law, the effect of such provisions on the essential validity of treaties shall be determined by reference to the rules contained in the subsequent paragraphs of this article.

2. Subject to paragraph 4, a State shall not be entitled to deny the validity in international law of the act of one of its representatives by which, in disregard of relevant provisions of the constitution, the representative has purported to enter into a treaty on its behalf, when —

(a) in the case of a treaty binding upon signature under articles 11 and 12 of part I, the treaty has been signed by a representative competent under the rules laid down in article 4 of part I to bind the State by his signature;

(b) in other cases, an instrument of ratification, acceptance, approval or accession has been exchanged or deposited in accordance with the treaty and the instrument appears on its face to have been executed in proper form by a representative of the State competent for that purpose under the rules laid down in article 4 of part I.

3. In cases falling under paragraph 2 —

(a) if the treaty is already in force or is brought into force by the unconstitutional signature or other unconstitutional act of its organ, the State concerned may only retract its consent to be bound by the treaty with the agreement of the other party or parties to the treaty;

(b) if the treaty is not yet in force, the State concerned may nevertheless retract the unconstitutional signature or other unconstitutional act of its organ at any time before the treaty shall have come into force, upon giving notice to the depositary or to the other party or parties to the treaty.

4. (a) Paragraphs 2 and 3 shall not apply if the other interested State or States or the depositary were in fact aware at the time that the representative lacked constitutional authority to establish his State's consent to be bound by the treaty, or if his lack of constitutional authority to bind his State was in the particular circumstances manifest to any representative of a foreign State dealing with the matter in good faith.

(b) In the cases mentioned in sub-paragraph (a), the State concerned shall be free to annul the signature of its representative or to retract the instrument of ratification, acceptance, approval or accession exchanged or deposited in its name at any time, provided that it has not —

(i) subsequently ratified the unauthorized act of its representative;

(ii) so conducted itself as to bring the case within the provisions of article 4 of this part.

Commentary

1. Constitutional limitations affecting the exercise of the treaty-making power take various forms.⁷ Some constitutions seek to preclude the executive from entering into treaties, or particular kinds of treaties, except with the previous consent of a legislative organ; some provide that treaties shall not be effective as law within the State unless "approved" or confirmed in some manner by a legislative organ; others contain fundamental laws which are not susceptible of alteration except by a special procedure of constitutional amendment and which in that way indirectly impose restrictions upon the power of the executive to conclude treaties. Legally, a distinction can be drawn under internal law between those types of provision which place constitutional limits upon the power of a government to enter into treaties and those which merely limit the power of a government to enforce a treaty within the State's internal law without some form of endorsement of the treaty by the legislature. The former can be said to affect the actual power of the executive to conclude a treaty, the latter merely the power to implement a treaty when concluded. Politically, however, the effect of the two types of provision upon the exercise of the treaty-making power may not be very different, since a responsible government will not knowingly commit the State to be bound by a treaty unless reasonably assured of being able to carry through the legislature any modifications of its municipal law necessary to enable it to perform its obligations under the treaty. The question which arises under articles 4 and 5 is how far, if at all, any of these constitutional limitations may affect the validity under international law of a consent to a treaty given by a State agent ostensibly authorized to declare that consent; and on this question opinion has been sharply divided.

2. One group of writers⁸ maintains that international law leaves it to the internal law of each State to determine the organs and procedures by which the will of a State to be bound by a treaty shall be formed and expressed; and that constitutional laws governing the formation and expression of a State's consent to a treaty have always to be taken into account in considering whether an international act of signature, ratification, acceptance, approval or accession is effective to bind the State. According to this doctrine, internal laws limiting the power of State organs to enter into treaties are to be considered part of international law so as to avoid, or at least render voidable, any consent to a treaty given on the international plane in disregard of a constitutional limitation; the agent purporting to bind the State in breach of the constitution is totally incompetent in international as well as national law to express its consent to the treaty. If this doctrine is accepted, it follows that other States are not entitled to rely on the ostensible authority to commit the State possessed by a Head of State, Prime Minister, Foreign Minister, etc., under article 4 of part I; they are required to satisfy

⁷ See *United Nations Legislative Series, Laws and Practices concerning the Conclusion of Treaties* (ST/LEG/SER.B/3).

⁸ E.g. M. W. Schücking, *Annuaire de l'Institut de Droit International*, 1930, p. 225; P. Chailley, *La Nature Juridique des Traités Internationaux selon le Droit Contemporain*, pp. 175 and 215; S. B. Crandall, *Treaties, their Making and Enforcement*, pp. 13-14; C. De Visscher, *Bibliotheca Visseriana*, vol. 2 (1924), p. 98.

themselves in each case that the provisions of the State's constitution are not infringed or take the risk of subsequently finding the treaty void. The weakening of the security of treaties which this doctrine entails is said by those who advocate it to be outweighed by the need to give the support of international law to democratic principles in treaty-making.

3. The Commission's first Special Rapporteur on the law of treaties, Professor Brierly, took this view, and in 1951 the Commission itself adopted an article based upon it.⁹ Some members, however, were strongly critical of the doctrine that constitutional limitations are incorporated into international law, while Mr. Kerno, the Assistant Secretary-General, expressed misgivings as to the difficulties with which it might confront depositaries. During the discussion the Rapporteur said that the Commission's decision had been based more on the practical consideration that States would not accept any other rule than on legal principles.

4. A second group of writers,¹⁰ while basing themselves on the incorporation of constitutional limitations into international law, recognize that some qualification of that doctrine is essential if it is not to undermine the security of treaties. According to this group, good faith requires that only notorious constitutional limitations with which other States can reasonably be expected to acquaint themselves should be taken into account. On this view, a State contesting the validity of a treaty on constitutional grounds can only invoke those provisions of the constitution which are notorious or could easily have been ascertained by inquiry. Moreover, some writers in this group further maintain that a State which invokes the provisions of its constitution to annul its signature, ratification, etc., of a treaty, is liable to compensate the other party which "relied in good faith and without any fault of its own on the ostensible authority of the regular constitutional organs of the State".¹¹ They also hold that, by allowing an undue period of time to elapse before invoking the invalidity of a treaty or by asserting rights under the treaty, a State may preclude itself from contesting the binding force of its signature, ratification, etc.

5. The Commission's second Special Rapporteur on the law of treaties, Sir H. Lauterpacht, belonged to this group, and in article 11 of his first report¹² proposed the following set of rules to cover the question of constitutional limitations:

"1. A treaty is voidable, at the option of the party concerned, if it has been entered in disregard of the limitations of its constitutional law and practice.

⁹ Article 2: "A treaty becomes binding in relation to a State by signature, ratification, accession or any other means of expressing the will of the State, in accordance with its constitutional law and practice through an organ competent for that purpose." (*Yearbook of the International Law Commission*, 1951, vol. II, p. 73).

¹⁰ E. G. Lord McNair, *Law of Treaties* (1961), chapter III; Paul De Visscher, *De la conclusion des traités internationaux* (1943), p. 275; P. Guggenheim, *Recueil des Cours de l'Académie de droit international*, vol. 74 (1949), p. 236; J. Mervyn Jones, *Full Powers and Ratification* (1946); pp. 154-155; Sir H. Lauterpacht, First Report on the Law of Treaties, *Yearbook of the International Law Commission*, 1953, vol. II, pp. 141-146.

¹¹ Sir H. Lauterpacht, *op. cit.*, p. 143; see also Lord McNair, *op. cit.*, p. 77; *Research in International Law*, Harvard Law School, part III, Law of Treaties, art. 21.

¹² Sir H. Lauterpacht, *op. cit.*, p. 141.

"2. A contracting party may be deemed, according to the circumstances of the case, to have waived its right to assert the invalidity of a treaty concluded in disregard of constitutional limitations if for a prolonged period it has failed to invoke the invalidity of the treaty or if it has acted upon or obtained an advantage from it.

"3. In cases in which a treaty is held to be invalid on account of disregard of the constitutional limitations imposed by the law or practice of a contracting party that party is responsible for any resulting damage to the other contracting party which cannot properly be held to have been affected with knowledge of the constitutional limitation in question.

"4. A party cannot invoke the invalidity of a treaty on the ground that it has been entered into in disregard of the constitutional limitations of the other contracting party.

"5. A party asserting the invalidity of a treaty on account of any failure to comply with constitutional limitations is bound, in case of disagreement, to submit the substance of the dispute or the question of damage to the International Court of Justice or to any other international tribunal agreed upon by the parties."

In putting forward these proposals Sir H. Lauterpacht maintained that the practice of States and the bulk of modern writers support such a compromise between the fundamental principle of the nullity of acts done by State agents in excess of their constitutional authority and the requirements of good faith and of the security of treaties. The Commission itself did not have an opportunity to discuss his proposals.

6. A compromise solution based upon the initial hypothesis of the invalidity in international law of an unconstitutional signature, ratification, etc., of a treaty presents certain logical and practical difficulties. If a constitutional limitation laid down in the internal law of a State is to be regarded as effective in international law to curtail the authority of a Head of State or other State agent to declare the State's consent to a treaty, it may be asked upon what principle a "notorious" limitation is effective for that purpose but a "non-notorious" one is not. Under the State's internal law both kinds of limitation are legally effective to curtail the agent's authority to enter into the treaty. Similarly, if the constitutional limitation is effective in international law to deprive the State agent of any authority to commit the State with respect to the treaty, it may not be easy to see upon what principle the State can be held internationally responsible in damages in respect of its agent's unauthorized signature, ratification, etc., of the treaty. If the initial signature, ratification, etc., of the treaty is not attributable to the State by reason of the lack of authority, all subsequent acts of the State agents with respect to the same treaty would also logically seem not to be attributable to the State. It may be added that, if internal constitutional provisions are to be regarded as incorporated in international law, it is not obvious why the unconstitutionality of a treaty should be a matter which can only be invoked by the State whose constitution is the cause of its invalidity, and not by the other parties to the treaty.

7. The practical difficulties are even more formidable, because the notion that a distinction can readily be made between notorious and non-notorious constitu-

tional limitations is to a large extent an illusion. Admittedly, there now exist collections of the texts of State constitutions and the United Nations has issued a volume of "Laws and Practices concerning the conclusion of Treaties"¹³ based on information, supplied by a considerable number of States. Unfortunately, however, neither the texts of constitutions nor the information made available by the United Nations are by any means sufficient to enable foreign States to appreciate with any degree of certainty whether or not a particular treaty falls within a constitutional provision. Some provisions are capable of subjective interpretation, such as a requirement that "political" treaties or treaties of "special importance" should be submitted to the legislature; some constitutions do not make it clear on their face whether the limitation refers to the power to conclude the treaty or to its effectiveness within domestic law. But even when the constitutional provisions are apparently uncomplicated and precise, the superficial clarity and notoriety of the limitations may be quite deceptive, as in the case of the United States Constitution. In the majority of cases where the constitution itself contains apparently strict and precise limitations, it has nevertheless been found necessary to admit a wide freedom for the executive to conclude treaties in simplified form without following the strict procedures prescribed in the constitution; and this use of the treaty-making power is only reconciled with the letter of the constitution either by a process of interpretation or by the development of political understandings. Furthermore, the constitutional practice in regard to treaties in simplified form tends to be somewhat flexible; and the question whether or not to deal with a particular treaty under the procedures laid down in the constitution then becomes to some extent a matter of the political judgement of the executive, whose decision may afterwards be challenged in the legislature or in the courts.

8. No doubt, it remains true that in a number of cases it will be possible to say that a particular constitutional provision is notorious and clear and that a given treaty falls within it. But it is equally true that in many cases neither a foreign State nor the national government itself can judge in advance with any certainty whether, if contested, a given treaty would be held under national law to fall within a constitutional limitation, or whether an international tribunal would hold the constitutional provision to be one that is "notorious" and "clear" for the purposes of international law. In consequence, the compromise solution advocated by Sir H. Lauterpacht and a number of other authorities appears only to go a small part of the way towards removing the risks to the security of treaties which arise, if constitutional limitations are treated as effective in international law to curtail the authority to act for the State ostensibly possessed by certain State agents under customary law.

9. A third group of writers¹⁴ considers that, not only

does international law leave to each State the determination of the organs and procedures by which its will to conclude treaties is formed, but it concerns itself exclusively with the external manifestations of this will on the international plane. According to this group, international law determines the procedures and conditions under which States express their consent to treaties on the international plane; it regulates not only the procedures for expressing consent to be bound by a treaty but the conditions under which the various categories of State agents will be recognized as competent to carry out such procedures on behalf of their State. This being so, if an agent, competent under international law to commit the State and apparently authorized by the government of the State to do so, expresses the consent of the State to a treaty through one of the established procedures, the State is held bound by the treaty in international law. Under this doctrine, failure to comply with constitutional requirements may entail the nullity of the treaty as domestic law, and may also render the agent or the government liable to legal proceedings under domestic law; but it does not affect the essential validity of the treaty in international law so long as the agent acted within the scope of his ostensible authority under international law. Some members of this group¹⁵ modify the stringency of the rule in cases where the other State is actually aware of the failure to comply with constitutional requirements or where the lack of constitutional authority is so manifest that the other State must be deemed to have been aware of it. This compromise solution, which takes as its starting point the supremacy of the international rules concerning the conclusion of treaties, does not seem to present the same logical difficulties as the compromise put forward by the previous group. As the basic principle, according to the third group, is that a State is entitled to assume the regularity of what is done within the ostensible authority of an agent competent under international law, it is logical enough that the State should not be able to do so when it knows, or must in law be assumed to know, that in the particular case the authority does not exist.

10. The Commission's third Special Rapporteur, Sir G. Fitzmaurice, belonged to the third group, and in his third report on the law of treaties (A/CN.4/115) proposed an article (article 10) which excluded constitutional provisions from having any effect upon the essential validity of a treaty in any circumstances. He considered this to be the "internationally correct" rule and the doctrines recognizing the effectiveness of constitutional limitations in international law to be difficult to reconcile with the principle of the supremacy of international over domestic law.

11. The majority of writers adopting the constitutional approach to the problem appear to have arrived at their conclusion rather upon the basis of theory than upon a close examination of international jurisprudence and State practice. If the evidence from these sources is not entirely decisive, the weight of it seems to point to a

¹³ *United Nations Legislative Series, Laws and Practices concerning the conclusion of Treaties* (ST/LEG/SER. B/3).

¹⁴ E. G. Anzilotti, *Cours de droit international* (translation Gidel) vol. 1 (1929), pp. 366-367; G. Scelle, *Précis du droit de gens*, vol. 2 (1934), p. 455; Sir G. Fitzmaurice, *British Yearbook of International Law*, vol. 15 (1934) pp. 129-137; 1. Seidl-Hohenveldern, *International and Comparative Law Quarterly*, vol. 12 (1963), pp. 102-103; Blix, *Treaty-Making Power* (1960) chapter 24; and see UNESCO, *Survey of the Ways in which States interpret their International Obligations*, pp. 7-8.

¹⁵ J. Basdevant, for example, while holding that States must in general be able to rely on the ostensible authority of a State agent and to disregard constitutional limitations upon his authority, considered that this should not be so in the case of a "violation manifeste de la constitution d'un Etat"; *Recueil des Cours de l'Académie de droit international*, 1926, vol. V, p. 581; see also the UNESCO "Survey on the Ways in which States Interpret their International Obligations" (P. Guggenheim), p. 8.

solution based upon the position taken by the third group. The international jurisprudence is admittedly neither extensive nor very conclusive. The *Cleveland Award*¹⁶ (1888) and the *George Pinson* case¹⁷ (1928), although not involving actual decisions on the point, contain observations favouring the relevance of constitutional provisions to the international validity of treaties. On the other hand, the *Franco-Swiss Custom* case¹⁸ (1912) and the *Rio Martin* case¹⁹ (1924) contain definite decisions by arbitrators declining to take account of alleged breaches of constitutional limitations when upholding the validity respectively of a protocol and an exchange of notes, while the *Metzger* case²⁰ contains an observation in the same sense. Furthermore, pronouncements in the *Eastern Greenland*²¹ and *Free Zones*²² cases, while not directly in point, seem to indicate that the International Court will not readily go behind the ostensible authority under international law of a State agent—a Foreign Minister and an agent in international proceedings in the cases mentioned—to commit his State.

12. As to State practice, a substantial number of diplomatic incidents has been closely examined in a recent work.²³ These incidents certainly contain examples of claims that treaties were invalid on constitutional grounds, but in none of them was that claim admitted by the other party to the dispute. Moreover, in three instances—the admission of Luxembourg to the League, the Politis incident and the membership of Argentina—the League of Nations seems to have acted upon the principle that a consent given on the international plane by an ostensibly competent State agent is not invalidated by the subsequent disclosure that the agent lacked constitutional authority to commit his State. Again, depositaries of treaties, while concerning themselves with the ostensible authority of State agents under international law and with the regularity of the form of full powers and instruments of ratification, acceptance, etc., have never concerned themselves with the constitutional authority of the agent signing a treaty or depositing an instrument of ratification, acceptance, etc. In one instance, the United States Government, as depositary, seems to have assumed that an ostensibly regular notice of adherence to an agreement could not be withdrawn on a plea of lack of constitutional authority except with the consent of the other parties.²⁴ Nor is it the practice of State agents, when concluding treaties, to cross-examine each other as to their constitutional authority to affix their signatures to a treaty or to deposit an instrument of ratification, acceptance, etc. It is true that in the *Eastern Greenland* case Denmark conceded the relevance in principle of Norway's constitutional provisions in appreciating the effect of the Ihlen declaration, while contesting their relevance in the particular circumstances of the case. It is also true that at the seventeenth session of the General Assembly the Italian representative to the Sixth

Committee expressed concern that certain passages in the International Law Commission's report (A/5209) seemed to imply a view unfavourable to the relevance of constitutional provisions in determining the question of a State's consent in international law. But other States, such as Switzerland, the United States and Luxembourg, have expressed themselves very clearly in an opposite sense and the weight of State practice seems to be the other way.

13. The present Special Rapporteur has based his proposals upon the principle that the declaration of a State's consent to a treaty is binding upon that State, if made by an agent ostensibly possessing authority under international law to make the particular declaration on behalf of his State. In doing so, he has been guided primarily by the indications contained in international jurisprudence and State practice and also by the rules concerning the conclusion of treaties already provisionally adopted by the Commission in part I. Nor could he fail to take account of the fact that, in dealing with the authority of agents to sign, ratify, etc., a treaty under article 4 of part I and with the questions of signature, ratification and acceptance under articles 11, 12 and 14 of that part, the Commission itself showed a marked reluctance to introduce into the provisions of those articles, by any form of reference, the differing constitutional rules and practices of individual States.

14. Other more general considerations also appear to justify the Commission's reluctance to incorporate into international law the constitutional provisions of individual States. International law has devised a number of treaty-making procedures—ratification, acceptance and approval—specifically for the purpose of enabling Governments to reflect fully upon the treaty before deciding whether or not the State should become a party to it, and also of enabling them to take account of any domestic constitutional requirements. When a treaty has been made subject to ratification, acceptance or approval, the negotiating States would seem to have done all that can reasonably be demanded of them in the way of giving effect to democratic principles of treaty-making. It would scarcely be reasonable to expect each Government subsequently to follow the internal handling of the treaty by each of the other Governments, while any questioning on constitutional grounds of the internal handling of the treaty by another Government would certainly be regarded as an inadmissible interference in its affairs. The same considerations apply in cases of accession where the Government has the fullest opportunity to study the treaty and give effect to constitutional requirements before taking any action on the international plane to declare the State's accession to the treaty. Again, in the case of a treaty binding upon signature it is the Government which authorizes the use of this procedure; the Government is aware of the object of the treaty before the negotiations begin and, with modern methods of communication, it normally has knowledge of the exact contents of the treaty before its representative proceeds to the act of signature; moreover, if necessary, its representative can be instructed to sign "*ad referendum*". Admittedly, in the case of treaties binding upon signature, and more especially those in simplified form, there may be a slightly greater risk of a constitutional provision being overlooked; but even in these cases the

¹⁶ Moore, *International Arbitrations*, vol. 2, p. 1946.

¹⁷ *United Nations Reports of International Arbitral Awards*, vol. V, p. 327.

¹⁸ *Ibid.*, vol. XI, p. 411.

¹⁹ *Ibid.*, vol. II, p. 724.

²⁰ *Foreign Relations of the United States*, 1901, p. 262.

²¹ P.C.I.J., Series A/B, No. 53, pp. 56-71 and p. 91.

²² P.C.I.J., Series A/B, No. 46, p. 170.

²³ H. Blix, *op. cit.*, chapter 20.

²⁴ H. Blix, *op. cit.*, p. 267.

Government has all the necessary means of controlling the acts of its representative and of giving effect to any constitutional requirements. In other words, in every case any failure to comply with constitutional provisions in entering into a treaty will be the clear responsibility of the Government of the State concerned.

15. The majority of the diplomatic incidents in which States have invoked their constitutional requirements as a ground of invalidity have been cases in which for quite other reasons they have desired to escape from their obligations under the treaty. Furthermore, in most of these cases the other party to the dispute has contested the view that non-compliance with constitutional provisions could afterwards be made a ground for invalidating a treaty which had been concluded by representatives ostensibly possessing the authority of the State to conclude it. Where a Government has genuinely found itself in constitutional difficulties after concluding a treaty and has raised the matter promptly, it appears normally to be able to get the constitutional obstacle removed by internal action and to obtain any necessary indulgence in the meanwhile from the other parties. In such cases the difficulty seems often to show itself not from the matter being raised in the legislative body whose consent was by-passed but rather in the courts when the validity of the treaty as internal law is challenged on constitutional grounds.²⁵ National courts have sometimes appeared to assume that a treaty, constitutionally invalid as domestic law, will also be automatically invalid on the international plane. More often, however, they have either treated the international aspects of the matter as outside their province or have recognized that to hold the treaty constitutionally invalid may leave the State in default in its international obligations. Confronted with a decision in the courts impugning the constitutional validity of a treaty, a Government will normally seek to regularize its position under the treaty by taking appropriate action in the domestic or international sphere.

16. The Special Rapporteur does not underestimate the importance of constitutional limitations on the treaty-making power. On balance, however, he considers that greater importance should be attached by the Commission to the need to safeguard the security of international agreements. The complexity of constitutional provisions and the uncertain application even of apparently clear provisions appear to create too substantial a risk to the security of treaties, if constitutional provisions are accepted as governing the scope of the international authority of a State's agents to enter into treaties on its behalf. In drafting the present article, therefore, he has taken as his starting point the principle that a State is bound by the acts of its agents done within the scope of their ostensible authority under international law.

17. Paragraph 1 defines the conditions for the application of the present article by setting out the kinds of constitutional limitation on the treaty-making power which brings it into operation. As already mentioned in paragraph 1 of this Commentary, it can be contended that constitutional provisions which are only directed towards the validity of treaties in internal law have no bearing on their international validity. Nevertheless

they do in practice affect the treaty-making powers of State agents and may sometimes be invoked, even if wrongly, as depriving State agents of constitutional authority to commit the State. Accordingly, it seems desirable to cover this kind of limitation in the article; and if "ostensible authority" is accepted as the relevant criterion, there is no occasion for drawing a distinction, however correct juridically, between a limitation upon the power to bind the State externally and a limitation upon the power to do so internally. If, however, the Commission were to adopt the doctrine that constitutional limitations are to be regarded as part of international law, it would be necessary to distinguish between the two kinds of limitation.

18. Paragraph 2 sets out the general rule that States are bound internationally by acts of their agents done within the scope of the authority ostensibly possessed by them under international law. Sub-paragraph (a) covers the case of treaties binding upon signature, while sub-paragraph (b) covers that of treaties subject to ratification, acceptance or approval. In both cases the criteria for determining "ostensible authority" are the rules set out in article 4 of Part I, which have already been provisionally adopted by the Commission.

19. Paragraph 3 sets out the legal position which results from the application of the "ostensible authority" doctrine. Sub-paragraph (a) draws the logical conclusion from that doctrine that, if the treaty is already in force or is brought into force by the signature or instrument of the State in question, it may only withdraw from the treaty with the agreement of the other parties. If the State subsequently seeks to impeach the validity of the act of its own agents, it is disturbing rights already acquired by the other parties; and, having been committed on the international plane by the act of its agent done within the scope of his ostensible authority, it can only withdraw from the treaty with the consent of the other parties.

20. Logically, it would be possible to contend that a similar rule should apply even if the treaty is not yet in force; in other words, that the unconstitutional signature or instrument may even in that case be withdrawn only with the consent of the other interested States. On the other hand, it seems reasonable that, if the treaty is not yet in force, the State should be allowed a *locus poenitentiae* within which to retract the unconstitutional act of its representative. In these cases there would be no question of the State's evading its obligations by a sneecious reliance on constitutional limitations; while the disturbance to the interests of other States would be minimal. Accordingly, sub-paragraph (b) proposes *de lege ferenda* that there should be a unilateral right of withdrawal at any time up to the entry into force of the treaty.

21. Paragraph 4, sub-paragraph (a), qualifies the "ostensible authority" doctrine to the extent of recognizing that actual knowledge of a representative's lack of constitutional authority negatives the right to regard him as ostensibly possessing authority to bind his State. Good faith precludes another State from claiming to have relied upon an authority which it knew was not in fact possessed by the representative who purported to commit his State. A number of authorities²³ also

²⁵ E.g. *Prosecution for Misdemeanours (Germanv)* case, (*International Law Reports*, 1955, pp. 560-1); *Belgian State v. Leroy* (*ibid.*, pp. 614-6).

²⁶ E.g. J. Basdevant, *Recueil des Cours*, 1926, Vol. V, p. 581; P. De Visscher, *op. cit.*, p. 272-3.

admit as an exception to the "ostensible authority" doctrine cases where the lack of the agent's authority is "manifest". It is certainly possible to imagine cases where the very question of constitutional authority has been ventilated in Parliament or the Press and the lack of authority can be said to be "manifest"; or where the treaty is of such a kind as to render the need for special constitutional authority self-evident. In these cases again, it can be said, it would be inconsistent with good faith to claim to have relied on the existence of an authority which any reasonable person would have known did not exist. On the other hand, the chief merit of the "ostensible authority" doctrine is to exclude the need for negotiating States to investigate each other's internal constitutional situation, and it is essential to avoid any qualification of the doctrine that would reintroduce the need for such investigations. From this point of view there may be a little hesitation in admitting the exception of "manifest" lack of constitutional authority; but the Special Rapporteur has included it in paragraph 4 for the Commission's consideration.

22. Paragraph 4, sub-paragraph (b) provides that where the lack of constitutional authority was known by or manifest to other States at the time, it can be invoked to annul the unauthorized act of the agent, unless the State has claimed benefits or asserted obligations arising under the treaty or has otherwise precluded itself by its conduct from denying its consent to be bound by the treaty. These provisos are important, since the danger is that a State may refrain from raising the constitutional objection to its participation in the treaty until the day comes when, having long acted as if the treaty was valid, it suddenly finds that it is inconvenient to carry out its obligations. The article 4 referred to in sub-paragraph (b) (ii) is the general article recognizing the relevance of the principle of *préclusion* (estoppel) in cases where a State claims to annul or denounce a treaty for lack of essential validity.

Article 6 — Particular restrictions upon the authority of representatives

1. If a representative, who neither possesses ostensible authority under article 4 of part I to bind the State nor specific authority to do so with regard to the particular treaty, purports to bind the State by an unauthorized signature or by an unauthorized exchange or deposit of an instrument, the State concerned may repudiate the act of its representative, provided that it has not —

(a) subsequently ratified the unauthorized act of its representative;

(b) so conducted itself as to bring the case within the provisions of article 4 of this part.

2. (a) When a representative, possessing ostensible authority under article 4 of part I to bind his State, is given instructions by his State which restrict that authority in particular respects, the instructions shall only be effective to limit his authority if they are made known to the other interested States before the State in question enters into the treaty.

(b) In such a case, if the representative disregards the restrictions imposed upon him by his instructions, the State may repudiate his unauthorized act, subject to the same provisos as those set out in paragraph 1 of this article.

Commentary

1. Article 6 seeks to cover cases where a representative may purport by his act to bind the State but in fact lacks authority to do so. This may happen because, not possessing ostensible authority under international law to bind the State in accordance with the provisions of article 4 of part I, he also lacks any specific authority from his Government to enter into the treaty on its behalf; or it may happen because, while possessing ostensible authority under international law, he is subject to express instructions from his Government which limit his authority in the particular instance. Neither type of case is common but both types have occasionally occurred in practice.²⁷

2. Where a treaty is not to become binding without subsequent ratification, acceptance or approval, any excess of authority committed by a representative in establishing the text of the treaty will automatically be ironed out at the subsequent stage of ratification, acceptance or approval. The State in question will then have the clear choice either of repudiating the text established by its representative or of ratifying, accepting or approving the treaty; and if it does the latter, it will necessarily be held to have endorsed the unauthorized act of its representative and, by doing so, to have cured the original defect of authority. Accordingly, the present article is confined to cases in which the defect of authority relates to the execution of an act by which a representative purports finally to establish his State's consent to be bound. These cases may arise either upon the unauthorized signing of a treaty, which is to become binding upon signature, or when a representative, authorized to exchange or deposit a binding instrument under certain conditions or subject to certain reservations, exceeds his authority by failing to comply with the conditions, or to specify the reservations, when exchanging or depositing the instrument.

3. Paragraph 1 of the article deals with cases where the representative lacks any authority to enter into the treaty. In 1908, for example, the United States Minister to Romania signed two conventions without having any authority to do so.²⁸ With regard to one of these conventions his Government had given him no authority at all, while he had obtained full powers for the other by leading his Government to understand that he was to sign a quite different treaty. More recently — in 1951 — a convention concerning the naming of cheeses concluded at Stresa was signed by a delegate on behalf both of Norway and Sweden, whereas it appears that he had authority to do so only from the former country. In both these instances the treaty was, in fact, subject to ratification but they serve to illustrate the kind of cases that may arise.²⁹ Another case, in which the same situation may arise, and one more likely to occur in practice, is that where an agent has authority to enter into a particular treaty, but goes beyond his full powers by accepting unauthorized extensions or modifications of it. An instance of such a case was Persia's attempt,

²⁷ See generally H. Blix, *op. cit.*, pp. 5-12 and 76-82.

²⁸ Hackworth, *Digest of International Law*, Vol. IV, p. 467.

²⁹ Cf. also the well-known historical incident of the British Government's disavowal of an agreement between a British Political Agent in the Persian Gulf and a Persian Minister which the British Government afterwards said had been concluded without any authority whatever; Adamyiat, *Bahrein Islands*, p. 106.

in discussions in the Council of the League, to disavow the Treaty of Erzerum of 1847 on the ground that the Persian representative had gone beyond his authority in accepting a certain explanatory note when exchanging ratifications.³⁰

4. Where there is no ostensible or express authority to enter into a treaty, it seems clear, on principle, that the State must be entitled to repudiate the act of its representative and paragraph 1 so provides. On the other hand, it seems equally clear that, notwithstanding the representative's original lack of authority, the State may afterwards endorse and validate his act, and will be held to have done so by implication if it invokes the provisions of the treaty or otherwise acts in such a way as to lead the other parties to assume that it regards itself as bound by the act of its representative. In other words, it will not be entitled to invoke its representative's lack of authority in cases where it has disabled itself from doing so under the principle of *préclusion* (estoppel) set out in article 4.

5. Paragraph 2 of the article deals with the other type of case where ostensible authority exists but has been curtailed by specific instructions. In principle, and in order to safeguard the security of international transactions, the rule, it is suggested, must be that specific instructions given by a State to its representative are only effective to limit his authority vis-à-vis other States, if they are made known to the other States in some appropriate manner before the State in question enters into the treaty. That this is the rule acted on by States is perhaps suggested by the rarity of cases in which a State has sought to disavow the act of its representative by reference to secret limitations upon his authority. In the incident in 1923 of the Hungarian representative's signature of a resolution of the Council of the League, the Hungarian Government sought to disavow his act by interpreting the scope of his full powers, rather than by contending that he had specific instructions limiting their exercise. The Council of the League seems clearly to have held the view that a State may not disavow the act of an agent done within the scope of the apparent authority conferred upon him by his full powers.

6. Paragraph 2 of the article therefore provides that specific instructions are only to be taken into account if disclosed to the other parties before the State in question enters into the treaty.

Article 7 — *Fraud inducing consent to a treaty*

1. Where one party to a treaty has been induced to enter into it by the fraud of another, the former shall be entitled after discovering the fraud —

(a) to declare that the fraud nullifies its consent to be bound by the treaty *ab initio*; or

(b) to denounce the treaty, subject to the reservation of its rights with respect to any loss or damage resulting from the fraud; or

(c) to affirm the treaty, subject to the same reservation.

2. Fraud inducing entry into a treaty comprises —

(a) the making of false statements or representations of fact either in the knowledge that they are false or without regard to whether they are true or false, for the

purpose of procuring the consent of a State to be bound by the terms of a treaty; or

(b) the concealment or non-disclosure of a material fact for such a purpose where the information relating to the fact in question is in the exclusive possession or control of one party only and the circumstances of the treaty are such that good faith requires the disclosure of all material facts.

3. Paragraph 1 of this article shall not, however, apply where —

(a) the adoption of the text of a treaty, which is subject to ratification, acceptance or approval, has been procured by fraud but, after discovering the fraud, the State nevertheless proceeds to ratify, accept or approve the treaty; or

(b) the defrauded State has so conducted itself as to bring the case within the provisions of article 4 of this part.

Commentary

1. There does not appear to be any recorded instance of a State claiming to annul or denounce a treaty on the ground that it had been induced to enter into the treaty by the fraud of the other party. The only instance mentioned in the books as one where the matter was discussed at all is the Webster-Ashburton Treaty of 1842 relating to the North-Eastern boundary between the United States and Canada.³¹ That, however, was a case of non-disclosure of a material map by the United States in circumstances in which it was difficult to say that there was any legal duty to disclose it, and Great Britain did not assert that the non-disclosure amounted to fraud.

2. Clearly, cases in which Governments resort to deliberate fraud in order to obtain the conclusion of a treaty are not very likely to occur, while cases of fraudulent misrepresentation of material facts would in any event be largely covered by the provisions of the next article concerning the effects of error. The question may therefore be asked whether there is any need to include an article dealing specifically with fraud. The drafts of Sir H. Lauterpacht and Sir G. Fitzmaurice contain such an article, as did also the Harvard Research Draft; and, on balance, the present Special Rapporteur feels that the draft articles should include provisions concerning fraud, even although their application may be rare. Fraud, when it does occur, strikes at the root of a treaty, as of a contract, in a rather different way from innocent misrepresentation and error; it destroys the basis of mutual confidence between the parties as well as nullifying the consent of the defrauded party.

3. Sir H. Lauterpacht's draft was somewhat laconic, speaking simply of "a treaty procured by fraud"; that of Sir G. Fitzmaurice was a good deal more elaborate, reproducing in some detail provisions of municipal law concerning fraud. While not disputing the relevance of municipal law concepts in appreciating the implications of fraud in the law of treaties, the present Special Rapporteur does not consider that all the points made by Sir G. Fitzmaurice need be expressed in the present article.

4. Paragraph 1 sets out suggested rules for determining the effects of fraud on the validity of treaties. Fraud, it is commonly said, undermines the reality of the consent

³⁰ For further cases, see H. Blix, *op. cit.*, pp. 77-81.

³¹ See Moore, *Digest of International Law*, vol. 5, p. 719.

and, as in the case of a contract, renders the treaty voidable. Treaties are employed for very diverse legal purposes — legislative, dispositive, contractual, etc., — and a State induced to enter into a treaty by fraud should, it is thought, have the option of avoiding the treaty *ab initio*, avoiding it as from the date of the discovery of the fraud, or affirming it, according as its interests and the circumstances of the case require.

5. Paragraph 2 defines fraud as comprising wilful or reckless mis-statements or misrepresentations of fact and, in addition, non-disclosure, where good faith requires full disclosure of material facts. Just as municipal law knows of classes of contract — e.g., insurance contracts — which are regarded as “*uberrimae fidei*” so there may, it is thought, be treaties where good faith requires the mutual disclosure of material facts. The Webster-Ashburton Treaty of 1842 was a boundary treaty and in such a case it may be there was no legal obligation to disclose the existence of a map, when access to the map could have been obtained by the other party. But it is easy to imagine treaties of mutual co-operation, e.g., treaties for the mutual exploitation and use of water resources, where non-disclosure of a material fact, e.g., the existence of an underground stream, would not be consistent with good faith. Accordingly, without attempting to give detailed classifications of such cases, it seemed desirable to provide for their possible occurrence. This seems also to have been the view of the previous Special Rapporteur.

6. Paragraph 3 excepts from the rule in paragraph 1 cases where a treaty is subject to ratification, acceptance or approval and fraud used to procure its adoption has been discovered before the act of ratification, acceptance or approval takes place. In such a case, the State is completely free to refuse to enter into the treaty. But if, knowing of the fraud used in the drawing up of the treaty, it nevertheless elects to enter into the treaty, with or without reservations, it clearly cannot afterwards invoke the fraud to disavow its act of ratification, acceptance or approval. Paragraph 3 also excepts from paragraph 1 cases where the State has disabled itself from invoking the fraud under the principle of *préclusion* (estoppel) set out in article 4.

Article 8 — Mutual error respecting the substance of a treaty

1. Where a treaty has been entered into by the parties under a mutual error respecting the substance of the treaty, any party shall be entitled to invoke the error as invalidating its consent to be bound by the treaty, provided that:

- (a) the error was one of fact and not of law;
- (b) the error related to a fact or state of facts assumed by the parties to exist at the time that the treaty was entered into;

(c) the assumed existence of such fact or state of facts was material in inducing the consent of the States concerned to be bound by the terms of the treaty.

2. In any such case the party in question may —

(a) regard the error as nullifying *ab initio* its consent to be bound by the treaty; or

(b) by mutual agreement with the other party or parties concerned, either (i) denounce the treaty as from such date as may be decided, or

(ii) affirm the treaty subject to any modifications that may be decided upon in order to take account of the error.

3. However, a party shall not be entitled to invoke an error as invalidating its consent to be bound where —

(a) the party in question contributed by its own conduct to the error, or could by the exercise of due diligence have avoided it, or if the circumstances were such as to put that party on notice of the possibility of the error; or

(b) the party in question has so conducted itself as to bring the case within the provisions of article 4 of this part.

Article 9 — Error by one party only respecting the substance of a treaty

1. Where only one or some of the parties to a treaty has or have entered into it under an error answering to the conditions set out in article 8, paragraph 1, such party or parties shall only be entitled to invoke the error as invalidating its or their consent to be bound by the treaty, if the error was induced by the innocent misrepresentation, negligence or fraud of the other party or parties.

2. In any such case the party or parties in question shall be entitled after discovering the error:

(a) to declare that the error nullifies its consent to be bound by the treaty *ab initio*; or

(b) to denounce the treaty, subject to the reservation of its rights with respect to any loss or damage resulting from the error; or

(c) to affirm the treaty, subject to the same reservation.

3. However, in the case of a State acceding to a treaty in the conclusion of which it did not take part, it may invoke an error as invalidating its consent to be bound by the treaty under the same conditions as those laid down for mutual error in article 8.

Commentary (articles 8 and 9)

1. These articles cover error in the formation of consent to a treaty, while the next article deals with error in the expression of a consent which was itself arrived at without any error. In municipal law error occupies a comparatively large place as a factor which may nullify the reality of consent to a contract. Some types of error found in municipal law, however, can hardly be imagined as operating in the field of treaties, e.g., error *in persona*. Similarly, some types of treaty, more especially law-making treaties, appear to afford little scope for error *in substantia* to affect the formation of consent, even if that may not be impossible. Moreover, treaty-making processes are such as to reduce to a minimum the risk of errors on material points of substance. In consequence, the instances in which errors of substance have been invoked as affecting the essential validity of a treaty have not been frequent.

2. Almost all the recorded instances concern geographical errors,³² and most of them concern errors in

³² See Harvard Law School: *Research in International Law*, III, Law of Treaties, pp. 1127-8; Hyde, A.J.I.L. 1933, p. 311; and *Répertoire français de droit international public*, Vol. I, pp. 55-6.

maps. In some instances, the difficulty was disposed of by a further treaty; in others the error was treated more as affecting the application of the treaty than its validity and the point was settled by arbitration. These instances confirm the possible relevance of errors in regard either to the validity of treaties or to their application, but they do not provide clear guidance as to the principles governing the effect of error on the essential validity of treaties.

3. The effect of error on treaties was, however, discussed in the *Eastern Greenland* case³³ before the Permanent Court of International Justice, and again in the *Temple* case³⁴ before the present Court. In the former case Norway contended that, when asked by the Danish Ambassador to say that Norway would not object to the Danish Government's extending its political and economic interests over the whole of Greenland, her Foreign Minister had not realized that this covered the extension of the Danish monopoly regime to the whole of Greenland; and that accordingly his acquiescence in the Danish request had been vitiated by error. The Court contented itself with saying that the Foreign Minister's reply had been definitive and unconditional and appears not to have considered that there was any relevant error in the case. Judge Anzilotti, while also considering that there was no error, went on to say: "But even accepting, for a moment, the supposition that M. Ihlen was mistaken as to the results which might ensue from an extension of Danish sovereignty, it must be admitted that this mistake was not such as to entail the nullity of the agreement. If a mistake is pleaded it must be of an excusable character; and one can scarcely believe that a Government could be ignorant of the legitimate consequences following upon an extension of sovereignty..."³⁵ In other words, he seems to have regarded the error as essentially one of law and not, therefore, "excusable". In the recent *Temple* case the error, which was geographical, arose in somewhat special circumstances. There was no error in the conclusion of the original treaty, in which the parties were agreed that the boundary in a particular area should be the line of a certain watershed; the error concerned what the Court held to be a subsequent, implied, agreement to vary the terms of the treaty. Siam had accepted a map prepared *bona fide* for the purpose of delimiting the boundary in the area in question, but showing a line which did not follow the watershed. Rejecting Siam's plea that her acceptance of the map was vitiated by error, the Court said: "It is an established rule of law that the plea of error cannot be allowed as an element vitiating consent, if the party advancing it contributed by its own conduct to the error, or could have avoided it, or if the circumstances were such as to put that party on notice of a possible error."³⁶

4. The *Eastern Greenland* and *Temple* cases throw light on the conditions under which error will not nullify the reality of the consent rather than on those under which it will do so. The only further guidance which can perhaps be obtained from the Court's decisions is in the *Mavrommatis Concessions* case³⁷ which, however, con-

cerned a concession, not a treaty. There the Court held that an error in regard to a matter not constituting a condition of the agreement would not suffice to invalidate the consent; and it seems to be generally agreed that, to negative consent to a treaty, an error must relate to a matter considered by the parties to form an essential basis of their consent to the treaty.

Commentary to article 8

5. This article deals with cases where both or all the parties are in error as to the substance of the treaty. Paragraph 1 states the conditions under which such an error may be invoked as invalidating consent. Sub-paragraphs (a), (b) and (c) reproduce the classical requirements for establishing error in the law of contract, which are also applicable in the law of treaties. These requirements were elaborated somewhat in Sir G. Fitzmaurice's draft in his third report (A/CN.4/115) so as to distinguish further between errors of fact and errors of judgement or of motive, and to emphasize the distinction between errors of fact and errors of expectation. However, these distinctions appear to be implied in the requirements set out in sub-paragraphs (a), (b) and (c); while the distinction between an error of fact and of opinion may sometimes call for nice judgement in the light of the particular circumstances of the case. Accordingly, it seems preferable to state the requirements in simple form, leaving their application to any given case to be appreciated in the light of its circumstances.

6. Paragraph 2 sets out the position of the parties in cases of mutual error. Clearly, where the error relates to an essential point of substance, any one of the parties is entitled to regard it as nullifying *ab initio* its consent to be bound by the treaty. This is a decision which each party has the right to take unilaterally, and sub-paragraph (a) so provides. On the other hand, treaties are of very different kinds, fulfilling very varied functions; and it may be that in some cases it may not be desirable or even practicable for the parties, on discovering the error, to regard the treaty as void *ab initio*. Accordingly, sub-paragraph (b) provides for the possibility that the parties may prefer to avoid the treaty as from a given date or to affirm it with modifications. These courses, it seems evident, could only be adopted by agreement between the interested States.

7. Paragraph 3 (a) lays down, as an exception to the rule contained in paragraph 1, that a party may not invoke an error as invalidating its consent to be bound where the error is not "excusable". The formulation of the exception is in substantially the same terms as those used by the Court in the *Temple* case (see paragraph 3 above).

8. Paragraph 3 (b) also reserves from the rule in paragraph 1 cases where a party has precluded (estopped) itself from relying on a plea of error under the principles set out in article 4.

Commentary to article 9

9. Article 9 deals with cases of unilateral error, and the general view seems to be that unilateral error cannot be invoked to invalidate a treaty unless it was induced by the innocent misrepresentation, negligence or fraud of the other party, and paragraph 1 so provides.

10. The position of a party which has been led into error by the fault of the other party would seem to be

³³ P.C.I.J., Series A/B, No. 53, pp. 71 and 91.

³⁴ I.C.J. Reports, 1962, p. 26; see also the individual opinion of Judge Fitzmaurice, p. 57.

³⁵ P.C.I.J., Series A/B, No. 53, p. 92.

³⁶ I.C.J. Reports, 1962, p. 26.

³⁷ P.C.I.J., Series A, No. 11.

similar to that of a party induced to enter into a treaty by fraud. The party concerned should have the right either to avoid the treaty *ab initio*, to denounce it or to affirm it while reserving its rights with respect to any resulting loss. The position is so stated in paragraph 2.

11. Paragraph 3 deals with the special case of a State led to accede to a treaty through error. Although the error may be of a unilateral character, the position of an acceding State is rather different from that of an original party led to enter into the treaty through error. The draft follows that of the previous Rapporteur in assimilating the case of error on the part of an acceding State to one of mutual error.

Article 10 — Errors in expression of the agreement

1. Where a treaty has been entered into with respect to whose substance the parties were mutually agreed, but the text of which contains an error in the expression of their agreement, the error may not be invoked by any party as invalidating its consent to be bound by the treaty.

2. In any such case articles 26 and 27 of part I shall apply.

Commentary

1. An error, which does not relate to the substance of what was agreed but merely to the expression of it in the text of the treaty, clearly does not detract from the essential validity of the treaty; and paragraph 1 of this article so provides.

2. Errors of expression, on the other hand, may lead to difficulties and divergent interpretations, and it is desirable that they should, if possible, be corrected. Paragraph 2 therefore draws attention to articles 26 and 27 of part I, which deal with the procedures for correcting errors.

3. As pointed out in the Commentary to article 26 of part I, the correction of errors by these procedures is only possible where the parties are agreed as to the existence of the error in the expression of their agreement. Where the error is not agreed, the problem is one of "mistake", which falls under articles 8 and 9 of the present part. In cases where there is no agreement as to an alleged error in expression and the alleged error does not affect the essential validity of the treaty under articles 8 and 9, the question becomes one of interpretation. The treaty stands and the difficulty as to its content has to be resolved by the application of the normal rules for the interpretation of treaties.

Article 11 — Personal coercion of representatives of States or of members of State organs

1. If coercion, actual or threatened, physical or mental, with respect to their persons or to matters of personal concern, has been employed against individual representatives of a State or against members of an organ of the State in order to induce such representative or organ to sign, ratify, accept, approve or accede to a treaty, the State in question shall be entitled after discovering the fact —

(a) to declare that the coercion nullifies the act of its representative *ab initio*; or

(b) to denounce the treaty, subject to the reservation of its rights with respect to any loss or damage resulting from the coercion; or

(c) to approve the treaty, subject to the same reservation.

2. Paragraph 1 does not apply, however, where —

(a) a treaty, which is subject to ratification, acceptance or approval, has been signed by a representative under coercion but, after discovering the coercion, the State proceeds to ratify, accept or approve the treaty; or

(b) the State has so conducted itself as to bring the case within the provisions of article 4 of this part.

Commentary

There appears to be general agreement that acts of coercion or threats applied to individuals with respect to their own persons or personal affairs in order to procure the signature, ratification, acceptance or approval of a treaty will necessarily justify the State in repudiating the treaty.³⁸ History provides a number of alleged instances of the employment of coercion against not only negotiators but members of legislatures in order to procure the signature or ratification of a treaty. Amongst these instances the Harvard Research Draft lists:³⁹ the surrounding of the Diet of Poland in 1773 to coerce its members into accepting the treaty of partition; the coercion of the Emperor of Korea and his ministers in 1905 to obtain their acceptance of a treaty of protection; the surrounding of the national assembly of Haiti by United States forces in 1915 to coerce its members into ratifying a convention. Another instance from more recent history was the third-degree methods employed in 1939 by the Hitler regime to obtain the signatures of the President and Foreign Minister of Czechoslovakia to a treaty creating a German protectorate over Bohemia and Moravia, although in that instance the coercion was a mixture of personal pressure on the individuals and threats against their people.⁴⁰

2. The question how far coercion of the State itself, whether by acts or threats, may afford a ground for repudiating a treaty is more controversial. Moreover, although it may not always be possible to distinguish completely between pressure upon the State and personal pressure upon individual ministers or representatives of the State, the two kinds of coercion are essentially different. The Special Rapporteur has accordingly dealt with them in separate articles, and the effect upon the validity of a treaty of its having been procured by the coercion of the State itself is considered in the next article.

3. Paragraph 1, therefore, refers to coercion of individual representatives of the State or members of State organs "with respect to their persons or to matters of personal concern". This phrase is intended to confine the coercion covered by this article to coercion of the individual as distinct from the State, and yet to be broad enough to include such forms of coercion of the individual as threats directed against his family or dependents. The explicit reference to "physical or mental" coercion is also designed to underline that coercion is not confined to acts or threats of physical force.

4. The position of a State confronted by the fact that coercion was used against its representatives or members of its administration to obtain the conclusion of a treaty

³⁸ McNair, *op. cit.*, pp. 207-209.

³⁹ Pages 1155-9.

⁴⁰ See *Répertoire français de droit international public*, vol. 1, pp. 52-54.

would seem to be similar to that of one confronted with a case of fraud. The provisions of paragraph 1 of this article therefore conform closely to those of paragraph 1 of article 7.

5. In the same way, the provisions of paragraph 2 of this article correspond to those of paragraph 3 of article 7, since on these points also the position seems to be the same in cases of coercion as in fraud.

Article 12 — Consent to a treaty procured by the illegal use or threat of force

1. If a State is coerced into entering into a treaty through an act of force, or threat of force, employed against it in violation of the principles of the Charter of the United Nations, the State in question shall be entitled —

(a) to declare that the coercion nullifies its consent to be bound by the treaty *ab initio*; or

(b) to denounce the treaty, subject to the reservation of its rights with respect to any loss or damage resulting to it from having been coerced into the treaty; or

(c) to affirm the treaty, subject to the same reservation, provided always that no such affirmation shall be considered binding unless made after the coercion has ceased.

2. Paragraph 1 does not apply, however, where after the coercion has ceased the State has so conducted itself as to bring the case within the provisions of article 4 of this part.

Commentary

1. The traditional doctrine prior to the Covenant of the League was that the validity of a treaty was not affected by the fact that it had been brought about by the threat or use of force. However, this doctrine was simply a reflection of the general attitude of international law during that era towards the legality of the use of armed force for the settlement of international disputes; and with the Covenant and the General Treaty for the Renunciation of War, 1927 (Pact of Paris) there began to develop a strong body of opinion which advocated that the validity of such treaties ought no longer to be admitted. The declaration of the criminality of aggressive war in the Nuremberg and Tokyo Charters, the clear-cut prohibition of the threat or use of force in Article 2, paragraph 4, of the Charter of the United Nations and the practice of the United Nations itself has reinforced and crystallized this opinion. If the use or threat of armed force in pursuit of national policies is now in certain circumstances to be considered criminal under international law, it is natural to question the possibility of regarding treaties procured by or resulting from such criminal acts as valid treaties binding upon the victims of the aggression.

2. Sir H. Lauterpacht, in his first report (A/CN.4/63, *ad* article 12), submitted a strongly reasoned argument to the Commission urging it to hold that a change has come about in international law on this point. In doing so, he said, the Commission would be "codifying not developing, the law of nations in one of its most essential aspects". He conceded that to allow States too easily to denounce treaties by making unilateral assertions of coercion might open the door to the evasion of treaties; but he proposed to meet the difficulty by providing that

a treaty was only to be invalid on the ground of coercion, if so declared by the International Court of Justice.

3. Sir G. Fitzmaurice, on the other hand, while recognizing the strength of present-day opinion on the point, considered that the practical difficulties in the way of admitting coercion of the State as a ground for the invalidity of a treaty are too great. These difficulties he summarized as follows:

"The case must evidently be confined to the use or threat of physical force, since there are all too numerous ways in which a State might allege that it had been induced to enter into a treaty by pressure of some kind (for example, economic). On this latter basis a dangerously wide door to the invalidation of treaties, and hence a threat to the stability of the treaty-making process, would be opened. If, however, the case is confined (as it obviously must be) to the use or threat of physical force, what follows? Either the demand for the treaty in question is acceded to, or it is not. If it is not, then *cadit quaestio*. If, *per contra*, it is, then the same compulsion or threat that procured the conclusion of the treaty will ensure its execution; and by the time, if ever, that circumstances permit of its repudiation, it will have been carried out, and many steps taken under it will be irreversible, or reversible, if at all, only by further acts of violence. It is this type of consideration, and not indifference to the moral aspects of the question, which has led almost every authority thus far to take the view that it is not practicable to postulate the invalidity of this type of treaty, and that if peace is a permanent consideration, it must follow logically that peace may, in certain circumstances, have to take precedence for the time being over abstract justice." (A/CN.4/115, para. 62).

These objections led him to the conclusion that the subject is only part of the wider problem of what exactly, in the light of modern conditions and juristic ideas, should be the consequences of the illegitimate use or threat of force; and that it is both inappropriate and undesirable to attempt to deal with the treaty aspect of the problem in isolation.

4. The practical difficulties which led the previous Special Rapporteur to omit forcible coercion of the State itself from his draft articles on the essential validity of treaties are, of course, those which are generally recognized to constitute an obstacle to the effectiveness of the principle of the non-recognition of situations brought about by illegal uses of force. Important though it may be to recognize the existence of these difficulties, they do not appear to be of such a kind as to call for the omission from the present articles of any mention of a principle which derives from the most fundamental provisions of the Charter and the general relevance of which to the validity of treaties cannot today be regarded as open to question. The facts, that sometimes it may not be possible to restore a treaty situation as it was before an aggression took place, and that sometimes the lapse of time may ultimately render an illegal treaty situation permanent, do not seem sufficient arguments for not proclaiming the invalidity in law of a treaty brought about by an illegal use or threat of force and the legal right of the coerced State to set it aside. Even if a State should initially be successful in achieving its objects by an aggressive use of force, it cannot be assumed that the

right to set aside a treaty resulting from aggression will never prove to be relevant in the subsequent evolution of world politics; the very existence of the United Nations gives a certain guarantee that that right may prove meaningful, if subsequent events should furnish an opportunity for its legitimate exercise. In the same way, the existence of the United Nations also provides machinery through which the international community can have a voice in the way in which the right is exercised, so as to minimize the risks to international peace mentioned by Sir G. Fitzmaurice.

5. Nor is it thought that to allow coercion of the State as a ground for contesting the validity of a treaty would involve any undue risks to the general security of international treaties, unless "coercion" is extended to cover other acts than the use or threat of force. Such risk as there may be does not seem to be materially greater in the case of "coercion" than in the case of some other grounds of invalidity, such as fraud and error. The risk lies in unilateral and *mala fide* assertions of "coercion" as a mere pretext for denouncing a treaty that is now thought to be disadvantageous. But if invalidity of treaties on the ground of coercion is confined to treaties procured by the use or threat of force, the possibilities of a plausible abuse of this ground of invalidity do not appear to be any more substantial than in cases of fraud or error or than in cases of termination of treaties on the ground of an alleged breach of the treaty or of a fundamental change in the circumstances (*rebus sic stantibus*).

6. On the other hand, if "coercion" were to be regarded as extending to other forms of pressure upon a State, to political or economic pressure, the door to the evasion of treaty obligations might be opened very wide; for these forms of "coercion" are much less capable of definition and much more liable to subjective appreciations. Moreover, the operation of political and economic pressures is part of the normal working of the relations between States, and international law does not yet seem to contain the criteria necessary for formulating distinctions between the legitimate and illegitimate uses of such forms of pressure as a means of securing consent to treaties. Accordingly, while accepting the view that some forms of "unequal" treaty brought about by coercion of the State must be regarded as lacking essential validity, the Special Rapporteur feels that it would be unsafe in the present state of international law to extend the notion of "coercion" beyond the illegal use or threat of force.

7. It is, indeed, important to stress that only treaties resulting from an illegal use or threat of force are lacking in essential validity; for otherwise the security of armistice agreements and peace settlements, whether legitimate or illegitimate, would be endangered and the difficulty of terminating hostilities increased. Clearly, there is all the difference in the world between coercion used by an aggressor to consolidate the fruits of his aggression in a treaty and coercion used to impose a peace settlement upon an aggressor. As one writer has pointed out,⁴¹ the validity of the peace settlements of the First World War was never questioned in the numerous cases in which they came under discussion before the Permanent Court or in the innumerable proceedings arising out of them before arbitral tribunals. Again,

while the treaty of 1939 between Nazi Germany and Czechoslovakia is generally regarded as invalid by reason of the coercion both of the delegates and the State,⁴² the validity of the Italian Peace Treaty, a treaty certainly not negotiated but imposed, has not been regarded as open to challenge.⁴³

Article 13 — Treaties void for illegality

1. A treaty is contrary to international law and void if its object or its execution involves the infringement of a general rule or principle of international law having the character of *jus cogens*.

2. In particular, a treaty is contrary to international law and void if its object or execution involves —

(a) the use or threat of force in contravention of the principles of the Charter of the United Nations;

(b) any act or omission characterized by international law as an international crime; or

(c) any act or omission in the suppression or punishment of which every State is required by international law to co-operate.

3. If a provision, the object or execution of which infringes a general rule or principle of international law having the character of *jus cogens*, is not essentially connected with the principal objects of the treaty and is clearly severable from the remainder of the treaty, only that provision shall be void.

4. The provisions of this article do not apply, however, to a general multilateral treaty which abrogates or modifies a rule having the character of *jus cogens*.

Commentary

1. The question how far international law recognizes the existence within its legal order of rules having the character of *jus cogens* is controversial. Some writers, considering that the operation even of the most general rules of international law still falls short of being universal, deny that any rule can properly be regarded as a *jus cogens*, from which individual States are not competent to derogate by treaties between themselves.⁴⁴ Imperfect though the international legal order may be, the view that in the last analysis there is no international public order — no rule from which States cannot at their own free will contract out — has become increasingly difficult to sustain. The law of the Charter concerning the use of force and the development — however tentative — of international criminal law presupposes the existence of an international public order containing rules having the character of *jus cogens*. The Commission will therefore, it is believed, be fully justified in taking the position in the present articles that there are certain rules and principles from which States cannot derogate by merely bilateral or regional treaty arrangements.⁴⁵

2. The formulation of the rule, however, is not free from difficulty, since there is not as yet any generally accepted criterion by which to identify a general rule of international law as having the character of *jus cogens*.

⁴² Ratz-Lienert and Klein v. Nederlands Beheers-Instituut (*International Law Reports*, 1957, p. 536).

⁴³ Cf. *Re Rizzo and Others* (*International Law Reports*, 1952, p. 478).

⁴⁴ See for example G. Schwarzenberger, *International Law* (3rd edition), vol. I, pp. 426-427.

⁴⁵ See McNair, *op. cit.*, pp. 213-4.

⁴¹ McNair, *op. cit.*, p. 209.

Moreover, it is undeniable that the majority of the general rules of international law do not have that character and that States may contract out of them by treaty. Sir H. Lauterpacht, although emphasizing that States are largely free to modify by treaty the application of customary law as between themselves, proposed a somewhat broad criterion. A treaty would be void under his draft if its performance involved an act "illegal under international law" (A/CN.4/63, article 15). Unless the concept of what is "illegal under international law" is narrowed by reference to the concept of *jus cogens*, it may be too wide. The general law of diplomatic immunities makes it illegal to do certain acts with regard to diplomats; but this does not preclude individual States from agreeing between themselves to curtail the immunities of their own diplomats. The phrase "illegal under international law" would also seem open to the interpretation that any treaty infringing the prior rights of another State is *ipso facto* void. This does, indeed, appear to have been the view of Sir H. Lauterpacht; but the evidence hardly seems to bear it out, especially in regard to treaties which conflict with the rights of other States under prior treaties.

3. Sir G. Fitzmaurice, on the other hand, expressed the rule in terms limiting the cases of illegality to infringements of rules of the nature of *jus cogens*. The present Special Rapporteur in paragraph 1 of the article has done likewise, even although he appreciates that this may leave some room for argument as to exactly what rules of international law institute *jus cogens*. In many national systems of law there are well-established categories of unlawful contracts. In international law, however, the time does not seem ripe for trying to codify the possible categories of "unlawful" treaties. The appearance of the concept of *jus cogens*, as already indicated, is comparatively recent, while international law is at a stage of rapid development. Accordingly, the prudent course seems to be to state in general terms the rule that a treaty is void if it conflicts with a rule of *jus cogens* and to leave the full content of this rule to be worked out in State practice and in the jurisprudence of international tribunals. At the same time, a general definition of a *jus cogens* rule has been included in article 1.

4. On the other hand, there may be advantage in indicating, by way of example, some of the more conspicuous instances of treaties that are void by reason of their inconsistency with a *jus cogens* rule. Paragraph 2, therefore, sets out three such instances. The first, the illegal use of force, hardly needs explanation; the principles stated in the Charter are generally accepted as expressing not merely the obligations of Members of the United Nations but the general rules of international law of today concerning the use of force. The second also speaks for itself; if a treaty contemplates the performance of an act criminal under international law, its object is clearly illegal. The third instance would also seem to be self-evident. Where international law, as in

the cases of the slave-trade, piracy and genocide,⁴⁶ places a general obligation upon every State to co-operate in the suppression and punishment of certain acts, a treaty contemplating or conniving at their commission must clearly be tainted with illegality. These instances are not exhaustive; the words "In particular" at the beginning of the paragraph indicate that they are merely particular applications of the principle that infringements of a *jus cogens* rule render a treaty void.

5. One point of view might be that any treaty having an illegal object should be totally void and lack all validity until reformed by the parties themselves in a way to cure it of the illegality. Having regard, however, to the relationships created by treaty and to the prejudice that might result from holding a treaty to be totally void by reason of a minor inconsistency with a *jus cogens* rule, it seems preferable to allow the severance of illegal provisions from a treaty in cases where they do not form part of the principal objects of the treaty and are clearly severable from the rest of its provisions.

6. Finally, it is to be emphasized that conflict with a rule of *jus cogens* is a ground of invalidity quite independent of any principle governing the legal effect of treaties which conflict with prior treaties. True, the *jus cogens* rule may be one that has been embodied in a prior general multilateral treaty. Under the present article, however, the relevant point is not the conflict with the prior general treaty, but the conflict with a rule having the character of *jus cogens*. The problem of resolving conflicts between successive treaties dealing with the same matters may sometimes overlap with the question of conflict with a *jus cogens* rule; but the rule in the present article is an overriding one of international public order, which invalidates the later treaty independently of any conclusion that may be reached concerning the relative priority to be given to treaties whose provisions conflict. On the other hand, it would clearly be wrong to consider rules now accepted as rules of *jus cogens* as immutable and incapable of abrogation or amendment in future. Accordingly, paragraph 4 provides that the article does not apply to a general multilateral treaty which expressly abrogates or modifies a rule having the character of *jus cogens*.

Article 14 — Conflict with a prior treaty

1. (a) Where the parties to two treaties are the same or where the parties to a later treaty include all the States parties to an earlier treaty, the later treaty is not invalidated by the fact that some or all of its provisions are in conflict with those of the earlier treaty.

(b) In any such case the conflict between the two treaties shall be resolved on the basis of the general principles governing the interpretation and application of treaties, their amendment or termination.

2. (a) Where one or a group of the parties to a treaty, either alone or in conjunction with third States, enters into a later treaty, the later treaty is not invalidated by the fact that some or all of its provisions are in conflict with those of the earlier treaty.

(b) In any such case the conflict between the two treaties shall be resolved —

(i) if the effectiveness of the second treaty is contested by a State party to the earlier treaty which is not

⁴⁶ See articles 13 and 14 of the Geneva Convention on the High Seas, 1958, text in *United Nations Conference on the Law of the Sea, Official Records*, vol. II (A/CONF. 13/38), United Nations publication, Sales No. 58.V.4, vol. II, annexes, doc. A/CONF. 13/L.53, and articles 5 and 7 of the Convention for the Prevention and Punishment of the Crime of Genocide 1948, adopted by General Assembly resolution 260 (III). Text in *United Nations Treaty Series*, vol. 78.

a party to the later treaty, upon the basis that the earlier treaty prevails;

- (ii) if the effectiveness of the second treaty is contested by a State which is a party to the second treaty, upon the basis of the principles governing the interpretation and application of treaties, their amendment or termination.

3. (a) Paragraphs 1 and 2 are without prejudice to any question of invalidity that may arise when the earlier treaty is the constituent instrument of an international organization which contains provisions limiting the treaty-making powers of its members with respect to the amendment of the constituent treaty or with respect to any particular matters.

(b) 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 shall prevail.

4. Paragraphs 1 and 2 shall not be applicable if the provision of an earlier treaty with which a later treaty conflicts is a provision embodying a rule having the character of *jus cogens*, in which case article 13 shall apply.

Commentary

1. The legal effect of a conflict with a prior treaty, as already emphasized in the commentary to the previous article, is a question which is quite distinct from that of conflict with a *jus cogens* rule, even although they may overlap when the *jus cogens* rule is embodied in a general multilateral treaty such as the Genocide Convention. The present article, therefore, is concerned exclusively with the question how far the essential validity of a treaty may be affected by the fact that its provisions conflict with those of a prior treaty.

2. It is evident that, where the parties to both treaties are identical, no question of essential validity can normally arise. The States concluding the second treaty are then fully competent to amend or annul the prior treaty and the problem whether, by reason of the conflict, the second treaty modifies or terminates the earlier treaty is simply one of interpreting the provisions of the second treaty. The conflict may raise a question of the amendment or termination of treaties, but not of essential validity. The position is also broadly the same where the parties to the two treaties are not identical but the parties to the later treaty include all the parties to the earlier one; since the parties to the earlier treaty are together competent to amend or annul it, they may also do so in conjunction with other States.

3. There are, nevertheless, two classes of case in which it is conceivable that a question of essential validity may arise, even although the parties to the two treaties are identical. One is the case where the earlier treaty is the constituent instrument of an international organization and provides that any amendment to it must be effected exclusively by action taken through organs of the organization. In this type of case it seems that the parties to the treaty transfer, in part at least, their treaty-making capacity with respect to the modification of the constituent treaty to the organization as such. For example, Articles 108 and 109 of the Charter appear to establish special constitutional processes for its amendment which are intended to exclude the normal diplomatic procedure

for amending treaties. In these special processes, two organs of the United Nations, the General Assembly and the Security Council, are given particular roles; at the same time the classic procedure of ratification by individual States is retained, but with the difference that any amendment comes into force for all Members even if ratified only by two-thirds. The possibility that all the Members of the United Nations might together conclude a new diplomatic treaty outside the Organization modifying provisions of the Charter is so remote as to make the question of the validity of the later treaty somewhat academic. But the question is by no means so academic in the case of a more limited organization, and has in fact been actively debated in connexion with the European Community Treaties.⁴⁷ The Franco-German Agreement of 1956 concerning the territory of the Saar resulted in a fundamental change of circumstance necessitating some revision of the European Coal and Steel Community Treaty, 1951, whereas articles 95 and 96 of the Treaty did not contemplate any amendment of its provisions during the "Transitional Period", which would only terminate in 1958. Although the problem was solved by the conclusion of a diplomatic treaty directly between the member States, it was made plain, at least in the Netherlands, that this was to be regarded as only justified by the exceptional and unforeseen circumstance of the transfer of the Saar to Germany; and the Netherlands Chamber adopted a resolution expressly declaring that after the end of the transitional period revision of the treaty, as also of the other Community Treaties, could only take place through the procedures laid down in the treaties themselves.

4. The other possible case which might arise would be that where an earlier treaty, a constituent instrument of an organization, had conferred exclusive treaty-making powers with respect to particular matters upon the organization. In such a case it could be said that the States concerned had deliberately transferred to the organization, or to certain of its organs, their treaty-making capacity with respect to the matters in question. Certainly, it seems to have been the view of all the judges of the Permanent Court, both majority and minority, in the *Austro-German Customs Union* case⁴⁸ that a State which by treaty not merely accepts restrictions upon the exercise of powers, but places itself under the authority of another State or group of States with respect to those powers, limits to that extent its own sovereignty and treaty-making capacity.

5. The two cases discussed in the preceding paragraphs really concern limitations upon capacity rather than treaties invalid by reason of inconsistency with a prior treaty. In the first case, the members of the organization have limited their capacity to amend the constitution of the organization by subjecting it to particular procedures within the organization; in the second case they have actually transferred a portion of their treaty-making capacity to the organization. The precise effect of such limitations upon treaty-making capacity may be controversial, and to introduce these questions of capacity into the present article may only complicate an already

⁴⁷ See Van der Goes van Naters, "La Révision des traités supranationaux", *Nederlands Tijdschrift voor Internationaal Recht* (Liber Amicorum J. P. A. François), July 1959, pp. 120-131.

⁴⁸ *P.C.I.J.*, 1931, Series A/B 41, p. 37.

difficult subject.⁴⁹ This being so, it is thought sufficient to reserve the point in the present article, without prescribing any definite rule. Accordingly, paragraph 1 of the article sets out, in sub-paragraphs (a) and (b), the general rules governing this class of case, while paragraph 3 (a) reserves the position in regard to limitations contained in the constituent instruments of international organizations.

6. The main difficulty, however, arises where the parties to the later treaty do not include all the States which were parties to the earlier one. This may come about in two ways: (1) some, but not all, of the parties to a treaty may enter into a second treaty modifying the application of the earlier treaty as between each other but without consulting the remaining parties to the earlier treaty; or (2) the situation is similar but one or more outside States, not parties to the earlier treaty, participate in the second treaty. In either of these cases the second treaty may encroach upon the vested rights of other States under the earlier treaty and the question is how far this fact may affect the essential validity of the second treaty.

7. Sir H. Lauterpacht's draft (A/CN.4/63 and 87, article 16) provided as the general rule that a treaty should automatically be void "if its performance involves a breach of a treaty obligation previously undertaken by one or more of the contracting parties". He qualified this provision by saying that it should only apply "if the departure from the terms of the prior treaty is such as to interfere seriously with the interests of the other parties to that treaty or substantially to impair an essential aspect of its original purpose". He also excepted general multilateral treaties altogether from the provision; and in his second report he extended this exception to treaties revising multilateral conventions when concluded by "a substantial majority of the parties to the revised convention". He justified this addition by pointing out in some detail the complications that might otherwise arise in the revision of multilateral conventions and especially those of a law-making type, where successive treaties on the same subject with varying parties are a common enough phenomenon. In support of his proposed general rule, Sir H. Lauterpacht cited the dissenting opinions of Judges Van Eysinga and Schücking in the *Oscar Chinn* case,⁵⁰ and of Judges Nyholm and Negulesco in the *European Commission of the Danube* case.⁵¹ He further explained that this rule proceeded on the assumption that "if parties to a treaty bind themselves to act in a manner which is a violation of the rights of a party under a pre-existing treaty, they commit a legal wrong which taints the subsequent treaty with illegality" (A/CN.4/63, article 16, comment. para. 2). This assumption he considered to follow from "general principles of law", "requirements of international public policy" and "the principle of good faith which must be presumed to govern international relations". "In the international sphere", he said, "the reasons for regarding later inconsistent treaties as void and unenforceable are even more cogent than in private law". Although a number of older writers, including Oppenheim, provide support for these views, the majority of writers today do not consider

that a treaty which infringes the rights of other States under prior treaties is necessarily invalid. They hold that a question of invalidity may arise in particular cases, but that in general the question is rather one of the priority to be given to conflicting legal provisions.⁵²

8. Sir G. Fitzmaurice's draft (A/CN.4/115, articles 18 and 19) was based on the view that in general the question is one of reconciling conflicting legal provisions and that only in certain types of case may the later treaty be invalid. His proposals concerning conflicts with prior treaties were somewhat elaborate, and in dealing with the main problem he drew a distinction between (1) cases where the parties to the second treaty include some only of the parties to the earlier treaty and some additional parties, and (2) cases where the parties to the second treaty include some only of the parties to the earlier treaty but no additional parties.

9. In the first class of case, where the parties to the later treaty comprise some new parties, he considered that the later treaty is not invalidated by the conflict and governs the relations between the parties to it; on the other hand, the earlier treaty prevails over the later treaty in the relations between any States which are parties to both treaties and States which are parties only to the earlier one. States which are parties to both treaties may therefore find themselves liable to make reparation to the remaining parties of the earlier treaty, if they do not carry it out; but, if they do carry it out, they may equally be liable to make reparation to the remaining parties of the second treaty, if the latter were unaware of the conflict when they entered into the second treaty. In other words, the conflict raises questions of priority and of legal liability, but not of validity.

10. Sir G. Fitzmaurice justified his rejection of the line taken by the previous Special Rapporteur by citations from certain writers⁵³ and also by the terms of Article 103 of the Charter. He pointed out that Article 103 does not pronounce the invalidity of treaties between Member States conflicting with the Charter, but only that in the event of a conflict between the obligations of Members of the United Nations under the Charter and their obligations under any other international agreement, their obligations under the Charter are to prevail. The rationale of Article 103 clearly is that priority is to be given to the Charter, not that invalidity is to attach to a treaty which conflicts with it. The conflicting treaty may be unenforceable, if to enforce it involves a violation of the Charter; but it is not void. Although this is clearly the effect of Article 103, reference to the *travaux préparatoires* shows that the Article was drafted primarily with prior treaties in mind and that Committee IV/2 looked rather to Article 2, paragraph 2 (the duty of each Member to fulfil in good faith its obligations under the Charter) to cover the case of a Member entering into a subsequent treaty inconsistent with the Charter. The report of that Committee stated:⁵⁴ "Concerning the second rule of

⁴⁹ Previous drafts on the law of treaties have not dealt with these questions.

⁵⁰ *P.C.I.J.* Series A/B, No. 63, pp. 132-136 and 148-150.

⁵¹ *P.C.I.J.* Series B/14, pp. 73 and 129.

⁵² e.g. C. Rousseau, *Principes généraux du droit international public*, p. 341; Lord McNair, *op. cit.*, p. 222; *Harvard Law School, Research in International Law*, III, Law of Treaties, p. 1024.

⁵³ C. Rousseau and the *Harvard Research in International Law*.

⁵⁴ U.N.C.I.O., Vol. 13, p. 708.

Article 20 of the Covenant, under which Members undertook not to enter thereafter into any engagement inconsistent with the terms thereof, the Committee has thought it to be so evident that it would not be necessary to express it in the Charter, all the more since it would repeat in a negative form the rule expressed in paragraph 2 of Chapter II⁵⁵ of the Charter". Nevertheless, it remains true that Article 103, which is entirely general in its terms and therefore appears to cover both prior and future agreements, lays down the principle of the priority of the Charter, not that of the invalidity of inconsistent treaties.⁵⁶

11. The particular question of the effect of the Charter upon a subsequent treaty entered into by a Member of the United Nations may require further consideration. It suffices here to say that the present Special Rapporteur is in agreement with the position taken by Sir G. Fitzmaurice that, where the parties to the second treaty include States not parties to the earlier one, the fact that there is a conflict between the two treaties does not render the later one invalid.

12. In the second class of case, where some, but not all, of the parties to a multilateral treaty conclude a later treaty modifying its application as between themselves, Sir G. Fitzmaurice again adopted as the fundamental rule the principle that the conflict with the earlier treaty does not render the later treaty invalid. He conceded that some weighty authorities have taken the view that it is not permissible for a restricted number of the parties to a treaty to conclude a new treaty on the same subject, if to do so would impair the obligation created by the earlier treaty or be "so inconsistent with the general purpose of the earlier treaty as to be likely to frustrate that purpose" (A/CN.4/115, para. 88). He also noted the view of Judges Van Eysinga and Schücking that in the case of a treaty having a quasi-statutory effect and status, providing a constitution, system or régime for an area or in respect of a given subject, it is not open to any of the parties to enter into such a later treaty without the consent of all the parties to the earlier one. Nevertheless, he considered that there are strong reasons for a more flexible rule. The second treaty is only binding upon the parties to it and does not in law diminish or affect the rights of the other States parties to the earlier treaty. It may do so in fact by undermining the régime of the earlier treaty and this may in some cases raise the question of the validity of the second treaty. But there is, in his view, another important consideration pointing the other way:

"The right of some of the parties to a treaty to modify or supersede it in their relations *inter se* is one of the chief instruments, increasingly in use today, whereby a given treaty situation can be changed in a desirable and perhaps necessary manner, in circumstances in which it would not be possible or would be very difficult to obtain — initially at any rate — the consent of all the States concerned. To forbid this process — or render it unduly difficult — would be in practice to place a veto in the hands of what might often be a small minority of parties opposing change. In the case of many important groups of treaties involving a 'chain' series, such as the postal

conventions, the telecommunications conventions, the industrial property and copyright conventions, the civil aviation conventions, and many maritime and other technical conventions, it is precisely by such means that new conventions are floated. In some cases the basic instruments of the constitutions of the organizations concerned may make provision for changes by a majority rule, but in many cases not, so that any new or modifying system can only be put into force initially as between such parties as subscribe to it." (*ibid.*, para. 89).

He also insisted that in cases of this kind it is often quite possible for the second treaty to be applied as between its parties without disturbing the application of the earlier treaty as between them and the other States parties to that treaty.

13. On the basis of the above reasoning, the previous Special Rapporteur was disinclined ever to regard a later treaty as invalidated by reason of a conflict with a previous treaty whose obligations are of a reciprocal kind. However, and with some hesitation, he specified two cases where the later treaty would be invalidated:

(1) where the earlier treaty expressly prohibits, as between any of the parties to it, the conclusion of any treaty inconsistent with its provisions;

(2) where the later treaty necessarily involves for the parties to it action in direct breach of their obligations under the earlier treaty.

At the same time, he considered that the position is quite different where the obligations of the earlier treaty are not of a "reciprocating" kind but are of an "interdependent" or objective kind. In these cases he provided that invalidity should be the general rule and dealt with them in a separate article, which will be examined later in paragraphs 22-30 of this Commentary.

14. The complexity of the proposals of the previous Special Rapporteur testify to the difficulty of the problem with which the present article deals. Sir H. Lauterpacht only arrived at his comparatively simple set of rules by applying in the law of treaties what he considered to be a general principle of law rendering void "contracts to break a contract". But treaties today serve many different purposes, legislation, conveyance of territory, administrative arrangement, constitution of an international organization, etc., as well as purely reciprocal contracts; and, even if it be accepted that the illegality of a contract to break a contract is a general principle of law — a point open to question — it does not at all follow that the principle should be applied to treaties infringing prior treaties. The imperfect state of international organization and the manifold uses to which treaties are put seem to make it necessary for the Commission to be cautious in laying down rules which brand treaties as illegal and void. This is not to say that to enter into treaty obligations which infringe the rights of another State under an earlier treaty does not involve a breach of international law involving legal liability to make redress to the State whose rights have been infringed. But it is another thing to say that the second treaty is void for illegality and a complete nullity as between the parties to it.

15. The attitude adopted by the Permanent Court in the *Oscar Chinn* and *European Commission of the Danube* cases hardly seems consistent with the existence

⁵⁵ The original designation of Article 2 (2) at the San Francisco Conference.

⁵⁶ See further paragraphs 33-4 of this Commentary.

in international law of a general doctrine invalidating treaties entered into in violation of the provisions of a prior treaty. In the *Oscar Chinn* case⁵⁷ the earlier treaty was the General Act of Berlin of 1885, which established an international régime for the Congo Basin. That treaty contained no provision authorizing the conclusion of bilateral arrangements between particular parties; on the contrary it contained a provision expressly contemplating that any modification or improvement of the Congo régime should be introduced by "common accord" of the signatory States. Nevertheless, in 1919 certain of the parties to the Berlin Act, without consulting the others, concluded the Convention of St. Germain whereby, as between themselves, they abrogated a number of the provisions of the Berlin Act, replacing them with a new régime of the Congo. The Court contented itself with observing that, no matter what interest the Berlin Act might have in other respects, the Convention of St. Germain had been relied on by both the litigating States as the source of their obligations and must be regarded by the Court as the treaty which it was asked to apply. Admittedly, the question of the legality of the Convention of St. Germain had not been raised by either party. But the question was dealt with at length by Judges Van Eysinga and Schücking in dissenting judgements and had, therefore, evidently been debated within the Court. Moreover, these Judges had expressly taken the position that the question of the validity or invalidity of the treaty was not one which could depend on whether any Government had challenged its legality, but was a question of public order which the Court was bound itself to examine *ex officio*. In these circumstances, it is difficult to interpret the Court's acceptance of the Convention of St. Germain as the treaty which it must apply, as anything other than a rejection of the doctrine of the absolute invalidity of a treaty which infringes the rights of third States under a prior treaty.

16. The line taken by the Court in its advisory opinion on the *European Commission of the Danube*⁵⁸ was much the same. The Versailles Treaty contained certain provisions concerning the international régime for the Danube, including provisions concerning the composition and powers of the European Commission for that river; at the same time it looked forward to the early conclusion of a further Convention establishing a definitive statute for the Danube. A further Convention was duly concluded, the parties to which did not comprise all the parties to the Treaty of Versailles but did include all the States which were concerned in the dispute giving rise to the request for the advisory opinion. In this case the question of the capacity of the States at the later conference to conclude a treaty modifying provisions of the Treaty of Versailles was raised in the arguments presented to the Court, which pronounced as follows:

"In the course of the present dispute, there has been much discussion as to whether the Conference which framed the Definitive Statute had authority to make any provisions modifying either the composition or the powers and functions of the European Commission, as laid down in the Treaty of Versailles, and as to whether the meaning and the scope of the

relevant provisions of both the Treaty of Versailles and the Definitive Statute are the same or not. *But in the opinion of the Court, as all the Governments concerned in the present dispute have signed and ratified both the Treaty of Versailles and the Definitive Statute, they cannot, as between themselves, contend that some of its provisions are void as being outside the mandate given to the Danube Conference under Article 349 of the Treaty of Versailles.*"⁵⁹

Here again, it is difficult not to see in the Court's pronouncement a rejection of the doctrine of the absolute invalidity of a later treaty which infringes the rights of third States under a prior treaty.⁶⁰ The *Mavrommatis Palestine Concessions* case⁶¹ was, it is true, a somewhat different type of case, but it also appears to proceed on a basis quite inconsistent with the idea that a later treaty will be void to the extent that it conflicts with an earlier multilateral treaty.

17. In its advisory opinion on the *Austro-German Customs Union*⁶² the Court was only called upon to consider the compatibility of the Protocol of Vienna with the Treaty of St. Germain; it was not asked to pronounce upon the legal consequences in the event of its being found incompatible with the earlier treaty. In two cases concerning Nicaragua's alleged violation of the prior treaty rights of Costa Rica and Salvador by concluding the Bryan-Chamorro Treaty with the United States, the Central American Court of Justice considered itself debarred from pronouncing upon the validity of the later treaty in the absence of the United States over which it had no jurisdiction. It therefore limited itself to holding that Nicaragua had violated its treaty obligations to the other two States by concluding a later inconsistent treaty with the United States.⁶³

18. International jurisprudence is not perhaps entirely conclusive on the question whether and, if so, in what circumstances a treaty may be rendered void by reason of its conflict with an earlier treaty. Nevertheless, it seems to the present Special Rapporteur strongly to discourage any large notions of a general doctrine of the nullity of treaties infringing the provisions of earlier treaties;⁶⁴ and it accordingly also lends point to the hesitations of Sir G. Fitzmaurice in admitting any cases of nullity where the conflict is with an earlier treaty of a "mutual reciprocating type".

19. The two cases of nullity tentatively suggested by him (see paragraph 13 above), although they are supported by the Harvard Research Draft, hardly seem consistent with the attitude of the Court in the *Oscar Chinn* and *European Commission of the Danube* cases. In the former case there was an express stipulation that

⁵⁹ P.C.I.J., Series B, No. 14, p. 23.

⁶⁰ The more so as two Judges, Nyholm and Negulesco, took a different line from the Court, holding that any provision of the Statute which conflicted with the Treaty of Versailles would be "null"; P.C.I.J., Series B, No. 14, pp. 73 and 129.

⁶¹ P.C.I.J., Series A, No. 2.

⁶² *Ibid.*, Series A/B, No. 41.

⁶³ *American Journal of International Law*, vol. II (1917), pp. 228 and 729.

⁶⁴ See G. Schwarzenberger, *op. cit.*, pp. 482-7; and see also article 18 of the Havana Convention of 1928 on Treaties (*Harvard Research in International Law*, p. 1207) which provided: "Two or more States may agree that their relations are to be governed by rules other than those established in general conventions concluded by them with other States."

⁵⁷ P.C.I.J., Series A/B, No. 63.

⁵⁸ P.C.I.J., Series B, No. 14.

any modifications of the Berlin Act should be by "common accord"; yet the Court considered it sufficient that no State had challenged the Convention of St. Germain. It does not seem that the Court would have adopted any different view, if the stipulation had taken the form of an express prohibition against contracting out of the treaty otherwise than by "common accord". It is also arguable that there is implied in every multilateral treaty an undertaking not to violate its provisions by entering into inconsistent bilateral agreements. Accordingly, it hardly seems justifiable to provide, as a special case, that a later treaty shall be void if it conflicts with a prior treaty which contains an express prohibition against inconsistent bilateral agreements. An undertaking in a treaty not to enter into a conflicting treaty does not, it is thought, normally affect the treaty-making capacity of the States concerned, but merely places them under a contractual obligation not to exercise their treaty-making powers in a particular way. A breach of this obligation engages their responsibility; but the later treaty which they conclude is not a nullity. Similarly, if the general view be adopted — as it was by the previous Special Rapporteur — that a later treaty concluded between a limited group of the parties to a multilateral treaty is not normally rendered void by the fact that it conflicts with the earlier treaty, his second tentative exception to the rule does not appear to justify itself. This exception concerned cases where the later treaty "necessarily involves for the parties to it action in direct breach of their obligations under the earlier treaty". The question of nullity does not arise at all unless the later treaty materially conflicts with the obligations of the parties under the earlier treaty. Can it make any difference whether the infringement of those obligations is direct or indirect, if it is the logical effect of the later treaty? Of course, if the later treaty is susceptible of different interpretations or is capable of performance in different ways, it may not be possible to know whether there is any conflict with the earlier treaty until the later treaty has been interpreted and applied by the States concerned. But if it is in fact interpreted and applied in a manner which violates the earlier treaty, can it reasonably be differentiated from a treaty whose terms unambiguously violate the earlier treaty?

20. On balance, and especially because of the considerations advanced by Sir G. Fitzmaurice with regard to "chain" multilateral treaties, the present Special Rapporteur suggests that the safest course for the Commission to adopt is not to prescribe nullity in any case where the earlier treaty is of a type involving reciprocal obligations. In other words, it should recognize the priority of the earlier treaty but no more. A party to it which enters into a later inconsistent treaty cannot "oppose" the later treaty to any party to the earlier treaty which is not also a party to the later one. A State party to both treaties may find its international responsibility engaged by the mere conclusion of the later treaty or by its application in a manner violating the earlier treaty; but the inconsistency does not make the later treaty null and void in law.

21. Accordingly, paragraph 2 of the present article does not make provision for the two cases of invalidity formulated — with much hesitation — by the previous Special Rapporteur. It states without qualification in sub-

paragraph (a) that in general a later treaty is not invalidated by the fact of its inconsistency with a prior treaty; and in sub-paragraph (b) it lays down that in the relations between any State which is a party to both treaties and a State which is a party to the first treaty only it is the provisions of the first treaty which prevail.

22. Finally, it is necessary to consider the cases in which the previous Special Rapporteur proposed (A/CN.4/115, article 19) that the general rule should be the nullity of the later treaty. These are cases where the earlier treaty is a multilateral treaty creating rights and obligations which are not of a "mutually reciprocating type" but are either —

(a) of an "interdependent type where a fundamental breach of an obligation by one party will justify a corresponding non-performance generally by the other parties and not merely in their relations with the defaulting parties"; or

(b) of an "integral type where the force of the obligation is self-existent, absolute and inherent for each party, and not dependent on a corresponding performance by the others".

In either of these cases the rule proposed in the draft was that "any subsequent treaty concluded by any two or more of the parties, either alone or in conjunction with third countries, which conflicts directly in a material particular with the earlier treaty will, to the extent of the conflict, be null and void". This exception, therefore, was to apply not only to the class of case where a group of the parties to the earlier treaty conclude a later, inconsistent, treaty but also to the other class of case where some of the parties to the earlier treaty plus some outside States conclude a later, inconsistent treaty.

23. Sir G. Fitzmaurice's division of treaties into three distinct types requires further explanation. Treaties of a "mutually reciprocal" type, as might be supposed, are "*do ut des*" treaties in which each party owes to each other party certain obligations and obtains in return corresponding rights from that party; in other words, the treaty, although multilateral, sets up what are essentially bilateral relationships. The Vienna Convention on Diplomatic Relations⁶⁵ is an example of this type of treaty, which has already been discussed in the preceding paragraphs; a later treaty is not to be considered void by the fact that it conflicts with such a treaty. An "interdependent type", on the other hand, is one where the obligations and rights of each party are only meaningful in the context of the corresponding obligations and rights of every other party; so that the violation of its obligations by one party prejudices the treaty régime applicable between them all and not merely the relations between the defaulting State and the other parties. Examples given by the previous Special Rapporteur were treaties of disarmament, treaties prohibiting the use of particular weapons, treaties requiring abstention from fishing in certain areas or during certain seasons, etc. The Antarctic Treaty⁶⁶ declaring that Antarctica is to be

⁶⁵ United Nations Conference on Diplomatic Intercourse and Immunities, Vienna, 2 March-14 April 1961, *Official Records*, vol. II (A/CONF. 20/14/Add.1), United Nations publication, Sales No. 62.XI.1, p. 82, document A/CONF. 20/13 and Corr. 1.

⁶⁶ Signed in Washington on 1 December 1959; text in *United Nations Treaty Series*, vol. 402, p. 71.

"used for peaceful purposes only" and prohibiting "any measures of a military nature" would presumably be another example of the same kind. The third, "integral", type was defined by the previous Special Rapporteur as comprising treaties where the force of the obligation is "self-existent, absolute and inherent for each party and not dependent on a corresponding performance by the others". The examples given by him were the Genocide Convention, Human Rights Conventions, the Geneva Conventions of 1949 on prisoners of war,⁶⁷ etc., International Labour Conventions and treaties imposing an obligation to maintain a certain régime or system in a given area, such as the régime of the Sounds and the Belts at the entrance to the Baltic Sea.

24. The reason which led the previous Special Rapporteur to distinguish "interdependent" and "integral" types of treaty from "mutually reciprocating" types and to propose the avoidance of later treaties conflicting with the two former types of treaty are easily understood. The conclusion of a conflicting treaty in the two former cases undermines the treaty régime between all the parties, whereas in the case of mutually reciprocating types it does not. The same reason led him to differentiate in a similar way between these types of treaty in his treatment of the termination of treaties on the ground of fundamental breach. Nevertheless, the proposal to avoid later treaties which conflict with "interdependent" or "integral" types of treaty requires very careful examination. As already stressed in paragraph 14, it is necessary for the Commission to be very cautious in prescribing the nullity of treaties concluded between sovereign States.

25. The first point for consideration is the relation between the proposed rule avoiding treaties for inconsistency with an "interdependent" or "integral" type of treaty and the rule avoiding treaties for conflict with a *jus cogens* rule. For example, the Genocide Convention and the Geneva Conventions of 1949 would clearly seem to fall under the article avoiding treaties for conflict with a *jus cogens* rule. Moreover, in the case of the Geneva Conventions of 1949, there is a certain awkwardness in holding the later treaty void simply on the ground of its conflict with the Conventions, "integral type" though they may be. For each one of these major humanitarian Conventions contains an express provision⁶⁸ stating that each one of the High Contracting Parties shall be at liberty to denounce the Convention, the denunciation to take effect one year after its notification. True, there is also a proviso that a denunciation made at a time when the party concerned is engaged in a conflict shall not take effect until after the application of the Conventions with respect to that conflict is ended. But otherwise the liberty to denounce the Conventions in complete, and this, to say the least, seriously weakens the case for holding a later bilateral treaty void simply on the ground of inconsistency with a prior "integral type" treaty. On the other hand, the fundamental principles which are enshrined in the Conventions are principles of a *jus cogens* character,

from which a State cannot release itself even by denouncing the treaties, as is indeed expressly pointed out in the articles providing for denunciation. Paragraph 4 of these articles states: "The denunciation shall have effect only in respect of the denouncing Power. It shall in no way impair the obligations which the parties to the conflict shall remain bound to fulfil by virtue of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity and the dictates of the public conscience". In other words, it seems to the present Special Rapporteur that it is the *jus cogens* nature of the subject-matter of these Conventions, rather than the "integral" character of the obligations created by the Conventions upon which the nullity of an inconsistent later treaty has to rest. It may be added that a large number of these so-called "integral" type treaties have withdrawal or denunciation clauses.⁶⁹ Even the Genocide Convention (article 14) provides for the possibility of unilateral denunciation at regular intervals every five years; but here again denunciation of the Convention would not absolve a State from observing its fundamental principles.

26. Another point is that "interdependent" and "integral" type obligations may vary widely in their character and importance. Some, although important or useful enough in their own sphere, may be essentially technical; while others deal with matters vital to the well-being of peoples, such as the maintenance of peace or the suppression of the traffic in women or narcotics. If the question of the nullity of inconsistent treaties is put — as it is by the previous Special Rapporteur — upon the illegality of the object of any treaty which conflicts with an "integral" or "interdependent" type obligation, the effect is almost to convert these obligations into *jus cogens* rules — at any rate so long as the treaty has not been denounced. It may be that international law will come to recognize "interdependent" or "integral" type obligations contained in multilateral treaties as having the force of *jus cogens* for the parties; but so long as such a wide freedom of denunciation, and indeed of reservation, exists in regard to many of these treaties, it scarcely seems possible to regard them in that way. Nor is it clear that a treaty derogating from an "interdependent" type obligation will necessarily tend to disrupt the whole régime. If two States were to agree to suspend as between themselves a treaty forbidding the discharge of oil into the sea, the agreement would, no doubt, violate an "integral type" obligation, but for geographical reasons it might well be that they themselves would be the only parties materially affected by the violation, or at worst they and a third neighbouring State. Again, some treaties which establish a general régime for a given area involve a recognition of rights and not merely an abstention from certain acts; and then, although the treaties are in principle of an "integral" type, denial of the right to one State may not materially weaken the general régime.

27. Some treaties which establish "interdependent" or "integral" type obligations also contain "mutually reciprocating" obligations. The Antarctic Treaty indeed

⁶⁷ International Committee of the Red Cross, *The Geneva Conventions of 12 August 1949*, Geneva.

⁶⁸ E.g. article 63 of the Geneva Convention for the Amelioration of the condition of the wounded and sick in Armed Forces in the Field.

⁶⁹ See the United Nations "Handbook of Final Clauses" (ST/LEG/6), pp. 59-73.

contains obligations of all three types: Articles 1 and 5, which prohibit respectively measures of a military nature and nuclear explosions, are of an "interdependent" type; article 2, which provides for "freedom of scientific investigation", is of an "integral" type, though it may involve some element of "reciprocating" obligation; article 3, which provides for free exchange of information, is of a "mutually reciprocating" type, while article 4, which reserves the existing legal positions of States with regard to territorial claims and forbids the treaty is in force, is perhaps a mixture of "interdependent" and "mutually reciprocating" obligations; article 7, which concerns the right to appoint observers, inspect stations etc., is purely of a "reciprocating" type, yet it is vital to the effectiveness of some of the "interdependent" obligations; article 8 is again, perhaps, a mixture of "interdependent" and "mutually reciprocating" obligations. The Antarctic Treaty thus illustrates very clearly how mixed may be the types of obligation in a single treaty; and a similar mixture can be seen in other treaties, for example treaties for the regulation of fisheries. It may also be noted that some international régimes created by treaty are regional in character, others universal.

28. The Permanent Court, it has been pointed out above (*supra*, paragraphs 15-16), refused in the *Oscar Chinn* case and again in the *European Commission for the Danube* case to discard as a nullity a treaty derogating from a prior treaty, despite the powerful argument in favour of the contrary view adduced by a small minority of dissenting judges. In both these cases the prior treaty was a multilateral treaty establishing for a particular region an international régime which contained obligations of an "integral" or "interdependent" type. In both cases the special character of the treaty was emphasized by the dissenting judges, yet the Court would not look beyond the fact that the disputing States were themselves parties to the later treaty and had not challenged its validity. In the *Mavrommatis Palestine Concessions* case the position was somewhat different in that the later treaty, a Protocol, extended, rather than derogated from, the earlier treaty and it was Great Britain, a party to both treaties, that challenged the application of the Protocol. Nevertheless, in that case also the earlier treaty was one establishing an international régime — a Mandate — and the Court was emphatic that, in case of conflict, the provisions of the later treaty should prevail.

29. The jurisprudence of the Permanent Court therefore, so far as it goes, seems to be opposed to the idea that a treaty is automatically void if it conflicts with an earlier multilateral treaty establishing an international régime. Where the States before the Court were all parties to the later treaty, the Court applied the later treaty. This does not, of course, mean that the Permanent Court would not, in an appropriate case, have considered a later treaty which derogated from an earlier multilateral treaty to be a violation of the rights of the States parties to the earlier treaty who were not also parties to the second treaty. But it does seem to mean that the Permanent Court acted on the principle that conflicts between treaties are to be resolved on the basis of the relative priority of conflicting legal norms, not on the basis of the nullity of the later treaty; and

acted on that principle even when the prior treaty was an international "statute" creating an international régime. Admittedly, the law of treaties has undergone considerable development during the past thirty years, and there is a greater disposition to recognize the objective effects of certain kinds of treaties. But it may be doubted whether this development has gone so far as to recognize that a treaty will be void to the extent that it conflicts with any earlier multilateral treaty establishing "interdependent" or "integral" obligations. Indeed, the important consideration to which the previous Special Rapporteur drew attention in regard to "chain" treaties is enough to induce hesitation on this question. Multilateral treaties creating "interdependent" obligations or international régimes are the very classes of treaty in which a "chain" series of instruments may be found;⁷⁰ and it will more often than not be the case that some parties to the earlier treaties fail for one reason or another to become parties to the later treaties. No doubt, it might be possible to try and cover this difficulty by a complicated formula excepting "chain" treaties from the penalty of invalidity. But it seems safer for the Commission, in the present state of the development of international law, to hold to the general line taken by the Permanent Court on this question.

30. Accordingly, while recognizing the general significance of the distinctions made by Sir G. Fitzmaurice, the present Special Rapporteur considers it preferable that the nullity of a treaty by reason of its inconsistency with an earlier multilateral treaty should not be predicated by the Commission as the general rule even when the earlier treaty is of an "interdependent" or "integral" type. Article 14 does not, therefore, make any distinction between treaties of an "interdependent" or "integral" type and other treaties, but places all types under the same rule in paragraph 2 (a), which goes upon the principle that conflict with an earlier treaty is not normally a ground of nullity.

31. Paragraph 2 (b) sets out the general rules for resolving conflicts between two treaties, when the parties to the later treaty do not include all the parties to the earlier one. It specifies two different rules according to whether the interests of a State which is a party to the first treaty but not to the second are involved. If so, since the parties to the second treaty are incompetent to deprive it of its rights under the first treaty, the earlier treaty prevails. If not, the question is one of the interpretation and application of treaties, and of their amendment or termination by subsequent agreement; and, as the jurisprudence of the Permanent Court indicates, the later treaty is likely to prevail in most cases.

32. Paragraph 3 (a) of the article, as previously indicated in paragraph 5 of this Commentary, draws attention to the case of the constituent instrument of international organizations which may contain provisions arguably affecting the capacity of members to enter into certain kinds of treaty. This being a question of capacity, not invalidity, which belongs to the law of international organizations, article 14 merely notes and reserves the point.

⁷⁰ Sir H. Lauterpacht also modified paragraph 4 of his draft article on this very ground (A/CN.4/87, article 16).

33. Paragraph 3 (b) repeats the provision contained in Article 103 of the Charter. This provision has already been mentioned in paragraph 10 of this Commentary, where it was pointed out that Article 103 appears to be based upon the principle of the priority of the Charter rather than upon that of the invalidity of inconsistent treaties. At the same time it was noted that the Article had been phrased primarily with pre-existing inconsistent treaties in mind and that it seems to have been considered at San Francisco that the conclusion of a subsequent inconsistent treaty would be a violation of Article 2, paragraph 2, by which Members undertake to fulfil in good faith the obligations assumed by them in the Charter. Within the United Nations the application of Article 103 has been discussed principally in connexion with the work of the Collective Measures Committee and with the relation between the Charter and the San Francisco Statement on Voting Procedure in the Security Council, though Article 103 has also been raised in connexion with one or two particular disputes. None of the discussions throw much light, however, on the question whether a later inconsistent treaty concluded by Members is to be regarded as void or merely a violation of their obligations under the Charter.⁷¹ Despite the fact that Article 103 itself only provides that the obligations of the Charter shall "prevail", one eminent authority⁷² has expressed the view "that those of its provisions which purport to create legal rights and duties possess a constitutive or semi-legislative character, with the result that Member States cannot 'contract out' of them or derogate from them by treaties made between them, and that any treaty whereby they attempted to produce this effect would be void". The same authority further explained⁷³ that, in his view, Members of the United Nations "by acceptance of the Charter, a constitutive instrument, have accepted a limitation of their treaty-making capacity".

34. The Special Rapporteur does not think that the Commission need or ought to take a position upon the general question of the effect of Article 103, which concerns the effect of a constituent treaty upon the treaty-making capacity of members of an organization *vis-à-vis* the organization. It is a question which is essentially one of the interpretation of the Charter and of the law of international organizations, and which therefore falls under the reservation of this question contained in paragraph 3 (a) of this article. Moreover, it is not the function of the Commission to render interpretations of the Charter. On the other hand, Article 103 lays down a rule which is of fundamental importance in regard to conflicts between treaties and, therefore, requires to be incorporated in some form in the article. The appropriate course, for the reasons just given, seems to be to reproduce, as has been done in paragraph 3 (b), the actual provision contained in Article 103.

35. Paragraph 4, simply for formal reasons of drafting, excepts from the operation of paragraphs 1 and 2 treaties which conflict with a *jus cogens* rule that is embodied in a prior treaty and makes them subject to article 13.

SECTION III — THE DURATION, TERMINATION AND OBSOLESCENCE OF TREATIES

Article 15 — Treaties containing provisions regarding their duration or termination

1. Subject to articles 18-22, the duration of a treaty which contains provisions either regarding its duration or termination shall be governed by the rules laid down in this article.

2. In the case of a treaty whose duration is expressed to be limited by reference to a specified period, date or event, the treaty shall continue in force until the expiry of the period, passing of the date or occurrence of the event prescribed in the treaty.

3. In the case of a bilateral treaty which is expressed to be subject to denunciation or termination upon notice, whether a notice taking effect immediately or after a stated period, the treaty shall continue in force until a notice of denunciation or termination has been given by one of the parties in conformity with the terms of the treaty and has taken effect.

4. (a) In the case of a multilateral treaty which is expressed to be subject to denunciation or withdrawal upon notice, whether a notice taking effect immediately or after a stated period, the treaty shall continue in force with respect to each party until that party has given a notice of denunciation or withdrawal in conformity with the terms of the treaty and that notice has taken effect.

(b) The treaty itself shall terminate in accordance with paragraph 2 if the number of the parties should at any time fall below a minimum number laid down in the treaty as necessary for its continuance in force.

(c) The treaty shall not, however come to an end by reason only of the fact that the number of the parties shall have fallen below the minimum number of parties originally specified in the treaty for its entry into force, unless the States still parties to the treaty shall so decide.

5. (a) In the case of a treaty which both expressly limits its duration and provides for a right to denounce or withdraw from it upon notice, the treaty shall continue in force with respect to each party until either the treaty shall have expired under paragraph 2, or the party in question shall have denounced or withdrawn from the treaty under paragraph 3 or 4, whichever event shall first occur.

(b) If a treaty, whose duration is expressed to be limited by reference to a specified period, date or event, provides that, unless denounced before the expiry of the period, passing of the date or arrival of the event, the treaty shall automatically be prolonged for a further period or periods, it shall continue in force until the expiry of the further period or periods, except with regard to any party which has denounced it in accordance with the terms of the treaty. If the length of the further period should not have been specified in the treaty, it shall be the same as that of the period prescribed for the initial duration of the treaty.

6. The rules stated in the preceding paragraphs shall also apply where the conditions of the duration or termination of a treaty have been fixed not in the treaty itself but in a separate related instrument.

⁷¹ *Repertory of Practice of United Nations Organs*, Vol. V, pp. 315-20.

⁷² Lord McNair, *op. cit.*, p. 217.

⁷³ *Ibid.*, p. 218.

Commentary

1. A great many modern treaties contain clauses either fixing their duration or providing for a right to denounce or withdraw from the treaty. When this is so, the duration and termination of the treaty are regulated by the treaty itself and the question is simply one of the interpretation and application of its terms. Nevertheless, the treaty clauses take a variety of forms,⁷⁴ and it seems desirable that the draft articles should set out the main rules by which the duration of treaties is determined under these clauses. As paragraph 1 states, these rules are set out in paragraphs 2-6 of this article, the case of treaties which contain no provisions on the question being left to the next article.

2. Most treaties today provide that they are to remain in force for a specified period of years or until a particular date or event. Clearly in such cases the treaty will, in principle, cease automatically upon the expiry of the period, the passing⁷⁵ of the date, or the occurrence of the event prescribed in the treaty; and this is so stated in paragraph 2 (a). The periods fixed by individual treaties vary enormously, periods between one and twelve years being the commonest but longer periods of up to twenty, fifty and even ninety-nine years being sometimes found. As to terminating events, one of the types most frequently found in practice is a provision that the treaty shall cease to have effect if the parties fall below a prescribed number.⁷⁶

3. Some bilateral treaties fix no specific limit to their duration but provide for a right to denounce or terminate the treaty either with or without notice. For example, article 5 of a recent Agreement⁷⁷ between the United Kingdom and Portugal for the avoidance of double taxation provides: "This Agreement shall continue in force indefinitely but may be terminated by either Contracting Party by giving six months' notice to the other Contracting Party". When the treaty does fix a specific period for its duration, such as five or ten years, it may at the same time provide for a right of denunciation upon six or twelve months' notice during the period, though this is unusual. Far more frequent is a provision continuing sometimes found. As to terminating events, one of the initial period, subject to a right in either party to denounce the treaty immediately or after some specified period of notice. The exercise of a right of termination or denunciation by one of the parties in the case of a bilateral treaty necessarily puts an end to the whole treaty. Paragraph 3 of the article is accordingly so worded as to make the treaty itself come to an end when a valid notice given by either of the parties has taken effect.

4. Similarly, multilateral treaties, which fix no specific limit to their duration, may provide for a right to denounce or withdraw from the treaty. That is the case, for example, with the Geneva "Red Cross" Conventions of 1949. Indeed, it is almost common form today for multilateral treaties to be made terminable either

upon denunciation of, or withdrawal from, the treaty. In many cases, even when the treaty is expressed to be entered into for a specific period, it is made to continue thereafter, subject to a right in each party to denounce or withdraw from the treaty. This is done either by stating that it shall continue in force indefinitely, subject to the right of denunciation or withdrawal, or by stating that it shall be perpetually renewable for further successive periods of years, with a right in each party to denounce or withdraw from it shortly before the end of each successive period. The two types of provision are not very different in their results, the main difference being that in the latter type the exercise of the right of denunciation or withdrawal is exercisable only at regular intervals. Nevertheless, it is thought more convenient to deal with the "renewable" type of treaty under paragraph 5, and paragraph 4 is intended to cover only those multilateral treaties which, either from the outset or after an initial specific period, are expressed to continue indefinitely, unless terminated by denunciation or withdrawal (see further paragraph 8 below).

5. Paragraph 4 (a) lays down the general rule for multilateral treaties. Here, denunciation or withdrawal by one party does not normally terminate the treaty itself, but only its application to that particular party. Accordingly the general rule is expressed to be that the treaty subject to denunciation or withdrawal, does provide for denunciation or withdrawal given by it has taken effect.

6. Sometimes, however, a multilateral treaty, which is subject to denunciation or withdrawal, does provide for the termination of the treaty itself, if denunciations or withdrawals should reduce the number of parties below a certain figure. For example, the Convention on the Political Rights of Women⁷⁸ provides that it "shall cease to be in force as from the date when the denunciation which reduces the number of parties to less than six becomes effective". In some cases the minimum number of surviving parties required by the treaty to keep it alive is even smaller, e.g., five in the case of the Customs Convention on the Temporary Importation of Commercial Road Vehicles⁷⁹ and three in the case of the Convention Regarding the Measurement and Registration of Vessels Employed in Inland Navigation.⁸⁰ These cases are covered in paragraph 4 (b).

7. In this connexion, the further point arises whether a multilateral treaty, the entry into force of which was made dependent upon its ratification, acceptance, etc., by a given minimum number of States, automatically ceases to be in force, should the parties afterwards fall below that number as a result of denunciations or withdrawals. The better opinion,⁸¹ it is believed, is that this is not a necessary effect of a drop in the number of the parties below that fixed for the treaty's entry into force. The treaty provisions in question relate exclusively to the conditions for the entry into force of the treaty and, if the negotiating States had intended the minimum number of parties fixed for that purpose to be a continuing condition of the validity of the treaty, it would have

⁷⁴ See United Nations *Handbook of Final Clauses* (ST/LEG. 6), pp. 55-73.

⁷⁵ It is the passing rather than the arrival of the date which is relevant since the treaty will expire at midnight on the date fixed by the treaty.

⁷⁶ See United Nations *Handbook of Final Clauses*, pp. 57, 58, 72 and 73.

⁷⁷ (1961) H.M. Stationery Office, Cmnd. 1873.

⁷⁸ United Nations *Treaty Series*, vol. 193, p. 135, art. 8.

⁷⁹ United Nations *Handbook of Final Clauses*, p. 58.

⁸⁰ *Ibid.*, pp. 72-3.

⁸¹ See E. Giraud, "Modification et terminaison des traités collectifs" *Annuaire de l'Institut de droit international*, tome I, 1961, p. 62.

been both easy and natural for them so to provide. In some cases, it is true, a treaty which fixes a low minimum number of parties for entry into force prescribes the same number for the cessation of the treaty. But there is no general practice to that effect, and the fact that this has not been a regular practice in cases where a larger minimum number, such as ten or twenty, has been fixed for entry into force seems significant. At any rate, when the number for entry into force is of that order of magnitude, it does not seem desirable that the application of the treaty should be dependent on the number of parties not falling below that number. Moreover, the remaining parties, if unwilling to continue to operate the treaty with the reduced number, may themselves either join together to terminate it or separately exercise their own right of denunciation or withdrawal. Accordingly, paragraph 4 (c) lays down that the validity is not affected by the mere fact that the number of its parties falls below that prescribed for its original entry into force.

8. Paragraph 5 (a) covers the possible, if unusual, case where a treaty lays down a specific period for its duration but nevertheless allows denunciation during the currency of the period. It also covers the case discussed in the previous paragraph where the treaty provides that each party shall have the right to denounce it and that it shall terminate upon the number of parties being reduced below a certain number. The application of the treaty may then terminate for an individual party either because it has itself exercised its right of denunciation or because the terminating event has occurred through the acts of other parties.

9. Paragraph 5 (b) covers the case of renewable treaties, which are today extremely common. When a treaty, especially a multilateral treaty, lays down a comparatively short period of years for its duration, it very frequently provides for its own renewal for a further period or periods of years; indeed, in most cases it provides for its indefinite continuance in succeeding periods of years. At the same time, however, it confers on each party a right to denounce or withdraw from the treaty on giving reasonable notice prior to the commencement of each new period. A typical example of this type of clause is article 14 of the Genocide Convention,⁸² which reads:

"The present Convention shall remain in effect for a period of ten years as from the date of its coming into force.

"It shall thereafter remain in force for successive periods of five years for such Contracting Parties as have not denounced it at least six months before the expiration of the current period."

One authority⁸³ has observed that this type of formula does not really convert the treaty into one for a limited term; for the treaty will continue indefinitely for successive periods of years. Thus, from the point of view of substance, the formula is rather a method of regulating the exercise of the right of denunciation than of providing for the renewal of the treaty for successive terms. This is, of course, true, and it could be argued that this

type of treaty really falls under paragraphs 3 and 4, which deal with treaties reserving a right of denunciation. But since the parties have chosen to express the duration of the treaty as one of successive terms of years and have linked the power of denunciation specifically to the dates of the expiry of each successive term, it seems perhaps to be more in accordance with their intentions to deal with this type of treaty under paragraph 5 as a special case of a time-limit combined with a denunciation clause. Paragraph 5 (b) accordingly covers this type of case by providing that the treaty is to continue in force for each party until the expiry of the further period or periods, except with regard to any party that may have exercised its right of denunciation.

10. Paragraph 6 is a formal article the reason for which is that in some cases it may happen that the provisions concerning the duration or termination of a treaty are not contained in the treaty itself but in a contemporaneous or collateral protocol or other such instrument.

Article 16 — Treaties expressed to be of perpetual duration

1. Subject to articles 18-22, and more particularly to articles 18 and 19, a treaty shall continue in force perpetually, if —

(a) the treaty expressly states that it is to remain in force indefinitely and does not provide for any right of denunciation or withdrawal; or

(b) the treaty expressly states that it is not to be subject to denunciation or withdrawal and does not prescribe any limit to its duration.

Commentary

1. The following article deals with cases where the treaty is totally silent both as to its duration and as to the right to denounce or withdraw from the treaty. The present article concerns the comparatively small number of cases where the treaty appears expressly on its face to contemplate that it shall remain in force "perpetually". This intention may be manifested in two ways: either by expressly providing for the treaty to remain in force indefinitely without providing for any right to denounce or withdraw from it, or by expressly excluding any right of denunciation or withdrawal without fixing any term to the treaty. Cases of these types are not very common, because a treaty which is expressed to be of indefinite duration normally does provide for a right of denunciation or withdrawal, while a treaty which expressly excludes such a right is normally one for a fixed term of years. Express declarations of the "perpetual" duration of a treaty are most likely to be found in those types of treaty which are inherently of a "permanent character" mentioned in article 17, paragraph 4, and especially those establishing a permanent international régime for a river or area. A recent instance is the Indus Waters Treaty of 1960,⁸⁴ which provides that it is to remain in force until terminated by a further treaty between the two Governments concerned. This treaty, since it merely makes its termination dependent upon the mutual agreement of the two interested States, is probably to be regarded as a true example of a "perpetual" treaty.

⁸² United Nations *Treaty Series*, vol. 78, p. 277; cf. also article 36 of the Convention of 1955 establishing an International Organization of Legal Metrology.

⁸³ E. Giraud, *op. cit.*, pp. 42-43.

⁸⁴ *American Journal of International Law*, 1961, pp. 797-822.

Another recent treaty, the Antarctic Treaty⁸⁵ expressly proclaims in its Preamble the intention of the Parties to set up a permanent régime for Antarctica. But article 12 does provide for a right of withdrawal after thirty years in very special circumstances connected with the possibility of a revision of the treaty. In consequence, the Antarctic Treaty seems to fall under paragraph 4 of article 15 rather than under the present article.

2. A treaty can in any event never be "perpetual" except in a qualified sense, since every treaty is liable to be terminated by a subsequent treaty concluded between the Parties; and in the case of a multilateral treaty the application of the treaty may even be terminated between individual parties by a new agreement *inter se*. The Indus Waters Treaty, as already mentioned, actually provides that it shall "continue in force until terminated by a duly ratified treaty concluded for that purpose between the two Governments". In order to avoid any misunderstanding as to what is involved in a "perpetual" treaty the opening words of the present article emphasize that it is subject to the provisions of articles 18 and 19, which deal with the power to terminate treaties by subsequent agreement.

Article 17 — Treaties containing no provisions regarding their duration or termination

1. Subject to Articles 18-22, the duration of a treaty which contains no provisions regarding its duration or termination shall be governed by the rules laid down in this article.

2. In the case of a treaty whose purposes are by their nature limited in duration, the treaty shall not be subject to denunciation or withdrawal by notice, but shall continue in force until devoid of purpose.

3. (a) In cases not falling under paragraph 2, a party shall have the right to denounce or withdraw from a treaty by giving twelve months' notice to that effect to the depositary, or to the other party or parties, when the treaty is —

- (i) a commercial or trading treaty, other than one establishing an international régime for a particular area, river or waterway;
- (ii) a treaty of alliance or of military co-operation, other than special agreements concluded under article 43 of the Charter;
- (iii) a treaty for technical co-operation in economic, social, cultural, scientific, communications or any other such matters, unless the treaty is one falling under sub-paragraph (b);
- (iv) a treaty of arbitration, conciliation or judicial settlement.

(b) In the case of a treaty which is the constituent instrument of an international organization, unless the usage of the organization otherwise prescribes, a party shall have the right to withdraw from the treaty and from the organization by giving such notice as the competent organ of the organization, in accordance with its applicable voting procedure, shall decide to be appropriate.

(c) When a treaty is terminable upon notice under sub-paragraph (a) or (b), its duration shall be determined by article 15, paragraphs 3 and 4.

4. A treaty shall continue in force indefinitely with respect to each party where the treaty —

(a) is one establishing a boundary between two States, or effecting a cession of territory or a grant of rights in or over territory;

(b) is one establishing a special international régime for a particular area, territory, river, waterway, or air-space;

(c) is a treaty of peace, a treaty of disarmament, or for the maintenance of peace;

(d) is one effecting a final settlement of an international dispute;

(e) is a general multilateral treaty providing for the codification or progressive development of general international law;

provided always that the treaty does not lack essential validity under any of the provisions of section II of this part, and is not one entered into merely for the purpose of establishing a *modus vivendi*.

5. In the case of any other treaty not covered by paragraphs 2-4, the duration of the treaty shall be governed by the rule in paragraph 4, unless it clearly appears from the nature of the treaty or the circumstances of its conclusion that it was intended to have only a temporary application.

6. Notwithstanding anything contained in the foregoing paragraphs, a treaty which is silent as to its duration or termination but supplements or modifies another treaty shall be of the same duration as the treaty to which it relates.

Commentary

1. Article 17 covers the case of a treaty which neither contains any provision regarding its duration nor regarding the right of the parties to denounce or withdraw from it. This type of treaty is not uncommon, recent examples being the Charter of the United Nations, the four Geneva Conventions on the Law of the Sea, 1958, and the Vienna Convention on Diplomatic Relations, 1961. According to the traditional view, the general rule was that stated in the Declaration of London of 1871:

"[Les Puissances] reconnaissent que c'est un principe essentiel du droit des gens qu'aucune Puissance ne peut se délier des engagements d'un Traité, ni en modifier les stipulations, qu'à la suite de l'assentiment des Parties Contractantes, au moyen d'une entente amicale."

That famous Declaration, which concerned a unilateral denunciation of certain clauses of the peace settlement after the Crimean War, was as much a reassertion of the principle of the unanimity of the Great Powers in European treaty-making as of the principle *pacta sunt servanda*.⁸⁶ Moreover, the treaty which was the subject of the Declaration was of a kind where the intention of the Parties normally is to create a stable settlement not subject to denunciation. Nevertheless, the Declaration was commonly represented as stating the general rule for treaties which are not expressed to have any fixed duration and do not contain any power of denunciation.

2. A large proportion of modern treaties, however, especially multilateral treaties, do contain provisions fixing their duration or providing for a right of denuncia-

⁸⁵ United Nations Treaty Series, vol. 402, p. 71.

⁸⁶ E. C. Hoyt, *The Unanimity Rule in the Revision of Treaties: A Re-examination*, p. 89.

tion or withdrawal; many indeed contain both kinds of provision. As multilateral treaty-making grew in the second half of the nineteenth century, the practice developed of inserting denunciation clauses in treaties dealing with technical matters.⁸⁷ During the present century the insertion of such clauses has become standard practice in multilateral treaties dealing with particular technical, economic, social or cultural matters, one of the few exceptions being the treaty establishing the World Health Organization.⁸⁸ The practice has also spread into bilateral treaties, and it is now almost common form for bilateral treaties dealing with these matters to be made terminable by some form of notice when they are not entered into for a fixed term. Indeed, the majority of the modern treaties which are neither expressed to be for a fixed term nor terminable upon notice are either treaties which establish international régimes for particular areas, rivers, etc., or treaties which have specific objects of limited duration, and are therefore by their very nature finite.

3. Admittedly, the treaty clauses take very varied forms. Some make the treaty terminable immediately upon giving notice; others require six or twelve months' notice; some make the right of termination exercisable from the very outset of the treaty; others make it exercisable only after the expiry of an initial fixed period; others make the treaty automatically renewable for fixed periods and link the right of termination to the expiry of the successive periods; yet others connect the right of termination with the revision of the treaty by majority vote. But, despite the variety of the clauses, it is clearly possible on the basis of the treaty practice to make out a case for the view that a treaty which does not fix its own duration and whose life is not inherently finite by reason of the nature of its objects is regarded by States as one that should in most cases be terminable in some manner and at some stage by unilateral denunciation or withdrawal. The treaty practice, in fact, furnishes a possible basis for implying in certain classes of treaty an intention to allow a right of denunciation or withdrawal, even although the treaty itself is altogether silent upon the point. There is, however, some difference of opinion as to exactly how far international law does or should imply an intention to allow denunciation or withdrawal in treaties which make no provision for it. Clearly, the question only arises where the treaty does not fix a specific period for its duration, because by fixing a period — even a long period — for the duration of the treaty, the parties have impliedly excluded any right to denounce or withdraw from it in the meanwhile. But where no period has been fixed, the question of the right of denunciation or withdrawal is both important and controversial.⁸⁹

⁸⁷ E. C. Hoyt, *op. cit.*, pp. 18-19.

⁸⁸ Universality of membership was regarded as so important in this organization that the normal denunciation clause was omitted. It was, however, conceded in an interpretative "declaration" that if an amendment is made to the WHO Constitution by a majority vote, States in the minority have the right to withdraw. The original ILO Constitution contained no right of withdrawal, but the amended constitution of 1945 now provides for it.

⁸⁹ See, for example, the United Nations Conference on the Law of the Sea, *Official Records*, United Nations publication, Sales No. 58.V.4, vol. II, document A/CONF. 13/38, pp. 19, 56 and 58.

4. The Harvard Research Draft insisted⁹⁰ that "a treaty may be denounced by a party only when such denunciation is provided for in the treaty or consented to by all other parties". It recognized that there was reputable authority for the view that a right of denunciation may sometimes be implied in a treaty and that an increasing number of treaties, both bilateral and multilateral, contained denunciation clauses. Nevertheless, it maintained that the only safe solution was to lay down as the general rule for all treaties that "no State which has bound itself by a treaty may denounce it and withdraw without the consent of the other party or parties, given either in advance in the treaty itself or later in the form of a special agreement". It considered that, unless such consent were necessary, "the rule of *pacta sunt servanda* would have little or no meaning". Support for the view that the principle enunciated in the Declaration of London is still the general rule of international law on the question can certainly be found in State practice; for States in protesting against what they conceived to be illegal denunciations of treaty obligations have not infrequently couched their protests in much the same language as the Declaration of London. On the basis of this practice Rousseau also took the position that denunciation of a treaty is only legitimate when effected under a power conferred by the treaty or with the consent of the other parties. The State practice in question, however, very largely relates to treaties intended to establish permanent settlements, and as often as not to peace treaties. The denouncing State was usually claiming to release itself from the treaty in these cases on such grounds as *rebus sic stantibus* breaches by the other parties, or the fact that the treaty had been imposed upon it. It was not claiming an implied right derived from the nature of the treaty and the general practice in regard to such treaties.

5. A number of other authorities,⁹¹ while upholding as the general rule the traditional doctrine that denunciation is only permissible if the right has been expressly granted in the treaty, recognize that the right may reasonably be implied in certain types of treaty. One well-known textbook,⁹² indeed, seems almost to hold that the general rule is that all treaties may be dissolved by withdrawal after notice by one of the parties, "provided that they are not such as are concluded for ever"; and the same book maintains that "all such treaties as are either not expressly concluded for ever, or are apparently not intended to set up an ever-lasting condition of things" may be dissolved after notice, even although they do not expressly provide for the possibility of withdrawal. It also lists, as examples of such treaties, "commercial treaties" and "treaties of alliance not concluded for fixed periods", while excluding, on the other hand, from this class "treaties of peace" and "boundary treaties". The most recent textbook on the law of treaties,⁹³ on the other hand, maintains that "there is a general presumption against the existence of any right of unilateral termination of a treaty", and appears only to admit "commercial treaties" as an exception to that presumption.

⁹⁰ Article 34, pp. 1173-1183.

⁹¹ See Hall, *International Law*, 8th edition, p. 405; Oppenheim, *International Law*, 8th edition, Vol. 1, p. 938; McNair, *Law of Treaties*, pp. 501-5.

⁹² Oppenheim, *loc. cit.*

⁹³ McNair, *op. cit.*, pp. 493 and 504.

6. The previous Special Rapporteur (A/CN.4/107, article 4, case A (ii)) considered that, in the absence of any provision in the treaty, it is to be assumed that the treaty is intended to be of indefinite duration and only terminable by mutual agreement of all the parties. But he also conceded that there are some exceptions which he formulated as follows.

"This assumption, however, may be negated in any case (a) by necessary inference to be derived from the terms of the treaty generally, indicating its expiry in certain events, or an intention to permit unilateral termination or withdrawal; (b) should the treaty belong to a class in respect of which, *ex natura*, a faculty of unilateral termination or withdrawal must be deemed to exist for the parties if the contrary is not indicated . . . such as treaties of alliance, or treaties of a commercial character."

In his commentary he explained that his exception (a) covered cases where some general inference as to duration may be drawn from the treaty as a whole by considering the nature of the obligation; e.g., the parties agree to take certain action "during the following year", or so long as certain conditions continue, etc. As to the exceptions under (b), he said: "It is generally thought that there are certain sorts of treaties which, unless entered into for a fixed and stated period or expressed to be in perpetuity, are by their nature such that any of the parties to them must have an implied right to bring them to an end or to withdraw from them". Citing "treaties of alliance" and "commercial or trading agreements" as instances of treaties where a right of termination may be implied, he insisted that this exception only extends to "treaties whose very nature imposes such an implication as a necessary characteristic of the type of obligation involved." He did not, in this connexion, make any distinction between bilateral and general multilateral treaties, or make any special mention of technical conventions.

7. A recent study⁹⁴ of the revision and termination of "traités collectifs" examines the special case of general multilateral treaties which do not provide for their duration or termination. The author of this study advances the view that, in the absence of a provision regarding denunciation, any general multilateral treaty may be denounced at any moment. "Cette opinion", he explains, "est fondée sur la considération du caractère de ces conventions qui sont législatives par la nature de leur contenu et contractuelles par leur mode de formation. Refuser aux parties le droit de dénoncer les conventions générales pour lesquelles la convention elle-même n'a pas fixé un terme, ce serait reconnaître à la convention un caractère de perpétuité à laquelle raisonnablement elle ne saurait prétendre." He then draws a distinction between "perpetual treaties" and treaties of unlimited or indefinite duration, and emphasizes that "un régime de droit n'est jamais perpétuel". This argument does not seem by itself to be convincing, since even a so-called "permanent" treaty is terminable by subsequent agreement, and the real point is whether the process for terminating obligations under a "legislative" treaty should be a unilateral act or a collective decision, whether unanimous or by majority.

8. On this point the same writer advances considerations of policy in favour of a general right to denounce multilateral treaties which raise large issues:

"La participation aux conventions générales, est essentiellement volontaire. Nul Etat n'est obligé d'y devenir partie. Logiquement, si les Etats ne sont pas obligés d'entrer, ils ne doivent pas être empêchés de sortir.

"Pratiquement, il n'y a aucun avantage à faire des conventions générales qui sont fondamentalement volontaires et libres des sortes de prison dans lesquelles une fois entré il ne serait plus possible de sortir. Les Etats sachant qu'ils peuvent régulièrement se dégager au bout d'un temps relativement bref hésiteront beaucoup moins à s'engager. En fait, les dénonciations ne sont pas très fréquentes, l'inertie jouant en faveur des situations existantes, mais la faculté de dénonciation qu'on pourrait utiliser, quoiqu'on n'utilise généralement pas, apaise les inquiétudes."

He went on to argue that a State which finds itself thwarted by a general convention is unlikely to apply it loyally and that it is preferable that it should be able to release itself from the convention. Violations of international law only weaken its authority, while if one State does denounce a general convention, the convention normally goes on being applied as if the State in question had never been a party. He concludes by suggesting that the best way of achieving stability in treaty relations is to include a denunciation clause in every general multilateral treaty and always to imply one in cases where it has been omitted; for a denunciation clause serves to some extent to control States in denouncing treaties and to check them from doing so too precipitately.

9. The insertion of denunciation clauses in general multilateral treaties was discussed at the Geneva Conference on the Law of the Sea in the context both of codifying conventions and of conventions making new law.⁹⁵ As already mentioned, none of the four Conventions prepared by that conference contains a denunciation clause. They only provide that after five years from the date of their entry into force any party may at any time request the revision of the Convention, and that it will be for the General Assembly to decide upon the steps, if any, to be taken in respect of the request. The Drafting Committee, in putting forward this revision clause, observed that its inclusion "made unnecessary any clause on denunciation". Proposals had previously been made for the inclusion of a denunciation clause and these were renewed in the plenary meeting, notwithstanding the view of the Drafting Committee. Some representatives thought it wholly inconsistent with the nature of a codifying convention to allow denunciation; some thought that a right of denunciation existed anyhow under customary law; others considered it desirable to provide expressly for denunciation in order to take account of possible changes of circumstances. The proposal to include the clause in the "codifying" convention was rejected by 32 votes to 12, with 23 abstentions. A similar proposal was also made with reference to the Fishing and Conservation Convention which formulated entirely new law. Here, opponents of the clause argued

⁹⁴ E. Giraud, *op. cit.*, pp. 66-77.

⁹⁵ See United Nations Conference on the Law of the Sea, *Official Records*, vol. II, pp. 19, 56 and 58.

that a right of denunciation would be out of place in a Convention which created new law and was the result of negotiation. Advocates of the clause, on the other hand, regarded the very fact that the Convention created new law as justifying and indeed requiring the inclusion of a right of denunciation. Again, the proposal was rejected, the vote being 25 in favour and 6 against, with no fewer than 35 abstentions. If the record of the discussions shows some uncertainty and difference of opinion as to the general legal position in regard to the right to denounce general multilateral treaties, the fact remains that this Conference considered and rejected a proposal to include a denunciation clause in these four Conventions. Moreover, the Vienna Conference of 1961 seems to have omitted the clause from the Convention on Diplomatic Relations almost without discussion; and the Vienna Convention, it may be added, is one which does not contain a revision clause.

10. Confronted with the conflicting opinions of jurists and with the large volume of State practice in which certain types of treaty are made terminable upon notice, the Special Rapporteur thinks it doubtful how far it can be said today to be a general rule or presumption that a treaty which contains no provision on the matter is terminable only by mutual agreement of all the parties. In principle, the question is one of the intention of the parties in each case, for the parties are certainly free, as and when they wish, to make their treaty terminable upon notice. There is, however, some tendency to confuse the question of the right of a party to denounce a treaty, under the treaty itself, with the question of the observance of the fundamental rule of *pacta sunt servanda*. No doubt, the questions are not unconnected, but the application of the *pacta sunt servanda* rule is dependent upon the terms of the "*pactum*" under consideration, and the question whether or not the parties intended the treaty to be terminable upon notice is one which necessarily arises prior to, and independently of, the application of the *pacta sunt servanda* rule. If the proper conclusion is that, by reason of the nature and circumstances of the treaty, the parties must be assumed to have intended it to be subject to denunciation upon reasonable notice, a denunciation so effected is in conformity, not in contradiction, with the *pacta sunt servanda* rule. There is also some tendency to confuse the right to denounce a treaty under the treaty itself with the right of a State to claim release from its treaty obligations by reason of a fundamental change in the circumstances. Here again there is a connexion between the two questions, because where there is a right of denunciation upon reasonable notice, the exercise of that right would be the natural way for a State to effect its release from a treaty which it considers to have become outdated by changes in the circumstances. But there is a material difference between a right implied in a treaty to terminate it at will upon reasonable notice without showing cause and a right to claim release from it by establishing such a change in the circumstances as brings the case under the provisions of article 22. It is only the former right which is in issue in the present article.

11. If it be accepted that the question is essentially one of the intention of the parties, the problem still remains as to the principles upon which that intention is to be determined. Clearly, one possible view might

be that, whenever the parties do not make the treaty terminable on notice as they are free to do, they must be presumed not to have intended that it should be so terminable. In other words, failure to include a denunciation clause would raise a presumption in every case that the treaty is intended to be terminable only by mutual agreement. There would then be a general rule — derived not from the rule *pacta sunt servanda*, but from the apparent intention of the parties — that in the absence of any provision making it terminable on notice, a treaty is only terminable by mutual agreement. That presumption undoubtedly operates in certain classes of case. It may even, perhaps, be the ultimate general rule.⁹⁶ But, in the opinion of the Special Rapporteur, it is today, at most, a residuary rule; for there are very large and important classes of treaty where States so usually include a right of denunciation that the presumption must be the other way. The true position today seems to be that there are certain classes of treaty where by reason of the nature of the treaty the presumption is against a right of denunciation and also certain classes where by reason of the nature of the treaty it is in favour of such a right. If any treaty falls outside these classes, it may be that the residuary rule applies. But the real difficulty is to define the different categories of treaty where the presumption in favour of a right of denunciation does or does not apply.

12. Paragraph 1, like paragraph 1 of article 15, is of an introductory character, to define the cases with which the article is concerned.

13. Paragraph 2 covers treaties which are inherently finite by reason of the nature of their purposes. As already mentioned in paragraph 2 of this Commentary, the majority of treaties concluded today which contain no provision either for their duration or termination are treaties whose purposes are of a transient character and whose duration is therefore limited by their purposes. These treaties do not normally contain denunciation clauses for the reason that they are intended to continue in force only until their purposes are discharged, when the treaty will die a natural death. Accordingly, in these cases the limited duration of the purposes, like a provision fixing a specific term to the treaty, raises a presumption against the parties' having intended to allow denunciation upon notice. Obvious examples would be an agreement to arbitrate a particular dispute or to co-operate on a particular occasion or in the performance of a particular task. The text of the paragraph states that the treaty will continue in force until "devoid of purpose", because it may come to an end through the failure as well as through the fulfilment of its purposes.

14. Paragraph 3 (a) sets out four classes of case in which the nature of the treaty appears to raise a presumption that it is to be regarded as essentially of a limited duration; and it proposes that these treaties should be considered to be terminable upon giving twelve month's notice. No distinction has been made in these cases between bilateral, multilateral or general multilateral treaties; for State practice does not appear to support the theory that all multilateral treaties are to be regarded as terminable upon notice (see

⁹⁶ Such clearly is the view of the previous Special Rapporteur and of Lord McNair.

paragraph 8 above). If the great majority of multilateral conventions on technical matters contain an express provision rendering them terminable upon notice, the reason seems to be rather the nature of the matters with which they deal than the fact that they are "*traités collectifs*". Precisely the same type of provision is very often to be found in bilateral treaties dealing with the same matters, while the deliberate omission of a denunciation clause from the Geneva and Vienna Conventions is scarcely consistent with the existence of a presumption that such a clause is to be read into every multilateral treaty. Moreover, some multilateral treaties establishing permanent international régimes (see paragraph 22 below) are clearly not inherently terminable upon notice.

15. Commercial or trading treaties are listed in sub-paragraph 3 (a) (i) as the first category of the cases which are impliedly terminable by notice when the treaty is silent upon the question. A number of authorities⁹⁷ support the view that these treaties are by their nature of limited duration and that, in consequence, they are to be regarded as terminable upon giving reasonable notice, if the parties have failed to fix their duration in the treaty itself. On the other hand, a treaty which is intended to establish an international régime of an economic kind for a particular area, river system, or waterway is quite a different matter. There the intention is normally to set up a continuing — "permanent" — régime, and the presumption is against the parties' having intended the régime to be terminable by unilateral denunciation.⁹⁸ These cases fall under paragraph 5.

16. Treaties of alliance or military co-operation, which are covered in sub-paragraph 3 (a) (ii), are another category where the treaty is commonly considered by its nature to be terminable⁹⁹ unless the contrary is expressly provided. Although the point may appear somewhat academic at the present moment, it seems proper to exclude from this category "special agreements" concluded between Members of the United Nations and the Security Council under Article 43 of the Charter, should any such come into existence.

17. Sub-paragraph 3 (a) (iii) brings under the same rule treaties of technical co-operation, as being treaties which, under the existing practice, are habitually entered into for limited terms or made subject to denunciation. In most cases these treaties are entered into for recurring periods of three, five or ten years, with a right to denounce at the end of each period, or they are entered into for a fixed period, with a provision that they shall continue in force thereafter unless twelve (or six) months' notice of denunciation is given. Again, in some cases they are entered into "indefinitely" subject to denunciation at any time upon giving a specified period of notice. The same is largely true of the constituent instruments of international organizations which deal with matters of technical co-operation; but for the reason given in paragraph 20 it seems advisable to make a separate category of treaties which

are the constituent instruments of international organizations.

18. In sub-paragraph 3 (a) (iv) the Special Rapporteur has thought it right also to bring under this rule, however reluctantly, treaties of arbitration, conciliation or judicial settlement. It is only necessary to look at the texts of the large number of such treaties collected in the United Nations publication "*Systematic Survey of Treaties for the Pacific Settlement of International Disputes, 1928-48*"¹⁰⁰ to see how almost invariably they are concluded either for a fixed term or for renewable terms subject to a right of denunciation, or are made terminable upon notice. One of the very few exceptions out of over 200 treaties is the Treaty of Peace, Friendship and Arbitration of 1929 between Haiti and the Dominican Republic, which contains no provision regarding its duration or termination.¹⁰¹ If the proportion of instruments containing no provision regarding their duration or termination is somewhat greater among declarations under the "optional clause" of the Statute of the International Court of Justice (or of the Permanent Court), the general picture is the same. Out of the thirty-seven declarations listed in the Court's Yearbook for 1961-2, eight contain no statement as to their duration or termination, and all the others are made for a limited period or made terminable upon notice. It is true that in 1938, when Paraguay, which then had a declaration of this kind, denounced it in a letter to the Secretary-General, six States¹⁰² made reservations with regard to the denunciation; and that the Paraguayan declaration was retained in the list of optional clause acceptances in the Yearbook of the Court until the year 1959-60, though with an explanatory footnote mentioning the reservations. But the declaration has now been removed from the list, while Liberia proceeded in 1952 to replace her previously unlimited declaration with a new declaration for a fixed term, without meeting with any objection from any State. Moreover, even before the Paraguayan denunciation, Colombia had "corrected" in 1937 an unlimited and unconditional declaration of 1932 by restricting it to disputes arising out of facts subsequent to 6 January 1932. Taken as a whole, State practice under the optional clause, and especially the modern trend towards Declarations terminable upon notice, seem only to reinforce the clear conclusion to be drawn from treaties of arbitration, conciliation and judicial settlement, that these treaties are regarded as essentially of a terminable character. Regrettable though this conclusion may be, it seems that this type of treaty ought, in principle, to be included in paragraph 3.

19. The period of notice suggested in sub-paragraph 3 (a) is twelve months. An alternative would be to say simply "reasonable" notice; but as the whole purpose of paragraph 3 is to clarify the position where the parties have failed to deal with the duration of the treaty, it seems better to propose a definite period of notice. A period of six months' notice is sometimes found in termination clauses, but this is usually where

⁹⁷ e.g. Hall, *op. cit.*, p. 405; Oppenheim, *op. cit.*, vol. I, p. 938; McNair, *op. cit.*, p. 504; Sir G. Fitzmaurice, second report (A/CN.4/107), *loc. cit.*

⁹⁸ See McNair, *op. cit.*, p. 505.

⁹⁹ See, for example, Oppenheim, *loc. cit.*, and Sir G. Fitzmaurice, *loc. cit.*

¹⁰⁰ United Nations publication, Sales No. 1949.V.3; see pp. 331-1175; and for an analysis of the termination clauses, see pp. 316-327.

¹⁰¹ *Ibid.*, p. 530.

¹⁰² All these States had themselves Declarations which were for limited terms.

the treaty is of the renewable type and is open to denunciation by a notice given before or at the time of renewal. Where the treaty is to continue indefinitely subject to a right of denunciation, the period of notice is more usually twelve months, though in some cases the denunciation takes effect at once. In formulating a general rule, it seems preferable to lay down a longer rather than a shorter period in order to protect the interests of the other parties to the treaty and to give a reasonable stability to the relations set up by the varying kinds of treaty.

20. Constituent instruments of international organizations are listed in sub-paragraph 3 (b) as a third category of treaties impliedly terminable upon notice. Nearly all treaties of this kind deal expressly with the right to denounce the treaty or to withdraw from the organization, and in various ways seek to regulate the exercise of the right. Amongst the exceptions are the well-known cases of the United Nations and the World Health Organization; but these cases serve to confirm rather than to negative the existence of a general presumption in favour of a right of withdrawal in this class of treaty. At San Francisco, although differing views were expressed during the discussion, the Conference ultimately agreed that a Member of the United Nations must be free in the last resort to withdraw from the Organization. While omitting any denunciation or withdrawal clause from the Charter for psychological reasons, the Conference adopted an "interpretative declaration" which included the following passage:¹⁰³

"The Committee adopts the view that the Charter should not make express provision either to permit or to prohibit withdrawal from the Organization. The Committee deems that the highest duty of the nations which will become Members is to continue their co-operation within the Organization for the preservation of international peace and security. If, however, a Member because of exceptional circumstances feels constrained to withdraw, and leave the burden of maintaining international peace and security on the other Members, it is not the purpose of the Organization to compel that Member to continue its co-operation in the Organization."

The draftsmen of the Constitution of WHO, by reason of the world-wide character of the struggle against disease, placed great emphasis on the need for the organization to be completely universal and, as in the case of the Charter, deliberately omitted any withdrawal clause. However, when a majority procedure was introduced into the Constitution for adopting amendments to it, it was agreed that States which felt unable to accept amendments so adopted ought to be free to withdraw. Accordingly, the WHO Conference also drew up an interpretative declaration in the following terms:¹⁰⁴

"A member is not bound to remain in the Organization if its rights and obligations as such were changed by an amendment of the Constitution in which it has not concurred and which it finds itself unable to accept."

One State¹⁰⁵ was allowed to make a reservation arrogating to itself a general right of withdrawal outside the terms of the declaration; but when another State¹⁰⁶ withdrew from the organization for a period, it was treated as a suspension rather than as a withdrawal of membership. The general understanding in the usage of WHO seems to be that withdrawal is not admissible except under the conditions specified in the declaration. But the position is exceptional, and based upon the particular need of universality in the work of the organization. Sub-paragraph 3 (b) seeks to cover such an exceptional position by excluding cases where there is a contrary usage in a particular organization. As to the period of notice in these cases, the treaties which contain denunciation or withdrawal clauses not infrequently specify twelve months. But it seemed better — in order to avoid any suggestion of amending the Charter or the constitution of any other organization — simply to specify such notice as the competent organ of the organization, in accordance with its applicable voting procedure, shall decide to be reasonable. It is for this reason that the constituent treaties of international organizations have been separated from the treaties in sub-paragraph 3 (c) (iii).

21. Sub-paragraph 3 (c) merely states that when a treaty is, by implication, terminable by notice under sub-paragraphs (a) and (b), its duration will be determined on the same principles as those set out in article 15, paragraphs 3 and 4, for treaties which the parties have expressly made terminable by notice.

22. Paragraph 4 lists five types of treaty in which the intention of the parties must be presumed to be to establish a permanent treaty régime, in the sense of a régime which will continue indefinitely until revised or terminated by subsequent agreement. It is with regard to these types of treaty that most of the major controversies have arisen in the past concerning the unilateral denunciation of treaties. In these controversies the denouncing State has almost invariably invoked some alleged legal ground for setting aside the treaty — error, coercion, or fundamental change of circumstances; and by doing so has implicitly acknowledged the intrinsically "permanent" character of the treaty. Since it is in connexion with these types of treaty that the question of essential validity is most often raised, it has been thought appropriate to reserve the question of essential validity explicitly in a proviso to the present paragraph. The question of a fundamental change of circumstances — the doctrine of *rebus sic stantibus* — is already reserved by the opening words of paragraph 1 of this article. Mention is also made in the proviso of an exception in the case of a *modus vivendi*, because it is quite possible for a boundary or an "international regime" to be the subject of a *modus vivendi*; but the provisional character of the instrument will then normally be apparent from the terms of the treaty.

23. Paragraph 5 provides a residuary rule to catch treaties that do not fall within paragraphs 2-4. More from respect for the authorities than from any deep conviction, the Special Rapporteur has taken as the basic residuary rule the presumption that in other cases a

¹⁰³ UNCIO, *Documents*, vol. VII, pp. 262-267; 327-329; Vol. VI, pp. 163-6; Vol. I, pp. 616-620.

¹⁰⁴ WHO *Official Records* (1946), No. 2, p. 74.

¹⁰⁵ O. Schachter, "The Development of International Law through the Legal Opinions of the United Nations Secretariat", *British Yearbook of International Law*, 1948, p. 125.

¹⁰⁶ WHO *Official Records* (1949), No. 17, p. 52.

treaty is terminable only by subsequent agreement of the parties. Outside the "permanent" types of treaty dealt with in paragraph 4, modern treaty practice does not furnish much evidence of a general intention on the part of States to enter into treaties which are to continue in force indefinitely unless terminated by agreement. On the contrary, in a rapidly changing world the tendency, as already mentioned, seems rather to be to fix a definite period for the duration of the treaty or, by various types of clause, to provide for its indefinite continuance subject to a right of denunciation under conditions fixed in the treaty.¹⁰⁷ Accordingly, a case can equally well be made out for formulating the residuary rule in the reverse way. If the rule is stated in the traditional way, it seems essential to qualify it by excepting cases where a contrary intention appears from the nature of the treaty, e.g. a *modus vivendi*, or from the circumstances of the conclusion of the treaty.

24. Finally, paragraph 6 seeks to cover the quite common case of a protocol, exchange of notes or other such treaty which adds to or varies an existing treaty. These instruments usually make no mention of their own duration, and the intention clearly is that they should simply be regarded as an annex to the original treaty.

Article 18—Termination of a treaty by subsequent agreement

1. Notwithstanding articles 15-17, a treaty may be terminated at any time —

(a) in the case of a treaty drawn up at an international conference convened by the States concerned or by an international organization, by the agreement of not less than two-thirds of the States which drew up the treaty, including all those which have become parties to the treaty, provided that, if X years have elapsed since the date of the adoption of the treaty, only the agreement of the States parties to the treaty shall be necessary;

(b) in the case of a treaty drawn up within an international organization, by a decision of the competent organ of the organization in question, adopted in accordance with the applicable voting rule of such organ;

(c) in other cases, by the mutual agreement of the parties.

2. However, where a treaty prescribes a specific procedure for its amendment or revision, such procedure shall, so far as is appropriate, also be applied for the purpose of effecting its termination.

3. An agreement terminating a treaty under sub-paragraphs (a) or (c) of paragraph 1 may be embodied —

(a) in a new treaty drawn up in whatever form the parties may decide;

(b) in communications made by the parties to the depositary of the treaty or to each other;

(c) in a tacit agreement, where one party has proposed the termination of the treaty or purported to denounce it, and it clearly appears from the circumstances that the other party or parties assented to such termination or denunciation of the treaty.

4. (a) If a depositary receives from a party to the treaty either a proposal for its termination or a request to withdraw from it, the depositary —

(i) in a case falling under sub-paragraphs 1 (a) and 1 (c), shall communicate such proposal to the States whose agreement is specified in those sub-paragraphs as being material;

(ii) in a case falling under sub-paragraph 1 (b), shall bring such proposal or request, as soon as possible, before the competent organ of the organization in question.

(b) The agreement of a State to which a proposal or request has been communicated under sub-paragraph 3 (a) (i) shall be presumed after the expiry of twelve months from the date of the communication, if it has not notified the Depositary of its objection to the proposal or request.

5. The provisions of the foregoing paragraphs regarding the termination of treaties by subsequent agreement shall also apply, *mutatis mutandis*, to their suspension by subsequent agreement.

Commentary

1. Where the treaty itself provides for an express right of denunciation, or where such a right is to be implied under article 17, the termination of the treaty is unlikely to give rise to any problem. Where, however, there is no such right, serious difficulties may arise. In the past, the termination of treaty obligations has too often taken the form of a unilateral and disputed assertion of a right to denounce the treaty. Particular importance attaches therefore to providing orderly procedures by which, when there are good reasons for doing so, States may seek to secure the termination or suspension of their treaty obligations by some form of agreement. Even when a party conceives itself to have a right to terminate the treaty on some specific ground, it is extremely desirable that it should seek if possible to bring about the termination of the treaty by consent rather than by a unilateral assertion of its supposed right.

2. The process of terminating has some analogy with that of creating a treaty régime. But the legal situation is more complex in that the parties to a treaty have vested rights in the treaty itself of which they will be deprived by its termination; and it is a strongly entrenched principle of international law that a treaty cannot by itself deprive third States of their rights under a prior treaty. Admittedly, it is possible to question whether the application of this principle to general multilateral treaties is entirely desirable, since it may impede the replacement of an out-of-date treaty by a new treaty. But there is always the danger that, from sheer inertia, some parties to an older treaty may fail to become parties to a more recent one; and the principle precluding even general multilateral treaties from affecting the position of non-parties under earlier treaties serves to keep alive some treaty obligations which might otherwise lapse. Accordingly, although the result may be to complicate treaty relationships and to impede the replacement of out-of-date treaties, it is necessary to be cautious in proposing, even *de lege ferenda*, rules permitting the termination of treaties by any form of majority decision, such as the Commission has proposed in article 6 of part I for the adoption of a treaty text.

¹⁰⁷ Consular Conventions, for example, are frequently made terminable upon notice.

Paragraph 1 therefore sets out the main rules for the termination of treaties in three sub-paragraphs, on the same pattern as the rules proposed by the Commission in article 6 of part I for the adoption of the text, but making the consent of all the parties to the treaty the general rule except in the case of a treaty actually drawn up within an international organization.

3. Sub-paragraph 1 (a) covers multilateral treaties drawn up at international conferences convened either by the States themselves or by an international organization. For the reason already given, it seems necessary to lay down that the termination of a multilateral treaty, in principle, requires the consent of all the States parties to the treaty. But in the case of multilateral treaties, and especially general multilateral treaties, it also seems necessary to take account of the interests of States which participated in the adoption of the text but have not yet become parties to the treaty owing to a delay in signing, ratifying, accepting, approving or acceding to the treaty. These States, by the terms of the treaty itself, are entitled to become parties to the treaty by performing the required act; and for at least some reasonable period of time it ought not to be open to the States which have already become parties — perhaps only two or a very few States — to deprive them of this right.¹⁰⁸ Accordingly, without attempting to fix the exact period, sub-paragraph 1 (a) provides that for a period of X years the termination of the treaty requires the consent of two-thirds of all the States which drew up the treaty, including all those which are actual parties. In formulating analogous provisions in part I, the Commission preferred to leave the length of the period undefined, until the views of Governments have been obtained. A period of the order of ten years is what the Special Rapporteur envisages.

4. Sub-paragraph 1 (b) covers the case of treaties, like the Genocide Convention and the Convention on the Political Rights of Women, which are drawn up actually within an international organization. Admittedly, treaties of this type, when drawn up, are opened to signature, ratification, acceptance, etc., and States become parties to them in the normal way. It is therefore arguable that they should be dealt with in the same way as treaties drawn up at a conference. Nevertheless, when a treaty has been drafted within an organization and then adopted by a resolution of one of its organs, there is a case for saying that the organization has an interest in the treaty and that its termination should be a matter for the organization. Accordingly, although it may involve some derogation from the normal principle that a State cannot be deprived of its rights under a treaty without its consent, it seems justifiable to propose that the termination of the treaty should be a matter for the organization. The genesis of the treaty in a decision of the organization is known to States when they become parties, and it seems reasonable to assume that they recognize the association of the organization with the treaty.

5. Sub-paragraph 1 (c) states the general rule for bilateral treaties and for other treaties not falling under sub-paragraphs 1 (a) and (b); the termination of the treaty requires the unanimous consent of the parties.

6. Paragraph 2 proposes, *de lege ferenda*, that where a treaty lays down a specific procedure for the amendment or revision of a treaty, the same procedure shall, so far as is appropriate, be applied for effecting its termination. It seems only logical that, where the parties have selected a particular means of bringing about the alteration of the treaty, they should be assumed to intend the same means to be employed for the even more fundamental step of terminating it.

7. Paragraph 3 provides that a subsequent agreement to terminate a treaty may take the form either of a new treaty or of notifications to the depositary of the treaty which is to be terminated. It is sometimes said that the subsequent agreement must be cast in the same form as the treaty which is to be terminated, or at least be a treaty form of "equal weight". This view has, for example, been expressed by the United States,¹⁰⁹ but it reflects the constitutional practice of individual States, not a general rule of treaty law. It is always for the States concerned themselves to select the appropriate instrument or procedure for bringing a treaty to an end and, in doing so, they will no doubt have in mind their own constitutional requirements. Paragraph 3 further records that the termination of a treaty may also come about through a tacit agreement. Whether in any given case the process is that of "estoppel" or "subsequent agreement" may not always be clear. But the general view seems to be that tacit agreement may be enough to terminate a treaty.¹¹⁰

8. Paragraph 4 (a) is essentially procedural, indicating the action to be taken by a depositary on receiving a notification from a party proposing the termination of the treaty. Then, in order that the procedure for terminating treaties by consent through the machinery of a depositary should not be frustrated through the mere inertia of individual States in responding to a proposal, paragraph 4 (b) proposes that the assent of a State should be presumed after the expiry of twelve months (a similar presumption was adopted by the Commission in article 19 of part I in connexion with the acceptance of reservations).

9. Where the reasons which cause the parties to want to release themselves from the obligations of a treaty are of a temporary character, it may happen that they prefer to suspend rather than terminate the treaty. In that event the same principles would seem to be applicable, and paragraph 5 so provides.

Article 19 — Implied termination by entering into a subsequent treaty

1. Where all the parties to a treaty, either with or without third States, enter into a new treaty relating to the same subject-matter, without expressly abrogating the earlier treaty, the earlier treaty shall nevertheless be considered to be impliedly terminated —

(a) when the parties to the later treaty have manifested an intention that the whole matter should thereafter be governed by the later treaty; or

(b) when the provisions of the later treaty are so far

¹⁰⁸ Quite a number of multilateral conventions come into force upon only two or a very small number of signatures, ratifications, etc.

¹⁰⁹ See an observation of the United States delegate at the 49th meeting of the Social Committee of the Economic and Social Council (E/AC.7/SR.49, p. 8), to which Sir G. Fitzmaurice drew attention.

¹¹⁰ See Sir G. Fitzmaurice's second report (A/CN.4/107), articles 12 and 14.

incompatible with those of the earlier one that the two treaties are not capable of being applied at the same time;

unless in either case it appears from the circumstances that the later treaty was intended only to suspend the operation of the earlier treaty for a limited period of time.

2. (a) If two parties or a number of the parties to a treaty, either with or without third States, enter into a new treaty relating to the same subject-matter, without expressly abrogating the earlier treaty, the application of the earlier treaty shall nevertheless be considered to be impliedly terminated as between the States which are parties to both treaties in the same circumstances as those set out in paragraph 1.

(b) However, the fact that the application of the earlier treaty is so terminated as between those of its parties which are also parties to the later treaty shall not affect its application either as between the States which are parties only to the earlier treaty or as between any such State and a State which is a party to both treaties.

3. When the termination of a treaty takes place by implication under the preceding paragraphs, the date of its termination shall be the date upon which the later treaty comes into force, unless the later treaty shall otherwise provide.

Commentary

1. This article covers, from the different standpoint of the termination of treaties, the cases of conflict between treaties which are the subject of article 14. It was pointed out in the Commentary to that article that, where there are two successive treaties on the same subject, the parties to which are identical, the States concerned, when they conclude the second treaty, are fully competent to amend or annul the prior treaty; and that the effect of the second treaty upon the prior treaty is essentially a question of what the contracting States intend when they conclude the second treaty. They may intend simply to supplement the earlier treaty or to revise it, or they may intend that the second treaty should replace it completely.

2. Paragraph 1 of the present article seeks to define the conditions under which the parties to a treaty are to be understood as having intended to terminate it by concluding a later treaty the parties to which are identical. The wording of the two clauses in paragraph 1 is based upon the treatment of the matter in the separate opinion of Judge Anzilotti in the *Electricity Company of Sofia* case,¹¹¹ where he said:

"There was no express abrogation. But it is generally agreed that, beside express abrogation, there is also tacit abrogation resulting from the fact that the new provisions are incompatible with the previous provisions, or that the whole matter which formed the subject of these latter is henceforward governed by the new provisions."

The Court in that case differed from Judge Anzilotti in thinking that there was no incompatibility between the two instruments by which the parties had accepted compulsory jurisdiction. Nevertheless, the passage cited from Judge Anzilotti's opinion provides what is thought to be a useful formulation of the criteria for determining

whether or not a second instrument abrogates a prior instrument dealing with the same subject-matter.

3. In the same opinion Judge Anzilotti held that the Belgian and Bulgarian declarations under the optional clause, although in his view incompatible with an earlier Belgo-Bulgarian Treaty of Conciliation, had not abrogated it because the Treaty was of indefinite duration, whereas the declarations were for limited terms of years. Without in any way questioning the correctness of that finding in the particular context of the treaty and the two declarations in that case, it may be doubted whether it can be said to be a general principle that a later treaty for a fixed term can never abrogate an earlier treaty expressed to have a longer or indefinite duration. It depends entirely upon the intention of the States in concluding the second treaty. If their intention apparently was that the whole matter should afterwards be governed by the new treaty, it seems unwarranted to assume that they intended the earlier treaty to revive, on the expiry of the new treaty. It seems more likely that what they had in mind was a need to review the situation after the end of the second treaty. Paragraph 1 merely provides, therefore, that abrogation shall not occur if it is clear from the circumstances that the later treaty was intended to replace the earlier one only temporarily.

4. Paragraph 2 deals with the same general problem, but in cases where the parties to the second treaty do not include all the parties to the first treaty. Here the principle that a treaty cannot by itself deprive non-parties of their rights, whether under general international law or under a prior treaty, comes into play; and, as pointed out in the Commentary to article 14, some authorities for that reason call in question the very validity of the second treaty. The rule proposed in article 14 accepts the validity of the second treaty, despite its conflict with the prior treaty; and on that basis the second treaty is effective in the relations between the States which are parties to it. Accordingly the problem arises as to whether in this type of case also the second treaty terminates the earlier one. As between the States which are parties to both treaties, the question is again essentially one of their intention when concluding the second treaty, and the rules laid down in paragraph 1 would seem to be equally applicable. Sub-paragraph (a) so provides. But these rules are only relevant for determining the position of the States which are parties to both treaties, because they are only competent to terminate the application of the earlier treaty as between themselves, and cannot dispose of the rights of the other parties to the earlier treaty. Accordingly, sub-paragraph (b) preserves the earlier treaty in being (1) as between the States which are parties only to the earlier treaty and (2) as between any of those States and a State party to both treaties.

5. Paragraph 3 simply provides that the date on which the implied termination of the earlier treaty takes place is the date on which the second treaty comes into force, unless the second treaty otherwise provides.

Article 20 — Termination or suspension of a treaty following upon its breach

1. (a) The breach of a treaty by one party does not of itself have the effect of terminating the treaty or of suspending its operation.

¹¹¹ P.C.I.J. Series A/B, No. 77, p. 92.

(b) Under the conditions set out in the following paragraphs of this article, however, a material breach of a treaty by one party entitles the other party or parties to denounce or withdraw from the treaty or to suspend, in whole or in part, its operation.

2. A material breach of a treaty results from —

(a) a repudiation of the treaty by a representative or organ of the State competent to express the will of the State to denounce the treaty;

(b) a breach so substantial as to be tantamount to setting aside any provision —

(i) with regard to which the making of reservations is expressly prohibited or impliedly excluded under article 18, paragraph 1 (a), (b) and (c) of part I; or

(ii) the failure to perform which is not compatible with the effective fulfilment of the object and purpose of the treaty;

(c) a refusal to implement a provision of the treaty binding upon all the parties and requiring the submission of any dispute arising out of the interpretation or application of the treaty to arbitration or judicial settlement, or a refusal to accept an award or judgement rendered under such a provision.

3. In the case of a bilateral treaty, a material breach by one party constitutes a ground upon which the other party may either —

(a) denounce the treaty or suspend its operation, subject to the reservation of its rights with respect to any loss or damage resulting from the breach; or

(b) denounce only the provision of the treaty which has been broken or suspend its operation, subject to the same reservation.

4. In the case of a multilateral treaty other than one falling under paragraph 5, a material breach by one party constitutes a ground upon which —

(a) any other party may, in the relations between itself and the defaulting State, either —

(i) terminate or suspend the application of the treaty, subject to the reservation of its rights mentioned in paragraph 3; or

(ii) terminate or suspend the application only of the provision of the treaty which has been broken, subject to the same reservation;

(b) the other parties to the treaty, by an agreement arrived at in accordance with the provisions of article 18 of this part, may collectively either —

(i) terminate the treaty or suspend its application; or

(ii) terminate or suspend the application only of the particular provision which has been broken.

Provided that, if a material breach of a treaty by one or more parties is of such a kind as to frustrate the object and purpose of the treaty also in the relations between the other parties not involved in the breach, any such other party may, if it thinks fit, withdraw from the treaty.

5. In the case of a material breach of a treaty which is the constituent instrument of an international organization, or which has been concluded within an international organization, any question of the termination or suspension of the rights or obligations of any party to the treaty shall be determined by decision of the competent organ of the organization concerned, in accordance with its applicable voting rules.

Commentary

1. The great majority of writers¹¹² recognize that the violation of a treaty by one party may give rise to a right in the other party to abrogate the treaty or to suspend the performance of its own obligations under the treaty. Nor is it easy to see how the rule could be otherwise, since good sense and equity rebel at the idea of a State being held to the performance of its obligations under a treaty which the other contracting party is refusing to respect. Moreover, on general principles, a violation of a treaty right, as of any other right, may give rise to a right to take non-forcible reprisals and, clearly, these reprisals may properly relate to the defaulting party's rights under the treaty. Opinion differs, however, as to the extent of this right and the conditions under which it may be exercised. Some writers,¹¹³ in the absence of effective international machinery for securing the observance of treaties, are more impressed with the innocent party's need to have this right as a sanction for the violation of the treaty. These writers tend to formulate the right in unqualified terms, giving the innocent party a general right to abrogate the treaty in the event of a breach.¹¹⁴ Other writers are more impressed with the risk that a State may allege a trivial or even fictitious breach simply to furnish a pretext for denouncing a treaty which it now finds embarrassing.¹¹⁵ These writers tend to restrict the right of denunciation to "material" or "fundamental" breaches and also to subject the exercise of the right to procedural conditions.¹¹⁶

2. State practice, although not lacking,¹¹⁷ does not give much assistance in determining the true extent of this right or the proper conditions for its exercise. In most cases, the denouncing State has been determined, for quite other reasons, to put an end to the treaty and, having alleged the violation primarily to provide a respectable pretext for its action, has not been prepared to enter into a serious discussion of the legal principles governing the denunciation of treaties on the basis of violations by the other party. Moreover, the other party has usually contested the denunciation primarily on the basis of the facts; and, if it has sometimes used language appearing to deny that unilateral denunciation is ever

¹¹² See Harvard Law School, *Research in International Law*, III, *Law of treaties*, pp. 1081-3; McNair, *op. cit.*, p. 553. C. Rousseau seems to have doubted whether customary law recognizes a right to denounce a treaty on the ground of the other party's non-performance, because claims to do so have usually been objected to. But for the reasons given in paragraph 2 this can hardly be regarded as sufficient evidence of the non-existence of any such customary rights.

¹¹³ e.g. Hall, *op. cit.*, p. 408; S. B. Crandall, *Treaties, their Making and Enforcement*, p. 456; Ch. Dupuis, "Liberté des voies de communication, Relations internationales", *Recueil des cours de l'Académie de droit international*, 1924-I, vol. 2, p. 340; A. Cavaglieri, "Règles générales du droit de la paix", *Recueil des cours de l'Académie de droit international* (1929-I), vol. 26, p. 535.

¹¹⁴ See Oppenheim, *op. cit.*, p. 947.

¹¹⁵ e.g., McNair, *op. cit.*, p. 571; C. C. Hyde, *International Law*, vol. 2, p. 1543; E. Giraud, *op. cit.*, p. 28.

¹¹⁶ See Harvard Law School, *Research in International Law*, III, *Law of treaties* (art. 27), p. 1077 and pp. 1091-1092.

¹¹⁷ Hackworth, *Digest of International Law*, vol. 5, pp. 342-348; Harvard Law School, *Research in International Law*, III, *Law of treaties*, pp. 1083-1090; McNair, *op. cit.*, pp. 553-569; A. C. Kiss, *Répertoire français de droit international*, Vol. 5, pp. 102-121; *Fontes Juris Gentium*, Series B, Section 1, tomus I, part I (2), pp. 791-792.

justified by any breach, this has usually appeared rather to be a protest against the one-sided and arbitrary pronouncements of the denouncing State than a rejection of the right to denounce when serious violations are established. Thus, States which have on one occasion seemed to assert that denunciation is always illegitimate in the absence of agreement have on others themselves claimed the right to denounce a treaty on the basis of breaches alleged to have been committed by the other party.

3. Municipal courts have not infrequently made pronouncements recognizing the principle that the violation of a treaty may entitle the innocent party to denounce it. But they have nearly always done so in cases where their Government had not in point of fact elected to denounce the treaty and they have not found it necessary to examine the conditions for the application of the principle at all closely.¹¹⁸

4. International jurisprudence has contributed comparatively little on this subject. In the case of the *Diversion of Water from the River Meuse*,¹¹⁹ the question of the effect of a violation of a treaty upon the obligation of the other party to perform the treaty was raised, but in a somewhat different way. Belgium there contended that, by constructing certain works contrary to the terms of the Treaty of 1863, Holland had forfeited the right to invoke the treaty against Belgium. While it did not claim to denounce the treaty, Belgium did in effect assert a right, as a defence to Holland's claim, to suspend the operation of one of the provisions of the treaty on the basis of Holland's alleged breach of that provision, although pleading the claim rather as an application of the principle *inadimplenti non est adimplendum*. The Court, having found that Holland had not violated the treaty, did not pronounce upon the Belgian contention. In a dissenting opinion, however, Judge Anzilotti expressed the view¹²⁰ that the principle underlying the Belgian contention is "so just, so equitable, so universally recognized that it must be applied in international relations also". That case did not therefore carry the question very far, and the only other case that seems to be of any significance is the *Tacna-Arica Arbitration*.¹²¹ Here Peru contended that by preventing the performance of article 3 of the Treaty of Ancon, which provided for the holding of a plebiscite under certain conditions in the disputed area, Chile had discharged Peru from its obligations under that article. The Arbitrator,¹²² after examining the evidence, rejected the Peruvian contention, saying:

"It is manifest that if abuses of administration could have the effect of terminating such an agreement, it would be necessary to establish such serious conditions as the consequence of administrative wrongs as would operate to frustrate the purpose of the agreement, and, in the opinion of the Arbitrator, a situation of such gravity has not been shown."

¹¹⁸ e.g. *Ware v. Hylton* (1796), 3 Dallas 261; *Charlton v. Kelly*, 229 U.S. 447; *Lepeschkin v. Gosweiler et Cie.*, *Journal du droit international* (1924) vol. 51, p. 1136; *In re Tatarko*, *Annual Digest and Reports of Public International Law Cases*, 1949, No. 110, p. 314.

¹¹⁹ *P.C.I.J.*, Series A/B, No. 70.

¹²⁰ *Ibid.*, p. 50; cf. Judge Hudson, pp. 76-77.

¹²¹ *Reports of International Arbitral Awards*, Vol. II, pp. 929 and 943-4.

¹²² President Coolidge of the United States.

This pronouncement certainly seems to assume that only a "fundamental" breach of article 3 could have justified Peru in claiming to be released from its provisions.

5. The previous Special Rapporteur (A/CN.4/107, articles 18-20 and commentary) leaned strongly to the side of those who are more impressed with the risk that this ground of denunciation may be abused than with its value as a sanction for securing the observance of treaties. His proposals therefore showed a marked concern to circumscribe and regulate the right to denounce a treaty on the ground of a breach by the other party. This concern manifested itself in a number of ways in his proposed rules.

6. In the first place, his draft limited the right of denunciation to cases of "fundamental breach", which he defined as "a breach of the treaty in an essential respect, going to the root or foundation of the treaty relationship between the parties, and calling in question the continued value or possibility of that relationship in the particular field covered by the treaty". The draft further provided (article 19, paragraph 2 (i) and (ii)) that the breach "must be tantamount to a denial or repudiation of the treaty obligation, and such as either to (a) destroy the value of the treaty for the other party; (b) justify the conclusion that no further confidence can be placed in the due execution of the treaty by the party committing the breach; or (c) render abortive the purposes of the treaty". By another provision (article 18, paragraph 2) the draft distinguished cases of fundamental breach from "cases where a breach by one party of some obligation of a treaty may justify an exactly corresponding non-observance by the other, or, as a retaliatory measure, non-performance of some other provision of the treaty". He considered that "in such cases there is no question of the treaty, or of its obligations, as such, being at an end; but merely of particular breaches and counter-breaches, or non-observances, that may or may not be justified according to circumstances, but do not affect the continued existence of the treaty itself".

7. Secondly, the previous Special Rapporteur considered "fundamental breach" as a ground for termination to apply in principle only in the case of bilateral, not multilateral, treaties (article 19, paragraph 1 (i) of his draft) and he recognized a right to terminate a multilateral treaty only in one instance (*ibid.*, article 19, paragraph 1 (ii)). He separated multilateral treaties into two broad categories. One covered treaties where the obligations are of a "reciprocal", or "interdependent", type, and with regard to these treaties his draft stated (*ibid.*) that a fundamental breach will justify the other parties —

(a) in their relations with the defaulting party, in refusing performance for the benefit of that party of any obligations of the treaty which consist in a reciprocal grant or interchange of rights, benefits, etc.;

(b) in ceasing to perform any obligations of the treaty which have been the subject of the breach and which are of such a kind that their performance by any party is necessarily dependent on an equal or corresponding performance by all the other parties.

His draft further stated (article 19, paragraph 1 (iii)) that in the case of this type of treaty, "if . . . [one] party commits a general breach of the entire treaty in such a

way as to constitute a repudiation of it, or a breach in so essential a particular as to be tantamount to a repudiation, the other parties may treat it as being at an end or any one of them may withdraw". With regard to the second category of treaties, on the other hand, he did not consider that a breach can ever justify either termination of or withdrawal from the treaty, or even non-performance by the other party of its obligations in respect of the defaulting State. The treaties which he placed in this category were (a) law-making treaties, (b) treaties either creating international régimes for a particular area, region, etc., or involving undertakings to conform to certain standards and conditions, and (c) "any other treaty where the juridical force of the obligation is inherent, and not dependent on a corresponding performance by the other parties to the treaty . . . so that the obligation is of a self-existent character, requiring an absolute and integral application and performance under all conditions".

8. Thirdly, the previous Special Rapporteur's draft (article 19, paragraph 3) negatived the right to terminate a treaty on the basis of a fundamental breach if —

(a) the treaty is due to expire in any event within a reasonable period;

b) the claim to terminate is not made within a reasonable time of the breach;

(c) the other party has condoned or waived the breach; or

(d) the party claiming to terminate itself caused or contributed to the breach.

The last three paragraphs are of course expressions of well-recognized general principles, (c) being covered in article 4 of the present draft articles.

9. Finally, the previous Special Rapporteur (in article 20 of his draft) laid down certain procedural conditions, the observance of which would be a *sine qua non* for the legitimate exercise of a right to terminate a treaty on the ground of its alleged breach by the other party. These conditions would require a State claiming to terminate a treaty on the ground of another party's breach (a) to present a reasoned statement of its case to the other party in question; (b) to give a reasonable time for the other to reply; (c) if the other party contested the case, to offer to refer the matter to an independent tribunal for decision; and (d) not to denounce the treaty unless the other party either failed to make any reply to the statement of the case or declined the offer to refer the matter to a tribunal. The question of the procedural requirements for denouncing a treaty also arises in other connexions, not only in regard to other grounds of termination but also in regard to cases under section II of the present draft. Accordingly, in the present draft they will be found dealt with in a general article in section IV.

10. The present Special Rapporteur, while having the same general approach to this question as his predecessor, believes that in some points his predecessor's draft may go a little further in limiting the right to terminate or suspend treaty relations with a covenant-breaking State than is altogether acceptable. These points will emerge and be discussed later in the present Commentary. Fortunately, the area in which the rôle of this article is likely to be important is somewhat narrowed by the modern practice of giving to many classes of treaties

comparatively short periods of duration or of making them terminable by notice. In these cases the injured party will usually have a simple and uncontroversial means of bringing the treaty to an end. It is primarily when treaties have been entered into either for longer fixed terms or indefinitely that the article may have a significant part to play.

11. Paragraph 1 (a) states what appears to be the universally accepted principle that the violation of a treaty, however serious, does not of itself put an end to the treaty.¹²³ This principle has frequently been insisted upon by judges in municipal courts, when private parties have claimed that a treaty ought to be disregarded by reason of its violation by the other High Contracting Party.¹²⁴ Paragraph 1 (b) merely states that under the conditions laid down in the article a "material" breach may give rise to a right in the other party or parties to the treaty to terminate or withdraw from the treaty or suspend its operation. The present Special Rapporteur believes that the word "material" used by some authorities is to be preferred to the word "fundamental" to express the kind of breach which may entitle the other party to terminate the relationship established by the treaty. The word "fundamental" might be understood as meaning that only the violation of a provision directly touching the central purposes of the treaty can ever justify the other party in terminating the treaty. But other provisions considered by a party to be essential to the effective execution of the treaty may have been very material in inducing it to enter into the treaty at all, even although these provisions may be of an entirely ancillary character. For example, a clause providing for compulsory arbitration in the event of a dispute as to the interpretation or application of the treaty is purely ancillary to the main purposes of the treaty, but it may well be regarded by some parties as an essential condition for agreeing to be bound by the treaty. In that case a refusal to arbitrate would go to the root of the other party's consent to be in treaty relations with the defaulting State.

12. Paragraph 2 seeks to define, so far as it is possible to do so, what may constitute a "material breach" giving rise to a right to terminate or suspend the treaty. The difficulties of this task were admirably stated by a nineteenth-century writer:¹²⁵

"Some authorities hold that the stipulations of a treaty are inseparable, and consequently that they stand and fall together; others distinguish between principal and secondary Articles, regarding infractions of the principal Articles only as destructive of the binding force of a treaty. Both views are open to objection. It may be urged against the former that there are many treaties of which slight infractions may take place without any essential part being touched, that some of their stipulations, which were originally important, may cease to be so owing to an alteration in circumstances, and that to allow states to repudiate the entirety of a contract upon the ground of such

¹²³ Harvard Law School, *Research in International Law*, III, *Law of Treaties* p. 1078; Fauchille, *Traité de droit international public*, 8th edition, vol. 1, par. III, para. 854; J. Spiropoulos, *Traité de droit international public*, p. 257.

¹²⁴ e.g. *Ware v. Hylton* (1796) 3 Dallas 261; *Charlton v. Kelly* (1913) 229 U.S. 447; *In re Tatarko*, *Annual Digest of International Law Cases* 1949, No. 110.

¹²⁵ W. E. Hall, *op. cit.*, pp. 408-9.

infringements is to give an advantage to those which may be inclined to play fast and loose with their serious engagements. On the other hand, it is true that every promise made by one party in a treaty may go to make up the consideration in return for which essential parts of the agreement are conceded or undertaken, and that it is not for one contracting party to determine what is or is not essential in the eyes of the other. It is impossible to escape altogether from these difficulties. It is useless to endeavour to tie the hands of dishonest states beyond power of escape. All that can be done is to try to find a test which shall enable a candid mind to judge whether the right of repudiating a treaty has arisen in a given case. Such a test may be found in the main object of a treaty. There can be no question that the breach of a stipulation which is material to the main object, or if there are several, to one of the main objects, liberates the party other than that committing the breach from the obligations of the contract; but it would be seldom that the infraction of an article which is either disconnected from the main object, or is unimportant, whether originally or by change of circumstances, with respect to it, could in fairness absolve the other party from performance of his share of the rest of the agreement. . . ."

The previous Special Rapporteur, as mentioned in paragraph 5 above, defined a "fundamental" breach as one "going to the root or foundation of the treaty relationship between the parties and calling in question the continued value or possibility of that relationship in the particular field covered by the treaty". This definition and the further qualifications put upon it by the previous Special Rapporteur seem perhaps to put the concept of a "fundamental" breach rather high. The present draft, though inspired by the same general considerations, seeks to define a "material" breach of a treaty by reference to the attitude adopted by the parties with regard to reservations at the time when they concluded the treaty; and, if they said nothing about reservations at that time, then by reference to the "object and purpose" of the treaty — the criterion used for determining the power to make reservations in such a case.¹²⁶ The reason, of course, is that, although the two questions are not identical, there is a certain connexion between the views of the contracting States concerning the making of reservations and their views concerning what are to be regarded as material breaches of the treaty. It therefore seemed logical, in formulating the present article, to take into account the rules regarding the making of reservations provisionally adopted by the Commission in article 18 of part I.

13. The definition of "material" breach in paragraph 2 has three clauses. Sub-paragraph (a) gives the repudiation of the treaty as the first and most obvious form of material breach. Although the point is obvious, it needs to be stated, if only to underline that the repudiation of a treaty by one party does not of itself terminate its obligations under the treaty. If that were true, as was pointed out by Vattel,¹²⁷ "engagements could readily be set aside and treaties would be reduced to empty formalities". The main definition is in sub-paragraph (b),

and under it the concept of a "material" breach contains two restrictive elements: the breach must be "substantial", so as to amount to a setting aside of the particular provision by the defaulting party; and the provision must be one apparently regarded by the parties as a necessary condition of their entering into the treaty. The latter point, however, is stated in as objective terms as possible by linking it, for the reasons explained in the previous paragraph, to the conditions under which the treaty permits reservations to be made. Where the treaty is silent as to the power to make reservations then the test, as in article 18 of the present Special Rapporteur's first report (A/AC.4/144), is compatibility with the object and purpose of the treaty. Sub-paragraph (c), in order to remove any doubts of the kind mentioned in paragraph 11 of the present Commentary, specifies that, where the treaty expressly provides for compulsory reference of disputes arising out of it to arbitration or judicial settlement, disregard of that provision will constitute a material breach.

14. Paragraph 3 sets out the rights of the innocent party in case of a material breach of a bilateral treaty. These are to abrogate the whole treaty or suspend its whole operation or, alternatively, to terminate or suspend the operation only of the provision which has been broken by the defaulting party. The latter right, like the former, is an application of the principle *inadimplenti non est adimplendum*, endorsed by Judge Anzilotti in the *Diversion of Water from the River Meuse* case.¹²⁸ Admittedly, it may also be put upon the basis of a right to take non-forcible reprisals and upon that basis it is arguable that the innocent party may suspend the operation not necessarily of the provision which has been broken of but some other provision of special concern to the defaulting party. The terms of paragraph 2 are not intended to exclude whatever other rights may accrue to the innocent party by way of reprisal; but it is thought better not to introduce the law of reprisals, as such, into the present article. Naturally, any abrogation or suspension of the whole or part of the treaty under paragraph 3 will be without prejudice to the innocent party's right to claim compensation for any loss or damage resulting from the breach.

15. Paragraph 4 sets out in a parallel manner the rights of the other parties in the case of a material breach of a multilateral treaty, with the difference that normally an individual innocent party is not in a position to terminate the treaty, or suspend its operation, generally as between all the parties. Its right is normally limited to terminating or suspending the treaty or one of its provisions as between itself and the defaulting State. The present draft does not take as its basis the division of multilateral treaties into different categories by reference to the nature of their obligations, which was a central feature of the previous Special Rapporteur's proposals (see paragraph 6 above). While not in any way wishing to minimize the general significance of the distinctions which he draws between the different kinds of obligation that may be contained in multilateral treaties, the present Special Rapporteur doubts whether, as the law stands today, they can be said to be of decisive importance in the present connexion. However true it may be that law-making treaties, treaties creating international régimes for particular areas and certain other types of

¹²⁶ See generally the Commentary to article 18 of the present Special Rapporteur's first report (A/CN.4/144).

¹²⁷ *The Law of Nations*, Book IV, chapter IV, Section 54.

¹²⁸ See paragraph 4 of this Commentary.

treaty may establish obligations of an objective character, there remains a contractual element in the legal relation created by the treaty between any two parties. No doubt, if one party violates the treaty, another innocent party cannot, as a rule, individually release itself on that account from its obligations under the treaty because of its undertakings to the remaining contracting parties. But it is quite another thing to say that it is bound, however substantial and persistent the violation, to continue in treaty-relations with the defaulting State and remain liable to the latter for any non-performance affecting its interests. Quite apart from the essentially bilateral character of many of the rights and obligations created by law-making treaties and by international régimes, such a rule hardly seems possible until the remedies for breaches of international law are more highly organized and certain. The mere fact that many such treaties expressly contemplate their own denunciation, while others contemplate the expulsion of a covenant-breaking State,¹²⁹ makes it doubtful whether such a rule would be in harmony with existing principles, however desirable it may be that international law should one day be in a position to adopt such a rule. In the cases distinguished by the previous *Special Rapporteur*, an innocent party may well be less inclined to terminate the treaty-relation in consequence of the breach, but to forbid it to do so is almost to protect the covenant-breaking State in its wrong-doing.

16. The primary distinction made in the present draft is between a multilateral treaty pure and simple and a multilateral treaty which is the constituent instrument of an international organization or that has been concluded — like international labour conventions — within an international organization. Paragraph 4 deals with ordinary multilateral treaties and paragraph 5 with constituent treaties and treaties concluded within an organization.

17. Paragraph 4 (a) provides that in the case of a material breach an individual party may break off or suspend the treaty relation as between itself and the defaulting State or do the same with regard only to the provision which is the subject of the breach; in other words, it provides in the bilateral relationships between parties to a multilateral treaty for rights corresponding to those which exist in the case of a bilateral treaty. If individual States react against a material breach by terminating the treaty link between them and the defaulting State, the treaty remains in force as between the latter and the other parties to the treaty. It is conceivable, however, that, because of the key position held by the defaulting State in the whole régime of the treaty, or because of the number of parties implicated in the breach, the general body of the parties to the treaty might wish to terminate or suspend the whole treaty. In that event, their natural course would seem to be to proceed to terminate or suspend the treaty by subsequent agreement under article 18, and this course is accordingly indicated in paragraph 4 (b). But in cases such as these, where the defaults of a key State or of a number of States go far to undermine the whole treaty

régime, it seems desirable that individual parties should also have the right not merely of terminating their treaty-relation with the defaulting State but of withdrawing altogether from the treaty. A proviso has accordingly been added to paragraph 4 recognizing such a right in cases where the breach has the effect of frustrating the object and purpose of the treaty also in the relations between the States not involved in the breach.

18. A plausible case could, perhaps, be made out in favour of recognizing a right in the other parties to the treaty collectively, by a two-thirds majority, to declare the defaulting State to be no longer a party — of expelling it from the régime of the treaty, just as in some international organizations the members may expel a State which persistently violates the obligations incumbent upon a member. The position is different, however, in the case of an international organization, because normally the members cannot by their individual action terminate their relations with the defaulting State within the organization. They can only do so by a collective decision. The fact that any party to a multilateral treaty can individually put an end to the treaty relation between itself and the defaulting State removes the need to legislate for the possibility of a collective expulsion of the treaty-breaking State.

19. Paragraph 5 provides that in the case of the material breach of a constituent treaty of an international organization the termination or suspension of the rights or obligations of the parties under the treaty shall in principle be matter for decision by the competent organ in accordance with the applicable rules of the constitution of the organization in question. The constitutions of many of the larger organizations contain provisions relating to the suspension or termination of membership or to the suspension of voting rights in the event of a member's being in default in its obligations and as mentioned in paragraph 20 of the Commentary to article 17, many of them provide for a right to denounce or withdraw from the treaty. In these cases, it seems clear that any question of terminating or suspending the membership of the defaulting party or of suspending generally the operation of a provision of the treaty must be one for the competent organ of the Organization and not for the individual parties to the treaty. Similarly, in the case of treaties, such as international labour conventions, concluded within an organization, the reaction of the parties to a material breach is essentially a matter to be settled within the organization. Admittedly, some of the more loosely knit organizations contain no provisions concerning termination or suspension of membership, or concerning withdrawal from the organization; and in some cases the only form of common organ they envisage is the occasional calling of a conference of the members. Even in such cases, however, it would seem that the expulsion of a party from the treaty régime or the termination or suspension of the treaty should, in principle, be questions for some form of "collegiate" decision within the organization.

Article 21 — Dissolution of a treaty in consequence of a supervening impossibility or illegality of performance

1. (a) Subject to the rules governing State succession in the matter of treaties, if the international personality of one of the parties to a treaty is extinguished, any other party may invoke the extinction of such party —

¹²⁹ Even a treaty like the European Convention of Human Rights, designed for the protection of the individual, is subject to denunciation, while a party which ceases to be a member of the Council of Europe automatically ceases to be a party to the treaty.

- (i) in the case of a bilateral treaty, as having dissolved the treaty;
- (ii) in other cases as having rendered the treaty inapplicable with respect to the extinguished State;

provided always that the extinction of such party was not brought about by means contrary to the provisions of the Charter of the United Nations.

(b) In a case falling under sub-paragraph (a) (ii), if the extinction of the party in question materially affects the fulfilment of the object and purpose of the treaty as between the remaining parties, it may be invoked by any such party as a ground for withdrawing from the treaty.

2. It shall be open to any party to call for the termination of a treaty if after its entry into force its performance shall have become impossible owing to —

(a) the complete and permanent disappearance or destruction of the physical subject-matter of the rights and obligations contained in the treaty; provided always that it was not the purpose of the treaty to ensure the maintenance of the subject-matter;

(b) the complete and permanent disappearance of a legal arrangement or régime to which the rights and obligations established by the treaty directly relate.

3. If in a case falling under paragraph 2 there is substantial doubt as to whether the cause of the impossibility of performance will be permanent, the treaty may only be suspended, not terminated. In that event, the operation of the treaty shall remain in suspense until the impossibility of performance has ceased or, as the case may be, has to all appearances become permanent.

4. It shall also be open to any party to call for the termination of a treaty, if after its entry into force the establishment of a new rule of international law having the character of *jus cogens* shall have rendered the performance of the treaty illegal under international law.

Commentary

1. This article and article 22 cover the dissolution or suspension of treaties by reason of events or developments subsequent to their conclusion. Under the previous articles of the present section, the termination of a treaty comes about either by its own terms or through the exercise by one of the parties of a right expressly or impliedly contained in it or through the exercise of a right arising out of the breach of the treaty. Under this and the next article it comes about through events or developments which occur outside the treaty, and it is often spoken of as happening by operation of law independently of the will of the parties. Some authorities, it is true, put these cases upon the ground of an implied resolutive condition, saying that every treaty is to be understood as subject to a condition as to the continued possibility and legality of its performance and as to the continued existence, without essential change, of the circumstances upon which the treaty was based. But under that theory also the termination of the treaty will, in principle, be automatic and come about independently of the will of the parties by the happening of events resulting in an impossibility or illegality of performance or a fundamental change in the circumstances.

2. It is true that in the cases dealt with in articles 21 and 22 the termination of the treaty might be regarded as taking place by operation of law, independent-

ly of any expression of will by the parties, when the terminating events or developments have occurred. But disputes may arise as to whether these events or developments have in fact occurred, just as in cases of "essential validity" disputes may arise as to the existence of the alleged ground of invalidity. As in section III, so also in these articles the absence of any general system of compulsory adjudication makes it difficult to adopt the principle of automatic annulment of the treaty by operation of law without any qualification. Otherwise, and especially with regard to the doctrine of *rebus sic stantibus*, there is a danger of a legitimate and relevant principle of law being used as a mere pretext for repudiating treaty obligations. It is for this reason that the present article and article 22 have been formulated in terms of the right of a party to denounce the treaty, rather than in terms of the automatic extinction of the treaty by operation of law; and for the same reason the right to claim that the treaty has been dissolved on one or other of the grounds mentioned in these articles is brought by article 4 under the procedural requirements of section IV. The upshot is that the cases arising under these articles are dealt with on the same lines as cases of essential validity and cases of termination following upon breach.

3. Supervening impossibility or illegality of performance are necessarily cases where there is a fundamental change in the circumstances on the basis of which the parties entered into the treaty; and they could accordingly be regarded as falling within the general scope of the doctrine of *rebus sic stantibus*. The special Rapporteur, however, agrees with his predecessor¹³⁰ in thinking that supervening impossibility and illegality of performance are distinct grounds for the dissolution of treaties having a juridical basis that is independent of the doctrine of *rebus sic stantibus*. Moreover, they are grounds for regarding a treaty as dissolved which are both more specific and leave much less room for subjective appreciation than the *rebus sic stantibus* doctrine. It therefore seems advisable to keep them apart from that doctrine, which is, in consequence, dealt with separately in article 22.

4. Paragraph 1 considers the special case of impossibility of performance brought about by the disappearance of one of the parties. This case is treated by most of the authorities as one of the instances of impossibility of performance, and it was so treated by the previous Special Rapporteur, although he recognized that it must be subject to the law governing State succession in the matter of treaties. His draft article 17, paragraph I A (i), read:

"Total extinction of one of the parties to a bilateral treaty, as a separate international personality, or loss or complete change of identity, subject however to the rules of State succession in the matter of bilateral treaties where these rules provide for the devolution of treaty obligations."

Owing to the links between this question and the question of State succession, which is being taken up separately by the Commission, the present Special Rapporteur felt some hesitation in including paragraph 1 of the present article. However, where succession does not

¹³⁰ Sir G. Fitzmaurice's second report (A/CN.4/107), article 17, and commentary, paragraphs 100-102.

take place, the extinction of a party is a ground for the automatic dissolution of a treaty or, in the case of a multilateral treaty, for the application of the treaty to cease with respect to the extinguished State.¹³¹ Accordingly, paragraph 1 has been included in order that the point may be considered by the Commission. If paragraph 1 is included, it seems appropriate to reserve from it the case of a State extinguished by means contrary to the Charter. Sub-paragraph (b) has been added to cover the possible case of the extinction of a party to a treaty concluded amongst a small group of States, in which event the disappearance of one party might largely impair the usefulness of the treaty.

5. Paragraph 2 covers cases where the treaty is literally impossible to perform by reason of the disappearance of its subject-matter. This may happen in two ways, either through the disappearance of the physical subject of the rights and obligations of the treaty or through the disappearance of a legal state of affairs which was the *raison d'être* of those rights and obligations. The former type is defined in sub-paragraph 2 (a), and examples of it are easier to imagine than to find in practice. Amongst the theoretical possibilities suggested by the previous Special Rapporteur were: the submergence of an island, the drying up of a river bed, the destruction of a railway by an earthquake, the destruction of plant, installations, a canal, lighthouse, etc.¹³² No doubt, any of these things may happen, but none of them has so far given rise to a leading case or diplomatic incident concerning the dissolution of treaties. As the previous Special Rapporteur pointed out, it is necessary to distinguish cases where the maintenance of the particular subject-matter was the express object of the treaty, e.g. a treaty concerning the maintenance of a lighthouse or other navigational aid, where there may be a duty to replace the lost or destroyed object.

6. The second type of case, which is defined in sub-paragraph 2 (b), is where a treaty relates to a legal arrangement or régime which is afterwards abolished, when the treaty necessarily ceases to be capable of performance and devoid of object. Examples are treaties relating to the operations of capitulations, which necessarily fell to the ground as each system of capitulations was finally and, to all appearances, permanently abolished. Other examples given by the previous Special Rapporteur (A/CN.4/107, paragraph 101) were treaties relating to a customs union or condominium which would also necessarily become incapable of performance if the customs union or condominium disappeared altogether. These examples appear to be genuine cases of impossibility of performance by reason of the disappearance of the subject-matter of the treaty similar to the disappearance of an island, river, etc. The previous Special Rapporteur formulated his rule rather more broadly as covering any case of "Supervening literal inapplicability owing to disappearance of the treaty field of action"; and he included under this head such cases as Great Britain's declaration in 1921 that she regarded her bilateral treaties for combatting the slave trade as terminated since there was no longer any slave trade

to combat. This seems to be more a case of desuetude than of impossibility of performance, and the present Special Rapporteur prefers to confine the present article to what are strictly cases of physical or legal impossibility of performance. Otherwise it may be difficult to separate the cases falling under the present article from those falling under the doctrine of *rebus sic stantibus*.

7. Paragraph 3 provides that where there is an impossibility of performance the permanence of which is doubtful, the treaty may only be suspended, not terminated. These cases, it is true, might simply be treated as cases where *force majeure* could be pleaded as a defence exonerating a party from liability for non-performance. But where there is a continuing impossibility of performance of continuing obligations it seems better to recognize that the treaty may be suspended. It should, perhaps, be added that one obvious case of impossibility, namely impossibility resulting from the outbreak of hostilities, does not fall under either paragraphs 2 or 3, and is not covered by the present article. The effect of war on treaties raises special issues and is not covered by the present report.

8. Paragraph 4 covers cases of impossibility arising from changes in the law itself and in the nature of things these are not likely to be very common in international law. A new inconsistent treaty may dissolve an earlier one between the same parties, but the process is properly to be regarded as one of implied abrogation by the parties, rather than of dissolution by operation of law; accordingly, such a case falls not under the present article but under article 14. The present article deals rather with an illegality arising from the emergence of a new rule of *jus cogens*. Then it is not simply a question of the priority to be given to two equally valid norms; for the emergence of the new rule of *jus cogens* renders the earlier treaty illegal and incapable of performance within the law. An example would be former treaties not to combat but to regulate the slave trade, some of which were concluded even in the nineteenth century.¹³³ The subsequent condemnation of all forms of slavery by general international law ultimately rendered such treaties incapable of application. Another illustration often given in the books is treaties concerning facilities for privateers concluded before the abolition of privateering.¹³⁴

Article 22 — The doctrine of *rebus sic stantibus*

1. (a) A change in the circumstances which existed at the time when a treaty was entered into does not, as such, affect the continued validity of the treaty.

(b) Under the conditions set out in the following paragraphs of this article, however, the validity of a treaty may be affected by an essential change in the circumstances forming the basis of a treaty.

2. An essential change in the circumstances forming the basis of a treaty occurs when:

(a) a change has taken place with respect to a fact or state of facts which existed when the treaty was entered into;

(b) it appears from the object and purpose of the

¹³¹ See Harvard Law School, *Research in International Law*, III, *Law of Treaties*, pp. 1165-1168; F. I. Kozhevnikov, *International Law* (Academy of Sciences of the USSR), p. 281.

¹³² Second report (A/CN.4/107, paragraph 97). See also McNair, *op. cit.*, p. 685.

¹³³ e.g., article 4 of the Anglo-Portuguese Treaty of 22 January 1815; see McNair, *op. cit.*, p. 685.

¹³⁴ See Oppenheim, *op. cit.*, p. 946.

treaty and from the circumstances in which it was entered into, that the parties must both, or all, have assumed the continued existence of that fact or state of facts to be an essential foundation of the obligations accepted by them in the treaty; and

(c) the effect of the change in that fact or state of facts is such as —

(i) in substance to frustrate the further realization of the object and purpose of the treaty; or

(ii) to render the performance of the obligations contained in the treaty something essentially different from what was originally undertaken.

3. A change in the policies of the State claiming to terminate the treaty, or in its motives or attitude with respect to the treaty, does not constitute an essential change in the circumstances forming the basis of the treaty within the meaning of paragraph 2.

4. An essential change in the circumstances forming the basis of a treaty may not be invoked for the purpose of denouncing or withdrawing from a treaty if —

(a) it was caused, or substantially contributed to, by the acts or omissions of the party invoking it;

(b) the State concerned has failed to invoke it within a reasonable time after it first became perceptible, or has otherwise precluded itself from invoking the change of circumstances under the provisions of article 4 of this part;

(c) such change of circumstances has been expressly or impliedly provided for in the treaty itself or in a subsequent agreement concluded between the parties in question.

5. An essential change in the circumstances forming the basis of a treaty may not be invoked for the purpose of terminating —

(a) stipulations of a treaty which effect a transfer of territory, the settlement of a boundary, or a grant of territorial rights;

(b) stipulations which accompany a transfer of territory or boundary settlement and are expressed to be an essential condition of such transfer or settlement;

(c) a treaty which is the constituent instrument of an international organization.

6. A party shall only be entitled to terminate or withdraw from a treaty on the ground of an essential change in the circumstances forming the basis of the treaty —

(a) by agreement under the provisions of articles 18 and 19; or

(b) under the procedure laid down in article 25.

Commentary

1. Almost all modern writers,¹³⁵ however reluctantly, admit the existence in international law of the principle with which this article is concerned and which is commonly spoken of as the doctrine of *rebus sic stantibus*. Just as many systems of municipal law recognize that, quite apart from any actual impossibility of performance, contracts may become inapplicable through a fundamental change of circumstances, so also, it is held,

international law recognizes that treaties may cease to be binding upon the parties for the same reason. Most writers, however, at the same time enter a strong *caveat* as to the need to confine the scope of the doctrine within narrow limits and to regulate strictly the conditions under which it may be invoked; for the risks to the general security of treaties which this doctrine presents in the absence of any general system of compulsory jurisdiction are even more serious than in the case of denunciation on the ground of an alleged breach of the treaty or in the case of any other ground either of invalidity or of termination. As was said by the previous Special Rapporteur in his second report (A/CN.4/107, paragraph 142):

“It is all too easy to find grounds for alleging a change of circumstances, since in fact in international life circumstances are constantly changing. But these changes are not, generally speaking, of a kind that can or should affect the continued operation of treaties. As a rule, they do not render the execution of the treaty either impossible or materially difficult, or its objects impossible of realization, or destroy its value or *raison d'être*. What they may tend to influence is the willingness of one or other of the parties, on ideological or political grounds — often of an internal character — to continue to carry it out.”

In short, this ground for obtaining release from treaty obligations is susceptible of being used even more flexibly and more subjectively than any of the others.

2. Despite the almost universal distrust of the doctrine and despite the differences of opinion which exist in regard to some aspects of it, there is a good deal of evidence of its recognition in customary law. The International Court, it is true, has not yet committed itself on the point. In the *Free Zones* case,¹³⁶ having held that the facts did not in any event justify the application of the doctrine, the Permanent Court expressly reserved its position. It observed that it became unnecessary for it to consider “any of the questions of principle which arise in connexion with the theory of the lapse of treaties by reason of change of circumstances, such as the extent to which the theory can be regarded as constituting a rule of international law, the occasions on which and the methods by which effect can be given to the theory, if recognized, and the question whether it would apply to treaties establishing rights such as that which Switzerland derived from the treaties of 1815 and 1816”. On the other hand, it can equally be said that the Court has never on any occasion¹³⁷ rejected the doctrine and that in the passage just quoted it even seems to have assumed that the doctrine is to some extent admitted in international law. Sir H. Lauterpacht¹³⁸ thought it to be clear from this passage that the Court was “prepared to recognize the principle, although it refused to say to what extent”. This statement seems, however, to go rather far, since the Court in dealing with the facts underlined that it

¹³⁶ P.C.I.J. Series A/B No. 46, pp. 156-8.

¹³⁷ e.g., in the *Nationality Decrees* Opinion (P.C.I.J., Series B, No. 4, p. 29), where it merely observed that it would be impossible to pronounce upon the point raised by France regarding the “principle known as the *clausula rebus sic stantibus*” without recourse to the principles of international law concerning the duration of treaties.

¹³⁸ *The Development of International Law by the International Court*, p. 85.

¹³⁵ e.g., Oppenheim, *op. cit.*, Vol. I, pp. 938-944; McNair, *op. cit.*, pp. 681-691; F. I. Koshevnikov, *op. cit.*, p. 281; C. Rousseau, *Principes généraux du droit international public*, tome I, pp. 580-615; Harvard Law School, *Research in International Law, III, Law of Treaties*, pp. 1096-1126; Chesney Hill, *The Doctrine of Rebus Sic Stantibus*, University of Missouri Studies (1934).

was confining itself to the case as it had been argued by France, without taking any position as to how far that case might or might not be well founded in law.

3. Municipal courts, on the other hand, have not infrequently recognized the relevance of the *rebus sic stantibus* doctrine in international law, though for one reason or another they have always ended by rejecting the application of the doctrine in the particular circumstances of the case before them.¹³⁹ These cases emphasize that the doctrine is limited to changes in circumstances the continuance of which, having regard to the evident intention of the parties at the time, was regarded as a tacit condition of the agreement;¹⁴⁰ that the treaty is not dissolved automatically by law upon the occurrence of the change but only if the doctrine is invoked by one of the parties,¹⁴¹ and that the doctrine must be invoked within a reasonable time after the change in the circumstances was first perceived.¹⁴² Moreover, in *Bremen v. Prussia*¹⁴³ the German Reichsgericht, while not disputing the general relevance of the doctrine, considered it altogether inapplicable to a case where one party was seeking to release itself not from the whole treaty but only from certain restrictive clauses which had formed an essential part of an agreement for an exchange of territory.

4. The doctrine of *rebus sic stantibus* has not infrequently been invoked in State practice either *eo nomine* or in the form of a reference to a general principle claimed to justify the termination or modification of treaty obligations by reason of changed circumstances. Detailed examination of this State practice is not possible in the present report.¹⁴⁴ Broadly speaking, it shows a wide acceptance of the view that a fundamental change of circumstances may justify a demand for the termination or revision of a treaty, but also shows a strong disposition to question the right of a party to denounce a treaty unilaterally on this ground. The most significant indications as to the attitude of States regarding the doctrine are perhaps to be found in statements submitted to the Court in the cases where the doctrine has been invoked. In the *Nationality Decrees* case the French Government contended that "perpetual" treaties were always subject to termination in virtue of the *rebus sic stantibus* clause and claimed that the establishment of the French protectorate over Morocco had for that reason had the effect of extinguishing certain Anglo-French Treaties.¹⁴⁵

The British Government, while contesting the French Government's view of the facts, observed that the most forceful argument advanced by France was that of *rebus sic stantibus*.¹⁴⁶ In the case concerning *The Denunciation of the Sino-Belgian Treaty of 1865*, China invoked, in general terms, changes of circumstances as a justification of her denunciation of a sixty-year-old treaty, and supported her contention with a reference to Article 19 of the Covenant.¹⁴⁷ This Article, however, provided that the Assembly of the League should "from time to time advise the reconsideration by Members of the League of treaties which have become inapplicable", and the Belgian Government was not slow to reply that neither Article 19 nor the doctrine of *rebus sic stantibus* contemplated the unilateral denunciation of treaties. It further maintained that there could be no question of China's denouncing the treaty because of a change of circumstances unless she had at least tried to obtain its revision through Article 19; that where both parties were subject to the Court's jurisdiction, the natural course for China, in case of dispute, was to obtain a ruling from the Court; and that if she did not, she could not denounce the treaty without Belgium's consent.¹⁴⁸ Even more striking, in the *Free Zones* case,¹⁴⁹ the French Government, the Government invoking the *rebus sic stantibus* doctrine, itself emphasized that the doctrine did not allow unilateral denunciation of a treaty claimed to be out of date. It argued that the doctrine would cause a treaty to lapse only "lorsque le changement de circonstances aura été reconnu par un acte faisant droit entre les deux Etats intéressés"; and it further said: "cet acte faisant droit entre les deux Etats intéressés peut être soit un accord, lequel accord sera une reconnaissance du changement des circonstances et de son effet sur le traité, soit une sentence du juge international compétent s'il y en a un".¹⁵⁰ Switzerland, emphasizing the differences of opinion amongst writers in regard to the doctrine, disputed the existence in international law of any such right to the termination of a treaty because of changed circumstances enforceable through the decision of a competent tribunal. But she rested her case primarily on three contentions: (a) the circumstances alleged to have changed were not circumstances on the basis of whose continuance the parties could be said to have entered into the treaty; (b) in any event, the doctrine does not apply to treaties creating territorial rights; and (c) France had delayed unreasonably long after the alleged changes of circumstances had manifested themselves.¹⁵¹ France does not appear to have disputed that the doctrine is inapplicable to territorial rights; instead, she drew a distinction between territorial rights and "personal" rights created on the occasion of a territorial settlement.¹⁵² The Court upheld the Swiss Government's contentions on points (a) and (c), but did not pronounce on the application of the *rebus sic stantibus* doctrine to treaties creating territorial rights.

¹³⁹ e.g., *Hooper v. United States*, Hudson, *Cases on International Law*, second edition, p. 930; *Lucerne v. Aargau* (1888), *Arrêts du Tribunal Fédéral Suisse*, Vol. 8, p. 57; *In re Lepeschkin*, *Annual Digest of Public International Law Cases*, 1923-1924, Case No. 189; *Bremen v. Prussia*, *Ibid.*, 1925-1926, Case No. 266; *Rothschild and Sons v. Egyptian Government*, *Ibid.*, 1925-1926, Case No. 14; *Canton of Thurgau v. Canton of St. Gallen*, *Ibid.*, 1927-1928, Case No. 289; *Bertaco v. Bancel*, *Ibid.*, 1935-1937, Case No. 201; *Stransky v. Zivnostenska Bank*, *International Law Reports*, 1955, pp. 424-427.

¹⁴⁰ *Lucerne v. Aargau*; *Canton of Thurgau v. Canton of St. Gallen*; *Hooper v. United States*.

¹⁴¹ *In re Lepeschkin*; *Stransky v. Zivnostenska Bank*.

¹⁴² *Canton of Thurgau v. Canton of St. Gallen*.

¹⁴³ *Annual Digest of Public International Law Cases*, 1925-1926, Case No. 266.

¹⁴⁴ See the accounts of State practice in Chesney Hill, *op. cit.*, pp. 27-74; C. Kiss, *op. cit.*, pp. 381-393; C. Rousseau, *op. cit.*, pp. 594-615; Harvard Law School, *Research in International Law*, III, *Law of Treaties*, pp. 1113-1124; H. W. Briggs, *A.J.I.L.* 1942, pp. 89-96, and 1949, pp. 762-769.

¹⁴⁵ P.C.I.J. Series C, No. 2, pp. 187-188.

¹⁴⁶ *Ibid.*, pp. 208-209.

¹⁴⁷ *Ibid.*, No. 16, I, p. 52.

¹⁴⁸ *Ibid.*, pp. 22-23; the case was ultimately settled by the conclusion of a new treaty.

¹⁴⁹ *Ibid.*, Series A/B, No. 46.

¹⁵⁰ *Ibid.*, Series C, No. 58, pp. 578-579, 109-146, and 405-415; see also Series C, No. 17, I, pp. 89, 250, 256, 283-284.

¹⁵¹ *Ibid.*, Series C, No. 58, pp. 463-476.

¹⁵² *Ibid.*, pp. 136-143.

5. Brief reference may also be made to two instances in which the *rebus sic stantibus* doctrine has been raised in political organs of the United Nations. In 1947 Egypt referred to the Security Council the question of the continued validity of the Anglo-Egyptian Treaty of 1936,¹⁵³ using arguments which, without mentioning it *eo nomine*, were based upon the *rebus sic stantibus* doctrine. No resolution was adopted; but several representatives expressed objection to an interpretation of the *rebus sic stantibus* doctrine which would allow a purely unilateral denunciation of a treaty without some form of adjudication upon the merits of a claim to invoke that doctrine. The second instance concerns a study, prepared by the Secretary-General at the request of the Economic and Social Council, of the present legal validity of the undertakings relating to the protection of minorities placed under the guarantee of the League of Nations. The Secretary-General, while emphasizing its limited character, assumed the *rebus sic stantibus* doctrine to be applicable in international law (E/CN.4/367, p. 37):

"International law recognizes that in some cases an important change of the factual circumstances from those under which a treaty was concluded may cause that treaty to lapse. In such cases the clause *rebus sic stantibus* applies if invoked by the Governments.

"But if international law recognizes the clause *rebus sic stantibus*, it only gives it a very limited scope and surrounds it with restrictive conditions, so much so that the application of the clause acquires an exceptional character."

Having mentioned the differences of opinion concerning the conditions for the application of the doctrine, the Secretary-General said that for the purposes of the study he would be guided by a restrictive definition of the doctrine, without suggesting that it was necessarily the one which should be adopted by international tribunals. On this basis, he stated that the doctrine requires that (1) certain factual conditions, which existed at the moment of the conclusion of the treaty and in the absence of which the parties would not have concluded the treaty, should have disappeared; (2) the new circumstances should differ substantially from those which existed at the time when the treaty was concluded, so as to render its application morally and physically impossible; and (3) the State invoking the clause should obtain the consent of the other contracting parties and, in the absence of such consent, should secure recognition of the validity of its claim by a competent international organ, such as one of the executive organs of the United Nations or the International Court of Justice. The general conclusion of the study was that the particular changes of circumstances with respect to each country concerned did not warrant the application of the doctrine; but that between 1939 and 1947 circumstances as a whole had changed to such an extent with regard to the system of protection of minorities that the undertakings given by States during the League period should be considered as having ceased to exist. This study was, of course, an objective, non-contentious, examination of the particular problem, and no doubt it was for that reason that the question of the

consent of the interested parties was not taken into consideration by the Secretary-General in arriving at his general conclusions.

6. The controversy that surrounds the doctrine and the dangers that it causes for the security of treaties justify some hesitation on the part of the Commission in including it in the draft articles on the law of treaties. Nevertheless, on balance, the Special Rapporteur agrees with his predecessor (A/CN.4/107, paragraph 144) in thinking that, carefully delimited and regulated, it should be included. A treaty may remain in force for generations and its stipulations come to place an undue burden on one of the parties. Then, if the other party is obdurate in opposing any change, the fact that international law recognized no legal means of terminating or modifying the treaty otherwise than through a further agreement between the same parties may impose a serious strain on the relations between the States concerned. It may be better to try and fill this gap in the law even by a legal institution so imperfect as the *rebus sic stantibus* doctrine, rather than to leave that dissatisfied State ultimately to release itself from the treaty by means outside the law. It is true that the number of such cases is likely to be comparatively small. As pointed out in the Commentary to article 15, the majority of modern treaties are expressed to be of short duration, or are entered into for recurrent terms of years with a right to break the treaty at the end of each term, or are expressly or implicitly terminable upon notice. In all these cases either the treaty expires automatically or each party, having the power to terminate the treaty, has the power also to apply pressure upon the other party to revise its provisions. Further, even when a treaty is not subject to early termination in any of these ways, the parties may be ready to agree upon the termination or revision of an out-of-date treaty. Nevertheless, there remains a residue of cases in which, failing any agreement, one party may be left powerless under the treaty to obtain any relief from outmoded and burdensome provisions. It is in these cases that the *rebus sic stantibus* doctrine may be required, not necessarily to effect the termination of the treaty, but as a lever to induce a spirit of compromise in the other party. Moreover, despite the strong reservations often expressed with regard to it, the evidence of the acceptance of the doctrine in international law is so considerable that it seems to indicate a general belief in the need for a safety-valve of this kind in the law of treaties.

7. Various theories have been advanced concerning the juridical basis of the doctrine,¹⁵⁴ three of which were isolated by the previous Special Rapporteur for detailed examination (A/CN.4/107, paragraphs 146-148):

- (i) Under this theory the parties are presumed to have had in mind the continuance of certain circumstances as the basis of their agreement and to have intended the treaty to be subject to an implied condition by which it is to come to an end if there is an essential change in those circumstances.
- (ii) Under the second theory, international law is considered to impose upon the parties to a treaty an objective rule of law prescribing that an essential

¹⁵³ Treaty of Friendship and Alliance, London, 26 August 1936, *United Kingdom Treaty Series* No. 6 (1937).

¹⁵⁴ See Chesney Hill, *op. cit.*, pp. 7-16; C. Rousseau, *op. cit.*, pp. 580-586.

change of circumstances entitles any of the parties to require the termination of the treaty.

- (iii) Under the third theory, which is a mixture of the first two, the doctrine is considered to be an objective rule of law the operation of which is to import into the treaty, regardless of the intention of the parties, an implied condition that it will come to an end if there is an essential change of circumstances.

The previous Special Rapporteur thought there is to be a crucial point of difference between the second and third theories. If the rule of law is considered to operate by inserting an implied condition in the treaty, the termination of the treaty will occur automatically when an essential change of circumstances takes place, whereas under the second theory the rule operates only to confer a right to call for the termination of the treaty. The difference between the two theories may not be so great in practice, since under either theory the really critical point is whether one party may unilaterally determine whether or not an essential change has occurred. If a purely unilateral power of determination is not admitted, the practical effect of the two theories is not very different. However, the present Special Rapporteur agrees with his predecessor in thinking that the third theory is not an improvement on the second and should be left aside.

8. The Special Rapporteur likewise agrees with his predecessor in recommending that the Commission should base itself upon the second rather than the first theory; that is, upon the view that the *rebus sic stantibus* doctrine is an objective rule of law rather than a presumption as to the original intention of the parties to make the treaty subject to an implied condition. True, the theory of an implied *clausula rebus sic stantibus* has a long history going back, according to one writer,¹⁵⁵ to St. Thomas Aquinas, and the great majority of writers have presented the doctrine in the form of a term implied in every perpetual treaty. But, as was pointed out by the previous Special Rapporteur, the tendency today is to regard the implied term as only a fiction by which it is attempted to reconcile the dissolution of treaties in consequence of a fundamental change of circumstances with the rule *pacta sunt servanda*. In most cases the parties have given no thought to the possibility of a change of circumstances and, if they had done so, would probably have provided for it in a different manner. Furthermore, the fiction is considered an undesirable one since, by making the doctrine dependent upon the intentions of the parties, it invites subjective interpretations and adds to the risk of abuse. For these reasons a number of modern authorities,¹⁵⁶ including the previous Special Rapporteur (A/CN.4/107, paragraph 149) reject the theory of an implied term and formulate the doctrine as an objective rule of law by which, on grounds of equity and justice, an essential change of circumstances radically affecting

the basis of a treaty will entitle a party to call for its termination. The Havana Convention on Treaties of 1928¹⁵⁷ seems also to state the doctrine in the form of an objective rule of law; and the present draft has been prepared upon this basis.

9. Many of the authorities (as also article 15 of the Havana Convention) limit the application of the doctrine to "perpetual treaties" and the previous Special Rapporteur's draft limited it to "treaties not subject to any provision, express or implied, as to duration". In paragraph 159 of his second report (Commentary to his article 21) he said:

"There is a general consensus of opinion that the principle *rebus* is only relevant to the case of what are sometimes called 'perpetual treaties' — indeed it can be said that the principle has no *raison d'être* in the case of other treaties, for it is precisely to remedy the hardship that might result from perpetuation, if an essential change of the order contemplated by the *rebus* principle occurs, that the principle exists. If the treaty is not of this kind, either the question does not arise, for the treaty can be terminated by other means . . . or else the treaty will expire in due course under its own terms; and this event can reasonably be awaited, for, short of supervening literal impossibility of performance (which would terminate the treaty in any case), a change of circumstances can hardly be of such a character that termination cannot await the natural advent of the treaty term. Indeed, it is a legitimate inference, as a matter of interpretation, that, if the parties provided a term, they meant to exclude earlier termination on any basis other than further special agreement, fundamental breach, or literal impossibility of performance."

10. The present Special Rapporteur does not find this reasoning altogether persuasive. When a treaty is for a brief term or is terminable upon notice, the application of the doctrine is clearly without any utility. But when a treaty is expressly given a duration of ten, twenty, fifty or ninety-nine years, it cannot be excluded that a fundamental change of circumstances may occur which radically affects the basis of the treaty obligations. The cataclysmic events of the present century show how radically circumstances may change within a period of only ten or twenty years. If the doctrine is put, as it was put by the previous Special Rapporteur, on the general ground of equity and justice, it is not evident why a distinction should be made between "perpetual" and "long term" treaties. The inference which he draws as to the intention of the parties to exclude earlier termination is perfectly legitimate, if the doctrine is regarded from the point of view of the "implied condition" theory; but it does not seem to be so, if the doctrine is regarded as an objective rule of law founded upon the equity and justice of the matter. Moreover, as one modern text book points out,¹⁵⁸ practice does not altogether support the view that the doctrine is confined to "perpetual" treaties. Some treaties of limited duration actually contain what are equivalent to *rebus sic stantibus* provisions.¹⁵⁹ The doctrine has also been invoked

¹⁵⁵ Baron de Taube, *L'inviolabilité des Traités, Recueil des Cours*, 1930, Vol. II, p. 361.

¹⁵⁶ C. Rousseau, *op. cit.*, p. 584; Sir J. Fischer Williams, *A.J.I.L.*, 1928, pp. 93-94; C. De Visscher, *Théories et Réalités en droit international public*, p. 391; J. Basdevant, "Règles générales du Droit de la Paix", *Recueil des Cours* 1936, Vol. IV, pp. 653-654; Lord McNair, however, so far as he admits the doctrine at all, seems to consider it to be based on an implied condition.

¹⁵⁷ Article 15; see: Harvard Law School, *Research in International Law*, III, *Law of Treaties*, p. 1206.

¹⁵⁸ C. Rousseau, *op. cit.*, p. 586.

¹⁵⁹ e.g., art. 21 of the Treaty on Limitation of Naval Armament, signed at Washington, 6 February 1922 (Hudson,

sometimes in regard to limited treaties as, for instance, in the Resolution of the French Chamber of Deputies of 14 December 1932, expressly invoking the doctrine of *rebus sic stantibus* with reference to the Franco-American war debts agreement of 1926.¹⁶⁰ Desirable though it may be to limit the scope of the doctrine as narrowly as possible, the present Special Rapporteur considers that, if the doctrine is accepted as an objective rule of law, no distinction should be made between "perpetual" and limited treaties. The rule has accordingly been framed in the present articles as one of general application, though for purely practical reasons it may seldom or never have relevance for treaties of limited duration or which are terminable upon notice.

11. Paragraph 1 (a), in order to emphasize the narrow scope of the doctrine, begins with the negative proposition that a change of circumstances does not, as such, affect the validity of a treaty. Paragraph 1 (b) then formulates the general rule that an essential change in the circumstances forming the basis of the treaty may be considered to affect its validity, and at the same time expressly limits the application of this principle to cases fulfilling the requirements stated in the further paragraphs of the article.

12. Paragraph 2 seeks to define the changes of circumstances which may give rise to a right to invoke the *rebus sic stantibus* doctrine. Although the basic concept is clear, a definition that is completely adequate is not easy to find. Many Common Law judges have similarly tried to formulate the corresponding definition of the changes of circumstances which justify an appeal to the analogous doctrine of frustration of contract, without finding any combination of words that satisfied all minds.¹⁶¹ Although the doctrine is properly to be regarded as an objective rule of law, its application in any given case cannot be divorced from the intentions of the parties at the time of entering into the treaty; for the rationale of the rule is that the change of circumstances makes the treaty obligations today something essentially different from the obligations originally undertaken. The problem is to define the relation which the change of circumstances must have to the original intentions of the parties and the extent to which that change must have affected the fulfilment of those intentions.

13. The previous Special Rapporteur made an exhaustive study of this problem in his second report (paragraphs 150-154, and 169-174), and it is not necessary to restate all the various considerations here. The definition which he proposed was contained in the following provision of article 22, paragraph 2, of his draft:

"(ii) The change must relate to a situation of fact, or state of affairs, existing at the time of the conclusion of the treaty, with reference to which both the parties contracted, and the continued existence of which, without essential change, was envisaged by both of them as a determining factor moving them jointly to enter into the treaty, or into the particular obligation to which the changed circumstances are said to relate.

"(iii) The change must have the effect either (a) of rendering impossible the realization, or further realization, of the objects and purposes of the treaty itself, or of those to which the particular obligation relates; or (b) of destroying or completely altering the foundation of the obligation based on the situation of fact or state of affairs referred to in sub-paragraph (ii)."

Paragraph 2 of the present draft incorporates the main elements of the above provisions, but is worded a little differently. The criterion laid down in sub-paragraph (ii) of the previous Special Rapporteur's draft "the continued existence of which, without essential change, was envisaged by both of them as a determining factor moving them jointly to enter into the treaty" seems, perhaps, to be framed in terms which are too subjective. They come near to reintroducing the fiction of the implied condition and, if literally interpreted, might almost exclude any operation of the *rebus sic stantibus* doctrine. In the great majority of cases the parties will have given no conscious thought at all to the circumstance, which has subsequently changed, as "a determining factor" in moving them to conclude the treaty, but will have simply taken it for granted as part of the then existing international order of things. Accordingly, difficult although it may be to find the right combination of words, it seems desirable to try and express the criterion in terms of an objective interpretation of the treaty and of the circumstances which surrounded its conclusion.

14. The definition in paragraph 2 contains the main elements. First, the change must relate to a fact or factual situation which existed at the time when the treaty was concluded. Secondly, it must appear from the object and purpose of the treaty and the circumstances surrounding its conclusion that the parties assumed the existence and continued existence of that fact or situation to be a necessary foundation of the obligations accepted by them. In other words, it must appear from an objective interpretation of the treaty and the circumstances surrounding its conclusion that the parties contracted on the assumption that the fact or situation in question was a necessary basis for the operation of the treaty. Thirdly, the effect of the change must be such as either (i) in substance to frustrate the further realization of the object and purpose of the treaty or (ii) to render performance of the treaty obligations something essentially different from what was undertaken. The previous Special Rapporteur expressed alternative (ii) in terms of the destruction or alteration of the foundation of the treaty obligations. It is thought, however, that in determining the relation which the change of circumstances must have to the original treaty, the relevant consideration is rather the nature and extent of the effect upon the performance of the treaty obligations.

15. Paragraph 3 underlines what is already clearly implied in paragraph 2, namely, that a subjective change in the views adopted by a State with regard to a treaty can never furnish a basis for invoking the *rebus*

International Legislation, vol. II, p. 820); art. 26 of the Treaty for the Limitation of Naval Armament, signed at London, 25 March 1936 (*Ibid.*, vol. VII, p. 280); and Convention regarding the régime of the Straits, signed at Montreux, 20 July 1936 (*League of Nations Treaty Series*, vol. 173, p. 229).

¹⁶⁰ For the text of the resolution, see C. Kiss, *op. cit.*, pp. 384-385.

¹⁶¹ See, for example, *Bank Line Ltd. v. Capel and Co.*, 1919 A.C., p. 457-460; *Denny Mott and Dickson v. Fraser*, 1944 A.C., p. 274-281; *Davis Contractors Ltd. v. Fareham Urban District Council*, 1956 A.C., p. 719 and 727.

sic stantibus doctrine. The reason for underlining the point in a separate paragraph is that appeals to the *rebus sic stantibus* doctrine are so often due in practice not to essential changes of circumstances, but to a change in a State's policy or attitude towards the treaty.

16. Paragraph 4 sets out three cases in which, although an essential change of circumstances forming the basis of the treaty has occurred, it may not be invoked for the purpose of denouncing or withdrawing from the treaty. Sub-paragraph (a) covers the case where the party invoking the *rebus sic stantibus* doctrine has itself been largely responsible for bringing about the change of circumstances. Sub-paragraph (b) covers the case where, after the change of circumstances has taken place and become perceptible, the State invoking it has not raised the question of its effect upon the treaty, but has continued to act as if the treaty was still in force. The previous Special Rapporteur in article 22, paragraph 3 (iii), of his draft put this exception on the basis that a failure to invoke the change of circumstances with reasonable promptness raises a presumption that the change was not a fundamental one. This is very much how the Court dealt with the question of France's delay in raising the alleged change of circumstances in the *Free Zones* case,¹⁶² and how the Swiss Federal Court dealt with a similar question of delay in the case of the *Canton of Thurgau v. The Canton of St. Gallen*.¹⁶³ In other words, the previous Special Rapporteur and the two Courts in the cases just mentioned seem to have regarded an unreasonable delay in invoking the change of circumstances as raising a case of *préclusion* (estoppel) covered by the general provision in article 4 of the present draft. This seems correct, and sub-paragraph (b) has therefore been framed in terms bringing cases of undue delay under the exception in that article. Sub-paragraph (c) covers the contingency that the parties might themselves have foreseen the possibility of a particular change of circumstances and provided for it expressly or impliedly in the treaty; for in that case the treaty would govern the case and the *rebus sic stantibus* doctrine could not be invoked to set aside the treaty.

17. Paragraph 5 excepts two classes of treaty provision from the *rebus sic stantibus* doctrine. Sub-paragraph (a) covers a provision actually effecting a transfer of territory, boundary settlement, or grant of territorial rights, such as rights of passage. The contention of the Swiss Government in the *Free Zones* case, that the doctrine does not apply to provisions establishing territorial rights, seems to be correct, as does also the distinction made by the French Government between provisions establishing territorial rights and provisions merely accompanying a transfer of territory.¹⁶⁴ Sub-paragraph (a) is therefore limited to actual transfers of territory, boundary settlements, or grants of territorial rights. Sub-paragraph (b), however, adds one case where a stipulation not creating a territorial right but merely accompanying transfer of territory is excluded from the doctrine, namely, the type of stipulation found in *Bremen v. Prussia*, where it was clear that the restriction upon the use of the territory as a fishing port had been an

essential condition of Prussia's willingness to transfer the territory.¹⁶⁵ The decision of the German court in that case would seem to have been entirely correct, and sub-paragraph (b) accordingly incorporates the point in the present article. Sub-paragraph (c) excepts from the rule treaties which are constituent instruments of international organizations, since the dissolution of an organization and the withdrawal of a member from it are matters to be settled by the organization itself.

18. Paragraph 6 in effect provides that a State may only terminate or withdraw from a treaty on the basis of the *rebus sic stantibus* doctrine either by agreement or by following a procedure which offers an objecting party the possibility of some form of independent determination of the claim to invoke the doctrine. Although there are certainly examples of purely unilateral denunciation on this ground, the weight of the opinion both amongst jurists and in State practice is strongly in favour of the view that unilateral termination or withdrawal without at least attempting first to secure the agreement of the other parties is inadmissible. The precise nature of the action required to be taken before termination or withdrawal is permissible on the ground of a change of circumstances raises delicate problems, however, that are similar to those which arise in connexion with certain other grounds of termination and invalidity. It must therefore be left to be covered in a general provision in article 25 of section IV.

SECTION IV—PROCEDURE FOR ANNULLING, DENOUNCING, TERMINATING, WITHDRAWING FROM OR SUSPENDING A TREATY AND THE SEVERANCE OF TREATY PROVISIONS

Article 23 — Authority to annul, denounce, terminate, withdraw from or suspend a treaty

The rules laid down in article 4 of part I with regard to the authority of a representative to negotiate, draw up, authenticate, sign, ratify, accede to, approve or accept a treaty on behalf of his State shall also apply, *mutatis mutandis*, to the authority of a representative —

(a) to annul, denounce, terminate, withdraw from or suspend a treaty; or

(b) to consent to the act of another State annulling, denouncing, terminating, withdrawing from or suspending a treaty.

Commentary

The power to annul, terminate, withdraw from or suspend treaties, no less than the power to conclude treaties, forms part of the treaty-making power of the State. If that power is normally exercised through the medium of a simple notification in writing, it is nevertheless important that other States should be able to satisfy themselves as to the regularity and binding character of an instrument of termination, withdrawal or suspension. The present article accordingly provides that the rules concerning the authority of representatives to negotiate and enter into treaties on behalf of their State, which have been provisionally adopted by the Commission in article 4 of part I (A/5209, chapter II) shall also apply, *mutatis mutandis*, to the authority of representatives to terminate, withdraw from or suspend treaties.

¹⁶² P.C.I.J., Series A/B, No. 46, p. 157.

¹⁶³ *Annual Digest of Public International Law Cases*, 1927-8, Case No. 289.

¹⁶⁴ See paragraph 4 above.

¹⁶⁵ See paragraph 3 above.

Article 24 — Termination, withdrawal or suspension under a right expressed or implied in the treaty

1. Where a treaty expressly provides for a right to terminate, withdraw from or suspend it, or where such a right is to be implied in the treaty under article 17, paragraph 3, of this part, a notice to terminate, withdraw from or suspend the treaty, in order to be effective, must —

(a) be in writing and signed by a representative competent for that purpose as prescribed in article 23;

(b) comply with any conditions laid down in the treaty with regard to the circumstances, period of time or manner in which such notice may be given;

(c) specify the provision of the treaty under which such notice is given or, failing any such provision, indicate the ground upon which a right to give such notice is claimed under article 17, paragraph 3;

(d) specify the date of the notice and the date upon which it is to take effect.

2. Unless the treaty otherwise provides, any such notice must be formally communicated through the diplomatic or other official channel —

(a) in the case of a treaty for which there is no depositary, to every other party to the treaty;

(b) in other cases, to the depositary, which shall transmit a copy of the notice to every other party to the treaty.

3. Unless the notice is one that takes effect immediately or the treaty otherwise provides, a notice of termination, withdrawal or suspension may be revoked at any time —

(a) before the date specified in the treaty for the notice to take effect; or

(b) failing any such specific provision, before the expiry of the period of time prescribed in the treaty or in article 17, paragraph 3, of this part for the giving of the notice.

Commentary

1. This article concerns the procedure for exercising a power of termination, withdrawal or suspension conferred either by the terms of the treaty or by operation of law under article 17, paragraph 3. The procedural act required, as mentioned in the previous Commentary, is a notification in writing. But, if difficulties are to be avoided, it is essential that the notice should be in due form, emanate from an authority competent for the purpose, and be regularly communicated to the other interested States.

2. Paragraph 1 sets out the requirements to be met in giving notice or termination or withdrawal. Sub-paragraph (a) provides that the notice must be in writing and signed by an authority competent for the purpose. Sub-paragraph (b) underlines that it must conform to any conditions laid down in the treaty itself; e.g. the condition frequently found in treaties for recurrent periods of years that notice must be given not less than six months before the end of one of the periods. Sub-paragraph (c) provides that the notice should indicate the legal basis upon which the State claims to have a right to terminate, withdraw from or suspend the treaty — either an express provision or the legal ground for implying such a right. If such an indication may not be strictly necessary in the case of an express treaty right, it may nevertheless serve to minimise the risk of an irregular notice by focus-

ing attention on the terms of the treaty provision. In other cases, it seems desirable to insist upon the legal ground for implying a right of termination being stated in the notice, since the implication of the right may be controversial. In general it is thought better, in the interests of regularity and certainty in treaty relations, to require the legal basis of the notice to be stated in every case. Again, in the interests of regularity and certainty, it is thought desirable to require that the date of the notice and the date when it is considered to take effect should be specified in the instrument; and sub-paragraph (d) so provides.

3. Paragraph 2 insists that a notice of termination etc. should be formally communicated to the other parties either directly or through the depositary. It sometimes happens that in moments of stress the termination of a treaty or a threat of its termination may be made the subject of a public statement either in parliament or in the Press. But it is considered essential that such statements, at whatever level they are made, should not be regarded as a sufficient substitute for the formal legal act which both diplomatic propriety and the needs of regularity and certainty in treaty relations so clearly require.

4. Paragraph 3, following a similar provision in the draft of the previous Special Rapporteur (A/CN.4/107, article 26, paragraph 9), provides that a notice of termination, withdrawal or suspension may be revoked at any time before it takes effect. This happens either upon a specific date indicated in the treaty, e. g. at the end of a particular "recurrent" period, or by the expiry of a period of notice specified in the treaty or in article 17, paragraph 3. The previous Special Rapporteur's draft had a proviso requiring the assent to the revocation of any other party "which, in consequence of the original notification of termination or withdrawal, has itself given such a notification or has otherwise changed its position". While the idea behind this proviso is clearly sound, it seems doubtful whether the proviso is really necessary; for any other State, which had followed the example of the first State in giving notice of termination or withdrawal, would equally have a right to revoke the notice.

5. The previous Special Rapporteur's draft also had a provision (*ibid.*, article 26, paragraph 6) laying down that, unless the treaty specifically allows it, a notice of termination or withdrawal may not be made conditional. But, as long as a notice is framed as a firm and unambiguous notice of termination or withdrawal, there does not seem to be great objection to allowing it to be expressed to be subject to a condition. If it is permissible to revoke a notice before it becomes effective, it would seem equally permissible to revoke it in advance upon the happening of a particular contingency. Similarly, if a condition were to be expressed as a condition precedent, it might well affect the date upon which the notice could be said to have been effectively given; but if the intention to give notice and the form of the condition were both unambiguous, the existence of the condition would hardly seem sufficient to vitiate the notice as a notice.

Article 25 — Annulment, denunciation, termination or suspension of treaty obligations under a right arising by operation of law

1. If a party to a treaty claims to have a right to annul, denounce, terminate, withdraw from or suspend a treaty

under any of the provisions of articles 5 to 9, 11 to 14, or 19 to 22 of the present articles, it shall be bound first to give notice of such claim to the other party or parties to the treaty. The said notice must —

(a) be in writing and signed by a representative competent for that purpose as prescribed in article 23;

(b) contain a full statement of the grounds upon which the claim is based and of the provision of the present articles by which it is said to be justified;

(c) specify the precise action proposed to be taken with respect to the treaty;

(d) specify a reasonable period within which the other party is requested to state whether or not it contests the right of the party in question to take the action proposed; provided that, except in cases of special urgency, the period mentioned in sub-paragraph (d) shall not be less than three months.

2. Any such notice must be formally communicated through the diplomatic or other official channel —

(a) in the case of a treaty for which there is no depositary, to every other party to the treaty;

(b) in other cases, to the depositary, which shall transmit a copy of the notice to every other party to the treaty.

3. If no party makes any objection, or if no reply is received before the expiry of the period specified in the notice, the claimant party shall be free to carry out the action proposed in its previous notice. In that event, it shall address a further communication to the other party or parties in the manner laid down in paragraph 2, stating that, in accordance with its previous notice, it annuls or, as the case may be, denounces, terminates, withdraws from or suspends the treaty.

4. If, however, objection has been raised by any party, the claimant party shall not be free to carry out the action specified in the notice referred to in paragraph 1, but must first —

(a) seek to arrive at an agreement with the other party or parties by negotiation;

(b) failing any such agreement, offer to refer the dispute to inquiry, mediation, conciliation, arbitration or judicial settlement by an impartial tribunal, organ or authority agreed upon by the States concerned.

5. If the other party rejects the offer provided for in paragraph 4 (b), or fails within a period of three months to make any reply to such offer, it shall be considered to have waived its objection; and paragraph 3 shall then apply.

6. If, on the other hand, the offer provided for in paragraph 4 (b) is accepted, the treaty shall continue in force, pending the outcome of the mediation, conciliation, arbitration or judicial settlement of the dispute; provided always, however, that the performance of the obligations of the treaty may be suspended provisionally —

(a) by agreement of the parties; or

(b) in pursuance of a decision or recommendation of the tribunal, organ or authority to which the mediation, conciliation, arbitration or judicial settlement of the dispute has been entrusted.

7. Where the treaty itself provides that any dispute arising out of its interpretation or application shall be referred to arbitration or to the International Court of

Justice, such provision, to the extent that there may be any conflict, shall prevail over the provisions of the present article.

Commentary

1. Article 25, although essentially concerned with procedure, is in many ways the key article for all those cases where a claim is made to set aside or put an end to a treaty on a ground not expressly or impliedly provided for in the treaty. As already emphasized in the Commentary to article 3, some of the grounds for invalidating or terminating a treaty, although legitimate in themselves, carry definite risks to the security of treaties, if they may be arbitrarily asserted and acted upon in face of the objections of other parties. These risks are particularly serious with regard to claims to denounce a treaty on the ground of an alleged breach or on the basis of the doctrine of *rebus sic stantibus*, because it is these grounds which offer the largest scope for unilateral assertion and subjective judgment of the facts. But the possibility also exists of unilateral and arbitrary denunciation of a treaty on other grounds, such as error, limited authority of the representative in concluding the treaty, or impossibility of performance. The only means of avoiding or reducing these risks is, first, by giving as much precision as possible to the definition of the several grounds in sections II and III, secondly, by procedural provisions limiting the opportunities for arbitrary action. However precise the definitions of these grounds may be made, the justification of any claim to annul, denounce, etc., a treaty in any particular case will often turn upon facts, the determination of which is controversial. Accordingly, it is upon the procedural provisions regulating the exercise of the right to invoke these grounds that the effectiveness of this branch of the law of treaties will ultimately depend.

2. If State practice provides instances of claims to denounce treaties unilaterally, it also shows that the other parties have normally expressed strong opposition to such claims and have insisted that the treaty could not legally be abrogated without their agreement.¹⁶⁶ In the *Free Zones* case even the claimant State took the position that either the agreement of the other party or a decision of a competent tribunal was necessary to bring about the termination of a treaty on the basis of the *rebus sic stantibus* doctrine. The Havana Convention on Treaties¹⁶⁷ also provided that, failing the agreement of the other party, a State invoking the *rebus sic stantibus* doctrine should appeal to arbitration and that the treaty was to remain in force pending the outcome of the arbitration. The Harvard Research Draft, not only in its articles on violation of treaty obligations and *rebus sic stantibus*, but also in those on fraud and mutual error, required the party claiming the termination of the treaty to seek a declaration to that effect from a "competent international tribunal or authority".¹⁶⁸ It contemplated that the claimant party should have the right, at its own risk, to suspend performance of its obligations pending the decision of the tribunal or authority; but it said nothing as to what should happen if the other party declined to co-operate in obtaining a decision.

¹⁶⁶ See the Commentaries to articles 20 and 22 above.

¹⁶⁷ Article 15; see: Harvard Law School, *Research in International Law, III, Law of Treaties*, p. 1206.

¹⁶⁸ *Ibid.*, pp. 1126 and 1144.

3. Sir H. Lauterpacht, in the articles of his first report dealing with essential validity (A/CN.4/63, articles 11 to 15) provided for reference to the International Court of Justice in the case of treaties imposed by force and illegality of object; and for reference to "the International Court of Justice or any other tribunal agreed upon by the parties" in cases of disregard of constitutional limitations, fraud or error. He explained these provisions in the following comment upon his article concerning error: "The principle of compulsory jurisdiction of international tribunals to determine the existence of error as a cause of invalidity of a treaty must, upon analysis, be regarded as a principle *de lege lata*. This is so for the reason that any acknowledgment of the right of a party to terminate unilaterally a treaty on the ground of error — or, generally, of any other allegation of absence of reality of consent — would be tantamount to a denial of the binding force of the treaty."

4. The previous Special Rapporteur covered the question in articles 20 (cases of breach) and 23 (cases of *rebus sic stantibus*) of his second report (A/CN.4/107) and article 23 (all cases of essential validity) of his third report (A/CN.4/115). Leaving aside a small difference in his treatment of *rebus sic stantibus* cases,¹⁶⁹ his proposals may be summarized as follows:

The claimant party must first communicate to the other party or parties a reasoned statement of the alleged ground on which annulment, termination or withdrawal is claimed. If the claim is rejected or not accepted within a reasonable period, the claimant party may "offer to submit the matter to an appropriate tribunal to be agreed between the parties (or, failing such agreement, to the International Court of Justice)". If that offer is not accepted within a reasonable period, the claimant party may "declare the suspension of any further performance of the treaty"; and, if the offer still remains unaccepted after six months, the claimant party may declare the actual invalidity of the treaty. Should the claimant party not offer reference to a tribunal, the treaty continues in force. If, on the other hand, the offer is made and accepted, it lies with the tribunal to decide what temporary measures of suspension or otherwise may be taken pending its decision. Finally, if the treaty itself provides for reference of disputes concerning it to arbitration or judicial settlement, the treaty provision is to apply and, in cases of conflict, to prevail over the general provisions.

When explaining these proposals in the context of the doctrine of *rebus sic stantibus*, the previous Special Rapporteur justified them on the basis that "the main weight of opinion undoubtedly is that a party which considers that, by reason of an essential change of circumstances, a treaty should be revised or terminated, should begin by addressing a request (or at least a reasoned statement) to that effect to the other party or parties, and that there is no automatic or immediate right of unilateral denunciation (A/CN.4/107, paragraph 155). He further said that to admit a right of unilateral denunciation would be inconsistent with the Declaration of London of 1871, which denies the right of a State to release itself from the provisions of a treaty, or to modify them in any way, except with the consent of

the other contracting parties; and that Declaration he considered to be still "part of the corpus of written international public law" (*ibid.*, paragraph 156).

5. There is, perhaps, some element of *petitio principii* in the previous Special Rapporteur's contention that to admit a right of unilateral denunciation would be inconsistent with the principle that a State may not release itself from its treaty obligations or modify them without the consent of the other parties, as there is also in his predecessor's statement that to do so would be tantamount to a denial of the binding force of the treaty. The very question at issue in these cases is whether under the general law any binding treaty ever existed or whether, if it did come into existence, it has, by operation of law, been dissolved and ceased to exist. These are questions which, in principle, precede the application of the rule *pacta sunt servanda*; for, if in either case the correct answer is that in law no treaty obligation existed at the time of the denunciation, neither is there any room for the application of the rule *pacta sunt servanda* nor is it justifiable in law for the other party to invoke the rule. In other words, the objection to admitting a right of unilateral denunciation is not that unilateral denunciation of a treaty, as such, violates the rule *pacta sunt servanda*; it is the risk, evidenced by historical instances, that, unless subject to procedural controls, unjustified claims to annul or denounce treaties on legal grounds may be asserted and the *pacta sunt servanda* rule be violated under the pretence of asserting a legal right. This objection is a very real one, and a strong body of opinion supports the general position taken by the two previous Special Rapporteurs in regard to the need for procedural controls to regulate recourse to alleged legal grounds for asserting the invalidity, dissolution or suspension of treaties.

6. The question then is as to the nature of the procedural requirements upon which it may be legitimate to insist in framing the present articles. Some authorities and some States have almost seemed to maintain that in all cases annulment, denunciation or withdrawal from a treaty are inadmissible without the consent of the other parties. This presentation of the matter, understandable although it is in the absence of compulsory jurisdiction, subordinates the legal principles governing invalidity and termination of treaties entirely to the rule *pacta sunt servanda* and goes near to depriving them of legal significance. Sir H. Lauterpacht, as already noted, sought to solve the problem by making all cases of invalidity subject either to the compulsory jurisdiction of the International Court or to compulsory arbitration. This would certainly be the ideal solution and the simplest way of guaranteeing the effectiveness of the rule *pacta sunt servanda*. But, having regard to the difficulties which proposals for compulsory jurisdiction encountered at the Geneva Conference of 1958 on the Law of the Sea, it does not seem possible for the Commission to adopt this solution.

7. Sir G. Fitzmaurice's draft, without subjecting questions of invalidity or termination generally to compulsory jurisdiction, sought to make willingness to submit the matter to the Court or to arbitration a means of testing the legitimacy of a claim to annul, repudiate, denounce or suspend a treaty. If the claim were disputed, and no offer were made to submit the matter to the Court or to arbitration, the treaty would continue in force and

¹⁶⁹ The *rebus sic stantibus* draft contemplated only suspension of the treaty, not its termination.

unilateral annulment, repudiation, etc., of the treaty would then be illegitimate and a violation of the rule *pacta sunt servanda*. On the other hand, if the offer were made and were either not accepted or met with no response, the claimant party would be free to act unilaterally, first by suspending performance of its obligations and then, after a further interval of six months, by terminating the treaty. Should the offer be made and accepted, the matter would pass into the hands of the tribunal, whose decision the claimant party would be bound to await.

8. In this system also there is an element of compulsion; but it is given expression in the form of a condition which a party to a treaty must comply with before it may lawfully tear up or suspend the treaty under an alleged but contested claim of right. The claimant State is not bound to accept compulsory adjudication or arbitration of the dispute at the instance of the other party, simply because there is an unresolved difference between them with regard to the treaty. Thus, it cannot be taken to Court at the instance of the other party when the latter finds that the negotiations have reached deadlock. But it may not lawfully proceed to destroy or suspend the treaty unilaterally on its own *ipse dixit* as to the legal merits of its claim; it must first offer arbitration or judicial settlement. Article 25 of the present draft adopts the same general system as that proposed by the previous Special Rapporteur, but modifies it in certain aspects.

9. First, paragraph 4 provides that a claimant party may offer to refer the dispute to "inquiry", "mediation" or "conciliation", as well as to "arbitration" or "judicial settlement", and that the authority to which the dispute is offered to be referred may be any "impartial tribunal, organ or authority agreed upon by the States concerned". Since arbitration and judicial settlement are not acceptable to all States as a means of resolving disputes, it seems necessary to widen the range both of the procedures and the organs the use of which may be offered by the claimant State. This modification, it may be added, brings the system more into line with article 33 of the Charter of the United Nations. It also serves to emphasise that the basis of the procedural provisions laid down in article 25 is not that of imposing a system of compulsory jurisdiction but of framing a procedural requirement compliance with which is to be a condition of a lawful denunciation or suspension of treaty obligations without the consent of the other party.

10. The other main modification of the previous Special Rapporteur's system is in paragraph 3 of article 25, which contemplates that the claimant State shall be free to act unilaterally at once, if the other parties either reply making no objection or make no reply at all within the period specified in the notice. The previous Special Rapporteur prescribed a further waiting period of six months, during which it would be permissible to suspend the performance of obligations under the treaty, but not to denounce the treaty. The utility of such a provision in giving the maximum security against unilateral termination of treaties is not doubted. But, if the primary object of the procedural requirements is to provide protection against unilateral denunciation of treaties, account also has to be taken of the interests of a party which has legitimate cause to invoke one of the grounds of invalidity or termination contained in sec-

tion II or III. Accordingly, the present Special Rapporteur has not thought it right to go beyond requiring the claimant party to state its case to the other party and to allow a reasonable period for the other party to comment upon that case. The other party, even if not able immediately to take up a definitive position with regard to the claim, should be able within a reasonable period to indicate whether it finds anything to contest in the claimant's statement of its case. A notice to that effect will then set in motion the further procedure of negotiation, etc., prescribed in paragraph 4, during which the respondent party can develop its objections to the claimant's case.

11. Paragraph 1 provides that any party claiming to annul, denounce, terminate, withdraw from or suspend a treaty must furnish the other party or parties with a full statement of its case in writing and specify, first, the precise action which it proposes to take and, secondly, a reasonable period within which the other party is to say whether or not it contests the claimant's right to take that action. The paragraph also provides that the "reasonable period" is not to be less than three months, except in cases of special urgency. Whether three months is adequate for the general rule is a matter for the Commission to consider. On the other hand, it is possible to imagine some cases, such as a case of a grave breach of the treaty, where there might be special reasons for a shorter period of notice.

12. Paragraph 2 merely provides for the regular communication of the notice to the other parties either directly or through the depositary.

13. Paragraph 3, for reasons already explained in paragraph 10 above, lays down that, if other party either replies making no objection or makes no reply at all within the period specified, the claimant is to be free to act upon its previous notice and to annul, denounce, etc., the treaty.

14. Paragraph 4 lays down that, if any party contests the claimant's right to take the action specified in its notice, the claimant must in the first instance seek to settle the matter by negotiation. The negotiations might, no doubt, end in the acceptance or withdrawal of the claimant's contention or in an agreement to revise the treaty. If, however, they end in a deadlock, the procedural check upon unilateral denunciation, already described in paragraphs 8 and 9 above, comes into play. The claimant party, if it wishes to press its point of view with regard to the termination or suspension of the treaty, cannot proceed unilaterally, but must offer to refer the dispute to "enquiry, mediation, conciliation, arbitration or judicial settlement by an impartial tribunal, organ or authority agreed upon by the States concerned".

15. Paragraph 5 provides that, if the offer is rejected or no reply is forthcoming from the other party within a period of three months, the check upon unilateral action is removed and the claimant is free to carry out the action specified in his original notice.

16. Paragraph 6 covers the case where the offer is made and accepted and provides that the treaty shall remain in force pending the outcome of the mediation, conciliation, arbitration or judicial settlement of the dispute agreed upon by the parties. At the same time it recognizes the possibility of the performance of the obligations of the treaty being suspended provisionally

either by agreement or under a decision or recommendation of the tribunal or body to whom the dispute has been referred. The Special Rapporteur is not unaware that difficulties may arise in practice in reaching agreement concerning the method of peaceful settlement to be employed or concerning the nomination of the persons or body to whom the mediation, conciliation or arbitration of a dispute should be entrusted. But it would hardly seem appropriate to try to resolve all such difficulties in the present article. If the parties failed to arrive at any agreement on these matters, the question might arise whether one or other of the parties was applying the procedure of the present article in good faith.

17. Paragraph 7 merely safeguards the operation of "disputes" clauses in treaties which expressly provide for the reference of disputes either to the International Court of Justice or to arbitration.

Article 26 — Severance of treaties

1. Unless the treaty itself otherwise provides, a notice framed under article 24 for the purpose of terminating, withdrawing from or suspending the provisions of a treaty shall apply to the treaty as a whole.

2. Except as provided in paragraphs 3 and 4, and unless the treaty itself otherwise provides, a notice framed under article 25 for the purpose of annulling, denouncing, terminating, withdrawing from or suspending the provisions of a treaty shall apply to the treaty as a whole.

3. (a) A notice framed under article 25 and invoking a ground which relates exclusively to one part of a treaty shall be limited so as to apply only to such part, if —

- (i) the provisions of that part are, in their operation, self-contained and wholly independent of the remainder of the treaty (general provisions and final clauses excepted); and
- (ii) acceptance of that part was not made an express condition of the acceptance of other parts either by a term in the treaty itself or during the negotiations.

(b) Subject to paragraph 4, the notice shall apply to the whole of such part and not be limited to particular provisions.

4. A notice framed under article 25 and invoking a ground relating exclusively to one provision of a treaty shall be limited so as to apply exclusively to that provision, if —

(a) the provision in question is, in its operation, wholly independent of the other provisions of the treaty (general provisions and final clauses excepted); and

(b) the provision is one with regard to which it is permissible to make reservations under article 18, paragraph 1, of part I.

Commentary

1. Most writers have examined the severance of treaty provisions only in discussing how far a breach of a treaty confers upon the injured party a right to terminate the treaty. Earlier writers tended to regard the provisions of a treaty as indivisible, so that the breach of any provision would entitle the injured party to termi-

nate the whole treaty.¹⁷⁰ Later writers came to distinguish between breaches of essential and non-essential conditions and to that extent can be said to have recognized that treaty provisions are in a certain degree separable. In point of fact, two questions of severance arise in connexion with cases of breach: (1) the question of severing inessential from essential provisions for the purpose of determining what is a material breach; and (2) the question of the injured party's right to denounce the whole treaty or only those provisions to which the breach relates. In the present draft these questions are covered in article 20, paragraphs 2, 3 and 4. It has, however, to be emphasized that the case of breach is a somewhat special one, since the violation of its rights under the treaty may entitle the injured party to invoke the principle *inadimplenti non est adimplendum* and the doctrine of reprisals. In other words, in cases of breach there may be a right to terminate or suspend only part of the treaty on grounds which are independent of any general concept of the severance of treaty obligations which may be applicable in other connexions. The problem in cases of breach is not so much whether the injured party may be entitled to limit its act of denunciation or suspension to parts only of the treaty, but whether, despite the material character of the breach, the injured party may in any circumstances be bound to limit its act of denunciation or suspension to those provisions, or to that part, of the treaty to which the breach relates. This problem will be considered below.

2. Outside the special case of "breach", there is the general question whether in invoking other grounds of termination or of invalidity, a party to a treaty is in any circumstances entitled or bound to limit its claim to the provisions, or to the part, of the treaty to which the ground of termination or invalidity itself relates. This question is not dealt with in the reports of the previous Special Rapporteur, but was made the subject of an article in the Harvard Research Draft. This article,¹⁷¹ entitled "Separable Provisions", stated that the provisions of the articles relating to cases of severance of diplomatic relations, violation of treaty obligations, *rebus sic stantibus* and mutual error "may be applied to a separate provision of a treaty if such provision is clearly independent of other provisions in the treaty".

3. The existence of a general doctrine of the separability of treaty provisions was thought by the authors of the Harvard Research Draft to be supported by a number of considerations. First, it was noted that in 1912 the Institute of International Law in its "Règlement concernant les effets de la guerre sur les traités"¹⁷² had accepted the principle of separability in the case of treaties containing provisions of more than one kind. Then it was emphasized that many multilateral treaties

¹⁷⁰ For a useful historical summary, see Harvard Law School, *Research in International Law, III, Law of Treaties*, pp. 1135-1139.

¹⁷¹ Article 30; see Harvard Law School, *Research in International Law, III, Law of Treaties*, p. 1134.

¹⁷² Article 3; see: L'Institut de droit international, *Tableau général des résolutions, 1873-1956*, pp. 174-175. Curiously enough, the Harvard Research Draft, having cited the view of the Institute with evident approval, did not itself make provision for the principle of separability in its article 35 dealing with the effect of war on treaties.

today contain large numbers of articles dealing with a variety of disconnected subjects and that the provisions relating to one subject may be quite independent of those relating to another. In such cases, it was urged, "one provision may be terminated or suspended without necessarily disturbing the balance of rights and obligations established by the other provisions of the treaty and others to remain in force would produce an inequality with respect to the rights and obligations of the treaty".¹⁷³ It was recognized that some multilateral treaties must be regarded as an indivisible whole because to allow some provisions to be terminated or suspended and others to remain in force would produce an inequality with respect to the rights and obligations of the parties under the treaty. It was not thought possible to lay down any generally applicable criterion for determining the treaties which fall within the class of indivisible treaties, but disarmament treaties and treaties of mutual assistance against aggression, alliance and guarantee were given as examples; and treaties in which the obligations of the parties differ were also considered to belong to this class. As to the class of divisible treaties, it was said that even bilateral treaties, for example treaties of commerce, may be found which contain very diverse provisions, some of which are not necessarily dependent upon the others. But the main emphasis was placed on the growing number of voluminous multilateral treaties, such as the Treaty of Versailles, with its 440 articles, the Sanitary Convention of 1928, with its 172 articles, and other treaties of the same character, which not infrequently deal with a multitude of different and often unrelated matters. It was also pointed out that in a number of instances particular provisions of the peace treaties of the First World War had been revised or terminated while the rest of the treaty continued in force; and that some treaties, like the Treaty of Neuilly, actually provided for a power to terminate or suspend particular provisions, while leaving the rest of the treaty in force.

4. The Harvard Research Draft further relied on the fact that the Permanent Court had recognized that "certain articles or parts of a treaty may be quite independent of others either because of their arrangement or because of the different subject-matter with which they deal".¹⁷⁴ In this connexion it cited pronouncements of the Court in the *Free Zones* case,¹⁷⁵ in two advisory opinions relating to the International Labour Organisation¹⁷⁶ and in the *Wimbledon* case,¹⁷⁷ all of which concerned the interpretation of the Treaty of Versailles. They do not seem to carry the matter much beyond a recognition by the Court that some treaties may deal with one or more subjects in separate series of provisions establishing self-contained régimes for each subject; and that this may affect the way in which the interpretation of the various provisions should be approached.¹⁷⁸ Although these pronouncements of the Permanent Court

have also been cited by other authorities¹⁷⁹ as evidence of a general concept in international law of the separability of treaty provisions, it seems necessary to be careful not to read too much into them. The considerations which may make it legitimate to interpret particular provisions of a treaty as a self-contained code of rules are not necessarily identical with those which may make it legitimate to annul, terminate or suspend a particular part, whilst leaving the rest of the treaty in force. A rule which, as in the Harvard Research Draft, would allow the severance of any "separate provision of a treaty if such provision is clearly independent of other provisions in the treaty" may for that reason be too broadly stated.

5. The most recent text-book on the law of treaties,¹⁸⁰ while taking the same general line on the separability of treaty provisions, is more cautious in proposing a general rule. Thus it rightly insists that in cases where denunciation takes place under a power conferred by the treaty, severance is not permissible unless the treaty expressly contemplates the separate denunciation of particular articles. On the other hand, it supports the distinction between essential and non-essential provisions in cases of breach, but does not express a view as to the conditions under which the injured party may limit its denunciation to parts of the treaty. It further gives firm support to the principle of severance in determining the effect of war on treaties, citing a number of decisions of municipal courts which distinguish between different kinds of provisions for this purpose. Finally, without formulating a precise rule, it suggests that the principle of the separate treatment of treaty provisions has now gone so far in international law that the principle of severance should be regarded as applicable to cases of invalidity, whether original or supervening; and it appears to consider that severance may operate either to save a particular provision by eliminating from it a part which is invalid or to prevent the invalidity of a particular provision from striking down the whole treaty.

6. Neither the Permanent Court nor the present Court has made any pronouncement upon the separability of treaty provisions in the context of essential validity or of termination of treaties. The question was raised, however, in both the *Norwegian Loans*¹⁸¹ and *Interhandel*¹⁸² cases in connexion with the so-called "automatic" reservation to declarations under the optional clause and was dealt with in the opinions of some individual judges. The fullest treatment of the matter is that of Judge Lauterpacht in the *Norwegian Loans*¹⁸³ case, who admitted the principle of severance in the law of treaties but declined to apply it to the "automatic" reservation. Having noted that early writers considered every single provision of a treaty to be indissolubly linked with each other, he said that this is not the modern view. Having referred to the pronouncements of the Permanent Court mentioned in paragraph 4 of this Commentary, he observed that the Opinion of the International Court of Justice in the *Reservations to the*

¹⁷³ Harvard Law School, *Research in International Law*, III, *Law of Treaties*, pp. 1138-1139.

¹⁷⁴ Harvard Law School, *Research in International Law*, III, *Law of Treaties*, p. 1144.

¹⁷⁵ P.C.I.J. Series A/B, No. 46, p. 140.

¹⁷⁶ *Ibid.*, Series B, No. 2, pp. 23 and 25; Series B, No. 13, p. 18.

¹⁷⁷ *Ibid.*, Series A, No. 1, p. 24.

¹⁷⁸ See generally Hudson, *Permanent Court of International Justice*, p. 647.

¹⁷⁹ e.g. Lord McNair, *Law of Treaties* (1961), chapter 28; and see Judge Lauterpacht's Individual Opinion in the *Norwegian Loans* case, I.C.J. Reports, 1956, at p. 56.

¹⁸⁰ Lord McNair, *op. cit.*, chapter 28.

¹⁸¹ I.C.J. Reports, 1957, p. 9.

¹⁸² *Ibid.*, 1959, p. 6.

¹⁸³ *Ibid.*, 1957, pp. 55-59.

Genocide Convention case¹⁸¹ also showed that "there may be reasonable limits to the notion of the indivisibility of a treaty and that some of its provisions may not be of a nature essential to the treaty as a whole". He then continued:¹⁸⁵

"International practice on the subject is not sufficiently abundant to permit a confident attempt at generalization and some help may justifiably be sought in applicable general principles of law as developed in municipal law. That general principle of law is that it is legitimate — and perhaps obligatory — to sever an invalid condition from the rest of the instrument and to treat the latter as valid provided that, having regard to the intention of the parties and the nature of the instrument, the condition in question does not constitute an essential part of the instrument. *Utile non debet per inutile vitiari*. The same applies also to provisions and reservations relating to the jurisdiction of the Court . . . However, I consider that it is not open to the Court in the present case to sever the invalid condition from the Acceptance as a whole. For the principle of severance applies only to provisions and conditions which are not of the essence of the undertaking."

He considered that the automatic reservation had been an essential condition of the State's Acceptance as a whole, and was not therefore severable from it.

7. In the *Interhandel* case Judge Lauterpacht¹⁸⁶ reiterated the above views and in this case Judge Spender¹⁸⁷ also took the same general position, holding that the automatic reservation was not severable from the declaration because it was "not a mere term but an essential condition of the United States Acceptance". "The reservation", he said, "could be described as a critical reservation without which the Declaration of Acceptance would never have been made." Judge Klaestad,¹⁸⁸ on the other hand, was prepared to apply the principle of separability to the automatic reservation in the particular case. He had formed the view that the United States had intended to issue a real and effective declaration accepting compulsory jurisdiction, even if with far-reaching exceptions. That being so, he was of the opinion that the circumstance that part of the reservation conflicted with the Statute of the Court did "not necessarily imply that it is impossible for the Court to give effect to the other parts of the Declaration of Acceptance which are in conformity with the Statute". This view was shared by Judge Armand-Ugon. The latter, however, also arrived at the conclusion that the reservation had not been a "determining factor" at the time of the formulation and submission of the United States declaration, and was only an "accessory stipulation".

8. The opinions discussed in the two previous paragraphs related to a question of "essential validity" arising out of the conflict of the automatic reservation with the Statute of the Court. Although the Judges concerned differed as to whether severance should or should not be applied in the particular instance, they all started from the basis that treaty provisions are,

in principle, severable in cases of essential validity under certain conditions. They differed primarily in their findings as to whether in the particular case severance would or would not defeat the original intentions of the contracting State in making its Declaration of Acceptance. Clearly, the opinions of these Judges provide strong endorsement of the view that the principle of separability is applicable to cases of essential validity, and this for the purpose of severing a particular provision from the rest of the instrument. It is necessary, however, when considering their pronouncements concerning the conditions for the application of the principle, to remember that the case concerned a unilateral declaration where the intentions of one party only were involved.

9. One other judicial pronouncement needs to be mentioned, that of Judge Lauterpacht in the Advisory Opinion on *Admissibility of Hearings of Petitioners by the Committee for South-West Africa*. Dealing with the gap created in the régime of the Mandate by the refusal of the Mandatory State to co-operate with the Commission, that Judge emphasized that a Mandate constitutes an international status "transcending a mere contractual relation". He then continued:¹⁸⁹

"The unity and the operation of the régime created by them cannot be allowed to fail because of a breakdown or gap which may arise in consequence of an act of a party or otherwise. Thus viewed, the issue before the Court is potentially of wider import than the problem which has provided the occasion for the present Advisory Opinion. It is just because the régime established by them constitutes a unity that, in relation to instruments of this nature, the law — the existing law as judicially interpreted — finds means for removing a clog or filling a lacuna or adopting an alternative device in order to prevent a standstill of the entire system on account of a failure in any particular link or part. This is unlike the case of a breach of the provisions of an ordinary treaty — which breach creates, as a rule, a right for the injured party to denounce it and to claim damages. It is instructive in this connexion that with regard to general texts of a law-making character or those providing for an international régime or administration the principle of separability of their provisions with a view to ensuring the continuous operation of the treaty as a whole has been increasingly recognized by international practice. The treaty as a whole does not terminate as the result of a breach of an individual clause. Neither is it necessarily rendered impotent and inoperative as the result of the action or inaction of one of the parties. It continues in being subject to adaptation to circumstances which have arisen."

The case of "separability" discussed in the above pronouncement was, of course, a very special one, and the other Members of the Court adopted a somewhat different approach to the case. Moreover, although the Court's three Opinions concerning the South-West Africa Mandate may be said to involve a question of the impossibility of performing particular stipulations of the Mandate, the question has not really been treated by the Court as one of separating the impossible stipulation from the remainder of the Mandate.

¹⁸⁴ *Ibid.*, 1951, p. 15.

¹⁸⁵ *Ibid.*, 1957, pp. 56-57.

¹⁸⁶ *I.C.J. Reports*, 1959, pp. 116-117.

¹⁸⁷ *Ibid.*, p. 57.

¹⁸⁸ *Ibid.*, pp. 77-78.

¹⁸⁹ *Ibid.*, 1956, p. 23, at pp. 48-9.

10. The broad conclusions at which the Special Rapporteur has arrived in the light of the available evidence are reflected in the provisions of article 26. That the principle of separability applies in some measure both to cases of invalidity and to cases of termination or suspension must, it is thought, be accepted. Clearly it is undesirable that treaties between sovereign States should be annulled or brought to an end in their entirety upon grounds of invalidity or of termination or suspension which relate to quite inessential points in the treaty. There is also much force in the point made by certain of the authorities that some treaties, more especially peace treaties, contain what is really a series of separate treaties combined in the same instrument. Nor is it to be doubted that in multi-lateral treaties laying down objective norms it may not infrequently be possible to eliminate certain provisions without materially upsetting the balance of the parties' interests under the treaty. On the other hand, the consensual element in all treaties, whether contractual or law-making, requires that the principle of the separability of treaty provisions should not be applied in such a way as materially to alter the basis of obligation upon which the consents to the treaty were given. The problem, therefore, is to find a solution which will keep the original basis of the treaty intact but at the same time prevent the treaty from being brought to nothing because of grounds of original or supervening invalidity which relate to inessential matters.

11. Paragraph 1 covers the case where a party denounces or suspends treaty provisions in the exercise of a power expressly or impliedly contained in the treaty. If cases can be found where a treaty authorizes denunciation or suspension of particular provisions only, it is very clear that the parties to a treaty cannot be supposed to have intended to authorize such partial denunciation or suspension of its provisions unless they have done so expressly in the treaty.

12. Paragraph 2 states what is conceived still to be the primary rule, notwithstanding the wide acceptance today of the principle of severability. The presumption still is that if any part of a treaty is vitiated either by some original or by some supervening cause of invalidity, the whole treaty will fall to the ground, unless the parties agree to continue it in force in a modified form. The reason is that, whether the treaty be essentially of a contractual or law-making character, there is a process of give and take in its conclusion and the elimination of any one provision from the treaty alters the basis on which the consents were given. Accordingly, it is only when the provision in question can fairly be shown not to have been material in inducing the consents to the treaty, or not to have been a material factor in inducing the consents to other parts of the treaty, that the primary rule is displaced in favour of the principle of separability.

13. The next two paragraphs deal with cases where annulment, termination or suspension is claimed on legal grounds outside the treaty. Paragraph 3 is designed to cover the case, to which attention has already been drawn, where there is within the treaty one or more series of provisions establishing a separate, self-contained régime for a particular matter or matters. In other words, the instrument contains within itself what are really two or more separate treaties linked together

in their negotiation and conclusion and by the general provisions and final clauses of the instrument, but in other respects quite independent of each other. The logical solution here seems to be to regard each part as a separate treaty for the purpose of applying the rules of essential validity and termination laid down in sections II and III, provided always that the parts really are independent of each other and that the contracting States did not regard acceptance of one part as an essential condition of the acceptance of the other part.

14. Paragraph 4 concerns the type of problem illustrated by the treatment of the "automatic" reservation by some of the Judges in the *Norwegian Loans* and *Interhandel* cases, which is discussed in paragraphs 6-8 above. It seems to the Special Rapporteur that the principle of severability ought only to be applied to particular provisions within comparatively narrow limits; and that it is inadmissible to permit the principle to be so applied as to alter in any essential point the basis upon which the consents of the parties were given to the treaty. The drafting of the paragraph takes account of the opinions expressed by the various Judges in the cases before the International Court of Justice. It also seemed appropriate here, as in the definition of material breach in article 20, to relate the question of the inessential character of the stipulation to the question whether or not it is permissible to make it the subject of a reservation.

SECTION V — LEGAL EFFECTS OF THE NULLITY, AVOIDANCE OR TERMINATION OF A TREATY

Article 27 — Legal effects of the nullity or avoidance of a treaty

1. In the case of a treaty void *ab initio*, any acts done in reliance upon the void instrument shall have no legal force of effect, and the States concerned shall be restored as far as possible to their previous positions.

2. In the case of a treaty avoided as from a date subsequent to its entry into force, the rights and obligations of the parties shall cease to have any force or effect after that date. Any acts performed and any rights acquired pursuant to the treaty prior to its avoidance shall retain their full force and effect, unless —

(a) the parties otherwise agree, or

(b) the avoidance of the treaty has been occasioned by the fraudulent acts of one of the parties, in which case it may be required to restore the other party as far as possible to its previous position.

3. Paragraphs 1 and 2 shall also apply, *mutatis mutandis* where a particular State's consent to a multi-lateral treaty is void *ab initio* or is avoided upon a date subsequent to the entry into force of the treaty with respect to that State.

Commentary

1. This article deals only with the legal effects of the nullity or avoidance of a treaty. It does not deal with any questions of responsibility or of redress arising from acts which are the cause of the nullity or avoidance of a treaty. Fraud or coercion, for example, clearly raise questions of responsibility and redress as well as of nullity or avoidance. But those questions fall outside the

scope of the present part, which is concerned only with the nullity or avoidance of the treaty.

2. Paragraph 1 provides that when a treaty is void *ab initio* any acts done under it are without any legal force or effect; and that the States concerned are as far as possible to be restored to their previous positions. It could perhaps be urged that in the case of a treaty void *ab initio* for conflict with a rule of *jus cogens*, the private law principle *in pari delicto potior est conditio defendentis* should be applied. But it is believed that a rule requiring the parties to be restored as far as possible to their previous positions would be more suitable for treaties between States and more conducive to the general international interest.

3. Paragraph 2 provides that, in the case of a treaty subsequently avoided as from a particular date, its provisions cease to apply after that date, but that acts done or rights acquired prior to its avoidance remain valid. This is the normal consequence of the avoidance of a treaty which is merely voidable. On the other hand, it would seem right to provide for a right to *restitutio in integrum* in cases where the ground of the avoidance of the treaty was the use of fraud by one of the parties in procuring the other's consent to the treaty.

4. Paragraph 3 adds that the same rules apply *mutatis mutandis*, where a particular State's consent to a multilateral treaty is void *ab initio* or is subsequently avoided, without the general validity of the treaty being affected. Such cases are likely to be rare; but if one should occur, it seems logical that it should be governed by the same principles.

Article 28 — Legal effect of the termination of a treaty

1. Unless the treaty otherwise provides or the parties otherwise agree, the lawful termination of a treaty under any of the provisions of section III —

(a) shall automatically release the parties from any further application of the provisions of the treaty; but

(b) shall not affect the validity of any act performed or of any right acquired under the provisions of the treaty prior to its termination.

2. Paragraph 1 also applies *mutatis mutandis* in cases where a particular State lawfully denounces, or withdraws, from a multilateral treaty.

3. The fact that under paragraph 1 or 2 of this article a State has been released from the further execution of the provisions of a treaty shall in no way impair its duty to fulfil any obligations embodied in the treaty which are binding upon it also under international law independently of the treaty.

Commentary

1. Article 28, like the previous article, does not deal with any question of responsibility or redress that may arise from acts which are the cause of the termination of a treaty, such as breaches of the treaty by one of the parties; it is limited to the legal effects of a treaty's termination.

2. Paragraph 1 provides that the termination of a treaty releases the parties from any further execution of the treaty, but does not affect the validity of acts performed or rights acquired under the treaty prior to its termination. These provisions are, of course, subject to variation either by the terms of the treaty itself or by agreement of the parties at the time of termination. Article XIX of the Convention on the Liability of Operators of Nuclear Ships,¹⁹⁰ for example, expressly provides that even after the termination of the Convention liability for a nuclear incident is to continue for a certain period with respect to ships the operation of which was licensed during the currency of the Convention.

3. The provisions of paragraph 1 are largely self-evident and their main importance is to underline that the termination of a treaty does not in principle have any retroactive effects on the validity of the acts of the parties during the currency of the treaty nor dissolve rights previously acquired under the treaty. The application of the treaty during the period when it was in force and the legal consequences flowing therefrom are not in any way affected by the treaty's termination.

4. Paragraph 2 provides that the position of an individual State which denounces or withdraws from a multilateral treaty is governed by the same principles. Occasionally, a multilateral treaty expressly provides that the denunciation of the treaty by an individual State does not release it from its obligations with respect to acts done during the currency of the Convention; e.g. the European Convention on Human Rights and Fundamental Freedoms¹⁹¹ (article 65). But in the great majority of cases the treaty is silent upon the point and simply assumes that the principles contained in the present article will apply.

5. Paragraph 3 provides — *ex abundanti cautela* — that release from the execution of the provisions of a treaty does not affect the liability of the parties to perform obligations embodied in the treaty which are also binding upon them under general international law or under another treaty. The point, although self-evident, is perhaps worth including in the draft articles, seeing that a number of major Conventions embodying rules of general international law and even rules of *jus cogens* contain denunciation clauses. A few Conventions, such as the Geneva Convention of 1949 for the humanising of warfare, expressly lay down that denunciation does not impair the obligations of the parties under general international law. But the majority of treaties do not, and even the Genocide Convention¹⁹² provides for its own denunciation without indicating that the denouncing State will remain bound by its obligations under general international law with respect to genocide.

¹⁹⁰ Signed at Brussels on 25 May 1962.

¹⁹¹ United Nations *Treaty Series*, vol. 213, p. 252.

¹⁹² *Ibid.*, vol. 78, p. 277.